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The European Social Dialogue in Perspective

Its future potential as an autopoietic system and lessons from the global maritime system of industrial relations

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The European Social Dialogue in Perspective

Its future potential as an autopoietic system and lessons
from the global maritime system of industrial relations

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FACULTY OF SOCIAL SCIENCE | SOCIOLOGY OF LAW DEPARTMENT | LUND UNIVERSITY



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Ann-Christine Hartzén



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DOCTORAL DISSERTATION

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Abstract: There are three starting points for this thesis. First, there is the system of ESD, which is criticised for lacking capacity to improve the working conditions within the EU. Secondly, there is the system developed through the global ITF FOC campaign, which is considered to have capacity to improve working conditions for seafarers at a global level. Thirdly, there is the theory on self-referential autopoietic systems, which is a useful tool for analysing systems of industrial relations and their functions. The purpose of this thesis is to deepen the understanding of the function of the ESD in relation to the development of EU legislation and policy with the aim of trying to find a model for providing a holistic analysis of regulatory systems for the labour market. The research questions are: 'How can the significant differences and similarities between the ESD and the global ITF FOC campaign be understood?' and 'Why is the ESD generally regarded as lacking the capacity needed for producing results that improve working conditions, while the ITF FOC is considered to have such capacity?' The theoretical framework used for the analysis is Luhmann's theory on autopoietic systems. Since the thesis has a normative core I have applied a methodological model that consists of a two-layer analysis at both the empirical and theoretical level. Firstly an analysis of positivistic values has been carried out and secondly an analysis of hermeneutic values. The empirical material consists of documents and texts that can be considered part of or reflecting the communication of the studied systems. The main conclusion is that whereas the ITF FOC system is a traditional system of industrial relations based on the binary code of negotiable or non-negotiable between collective actors the ESD is a system of industrial relations based on a less clear binary code of discussable or non-discussable. The ESD is also subject to less developed communicative structures that negatively affect the system's capacity both to produce results and to secure the efficient implementation and application of these results. This makes the ESD as a system more sensitive to hermeneutic values framing the programming of structurally coupled systems causing difficulties for the ESD to challenge such hermeneutic values.			
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For Elias and Stefan, Namastè!

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Preface

The work with this thesis has been a long journey both in terms of state of mind and time. When I started off this project I was highly optimistic in my hopes that the European Social Dialogue (ESD) could have the potential of becoming a strong system of collective bargaining at the EU level. I thus started the project of mapping out the ESD in order to try and find an answer to the role of the ESD in the policy-shaping processes of the EU. However, during this work I noticed interesting issues in my material, issues that my original research question could not explain and I therefore saw a need to change both my research question and my methodology. The final result is something that I could have never imagined at the beginning and it is the opposite of a positive view of the ESD. This journey has in other words been interesting and challenging along a bumpy road and there are many people that have worked as bumpers and seat belt in order to get me through all the way.

Without Eva Schömer I would never have come to the end of this project. You are an inspiration! Your competence and your ability to raise energy, confidence and commitment from nowhere is a true blessing for the academic world. You are the best! In addition to Eva I have also received the most valuable support from Reza Banakar who has helped me building up my confidence in finalising this project by showing understanding for my difficulties with socio-legal theory when I was completely new to it and giving me the courage to believe I could handle such discussions. I hope that my future career will allow me to collaborate with the both of you, because the two of you create a wonderful environment for academic research.

I would also like to thank the Swedish Science Council, the EUI and Marie-Ange Moreau for the financing, initial doctoral education and supervision at the beginning of this journey. Without whom I would never have gotten to the start of this project. Several people also played an important role during my years in Florence and you will always remain dear to me. None mentioned, none forgotten. Also present and former colleagues at the Linnaeus University in Växjö have provided me with positive and encouraging advice throughout the years. Dominique Axno deserves special thanks for continuous encouragement, useful comments and advice on suitable organisations to which I should send a copy of my thesis. I am lucky to have such lovely colleagues to work with in the future. In addition to my colleagues I am also indebted to John Paterson and Petra Herzfeld-Olsson who both provided me with helpful comments during my final seminar and in addition did so in a manner that made me feel highly

competent. Your efforts in seeking to help me further my abilities are warmly appreciated.

I am most grateful to our head of department Jan Alpenberg who has believed in me and contributed in getting the funding of the finalisation of this project into place. My warm gratitude is also directed to the Emil Heijne Foundation for Research in Legal Science (Emil Heijnes Stiftelse för rättsvetenskaplig forskning) from which I received a generous contribution allowing me to finance the printing of this book. As to the cover of the book I am most grateful to dearest Emma Ageberg who helped me get the front-page picture the way I wanted it. For the most thorough and helpful language correction and proof reading of an earlier draft of this manuscript I am most indebted to Robin Blanton. The remaining (and new) errors are my sole responsibility.

Finally, my family has supported me with unconditional love throughout the years. I am filled with gratitude to my parents always supporting decisions for moving further in knowledge and always believing in me. In addition I have been blessed with a wonderful presence in my life; my husband who has been by my side and truly supportive without question during the ups and downs of this entire journey, and my son who has brought me joyful moments when I have needed them the most. Even though this project at times has taken overhand you are and will always be the most important in my life. Even when my mind and thoughts are in the writing, my heart will always be with you, Stefan and Elias.

List of abbreviations

AB	Able bodied seaman
AMOSUP	Associated Marine Officers and Seamens' Union of the Philippines
ASP	Agreement on Social Policy (annexed to the Maastricht Treaty)
CEC	Commission of the European Communities
CEE	Central and Eastern European
CEEP	Centre Européen des Entreprises à Participation Publique et des Entreprises d'Intérêt Economique Général
CEU	Commission of the European Union
CFI	Court of First Instance
CGIL	Confederazione Generale Italiana del Lavoro (The Italian General Confederation of Labour)
CGT	Confédération Général du Travail (The French General Confederation of Labour)
CIFE	Council of European Industrial Federations
CISL	Confederazione italiana Sindacati Lavoratori (The Italian Confederation of Trade Unions)
CJEU	Court of Justice of the European Union
DGB	Deutscher Gewerkschaftsbund (The German Trade Union Confederation)
EAEA	European Arts and Entertainment Alliance
EC	European Community
ECA	European Cockpit Association
ECB	European Central Bank
ECF-IUF	European Committee of Food, Catering and Allied Workers' Union within the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Work
ECFTU	European Confederation of Free Trade Unions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECT	Treaty of the European Community
EEA	European Arts and Entertainment Alliance
EEA	European Economic Area
EEC	European Economic Community
EFA	European Union of Agricultural Workers
EFBWW	European Federation of Building and Woodworkers
EFCGWU	European Federation of Chemical, Energy and General Workers Unions

EFFA	European Ferry Framework Agreement
EFFAT	European Federation of Food, Agriculture and Tourism Trade Unions
EFJ	European Federation of Journalists
EFTA	European Free Trade Association
EMCEF	European Mine, Chemical and Energy Workers' Federation
EMU	European Monetary Union
EO-WCL	European Organisation of the World Confederation of Labour
EPSU	European Federation of Public Service Unions
ERO-ICFTU	European regional Organisation of the International Confederation of Free Trade Unions
ESC	European Social Charter
ESCA	European Community Ship-owners' Association
ESD	European Social Dialogue
ESM	European Social Model
ESMT	European Stability Mechanism Treaty
ESRC	European Seafarers' Regional Committee
ETF	European Transport workers' Federation
ETUC	European Trade Union Confederation
ETUF:TCL	European Trade Union Federation of Textiles, Clothing and Leather
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Euro-CIETT	European Organisation of CIETT (International Confederation of Private Employment Agencies)
EUROCOP	European Confederation of Police
Euro-fiet	International Federation of Commercial, Clerical, Professional and Technical Employees (since 2000 part of UNI-Europa)
EURO-MEI	UNI-Europa Media, Entertainment & Arts
EUROS	European international ship register (was never established)
EWC	European Works Council(s)
FGTB	Fédération Général du Travail de Belgique (The General Labour Federation of Belgium)
FIA	International Federation of Actors
FIEC	European Construction Industry Federation
FIS	French International Ship register
FOC	Flag of Convenience
FPC	ITF Fair Practices Committee
FST	Federation of Transport Workers' Unions in the European Union
FSU	Finnish Seamens' Union
FWZ	The Dutch Seafarers' Federation
GIS	German International Ship register
IBF	International Bargaining Forum
ICEM	International Federation of Chemical, Energy, Mine and General Workers' Unions
ICFTU	International Confederation of Free Trade Unions
IFALPA	International Federation of Air Line Pilots Associations

IFM	International Federation of Musicians
ILO	International Labour Organisation
IMEC	International Maritime Employers' Committee
IMF	International Monetary Fund
IMMAJ	International Mariners Management Association of Japan
IMO	International Maritime Organisation
ITF	International Transport Workers' Federation
ITUC	Interregional Trade Union Council
LO-S	Landsorganisationen-Sverige
MLC	Maritime Labour Convention
MoU	Memorandum of Understanding
NUSI	National Union of Seafarers of India
OECD	Organisation for Economic Co-operation and Development
OMC	Open Method of Coordination
OJ	Official Journal of the European Union
POC	Port of Convenience
PSC	Port State Control
SEA	Single European Act
SME	Small and Middle-sized Enterprises
Social Charter	Community Charter of the Fundamental Social Rights for Workers
SSDC	Sectoral Social Dialogue Committee
TAW	Temporary Agency Work
TCC	Total Crew Cost
TCO	Tjänstemännens Centralorganisation (The Swedish Confederation of Professional Employees)
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TUC	Trade Union Congress
UEAPME	Union Européenne de l'Artisan et des Petites et Moyennes Entreprises
UGS	The Greek Shipowners' association
UIL	Unione Italiana del Lavoro (The Italian Labour Union)
UN	United Nations
UNCLOS	Un Convention on the Law of the Sea
UNICE	Union des Confédérations de l'Industrie et des Employeurs d'Europe
UNI-Europa	Union Network Europe
UNI-Global	Union Network Global

1 Introduction

1.1 Background

In the Swedish labour market model, the social partners play an important role in the shaping and governance of norms that regulate working conditions and employment relations. Some have argued that this system has helped make Swedish society one of the most equal societies in the world.¹ As a graduate student, this was one of two issues that caught my main interest. The other was the European Union (EU), both in general and more precisely as a project of European integration. These two points of interest in combination led me to focus my studies on the European social dialogue (ESD), which can be considered as a system of industrial relations that influences labour market regulations at the European level.² In spite of the existence of this system at the EU level, however, the EU has been criticised for failing to meet expectations regarding social developments and its original social aims of improving living standards and working conditions. It has been claimed that the issue of social policy has been set aside or de-emphasised, partly due to the assumption that spillover effects from economic integration would also generate integration in the social

¹ A rapid increase in income inequality since the late 1990s notwithstanding, Sweden ranks amongst the nine most equal of the OECD countries; see OECD (2016) 'Income inequality (indicator)'. Available at: <https://data.oecd.org/inequality/income-inequality.htm#indicator-chart> (Accessed 5th November 2016.) As for the role of the Swedish labour market model in creating an equal society, the Swedish Confederation of Professional Employees (TCO), in an effort to promote the Swedish model, has distributed a campaign film available at <http://www.likeaswede.se>. Although this campaign is framed by a trade union perspective it does give a reasonable picture of the importance of the Swedish labour market model in shaping Swedish society. On the importance of centralised or intersectoral wage moderation as part of the collective bargaining system in the maintenance of a productive and low-risk economic system, see Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, especially pp. 90f.

² The ESD and its function within the EU legislative system have been debated for quite some time. Views range from optimistic to pessimistic on the potential of the ESD to make a productive contribution to the development of EU labour law. A full description of this debate is not possible to provide in this introduction. Instead the debate will be presented and discussed throughout the thesis, especially in chapters 5-6 on certain aspects of the historical development of the ESD.

sphere,³ and partly due to the political difficulties both of ensuring the EU has the right competencies in social policy and reaching agreements in the Council on proposed social policy measures.

The difficulties in achieving full-blown integration in the field of social policy have often been described and analysed as failures, or at least deficiencies. More precisely, this challenge has been labelled the 'social deficit' of the EU.⁴ In brief, the idea is that while economic integration is more or less finalised, social integration has lagged behind. The concept is more complex, however, in that the cause of the deficit is not simply a lack of political will or interest. Instead the social deficit of the EU is the result of the complex interaction between law and institutions framed by historical, political and cultural factors throughout the development of the EU. This in turn has created a constitutional setting for the EU in which integration, not least within the social field, is hampered by insufficient legislative competency and by ineffective decision-making procedures in fields where competencies do exist. In other words, the social deficit is interconnected with a democratic deficit within the EU.⁵ That is to say: '*Democracy is all about giving politicians an incentive to respond to the needs of the public rather than powerful sectoral interests or fashionable economic theories.*'⁶ The

³ On various forms of spillover effects, see for example Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge, p. 8; Marginson, P. and Sisson, K. (2004) *European integration and industrial relations - Multi-level governance in the making*. New York: PALGRAVE MACMILLAN, p. 10; or Schimmelfennig, F. and Rittberger, B. (2006) 'Theories of European integration', in Richardson, J. (ed.) *European Union - Power and policy-making*. New York: Routledge, pp. 73-96, especially pp. 87ff. For a further discussion that builds on the ideas of functional and political spillover, see also Stone Sweet, A. and Caporaso, J. A. (1998) 'From Free Trade to Supranational Polity: The European Court and Integration', in Sandholtz, W. & Stone Sweet, A. (eds.) *European Integration and Supranational Governance*. Oxford: Oxford University Press, pp. 92-133; Stone Sweet, A. and Sandholtz, W. (1998) 'Integration, Supranational Governance and the Institutionalization of the European polity', in Sandholtz, W. & Stone Sweet, A. (eds.) *European Integration and Supranational Governance*. Oxford: Oxford University Press, pp. 1-26.

⁴ See for example Joerges, C. (2005) 'What is left of the European Economic Constitution? A melancholic eulogy', *European Law Review*, (30), pp. 461-489; Joerges, C. 'Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', *Europe and the Challenges of the 21st Century on the Eve of the Portuguese Presidency of the EU*, Lisbon, 27-29 June 2007; and Joerges, C. and Rödl, F. (2008) 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', *European Law Journal*, 15(1), pp. 1-19. See also Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing, especially chapter 2, where Lo Faro discusses the regulatory deficit of the Community in relation to labour law.

⁵ There are a large number of publications discussing the democratic deficit of the EU from various perspectives. For a useful literature review on the democratic deficit of the EU, see Jensen, T. (2009) 'The Democratic Deficit of the European Union', *Living Reviews in Democracy*, 1, pp. 1-8.

⁶ Bellamy, R. (2006) 'Still in Deficit: Rights, Regulation and Democracy in the EU', *European Law Journal*, 12(6), pp. 725-742 at p. 739.

democratic deficit can thus be understood as a situation in which deficiencies exist in terms of both political incentives and methods for distinguishing between the needs of the public and sectoral interests.

The democratic deficit of the EU has been used to analyse and explain difficulties and challenges for the development of the European project in general as well as in various policy fields,⁷ but over the years it has been particularly prominent in connection with social policy. To some extent, it has been argued that the social dialogue could be or is the right means to overcome the democratic deficit of the EU in the field of social policy, and more precisely as regards employment relations and working conditions.⁸ This would make the ESD an important tool for solving at least part of the social deficit of the EU.⁹ The effects of globalisation further highlight the importance of assessing the potential for transnational collective bargaining systems, where outsourcing and employers' labour market hopping tend to undermine national trade

⁷ In the aftermath of the financial crisis and the measures taken within the EU to deal with its consequences there has been an intensified focus on financial and economic issues in the debate on the democratic deficit of the EU. See for example Craig, P. (2015) 'The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility', *Indiana Journal of Global Legal Studies*, 22(2), pp. 243-267; Dawson, M. and de Witte, F. (2013) 'Constitutional Balance in the EU after the Euro-Crisis', *The Modern Law Review*, 76(5), pp. 817-844; and to some extent also Habermas, J. (2015) 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', *European Law Journal*, 21(4), pp. 546-557. For a discussion of the democratic deficit of the EU as it relates to the EU's common security and defence policy, see Fanoulis, E. (2014) 'Understanding the social construction of the democratic deficit in CSDP: a Foucauldian approach', *European Security*, 23(4), pp. 466-483.

⁸ Although critical of the idea of deliberative democracy, Bellamy recognises that trade unions have a place within a deliberative democratic model, as they have a certain degree of internal democracy (see Bellamy, R. (2006) 'Still in Deficit: Rights, Regulation and Democracy in the EU', *European Law Journal*, 12(6), pp. 725-742., p. 741). However, in order to assure the democratic legitimacy of political decisions on working life issues, both trade unions and employer organisations involved in a deliberative process would, in my view, have to offer reasonable representation of workers and employers across the EU, which, considering the various levels of membership across the Member States, is hardly the case at present.

⁹ See for example Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge; and Bercusson, B. (1999) 'Democratic Legitimacy and European Labour Law', *Industrial Law Journal*, 28(2), pp. 153-170. However, it is clear from most contributions that changes to the institutional structure of the social dialogue are needed before it can help solve the social deficit of the EU; see Bercusson, B. (2009a) *European Labour Law*. second edn. Cambridge: Cambridge University Press, pp. 126ff and especially pp. 519ff. For an even more critical analysis see Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing, pp. 132ff, who is sceptical that the ESD poses a solution to the regulatory deficit within EU social law in any other way than as an instrument of the EU institutions, i.e. the social dialogue will merely serve as a legislative resource that serves the purposes of the EU institutions and will not provide new or autonomous impetus to legislative developments in the field of social and labour law.

unions and affect workers individually at a global scale.¹⁰ In order for the ESD to effectively contribute to social developments in the EU, however, it is necessary for this system to have a useful value-adding function and succeed in its communications. By this I mean that the ESD will need to show that it is capable of producing results that provide a contribution and impact that give greater impetus to the social dimension of the EU than is provided by the political and legal systems of the Union.

One example of a system of industrial relations and/or trade union influence producing more efficient results as regards working conditions and social developments at the global level is the maritime transport sector, and more specifically the Flag of Convenience (FOC) strategy adopted by the International Transport Workers' Federation (ITF).¹¹ Briefly, the ITF FOC campaign was developed to ensure that shipowners established in high-cost countries do not implement unacceptable working conditions for the seafarers they employ by changing the flag of the ship through registering the ship in a low-cost country with little or no labour legislation, such as Panama, for example.¹² The ITF FOC campaign can thus be understood as a system that functions to both secure decent working conditions for seafarers and regulate employment relations in the global maritime sector.

Whilst studying the ESD, I had the opportunity to delve more deeply into the specific case of the ITF FOC campaign, an instance of a well-developed global system for the governance of working conditions and industrial relations that has been established at least since the 1970s.¹³ Within the seafaring sector the effects of

¹⁰ Sampson, H. (2013) 'Globalisation, Labour Market Transformation and Migrant Marginalisation: the Example of Transmigrant Seafarers in Germany', *International Migration & Integration*, 2013(14), pp. 751-765 at pp. 752ff.

¹¹ However, the potential future efficiency of this system within the EU and the EEA can be discussed, owing to the CJEU's (at that time ECJ) interpretation of the ITF FOC strategy in relation to free movement. In the *Viking* and the *Fonship* cases (see *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779; *Case C-83/13, Fonship A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v. Fonship A/S* [2014] Court Reports - General ECLI:EU:C:2014:2053 2053.), the CJEU interpretation favours economic interests over social interests and limits the potential for the ITF FOC campaign to promote and/or protect the interests of seafarers/workers. Nevertheless, in my opinion, the results produced within the system of the ITF FOC campaign in the complex global environment make it interesting to draw a comparison with the system of the ESD and its function in the development of EU social policy. A further discussion on the ITF FOC campaign and how CJEU judgements may affect this campaign can be found in chapter 11 below. For a brief and good contribution on the development and function of the ITF FOC campaign at a global level before the *Viking* and *Fonship* cases were decided, see Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67.

¹² A more detailed explanation of the ITF FOC campaign will be provided in chapter 10 below.

¹³ The ITF FOC campaign dates further back than this, but it was in the 1970s that the campaign began delivering efficient results in terms of the improvement of working conditions. For further details on the development of the ITF FOC campaign, see chapter 10 below.

globalisation are also visible at full scale, and the sector can thus provide a useful framework for understanding the results of globalisation that are beginning to appear in other sectors as well.¹⁴ By “mirroring” the idea of the ESD in the model developed in the maritime transport sector and theories on normative governance, it should be possible to develop a deeper understanding of the interplay between legal institutions and the regulation of the labour market through the ESD. Such an analysis could also offer insights useful for the future potential and development of the ESD. This knowledge increased my desire to further study the governance of labour relations and regulations. It seemed to me that if there was one sector where a functioning governance of labour market conditions and relations produces results that improve working conditions at a global level, then insights from that system could further our understanding of the EU model of social dialogue as a whole. Even though certain differences between the ESD and the ITF FOC systems make it difficult to compare them on an equal footing, they also share important similarities, since both deal with the regulation of working conditions in a transnational environment.¹⁵ I will now provide some further explanation and clarification of the research object and purpose of my thesis.

1.2 Research object and purpose

Having given a general background above, I would now like to explain the topic in more detail in order to provide a clearer understanding of the purpose of this study. The next sections review the main starting points for my research project and the relevance of the project in relation to existing academic contributions on the ESD.

1.2.1 Starting points and problem formulation

Over the course of the years, the EU has developed into a well-integrated economic market in which some integration in regards to social policy has also been achieved. In spite of the aims of improved working and living conditions laid out in the Treaty of Rome, however, the institutions of the EU have in fact mainly focused on economy and trade, and as mentioned above, this has been a subject of debate. The ESD can to some extent be understood as having developed as a response to the

¹⁴ Sampson, H. (2013) 'Globalisation, Labour Market Transformation and Migrant Marginalisation: the Example of Transmigrant Seafarers in Germany', *International Migration & Integration*, 2013(14), pp. 751-765 at pp. 753ff.

¹⁵ Further discussion on the comparability of the ESD and the ITF FOC is provided in section 2.1 below.

critique concerning the so-called social deficit of the EU. The social deficit of the EU is a debated issue and often the debate is linked to the broader concept of the democratic deficit of the EU. There are, however, differing opinions as to whether such a deficit exists.¹⁶ Nowadays the ESD can be considered part of the EU legislative process in the field of social policy, via its recognition in Articles 154 and 155 TFEU. However, the development of this process goes further back and can to some extent be considered as having begun in a more informal and unstructured way already during the initial phases of the Community in the 1960s.¹⁷ A common characteristic for some of the major steps in the development of the ESD has been that they make up part of a response to difficulties or setbacks in the development of European Community social policy.¹⁸

Over the years the ESD has, however, received similar critique to the EU in general as regards disappointing or insufficient results in achieving harmonisation and producing added value for EU workers and citizens. Optimistic debaters have given the ESD points for managing to produce results at all and believe in its future potential to generate improvements in working conditions.¹⁹ Pessimists have held that the ESD stands no chance of generating any results other than being a tool for legitimising the actions or non-actions of the EU institutions on employment policy.²⁰ Critique notwithstanding, it is possible to state that the ESD has developed towards a system of industrial relations at the EU level and has produced some results

¹⁶ On the existence of the democratic deficit and its consequences for social policy, see for example Joerges, C. (2005) 'What is left of the European Economic Constitution? A melancholic eulogy', *European Law Review*, (30), pp. 461-489; Joerges, C. and Rödl, F. (2008) 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', *European Law Journal*, 15(1), pp. 1-19; Dawson, M. (2011) *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy*. Cambridge, UK: Cambridge University Press, pp. 27ff. For the opposite view, i.e. that there is no democratic deficit within the EU see for example Moravcsik, A. (2002) 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 40(4), pp. 603-624.

¹⁷ In the 1960s various cross-industry advisory committees were set up to make possible joint consultations of representatives from governments, trade unions and employers' organisations. See Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48 at p. 33. A more detailed discussion on these developments is provided in chapters 5-6 below, on certain aspects of the historical development of the ESD.

¹⁸ For a further discussion see chapters 5 and 6 below, on certain aspects of the historical development of the ESD.

¹⁹ See for example Degryse, C. (2007) 'Cross-industry social dialogue in 2006', in Degryse, C. & Pochet, P. (eds.) *Social developments in the European Union 2006 - Eighth annual report*. Brussels: ETUI-REHS, pp. 69-98.

²⁰ Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125.

in the sphere of working conditions and employment relations.²¹ To ignore the role of ESD in the development of EU social policy would thus be too simplistic.

Since the financial crisis of 2008, we have also seen the EU tend to focus on economic issues as the only way out of the crisis, neglecting social policy and social development. These developments have increased internal tensions within the EU. Member States are increasingly questioning social policy harmonisation and existing EU social rights. Some are even discussing or implementing stricter limits on social rights for citizens of other EU countries, and especially for citizens of the most challenged EU countries.²² An interesting idea would thus be if the ESD could provide the EU with a counterbalance, ensuring that the field of social policy is not set aside to such an extent as to permit de-harmonisation or declines in living and working conditions. To what extent does the ESD have the potential to contribute to improvement of living and working conditions for EU citizens when the EU institutions set aside the social aspects of the European integration project? The situation is not new and might not last forever, but it is likely to occur again, and understanding what role the ESD might play and what it needs in order to be able to play that role is of interest, whether or not one favours further European integration.

Some of those who take a more optimistic view of the ESD have held that simply the fact that any results have been achieved is a success, citing the vast number of different interests that need to be respected and adhered to within the ESD. Different models for labour law, employment relations and different levels of working conditions need to come together and a common denominator needs to be found, in addition to negotiating some agreement between the differing interests of management and labour. If results are few or vague, this comes as no surprise but is

²¹ The cross-industry framework agreements concerning parental leave and atypical employment that have all been implemented through directives are probably the examples closest at hand. See *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* (1996): Council of the European Communities (OJ No L 145/1996), *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work* (1998): Council of the European Communities (OJ No L 14/1998), *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999).

²² Over the years, the UK has been the country to most strongly oppose developments and harmonisation in social policy, especially employment policy. Since the financial crisis, however, it is apparent that more countries are becoming increasingly nationalistic as regards the free movement of workers. Discussion of concepts such as welfare migration and social tourism has increased and Member States of the old EU15 have tried to find various ways to circumvent the EU law on equal treatment of EU citizens as regards certain social benefits. For an interesting contribution to this debate, see Blauberger, M. and Schmidt, S. K. (2014) 'Welfare migration? Free movement of EU citizens and access to social benefits', *Research and Politics*, 2014(October-December), pp. 1-7.

rather exactly what could be expected.²³ By contrast, it is interesting to note that in the global maritime transport sector, the ITF FOC campaign has achieved very concrete and rather progressive results in terms of average salary level increases and improved working conditions for seafarers at the global level. Globally, national differences in labour regulations, employment relations and working conditions are even greater than they are within the EU, but the ITF has nonetheless managed to produce results of value for many workers. Although the ITF has been criticised for being protectionist of the jobs of seafarers from high-cost countries, the fact still remains that the average salary for seafarers has increased as a result of the FOC campaign, which makes it interesting to analyse this system to see how it might contribute to a further understanding of the ESD. There are, of course, obvious differences between the ESD and the ITF FOC campaign and placing them side by side as equal and fully comparable systems would be wrong. However, trying to understand how both these systems have developed, what their differences and similarities are, and why differing views of these two systems appear could provide insights that would improve our understanding of the ESD.

Both the ESD and the ITF FOC campaign can in some measure be characterised as systems of industrial relations. In order to be able to analyse them and make use of the conclusions about each in a similarly structured and constructive manner it is necessary to adopt a theoretical framework through which the analysis may be constructed. Systems theory has been used successfully to analyse industrial relations²⁴ and as Rogowski suggests, industrial relations can be understood as autopoietic systems.²⁵ Briefly, autopoietic systems are self-producing systems operating through recursive communications relating to a specific binary code. The autopoietic function system of law thus delimits itself by identifying whether something is legal or non-legal and communicates only about legal issues.²⁶ This theory can thus be a means to

²³ See for example Clauwaert, S. (2005) 'News and background - 1985-2005: Celebrating 20 years of EU social dialogue, but what about its future?', *Transfer*, 11(3), pp. 457-461; Clauwaert, S. (2011) '2011: 20 years of European interprofessional social dialogue: achievements and prospects', *Transfer*, 17(2), pp. 169-179.

²⁴ See Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 98. For an example of a system-theoretical contribution specifically concerning the ESD, see Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing.

²⁵ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126.

²⁶ The motivation for using this theory as a basis for analysis can be found in sections 2.2 and 2.3 with subsections below. For an accessible explanation of Luhmann's theory, see for example Borch, C. (2011) *Niklas Luhmann*. London and New York: Routledge. A more detailed explanation and analysis of Luhmann's theory on autopoietic systems and Rogowski's application of this theory to industrial relations is provided in chapter 3 below.

analyse and understand both the ESD and the ITF FOC campaign, in order to grasp their differences and similarities in a more comprehensive manner.

1.2.2 Purpose and research questions

This research project thus has three starting points. First, there is the system of the ESD, which has been criticised for not producing sufficient results regarding the EU's social objective of improving working conditions. The ESD has also been criticised for its failure to ameliorate the EU social deficit. Second, there is the system developed through the global ITF FOC campaign, which has been considered efficient in the improvement of working conditions for seafarers at a global level. In this sense, my research project has a normative core, in that I have a clear idea of what a system of industrial relations ought to achieve in order to be considered successful. Simply put, the normative core of my thesis consists in the view that a successful system of industrial relations must produce results that clearly improve working conditions.²⁷ However, this normative core does not imply that I intend to provide answers about how a system of industrial relations ought to be framed or function; rather I wish to understand why such systems function the way they do. Third, there is the theory of self-referential autopoietic systems, which is useful in the analysis of systems of industrial relations and their functions. This leads us to the purpose of my research project.

The overall ambition of this project is to deepen our understanding of the function of the ESD in relation to the development of EU legislation and policy, with the aim of finding a model that can provide a holistic analysis of regulatory systems for the labour market.²⁸ I define the function of the ESD as the role that the ESD could play in the future development of the social dimension of the EU. Mirroring the ESD and the global ITF FOC campaign will further such an understanding of the function of the ESD. I use the term “mirroring” since the idea is not to carry out a full and equal comparison of the two systems, but rather to ask the same questions about both the ESD and the ITF FOC campaign. In doing so I will be fully aware that the differences between these two systems are likely to generate different answers: those differences in the answers will be useful to analyse further. This mirroring will be done through an analysis based on the autopoietic system theory developed by Luhmann and complemented by Rogowski's development of this theory in relation to

²⁷ For a further discussion on the normative character of my research, see section 2.2 and its subsections below, on methodological considerations.

²⁸ A detailed explanation of my methodological approach and the analytical model I will test is provided in chapter 2 below.

systems of industrial relations.²⁹ In doing so I hope to be able to explain the function of the ESD in the development of EU social policy and legislation in a new manner, compared to previous research in this field, by testing a model for holistic analysis. I hope this will open the door to new ideas and useful advice for the future development and impact of the ESD. For this purpose, I have formulated the following research question:

How can the significant differences and similarities between the ESD and the global ITF FOC campaign be understood?

In order to construct an analysis that allows me to answer this question, I need to identify both similarities and differences between the two systems of industrial relations in terms of systemic structures and functions. Such similarities and differences need to be understood from a general systemic perspective, i.e. we need to look at the differences and similarities between the various systemic factors that make the systems capable of producing results that can affect other systems. There are both differences and similarities between the ESD and the ITF FOC campaign: for example, both systems deal with a supranational level of industrial relations, albeit one is global and sectoral in character and one relates to the EU and covers both cross-industry relations and sectoral relations. These differences and similarities will thus be highlighted in the study. By focusing on the systemic structures and functions this analysis will also make it possible to answering the second question of:

Why is the ESD generally regarded as lacking the capacity needed for producing results that improve working conditions, while the ITF FOC is considered to have such capacity?

With these questions I aim to provide a broad picture of both the ESD and the global ITF FOC campaign, in order to explain how these two systems can be described and understood. The basis for analysing the results of my study will be Luhmann's theory on autopoietic systems. In my analysis I will thus focus on the two different systems, their development over time, and how they can be understood and depicted from the standpoint of systems theory. The analysis will be conducted in a holistic manner aimed at describing not only what the systems are and what results they can produce, but also why this is so. This analysis will be conducted in accordance with socio-legal

²⁹ For an overview of Luhmann's theory on autopoietic social systems, see Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press. For Rogowski's development of this theory in relation to industrial relations, see Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126. A further explanation of this theoretical framework and how I will make use of it in my analysis can be found in chapter 3.

methodology, where the empirical material consists of various kinds of legal sources, texts produced within the two studied systems and previous research on these.

The methodology distinguishes between positivistic values and hermeneutic values, in the sense that the analysis has been carried out in two layers. The first-layer analysis has been focused on positivistic values, e.g. defining what belongs to or lies outside of the systems. The second-layer analysis has been focused on identifying the hermeneutic values that become important for understanding why some communications succeed and others do not within the two systems.³⁰ I shall explore my research questions by investigating the codes, programmes, communications and structural coupling of the systems in order to identify problematic issues that the ESD is facing. In addressing this research question I shall account for the environment in which the ESD exists and what differing sources of interference are necessary for the ESD to deal with, both in terms of the legal framework and in terms of relations between the EU and the national levels. The results will contribute to a deeper understanding of the function of the ESD in relation to the development of EU legislation and policy. Before proceeding, however, I also need to clarify a few concepts that will be used throughout the thesis, in order for the reader to fully understand what I aim to do. The next section will provide these conceptual definitions.

1.3 Conceptual definitions for social dialogue in the EU and the global maritime sector

In order to understand the ESD and its function within the legislative and policy-shaping processes of the EU it is important to have a clear understanding of a number of frequently used and referenced concepts. This section provides definitions of the most relevant concepts that recur within this work. The first of these is ‘the ESD’. To reach a deeper understanding of the function of the ESD in relation to the development of EU legislation and policy, it is essential to understand how the ESD should be defined. We need to begin by considering the concept of ‘social dialogue’ and thereafter define what distinguishes the ESD from social dialogue more generally.

The concept of ‘social dialogue’ is often used without further clarification or definition, especially in works dealing specifically with the ESD. Quite remarkably what seems to prevail is an underlying assumption that social dialogue as a concept has only one meaning, commonly known to all. However, this is by no means true; instead it has different definitions, depending not only on who is using the concept

³⁰ For further discussion see chapter 2 on my methodological approach.

but also on the context within which the concept is used. The International Labour Organisation (ILO), for example, has no clear definition for social dialogue. Instead the ILO refers to ‘tripartism and social dialogue,’ a heading under which it includes such diverse activities as negotiations, consultations, exchange of information, collective bargaining, dispute resolution, corporate social responsibility and international framework agreements. The ILO view on social dialogue, in other words, covers more or less everything that could fall under the heading of industrial relations, including the relationship between labour market organisations and state representatives.³¹ The ILO concept of social dialogue has expanded over the years to include more forms of activities, but there is still a strong focus on tripartism and it is somewhat unclear whether this ought to be considered part of the concept of social dialogue, or as a separate phenomenon.³² In this respect the definition is not well suited to the ESD, which is a phenomenon that involves not only tripartite but also bipartite interaction, i.e. interaction between representatives of management and workers only.

The European social partners, on the other hand, limit their definition of social dialogue to include only the bipartite work by the social partners, even though they recognise that this work may be prompted by consultations carried out by the Commission in accordance with the procedure established in Articles 154–155 TFEU.³³ The social partners recognise that there are other types of activities with which they are involved, such as tripartite concertation and consultation by the Commission. However, the social partners do not consider such tripartite activities to be part of the social dialogue. The reason for this distinction is that, in the view of the social partners, confusion between tripartite concertation and bipartite social dialogue risks undermining the development of autonomous social dialogue in countries where such structures are less developed than in the older Member States.³⁴ Clearly this is a

³¹ ILO (2016) *ILO website - Home - Topics - Tripartism and social dialogue*. Available at: <http://www.ilo.org/global/topics/workers-and-employers-organizations-tripartism-and-social-dialogue/lang--en/index.htm> (Accessed: 23 March 2016).

³² The older ILO definition of social dialogue as essentially involving tripartism and the similarity between the ILO concept and the concept of industrial relations are also discussed in Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 9.

³³ This procedure was introduced as Articles 3 and 4 in the protocol annexed to the Agreement on Social Policy (hereinafter ASP) annexed to the Maastricht Treaty, later incorporated as Articles 118a and 118b ECT at the entry into force of the Amsterdam Treaty, thereafter changed to Articles 138 and 139 ECT and most recently changed to Articles 154 and 155 TFEU after the entry into force of the Lisbon Treaty. For reasons of simplicity the Articles will be referred to as Articles 154-155 TFEU throughout the thesis unless a more specific reference is necessary in discussions of historical developments.

³⁴ See ETUC, UNICE and CEEP 2001. Joint contribution by the social partners to the Laeken European Council, p. 2 in particular.

strategic choice by the social partners in order to further emphasise and enhance their autonomy, which has been the main issue for the social partners since the beginning of the twenty-first century.³⁵ However, the social partners' definition of social dialogue excludes many of their activities that in fact are important for the development of EU level social policy.³⁶ Therefore, this definition is not fully suitable for a research project focusing on the function of social dialogue within the legislative and policy-shaping systems of the EU.

It would thus seem more appropriate to adopt a definition that includes all of the activities carried out by the social partners in relation to EU social policy and legislation. How to formulate a suitable definition is the next question. A good start would be to combine various definitions to reach a broad concept that can be narrowed down in order to fit the concept of the 'ESD'. Social dialogue in general will thus, for the purposes of this research project, have the following meaning: 'discussions, consultations, negotiations and similar activities undertaken by representatives of employers and employees, with or without the involvement of public authorities or institutions'. This definition expands the concept of social dialogue to both bipartite and tripartite activities and leaves open the level at which social dialogue occurs, i.e. cross-industry, sectoral, national, cross-border or company. Starting from this definition it should thus be possible to specify a definition suitable for the concept 'ESD' within the context of this research project.

As stated above, a single, precise and explicit definition of the ESD does not seem to exist in the academic literature. Instead the meaning of the concept is often implicitly expressed and seems to have changed and developed over time. This is particularly true in relation to the ESD for which the implicit definitions seem to have changed and evolved as the phenomenon of the ESD itself has evolved. In other words, the concept has been defined pragmatically, and its definition has changed over time. Initially academics focused on the cross-industry level, implying that social dialogue concerned activities involving the Community institutions and the social partner organisations ETUC, BUSINESSEUROPE (previously named UNICE)³⁷ and CEEP.

³⁵ See for example Keller, B. (2008) 'Social Dialogue - The Specific Case of the European Union', *International Journal of Comparative Labour Law and Industrial Relations*, 24(2), pp. 201-226 at pp. 204 and 208ff.

³⁶ Cf. the implicit definition of social dialogue in Falkner, G., Treib, O., Hartlapp, M. and Leiber, S. (2005) *Complying with Europe - EU Harmonisation and Soft Law in the Member States*. Cambridge: CAMBRIDGE UNIVERSITY PRESS, p. 2, which seems to exclude all activities not intended to result in an agreement to be implemented through a Council decision, i.e. the social partners' autonomous work would according to this definition fall outside the scope of the ESD.

³⁷ The employers' organisation BUSINESSEUROPE will be referred to by its current name when the discussion is framed in a general or current context, but when the discussion relates to historical developments and periods when the name of the organisation was still UNICE, the name UNICE will be used.

The sectoral level has, however, been granted more and more attention and is now considered an important – sometimes even the most important – level of social dialogue.³⁸ In addition we now see work that implicitly or even explicitly includes other levels and forms of industrial relations within the concept of the ESD. The most common examples in this respect are the inclusion of European Works Councils (EWC)³⁹ and cross-border industrial relations dialogue, especially in relation to multinational firms, as part of the ESD.

The Commission to some extent embraces the broad and pragmatic understanding of the ESD described above. It seems, however, that the Commission generally prefers a slightly narrower definition of the ESD as referring to the discussions, consultations, negotiations and joint actions undertaken specifically by the so-called recognised European social partner organisations, either in bipartite form or in tripartite form, where the public authorities at the European level are included as actors.⁴⁰ This definition includes consultations and concertation as well as both bipartite and tripartite forms of negotiation. It also limits the concept to require the involvement of specifically recognised European social partner organisations, making it necessary to also define the concept of the ‘European social partner organisation’. This concept is however somewhat easier to define, as the Commission early on established requirements for organisations to fulfil in order to acquire recognition as European social partner organisations to be consulted under the social provisions of the Treaties. Such organisations must:

‘... [be] cross industry or relate to specific sectors or categories and be organised at European level;

- consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible;

³⁸ See for example Keller, B. (2005) 'Europeanisation at sectoral level: Empirical results and missing perspectives', *Transfer*, 11(3), pp. 397-408 at p. 398.

³⁹ For example Vigneau, C. 'The Future of European Social Dialogue', *In Honour of Brian Bercusson and Yota Kravaritou - Before and After the Economic Crisis: What Implications for the 'European Social Model'?*, Florence, October 23-24 2009: EUI; and Smismans, S. (2003) 'Towards a New Community Strategy on Health and Safety at Work? Caught in the Institutional Web of Soft Procedures', *International Journal of Comparative Labour Law and Industrial Relations*, 19(1), pp. 55-83.

⁴⁰ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 9.

- have adequate structures to ensure their effective participation in the consultation process⁴¹;

‘... [be] composed of organisations representing employers or workers with membership which is voluntary at both national and European level;

- ... have a mandate from their members to represent them in the context of the Community social dialogue and [be able to] demonstrate their representativeness.’⁴²

Organisations that fulfil these requirements will be recognised by the Commission as European social partner organisations.⁴³ This recognition in turn makes it possible to establish formal relations with other European social partner organisations and participate in the processes relevant for the ESD as defined by the Commission. The Commission’s recognition, in other words, is necessary to be able to act within the treaty-based framework of the ESD.

The definition of the ESD in this study is based on the treaty-established process for social dialogue, a process that also allows for the autonomous work carried out by recognised European social partner organisations to be included within the definition. This means that the ESD, in this study, includes processes of consultation, concertation and collective bargaining, in both bipartite and tripartite forms, initiated either by the Commission or by the social partners themselves. This definition uses the same concept of a European social partner organisation as the one used by the Commission.

The definitions adopted in this study are thus the following: The ESD is ‘the process of consultation, concertation and collective bargaining carried out in a bipartite manner between the recognised European social partners as well as in a tripartite manner also involving the Commission, and initiated either by these social partner organisations or by the Commission’. The recognised social partner organisations are defined as ‘organisations recognised by the Commission as European social partners’.

⁴¹ See CEC (1993) *COM(93) 600 final - Communication from the Commission on the Application of the Protocol on Social Policy*. Brussels: European Commission (COM(93) 600 final), paragraph 24.

⁴² CEC (1996a) *COM(96) 448 final - Communication from the Commission concerning the development of the social dialogue*. Brussels: European Commission (COM(96) 448 final), paragraph 62.

⁴³ The strictness of the Commission when evaluating organisations according to these criteria is debatable. Regarding the requirement that the organisations be representative of all Member States, the formulation ‘in so far possible’ may be considered to have received a fairly broad interpretation, likewise the requirement that the organisations should have a mandate from their members to represent them within the ESD. If the Commission were to apply these requirements in a strict sense we would most likely have seen some organisations disappear from the Commission’s list of organisations to consult, rather than more and more organisations being added.

In addition to defining the ESD, we also need to clarify the term 'sectoral', as it is used to distinguish between the European cross-industry social dialogue and the European sectoral social dialogue. In the development of the European sectoral social dialogue the definition of sectors has to a very great extent been done pragmatically, basically stemming from the various sectoral social dialogue committees that have been established throughout the years. Upon closer examination, however, various sectors have close links and could in fact be considered subsectors of one larger sector. This includes, for example, the various transport sectors as well as some sectors that are all considered part of the broader metal industry sector. The division of a sector into several subsectors might very well provide gains in terms of providing an arena with more homogeneous interests and thus greater potential for achievements and results.⁴⁴

Is it relevant, however, to distinguish between sectoral and subsectoral social dialogue, and do we need a theoretically based definition of the term sector? The definition of the term sector varies both among the different Member States' national systems and from the level of the national systems to the level of the EU. It would thus be complicated to derive a definition of a sector that makes sense at both these levels. Furthermore, regardless of how we define a 'sector', the activities carried out within the European sectoral social dialogue take place within the framework of the established sectoral social dialogue committees, and it is the work of these committees that is relevant to this study. Whether or not a specific sectoral social dialogue committee should in fact be considered as a subsectoral social dialogue committee is thus not of the greatest importance; it is nevertheless part of the ESD as such.

In addition to all of these concepts that are directly linked to the ESD, this thesis also uses some concepts that describe the relations between the ESD and the ITF FOC campaign or other function systems. Here I would first of all like to clarify that the aim of the thesis is to focus on the ESD and the ITF FOC campaign as autopoietic systems. Other function systems are not studied in detail and are only mentioned when relevant to the analysis as part of the environment of the ESD and the ITF FOC systems. Since the legal and political systems of the EU are closely structurally coupled⁴⁵ and the demarcation between these systems is not really part of the study, at times it is also difficult, or at least not relevant to the purpose of the thesis, to state whether it is the legal system or the political one that has exerted influence on the ESD or ITF FOC campaign through structural coupling between systems. I will

⁴⁴ Keller, B. (2005) 'Europeanisation at sectoral level: Empirical results and missing perspectives', *Transfer*, 11(3), pp. 397-408 at p. 399; and Keller, B. and Bansbach, M. (2001) 'Social Dialogues: Tranquil Past, Troubled Present and Uncertain Future', *Industrial Relations Journal*, 32(5), pp. 419-434.

⁴⁵ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 112f.

therefore at times use the term ‘the policy-shaping systems’ of the EU, rather than singling out the legal system or the political system specifically.

Second, the term ‘the shadow of law’ will recur throughout this thesis. This concept is probably familiar to those who have studied the ESD, or even EU labour law, but because it is an important concept for my analysis I nevertheless want to explain its meaning briefly in this introductory chapter. The concept relates to the relationship between the EU policy-shaping processes and the probability that the European social partners will engage in negotiations under the Article 154–155 TFEU procedure. It came into use in order to describe the situation in which the Commission made clear that it would put forward a legislative proposal, regardless of whether or not the social partners were to engage in negotiations for a potential agreement to be implemented in accordance with the treaty-established procedure.⁴⁶ This threat of legislation served to push the more frequently reluctant management side to the negotiating table, with the result being concluded agreements that later were implemented as Directives in accordance with the procedure.⁴⁷ The concept of ‘the shadow of law’ thus means that negotiations within the ESD were carried out under threat of legislation, and that this threat was a facilitator getting the social partners to the negotiating table. Since this concept works well to explain certain aspects of the structural coupling between the policy-shaping systems of the EU and the ESD,⁴⁸ I will also use it in relation to such analysis. Worth pointing out in relation to this is that even though the concept involves the word ‘law’ it is not to be confused as stemming from the EU legal system, rather it relates to the political system since that is where a decision on adopting legislation will be taken.

One final clarification relates to the fact that, as for most research projects that stretch over several years, changes concerning terminology and context have taken place during the course of this project. There have additionally been changes during the period of time under study. For example, some relevant actors, such as social partner organisations, have changed names; we might mention UNICE, which changed its name to BUSINESSEUROPE. Furthermore, the entry into force of the Lisbon Treaty, in addition to bringing about material changes, also caused a change to the numbering of the articles in the Treaties. For example, the provisions of most

⁴⁶ Bercusson, B. (2009b) ‘Maastricht: A fundamental change in European labour law’, in Bruun, N., Jacobs, A.T.J.M., Veneziani, B., Blanke, T., Vigneau, C., Kollonay-Lehoczky, C., Lörcher, K., Dorsemont, F., Deakin, S. & Passchier, C. (eds.) *Labour Law and Social Europe - Selected writings of Brian Bercusson*. Brussels: ETUI, pp. 89-114 at pp. 107ff.

⁴⁷ The first example of negotiations conducted under the shadow of law was the example of negotiations concerning the formulation of the social dialogue process in the ASP; see section 6.5 for further discussion.

⁴⁸ As pointed out in chapter 3 on my theoretical framework this concept can be understood as making up decision premises for organisations or programs for autopoietic systems. I will discuss this concept continuously in the material chapters of the thesis as well.

relevance for the ESD, previously Articles 137–139 ECT, are now Articles 153–155 TFEU. In order to be as clear as possible, terminology will be adapted to the time referred to in each section, i.e. if the discussion concerns a period when *BUSINESSEUROPE* was still named, *UNICE* the latter name will be used. Sections referring to the present time or that are framed as a more general discussion will use current names and terminology. Relevant remarks concerning these changes, such as footnotes pointing out previous or current numbers of articles referred to, will be provided when necessary in order to limit the risk of misunderstandings. Having defined these key concepts as well as the purpose of my study, I would also like to explain what falls outside the scope of the study. The next section marks out some of the boundaries of this work.

1.4 Limits of the study

Some activities and processes involving organisations of management and labour at the European level will fall outside the definition of the ESD as laid out above. For example, the issues of cross-border collective bargaining coordination, territorialised social dialogue and company-based multinational social dialogue, which are sometimes referred to in works concerning the ESD, fall outside the scope of the definition used here. These activities are by no means considered unimportant, but they are not the main focus of this study and will therefore only be mentioned or referred to in cases when they are relevant to the contextual understanding of the ESD as defined above.

The definition of the ESD adopted here excludes the issue of company-based multinational social dialogue, as the actors involved in these dialogue mechanisms are by no means to be considered as recognised European social partner organisations. Instead they are based at the company or even the workplace level; thus, this phenomenon will not be dealt with here, in spite of the fact that it may well gain importance in the near future.⁴⁹ Including this phenomenon would broaden the field of study to also include the work carried out by, for example, European works councils. These topics are by no means irrelevant, but they raise questions and involve issues broad enough for yet another thesis. Due to its weaker link to the concepts of the ESD and the recognised European social partner organisations, as defined above, the issue of company-based multinational social dialogue has thus been excluded from the field of study.

⁴⁹ Colclough, C. J. (2005) 'The sectoral social dialogue - telecommunications', *Transfer*, 11(3), pp. 391-396 at p. 396.

In addition, it is also worth noting that although this thesis does aim to consider the ESD in terms of work carried out at both cross-industry and sectoral levels, my ambition is not to give a complete picture based on an in-depth analysis of everything that fits within that framework. Instead my idea is to give a general idea of the entirety of the ESD, through examples from the various parts that fall within my definition of the ESD. I hope in this way to provide a picture that will deepen our understanding of the object of study, i.e. the ESD. Since the focus of the study is also on the systemic structures the detailed contents of the results produced will only be discussed in brief examples. This way of using examples to highlight the structures of the system in order to explain the system's capacity also means that the study is not fully up to date in a detailed manner.

The aim of this thesis encompasses a focus on the ESD and the ITF FOC campaign as regulatory systems. This means the focus is on how these systems work and not on issues that fall outside of these systems. I will therefore not study questions such as illegal work or the increased use of self-employed workers, since these are means of circumventing the regulatory system. As regards the ITF FOC system and the effects of EU policy-shaping systems on this system and the evolution of the ESD within maritime transport, I would also like to clarify that my ambition is not to produce an in-depth study of the general EU policy and legislative framework concerning maritime affairs. The major issue I am concerned with and the main importance of the ITF FOC system is its contribution to improving working conditions and ensuring the possibility of decent working conditions for seafarers on ships engaged in maritime transport within the EU. In that respect, the main problem is the difficulty of guaranteeing decent working conditions on board FOC ships, whose owners are protected by free movement provisions, specifically the freedom to provide services and the freedom of establishment. I will therefore not provide a full study of the Directives adopted concerning the responsibilities of the flag state, since that legislative framework only applies to EU flag states and thus will not address the issue of unacceptable working conditions for seafarers on board non-EU FOC registered ships. For these seafarers, the improvement of working conditions remains in the hands of the global ITF FOC system; therefore, developments in flag state control are of less relevance for this study. Instead the focus will be on the relations between the ESD, the EU policy-shaping systems and the ITF FOC system with a view to possibilities for improving working conditions for seafarers on ships that fall within the framework of the free movement provisions.

Finally, it is worth mentioning that in spite of Brexit being on a lot of researchers minds these days I do not intend to provide an analysis encompassing potential changes following Brexit. The reason for this being that such an analysis at this present stage could not be anything else than speculations due to the unknown conditions for Brexit and unknown results of Brexit as concerns the future relations between the EU and the UK. These issues remain to be solved and before the

outcome of the current negotiations between the EU and the UK are unknown I find it unsuitable to comment on potential effects for the ESD. With that said, let me describe how the rest of this dissertation is organised and explain the reasoning behind its structure.

1.5 Disposition

The dissertation has four main parts. The first part, comprising chapters one through four, defines the research project and its methodology, theory and relation to the field of research in large. In addition the fourth chapter provides the reader with an understanding of the general legal framework concerning the fundamental rights of freedom of association, right to collective bargaining and right to industrial action, which are to be considered the founding pillars for any system of industrial relations. The second part concerns the ESD, and each of its five chapters answers different questions about the ESD. Since the ESD is often discussed in terms of a division between the cross-industry and the sectoral ESD, the historical development and forms of institutionalisation of each are analysed separately in chapters five and six. These two chapters should give the reader an understanding of the general framework and basic structures of the ESD as a whole. However, the full complexity of the ESD cannot be understood by merely analysing the general framework within which this system works and the general structures for this system. In order to understand and grasp the full complexity of the ESD as an autopoietic system, it is necessary to consider the various details of how it works, is challenged and altered through its cognitive openness. Such details will be provided in various ways in chapters seven, eight and nine, where each chapter addresses specific questions of complexity for the ESD.

Chapter seven deals with the challenges of enlargement for the ESD and will explain how the ESD as a system works with varying degrees of efficiency across geographical borders and between the different national and international levels. Chapter eight extends the discussion of the issue of improbabilities of communication and considers the effects of the structural coupling between various function systems and the ESD by focusing on the issue of temporary agency work (TAW). Chapter nine further investigates the importance of the economic system for the EU as a whole and the ESD specifically by analysing the consequences of the 2008 financial crisis for the ESD.

The reader ought now to have both a general and a detailed understanding of the ESD from a Luhmannian point of view, making it possible to move on to the third part of the thesis, which concerns the ITF FOC campaign with the goal of holding up this system as a mirror for the ESD. This section consists of two chapters. Chapter

ten gives the reader a general framework and an overall understanding of the ITF FOC campaign as a function system. It thus aims at answering the reader's questions about the detailed issues of structural couplings, improbabilities of communication and the links between the national and international levels in a manner similar to (albeit more concise than) what was done for the ESD in chapters seven, eight and nine. Chapter eleven addresses questions concerning the ITF FOC campaign in terms of its place or potential as an autopoietic system within the EU and/or its relationship with the ESD and the EU policy-shaping systems. This chapter thus provides a bridge between the analysis of the ESD and the ITF FOC campaign. The fourth and final part of the thesis consists of a concluding analysis that answers my research question, in chapter twelve. The organisation of the dissertation is summarised in the table below.

Table 1: Disposition of thesis

Part	Chapters	Examples of questions dealt with
I	Chapter 1: Introduction Chapter 2: Methodological considerations Chapter 3: Theoretical framework Chapter 4: Legal framework concerning fundamental labour rights	Problem description and research questions Methodology, method and materials The theoretical framework used for analysis An overview of the legal framework governing the fundamental rights making up the founding pillars of a system of industrial relations
II	Chapter 5: The institutionalisation of Sectoral Social Dialogue Committees Chapter 6: The events leading up to the inclusion of the European Social Dialogue in the Agreement on Social Policy Chapter 7: Enlargement and its effects for the European Social Dialogue Chapter 8: Temporary agency work – a failure or a lesson for the European Social Dialogue? Chapter 9: The effects of the financial crisis on the European Social Dialogue	How can the ESD be understood as an autopoietic system in relation to other function systems? How can the ESD be understood as an autopoietic system? What is the ESD and what results does it produce? How can the communicative structures of the ESD be understood and what values frame the programming of this system? How is the ESD affected by improbabilities of communication? How does structural coupling with other systems influence the ESD and its programming? How can the structural coupling between the ESD and other function systems affect the ESD? What is the relationship between the values promoted by different function systems?
III	Chapter 10: The International Transport Workers' Federations' Flag of Convenience Campaign Chapter 11: The effects of the EU policy-shaping systems for the ITF FOC campaign	How can the ITF FOC be understood as an autopoietic system? What is the ITF FOC and what results does it produce? How can issues such as communicative structures, values framing the programming of the system and effects of structural coupling with other function systems be understood? How can similarities and differences between the ESD and the ITF FOC be understood when specifically analysing to what extent the SSDC for maritime transport is to be considered part of the ESD or of the ITF FOC?
IV	Chapter 12: Concluding analysis	This chapter offers answers to my research question.

I hope that this overview will help the reader to understand which issues will be dealt with in the various parts of the text. Since the ESD is a topic that has been much researched throughout the years, I would now like to position my thesis in relation to the previous research in the field. In order to do so in a suitable manner, the next section offers a brief review of some of the relevant literature.

1.6 Literature review and the academic relevance of this thesis

As has been shown above, the ESD is a well-researched topic and it is possible to find a great deal of material on both the cross-industry social dialogue as well as the sectoral social dialogue. This research stems from various disciplines and focuses on differing aspects of the ESD, be it the legal normative framework for this dialogue,⁵⁰ the actors involved,⁵¹ the results produced⁵² or the challenges it faces.⁵³ Much of this

⁵⁰ For a doctrinal study of the ESD see Franssen, E. (2002) *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia. Another author using a legal normative perspective is Welz, although the doctrinal aspect is only part of his study in Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International.

⁵¹ Much of the research published on the ESD discusses the actors involved to some extent, but some publications provide a more in-depth discussion of one or more actors. See for example Dølvik, J. E. (1997) *Redrawing boundaries of solidarity? – ETUC, social dialogue and the Europeanisation of trade unions in the 1990s*. Oslo: ARENA, FAFO; Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI; Ahlberg, K. (1999) 'The Negotiations on Fixed-term Work', in Vigneau, C., Ahlberg, K., Bercusson, B. & Bruun, N. (eds.) *Fixed-term work in the EU - A European agreement against discrimination and abuse SALTSA - Joint Programme for Working Life Research in Europe*. Stockholm: National Institute for Working Life, Arbetslivsinstitutet, pp. 13-38; Clauwaert, S. (1999) 'The ETUC Point of view', in Vigneau, C., Ahlberg, Kerstin, Bercusson, Brian, Bruun, Niklas (ed.) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: National Institute for Working Life, Arbetslivsinstitutet, pp. 39-44; de Liedekerke, T. (1999) 'The UNICE point of view', in Vigneau, C., Ahlberg, Kerstin, Bercusson, Brian, Bruun, Niklas (ed.) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet, pp. 45-48; Dufresne, A., Degryse, C. and Pochet, P. (eds.) (2006a) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang; Falkner, G. (2000) 'The Council or the social partners? EC social policy between diplomacy and collective bargaining', *Journal of European Public Policy*, 7(5 Special Issue), pp. 705-724; Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26; Waddington, J. (2005) 'Trade unions and the defence of the European social model', *Industrial Relations Journal*, 36 (6), pp. 518-540.

work, however, takes its starting point in the idea that to understand the ESD or any other system of collective bargaining, it is necessary to consider the phenomenon as consisting of actors, processes and results shaped in a specific legislative framework.⁵⁴ In other words, the general industrial relations theory model is used to depict the phenomenon, even though the academic work carried out might not necessarily be

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- ⁵² The results stemming from the ESD have been studied both quantitatively, in terms of how many and what categories of texts are produced, and more qualitatively, in terms of the contents and legal status of those texts. For good examples of quantitative studies see Pochet, P. (2006a) 'A Quantitative Analysis', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 83-109; Pochet, P. (2005) 'Sectoral social dialogue? A quantitative analysis', *Transfer*, 11(3), pp. 313-332. There are more examples of qualitative studies, but most of the research published relates to one or a few specific agreements. Good examples include Vigneau, C., Ahlberg, K., Bercusson, B. and Bruun, N. (eds.) (1999) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet; Keller, B. (2005) 'Europeanisation at sectoral level: Empirical results and missing perspectives', *Transfer*, 11(3), pp. 397-408; Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International; de Boer, R., Benedictus, H. and van der Meer, M. (2005) 'Broadening without Intensification: The Added Value of the European Social and Sectoral dialogue', *European Journal of Industrial Relations*, 11(1), pp. 51-70; Keller, B. and Bansbach, M. (2000) 'Social dialogues: an interim report on recent results and prospects', *Industrial Relations Journal*, 31(4), pp. 291-307.
- ⁵³ Dufresne, A., Degryse, C. and Pochet, P. (eds.) (2006a) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang; ETUC, BUSINESSEUROPE, UEAPME and CEEP 2007b. Key Challenges Facing European Labour Markets: A Joint Analysis of the European Social Partners. Brussels: The European Commission; Joerges, C. 'Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', *Europe and the Challenges of the 21st Century on the Eve of the Portuguese Presidency of the EU*, Lisbon, 27-29 June 2007; Rutherford, T. D. and Gertler, M. S. (2002) 'Labour in 'lean' times: geography, scale and the national trajectories of workplace change', *Transactions of the Institute of British Geographers*, 27(2), pp. 195-212; Waddington, J. (2005) 'Trade unions and the defence of the European social model', *Industrial Relations Journal*, 36 (6), pp. 518-540; Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26.
- ⁵⁴ In this respect I would like to highlight some dissertations covering the social dialogue that all have made useful contributions to the field. All of them take as a basic assumption that industrial relations can best be understood by studying the constituent elements of actors, process and results, although some of them direct the research questions towards just one or two of these elements. These theses are: Dølvik, J. E. (1997) *Redrawing boundaries of solidarity? – ETUC, social dialogue and the Europeanisation of trade unions in the 1990s*. Oslo: ARENA, FAFO; Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing; Franssen, E. (2002) *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia; Mias, A. (2005) *Le Dialogue Social Européen (1957-2005) - Genèse et Pratiques d'une Institution Communautaire*. Doctorat en sociologie, Conservatoire National des Arts et Métiers, Paris; Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International.

framed within the field of industrial relations research.⁵⁵ Less research has been published taking a differing starting point and there is thus the possibility that questions and answers relating to the ESD have been overlooked simply because a different model for analysis has not been used. In this section I will provide a brief overview of the literature in the field, focusing on some of the works that I consider major contributions⁵⁶ and how my research can complement the perspectives they provide.

For research on the actors involved in the ESD, one of the major contributions is Dølvik's book on the European Trade Union Confederation (ETUC),⁵⁷ which focuses on the Europeanisation of trade unions, but does so in a context of EU social policy developments and also relates to the evolution of the employer organisations. The purpose of the book is to 'give an overview of the background and historical evolution of trade unionism and social policy at the EC/EU level up to the Maastricht reforms'⁵⁸ in order to shed insight on developments concerning trade unionism and social dialogue. Dølvik analyses these developments in an interdisciplinary manner using perspectives from sociology and political science. The book covers the history of the Community project from the Rome Treaty to the early post-Maastricht developments. The focus is on issues such as the development of the internal market and the overall institutional framework for Community social policy and how this has affected European trade unionism and social dialogue. The book also gives a detailed description and analysis of how the ETUC has evolved over the same time period and offers insights into the development of the major cross-industry employer organisations. As such, it is a valuable contribution for understanding the history of the cross-industry social dialogue from a sociological and political science perspective. However, although it makes reference to Treaty Articles, the book does not develop

⁵⁵ Of the theses mentioned in the previous footnote, two are more strongly connected to the field of legal research than the field of industrial relations: Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing; and Franssen, E. (2002) *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia.

⁵⁶ I have no ambition to cover the entirety of research publications on social dialogue, as the literature on the topic is vast and this section must be kept to a reasonable length. Since the focus of my research is the ESD, and the idea of mirroring the ESD in the ITF FOC campaign is intended as an explanatory tool, the literature review here will focus only on ESD research; I will not attempt to position the part of this work that concerns the ITF FOC campaign in relation to the research on that system. .

⁵⁷ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI. As Dølvik notes in the preface, the book is based on his dissertation (Dølvik, J. E. (1997) *Redrawing boundaries of solidarity? – ETUC, social dialogue and the Europeanisation of trade unions in the 1990s*. Oslo: ARENA, FAFO.), but is intended to be more accessible. I have relied more heavily on the book, occasionally complemented with information from the dissertation.

⁵⁸ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 12.

or analyse the relationship between law and society. Furthermore, social dialogue is explored only in terms of cross-industry developments, a natural consequence of the purpose of the book in focusing on that level.

Another contribution that focuses on the cross-industry social dialogue is Lo Faro's work on the ESD as a regulatory technique within Community policy-shaping systems.⁵⁹ This is an interdisciplinary contribution that includes legal theory analysis complemented by an analysis based on terminology found in political and economic theories. The analysis considers the place of the ESD within the regulatory framework and regulatory processes of the EU and as such it is an interesting theoretical contribution on the intricate interplay between law and the societal institutions through which law works and is created. The focus on the ESD is, however, placed squarely on the work of the cross-industry ESD produced within the framework of the Commission consultation process as established in what is now Art. 154–155 TFEU. This was a relevant and valuable contribution to socio-legal studies of the ESD at the time of publication. However, later developments have meant that much of the work conducted within the ESD takes place outside of the Treaty process and most of the results produced are to be found within the sectoral part of the ESD, and so there is a need for further socio-legal studies that take these developments into account.

Further contributions of a socio-legal character concerning the cross-industry ESD concern specific topics of negotiation between the European cross-industry organisations representing management and labour. These topics include fixed-term work⁶⁰ and temporary agency work (TAW),⁶¹ where the former saw the conclusion of a European framework agreement implemented through the Directive on fixed-term work,⁶² while the latter ended in failure for the cross-industry social partners as negotiations broke down.

In the contribution on fixed-term work, the authors address the legal results in an analysis of the agreement and its implications and also offer a detailed account of the negotiating process, including the formally approved view of the ETUC as concerns

⁵⁹ Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing.

⁶⁰ Vigneau, C., Ahlberg, K., Bercusson, B. and Bruun, N. (eds.) (1999) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet.

⁶¹ Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. and Zappalà, L. (eds.) (2008) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A.

⁶² *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999).

the agreement. The overall approach is one that applies the method of law in context to reach a deeper understanding of the legal implications of this agreement and the process leading up to the adoption of the agreement.⁶³ As such, this contribution sheds light on the dynamics between the ESD and the EU policy-shaping systems, although it brings no socio-legal theory to bear that can clearly explain these dynamics. In addition, the study has clear limits owing to its topical focus within the framework of the cross-industry ESD, and it offers only a fraction of a holistic explanation of the ESD. These limits are shared by the publication on TAW,⁶⁴ which relates its topic to the European legal context as well as the legal context in some Member States, in addition to providing insights into the failed negotiations between the social partners and the subsequent negotiations for a proposed Directive within the policy-shaping systems of the EU. The focus on the failed negotiations between the social partners makes this contribution a useful piece of the larger puzzle of understanding why the ESD is perceived as generally unsuccessful in producing results that have relevance for individual workers. Again, however, this is only one piece of the explanation, and in order to provide a holistic answer we need to consider more pieces of the puzzle, not least regarding sectoral developments in the ESD.

For the sectoral social dialogue, I have found the major contribution to be the publication of work conducted by a team of researchers affiliated with the Observatoire Sociale Européen (OSE), which applies mainly a political science perspective.⁶⁵ This team has conducted rigorous work in collecting and classifying empirical material comprising all the texts produced within the ESD as well as interviews with representatives of management, labour and the EU institutions for the sectors covered in the publication. The contribution provides a historical account of the development of the ESD on both the cross-industry and sectoral levels, a quantitative analysis of the texts produced within the sectoral ESD, a typology that sheds light on the kinds of texts that are produced within the ESD and some detailed discussions on specific sectors and the driving forces for social dialogue within these sectors. This contribution offers useful tools for understanding what the ESD is and why it is what it is – at least the sectoral part of it. However, because the publication adopts a political science perspective, the implications of the legal system for the ESD

⁶³ Vigneau, C., Ahlberg, K., Bercusson, B. and Bruun, N. (eds.) (1999) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet.

⁶⁴ Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. and Zappalà, L. (eds.) (2008) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A.

⁶⁵ Dufresne, A., Degryse, C. and Pochet, P. (eds.) (2006a) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang. Some of the contributors have backgrounds in other fields, such as social economy and industrial relations, but the publication is clearly framed as work in political science.

remain underdeveloped, and therefore it does not give a full picture of the institutional dynamics that affect the ESD. There is still room for a socio-legal study that takes these aspects into account.

Of the literature on the ESD, we can say in general that the contributions either seek to generalise about the ESD on the basis of the cross-industry social dialogue or they provide insight into a specific sector. There exist studies of the cross-industry social dialogue from a social science perspective that focus on institutional dynamics⁶⁶ and also studies focusing on the role of the social partners⁶⁷ as well as a purely legal analysis of the ESD.⁶⁸ In addition there are several contributions for various sectors; apart from the OSE contribution mentioned above,⁶⁹ an entire issue of the journal *Transfer* was dedicated to the sectoral social dialogue in 2005.⁷⁰ These contributions do not claim to reach any general conclusions about the ESD, but are intended to provide insight into the specific sectors studied.

Most of the contributions mentioned above mainly focus on the Treaty-based process for social dialogue, initiated by the Commission consultation. They also tend to either focus mainly on the legal aspects or leave the legal aspects aside. One contribution that seeks to compensate for this, as an interdisciplinary study that

⁶⁶ Several contributions have been published on this theme. See for example De Vos, M. (ed.) (2003) *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. The Hague: Kluwer Law International; Smismans, S. (2008) 'The European Social Dialogue in the Shadow of Hierarchy', *Journal of Public Policy*, 28(1), pp. 161-180; Falkner, G. (2003) 'The Interprofessional Social Dialogue at European Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate, pp. 11-29; Mias, A. (2005) *Le Dialogue Social Européen (1957-2005) - Genèse et Pratiques d'une Institution Communautaire*. Doctorat en sociologie, Conservatoire National des Arts et Métiers, Paris; Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125; Keller, B. (2008) 'Social Dialogue - The Specific Case of the European Union', *International Journal of Comparative Labour Law and Industrial Relations*, 24(2), pp. 201-226.

⁶⁷ See for example Arcq, E., Dufresne, A. and Pochet, P. (2003) 'The Employers: the hidden face of European industrial relations', *Transfer*, 9(2), pp. 302-321; Fashoyin, T. (2005) 'Tripartism and Other actors in Social Dialogue', *The International Journal of Comparative Labour Law and Industrial Relations*, 21(1), pp. 37-58; Falkner, G. (2000) 'The Council or the social partners? EC social policy between diplomacy and collective bargaining', *Journal of European Public Policy*, 7(5 Special Issue), pp. 705-724.

⁶⁸ Franssen, E. (2002) *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia.

⁶⁹ Dufresne, A., Degryse, C. and Pochet, P. (eds.) (2006a) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang.

⁷⁰ Some of the articles published in that issue are: Schmidt, E. (2005) 'Coalition building: trade union dialogues with civil society', *Transfer*, 11(3), pp. 449-456; Goetschy, J. (2005) 'The European social dialogue in the 1990s: institutional innovations and new paradigms', *Transfer*, 11(3), pp. 409-422; de Marchi, S. (2005) 'European social dialogue in the private security sector', *Transfer*, 11(3), pp. 369-373; Keller, B. (2005) 'Europeanisation at sectoral level: Empirical results and missing perspectives', *Transfer*, 11(3), pp. 397-408.

considers fruitful and failed negotiations within the Treaty-established process as well as other results from the ESD not initiated by the Commission, is Welz's thesis.⁷¹ This contribution is a massive exploration of the cross-industry social dialogue using theoretical approaches from the fields of labour law, industrial relations and political sciences in order to assess the ESD as a model of governance. To achieve his aim, Welz elaborates on the actors involved, the process based in the Treaty and outcomes of agreements concluded following Commission consultation, agreements concluded without the initiative of the Commission and failed negotiations.

Welz touches upon an interesting angle for analysing the ESD by briefly explaining that the ESD can be understood as an autopoietic subsystem of the EU. He further states that the ESD is complemented by the legal and political subsystems of the EU in situations when ESD communications break down, i.e. when the system fails.⁷² Welz does not, however, discuss the function of ESD in relation to social issues, such as working conditions, when the legal and political subsystems of the EU are focused only on economic concerns. In my view, this is an interesting angle to discuss in view of developments after the financial crisis of 2008. Therefore, a more detailed analysis of the ESD in terms of an autopoietic system could be of interest. Furthermore, Welz has limited his study of the ESD to the work carried out at the cross-industry level, excluding the work produced by the SSDCs.⁷³ Such a limitation is understandable for the broad spectrum of theoretical approaches that Welz aspires to apply, but in relation to Luhmann's theory I find it somewhat problematic.

The reason is that Luhmann's theory is aimed at understanding autopoietic systems through how they reduce complexities whilst at the same time taking the entirety into account.⁷⁴ In other words, Luhmann's theory is not intended to ignore complexities by studying a more or less simple part of the whole. In my view, therefore, it is necessary to consider the ESD in full, without limiting a study to the cross-industry level, or to one or a few specific sectors/s or one specific topic, in order to assure that the analysis can shed light on the full complexity of the ESD. Luhmann's theory that nevertheless manages to make these complexities understandable is well suited for such an analysis. My thesis will bring together various parts of the ESD that have been studied before, and thus complement the previous research by filling in the picture and with it, a gap in the academic debate. However, it is possible to question the use of a non-normative theory as the framework of analysis for answering a

⁷¹ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International.

⁷² *Ibid.*, pp. 518f.

⁷³ *Ibid.*, p. 4.

⁷⁴ For well-described examples of what Luhmann means by reducing complexities in relationship to the globalised world, see Luhmann, N. (1997a) 'Globalization or World Society: How to conceive of modern society?', *International Review of Sociology*, 7(1), pp. 67-79 at pp. 73f.

research question based on a normative assumption. I therefore think it is necessary to further clarify my methodological considerations, and this is the subject of the next chapter.

2 Methodological considerations

This thesis focuses on questions relating to the interplay between regulatory systems and society. As such an overall theme for the thesis is the interaction between law and institutions: an interaction from which the law can only be disconnected through doctrinal research, which would put the focus on the contents of law. Even though my main background is within doctrinal studies, such a methodology would not satisfactorily meet my aim of reaching a deeper understanding of the function of a regulatory system in society. Therefore, I have sought to expand my methodological knowledge and frame my thesis as a socio-legal study. This chapter further explains the resultant methodological considerations, choice of method, and materials selected for this study.

2.1 The comparability of the ESD and the ITF FOC systems

My research questions and the idea to mirror the ESD and the ITF FOC system requires that I pose the same questions to two different systems. Even though I do not intend to compare the two systems as equals, it is nevertheless relevant to address the issue of their comparability. At first glance, the idea of attempting any comparison, even if not full-blown, between the ESD and the ITF FOC systems might appear to be a dead end, due to the differences between the two systems. However, the systems also share similarities; and their differences provide interesting points for analysis. In this section I aim to explain why and how the mirroring of the ESD and the ITF FOC can be a useful tool to reach a deeper understanding of the ESD.

The main differences between the ESD and the ITF FOC can be found in the complexity of these systems, which needs to be described and understood in different ways. Firstly, we might say that the ESD is a more complex system than the ITF FOC, since the ESD, apart from involving dialogue between labour market

organisations, also to a great extent engages in tripartism and policy development⁷⁵ in a manner that the ITF FOC system does not. In this sense the ESD is thus partly a subject for the discussion of the social deficit of the EU. Such a discussion is alien to the ITF FOC system, since this system originates in trade union strategies aimed at promoting worker interests and seeking to improve conditions for the most vulnerable workers⁷⁶; this system is therefore not affected by tripartism and the risks of a social deficit in the same manner. The two systems thus actualise different forms of legal sources, with legislation more prominent for the ESD and collective agreements more so for the ITF FOC. We might also say that the ESD is more complex since it spans a broad spectrum of sectors,⁷⁷ whereas the ITF FOC system is specific to the maritime transport industry. One way to overcome the problem of comparability as regards scope of sectors covered would have been to limit the study of the ESD to only one sector. However, such a limitation would have simplified the ESD as a system and also failed to provide the holistic understanding of the ESD that I hope to achieve in this study.

There are more aspects to take into account, however, and the complexity of the systems must also be assessed in relation to the geographical and legal environments within which they operate. When considering the systems from this perspective, the ESD appears less complex, since it operates in a narrower market with a more harmonised legal system and a more homogeneous labour market. The EU market provides a clearer legal framework and has less divergent regulations governing the labour market and working conditions than does the global market. The ITF FOC system thus needs to deal with a higher level of complexity in the form of a broader spectrum of heterogeneous legal systems and diverging labour markets than does the ESD. This is apparent in the difference in how the two systems work to impact working conditions. Whereas the ESD seems to seek solutions that offer an average protection, albeit at a lower level of the average, for the countries covered, the ITF

⁷⁵ For a brief explanation of this institutional background of the ESD, see for example Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48.

⁷⁶ For a brief but thorough discussion of the historical developments of the ITF FOC system see for example Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67.

⁷⁷ The number of sectors covered by SSDCs amount to more than 40 in addition to the ESD also covering the cross-industry level and allowing for multisectoral work. For further details see for example CEU (2010a) *Commission staff working document on the functioning and potential of the European sectoral social dialogue*. Brussels (SEC(2010) 964 final) and CEU (2016) *Website of the European Commission - Employment, Social Affairs & Inclusion - Policies and Activities - Agencies and Partners - Social Dialogue Texts Database*. Brussels: European Commission. Available at: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en&day=&month=&year=§orCode=SECT22&themeCode=&typeCode=&recipientCode=&keyword=&mode=searchSubmit> (Accessed: 2 July 2017).

FOC focuses on improving conditions for the workers worst off. In other words, both systems are subject to complexities, but complexities of different kinds that affect the systems, as regulatory systems for transnational labour markets, in diverse ways.

These differences notwithstanding, both the ESD and the ITF FOC systems involve some sort of dialogue or negotiations between social partners, and both systems deal with the issue of working conditions in a transnational manner. In addition both systems need to deal with diverging and sometimes even competing interests between different groups of workers. For both systems there exist groups of workers who see improved working conditions partially as a threat and other groups of workers who consider improved working conditions as a necessity. The reason is that different groups of workers compete on the labour market on different grounds in spite of working within the same sector. Whereas some workers make use of their lower wage demands as a competitive advantage other workers seek to compete for jobs on the basis of qualifications and find the improvement of working conditions a necessity in order for them to be able to remain competitive in relation to lower cost workers. Such contrasting interests amongst workers need to be dealt with both within the ESD and the ITF FOC systems. The comparability of the ESD and the ITF FOC systems therefore lies both in their differences and in their similarities, as regards the aim of this thesis: namely, to offer a deeper understanding of the ESD as a regulatory system for transnational labour markets with divergent working conditions. In order to understand how systems of industrial relations can develop system mechanisms that allow for regulation of working conditions in a complex, globalising society, both the ESD and the ITF FOC systems can provide useful clues. The idea is not to make use of the ITF FOC system in the sense that its mechanisms can be transplanted into the ESD. Instead, posing the same questions to both systems will complement the analysis by using the ITF FOC system to illustrate problematic issues that need to be addressed within the ESD.

2.2 Normative research and non-normative theory

My research questions contains an assumption: that systems of industrial relations can be more or less capable of producing results that improve working conditions. This makes it in part a normative question, in that there is an underlying idea of how a system of industrial relations ought to be or how it ought to function. Since this study is partly based within legal studies, having a research question with a normative aspect is not necessarily controversial. Within the legal positivist tradition, the law is in itself

considered normative⁷⁸ and therefore research focusing on legal issues could rather naturally be normative. However, I am not convinced that the normativity of law can be decoupled from societal values and ideals in the sense that is true for legal positivism. Rather, I see the law as something that can serve both to reflect societal norms and influence them.⁷⁹ Nor do I find that approach suitable for my research, which is socio-legal in character, rather than doctrinal. In relation to Luhmann's theory on autopoietic systems, the normative aspect of my thesis presents a contrast, since Luhmann's theory seeks to explain what or how society is and functions, in a non-normative manner.⁸⁰ The question that arises is thus to what extent it is possible to apply this kind of non-normative theory to answer a research question that entails a normative assumption? I would like to point out that my ambition is not to provide conclusions of a normative kind on how the ESD ought to function; rather I wish to explain why the ESD is considered as having less capacity than the ITF FOC campaign in terms of producing results that improve working conditions. Nevertheless, this relationship between a research question holding on a normative assumption and a theoretical framework for analysis that is non-normative needs further explanation. In order to provide such an explanation it is necessary to consider the concept of normativity more closely.

2.2.1 Normativity and the concept of values

Normativity is a central concept for any study involving socio-legal matters, and an important concept for understanding the interconnectedness of law, norms and the societal institutions through which they work. It is, however, a complex concept, as the conception of normativity differs when considered from a legal perspective to how

⁷⁸ For two of the major contributions in the field of legal positivism, see Hart, H. L. A. (1994) *The Concept of Law*. Oxford New York: Oxford University Press and Kelsen, H. (2011) *General Theory of Law and State*. Translated by: Wedberg, A. Cambridge: Harvard University Press.

⁷⁹ Different scholars have explained the traditional and classic socio-legal view of the law as formalised social norms in various ways. One of the first contributions in the field of sociology of law relating to this can be considered the work of Ehrlich, E. (2002) *Fundamental Principles of the Sociology of Law*. London: Transaction Publishers, where the discussion on the concept of living law is particularly relevant in this respect. My comment here relates partly to the traditional socio-legal view of law as an institutionalisation of social norms, thus normative, as well as the idea that law can be produced and/or created with a normative intention which can be used to further understand the meaning and interpretation of the law.

⁸⁰ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 1ff.

it is conceived from a perspective of social sciences.⁸¹ In a socio-legal research project, therefore, this difference, and the ways the normativity concept is used and understood, requires clarification. Normativity in the legal sense relates to the binding force of law, its interpretation and application. Thus, normativity as a legal concept can be decoupled from the societal values and ideals that have participated in the shaping of the law itself.⁸² The sociological understanding of normativity, on the other hand, embraces the link between the societal values and societal norms that guide the behaviour of actors, thus expanding the meaning of normativity beyond the mere sphere of the force of law. The concept of normativity in socio-legal studies can thus be used to examine and explain e.g. the efficacy of legal rules, but more importantly it can shed light on the exact question of the interconnectedness of law, norms and the societal institutions through which they work.⁸³

Banakar explains this well: ‘... laws which are generated by transforming political decisions based on existing community values or system imperatives continue to bear the legitimising seal of the community or the administrative system which initially generated them and can more easily be translated back into a language that can be used by the system or lifeworld to realise ‘social goods’. In contrast, laws which are not rooted in community or system imperatives and are brought about to modify common usages, and mores have to fight an uphill battle.’⁸⁴ In other words, normativity as a socio-legal concept is intertwined with the idea of societal values that shape norms in society and the institutions through which these norms develop and function. In order to fully shed

⁸¹ For an interesting contribution on the concept of normativity in the socio-legal sense, see Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer. Compare this with the more implicit understanding of the concept of normativity in Trevino, A. J. (2013) 'Sociological Jurisprudence', in Banakar, R. & Travers, M. (eds.) *Law and Social Theory*. Oxford and Portland, Oregon: Hart Publishing, pp. 35-51.

⁸² The legal positivistic strand to which Hart and Kelsen belong has met with critique from various fields. For interesting contributions on the normativity of law, see for example Olney, C. (2016) 'Justice and Legitimacy: Rawls, Schmitt and the Normativity of Law', *Law, Culture and the Humanities*, 12(1), pp. 49-69; Rodriguez-Blanco, V. (2009) 'From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence of Hart's Practice Theory of Rules Reconsidered', *Law and Philosophy*, 28(1), pp. 59-100; Zanetti, G. (2016) 'On Normative Discourse', *Ratio Juris*, 29(1), pp. 44-58; Orakhelashvili, A. (2014) 'Scelle, Schmitt, Kelsen, Lauterpacht, and the Continuing Relevance of their Inter-War Debate on Normativity', *Nordic Journal of International Law*, 83, pp. 1-38; Rhui Demiray, M. (2015) 'Natural Law Theory, Legal Positivism, and the Normativity of Law', *The European Legacy*, 20(8), pp. 807-826; Crowe, J. (2015) 'Natural Law and Normative Inclinations', *Ratio Juris*, 28(1), pp. 52-67; Guastini, R. (2016) 'Kelsen on Validity (Once More)', *Ratio Juris*, 29(3), pp. 402-409; or Smith, S. A. (2011) 'The Normativity of Private Law', *Oxford Journal of Legal Studies*, 31(2), pp. 215-242.

⁸³ Law can thus be seen as working to stabilise normative expectations in society see Francot-Timmermans, L. M. A. (2008) *Normativity's Re-Entry - Niklas Luhmann's Social Systems Theory: Society and Law*. Nijmegen: WLP, pp. 169f.

⁸⁴ Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer, p. 222.

light on why a regulatory system produces the results it does, in other words, it is necessary to understand how this system is affected by normativity, and this can only be done by illuminating the societal values that form the foundation for the concept of normativity. As Francot-Timmermans explains, it is also necessary to integrate an understanding of normative organising values when we seek to answer questions about why society functions or reacts to developments in a particular way.⁸⁵ In order for me to explain how I can make use of a non-normative theory to answer my research question, it is therefore necessary to further examine the concept of values and its meaning within socio-legal research. This is the topic of the next section.

2.2.2 The role of values in socio-legal studies

The key to the problem of using a non-normative theory as the framework for answering a research question based on normative assumptions may be found, as stated above, in the concept of values, where Luhmann himself has a two-sided view. Values are to a great extent a basic prerequisite in Luhmann's theory, since the binary code within each autopoietic system is based on a certain value with a positive side (making up part of the system) and a negative side (all that falls outside of the system):⁸⁶ thus, a highly positivistic manner of conceiving values. This is, however, not the only manner in which Luhmann considers values. Instead he acknowledges that the binary code carries a positivistic appreciation of values in the sense of true or false, excluding any values in the sense of good or bad. This means that the system's own classification of whether or not a question falls within the legal system is never considered in terms of good or bad, nor on the basis of success or failure by the legal system; such values are excluded by the binary code. Luhmann then goes on to explain that the values excluded by the binary code of the system can re-enter the system through the programs of the system.⁸⁷ There is thus also room for a more hermeneutic or normative understanding of values within Luhmann's theory. His work contains no rejection of hermeneutic values; rather, he acknowledges their existence as part of programs within the system, whereby communication can be aimed at the promotion of values, such as peace, justice or solidarity. However, Luhmann views these values as unsuitable for distinguishing whether or not the communication should be considered correct, since in fact, all such abstract values

⁸⁵ Francot-Timmermans, L. M. A. (2008) *Normativity's Re-Entry - Niklas Luhmann's Social Systems Theory: Society and Law*. Nijmegen: WLP, p. 158.

⁸⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press. pp. 1ff.

⁸⁷ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

can be either positively or negatively perceived.⁸⁸ It is in this sense that values, according to Luhmann, do not serve to explain what society is, as his level of abstraction makes these values less important for describing society.

How then are values in the hermeneutic sense to be understood? As stated above, Luhmann referred to values such as peace and justice, which are relatively unquestioned values in Western democratic societies. Other such values are freedom, equality and welfare, as described by Francot-Timmermans.⁸⁹ Hermeneutic values are thus more related to culture than to norms,⁹⁰ even though they play an important part in the understanding of normativity. In this sense I think it is also important to highlight the fact that capitalism has been an important framing ideology for Western societies, and therefore capitalist values such as economic growth, profit and competitiveness should not be overlooked when we seek to answer why society reacts or operates in a particular way. However, Luhmann's theory is unconcerned with such normative or hermeneutic values; it merely aims to answer what society is. To answer questions about why society is what it is, it is therefore necessary to elaborate on the use of the hermeneutic understanding of the concept of values.⁹¹ My ambition in this project is to apply a methodology that allows me to grasp the values that re-enter the system through the programming of the system. This requires a particular methodological approach, which I will explain further in the next section.

2.2.3 A methodological model for a holistic analysis

In looking for a way to combine a research question holding a normative core with an analysis based on a non-normative theory, I have sought a solution that would allow me to provide a holistic analysis that would explore the concept of values in both a

⁸⁸ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 317ff.

⁸⁹ Francot-Timmermans, L. M. A. (2008) *Normativity's Re-Entry - Niklas Luhmann's Social Systems Theory: Society and Law*. Nijmegen: WLP, p. 156.

⁹⁰ Deflem, M. (2013) 'The Legal Theory of Jürgen Habermas: Between the Philosophy and the Sociology of Law', in Banakar, R. & Travers, M. (eds.) *Law and Social Theory*. Oxford and Portland, Oregon: Hart Publishing, pp. 75-90 at p. 85.

⁹¹ Francot-Timmermans, L. M. A. (2008) *Normativity's Re-Entry - Niklas Luhmann's Social Systems Theory: Society and Law*. Nijmegen: WLP, pp. 155ff.

positivistic and a hermeneutic manner.⁹² To illustrate how I think the concept of values can be understood in a hermeneutic or positivistic manner, and what implication this has for research, let me offer a hypothetical example focusing on research concerned with the results produced by a regulatory system. If values were interpreted in the positivistic manner, such a project would, at the empirical level, generate a research question focusing on the results produced by the regulatory system. If the concept of values instead would be understood in a more hermeneutic manner, then the empirical research would focus on finding answers to why the system produces certain results. At the theoretical level there are thus also differences, in that the positivist understanding of values would generate an analysis seeking to lie out or utilise a descriptive theoretical argument that focused on explaining what is. The hermeneutic understanding of values, on the other hand, would generate a theoretical argument focusing on why something is through a normative theoretical analysis. In the model below I try to explain these different forms of research questions that spring from the different understandings of the concept of values.

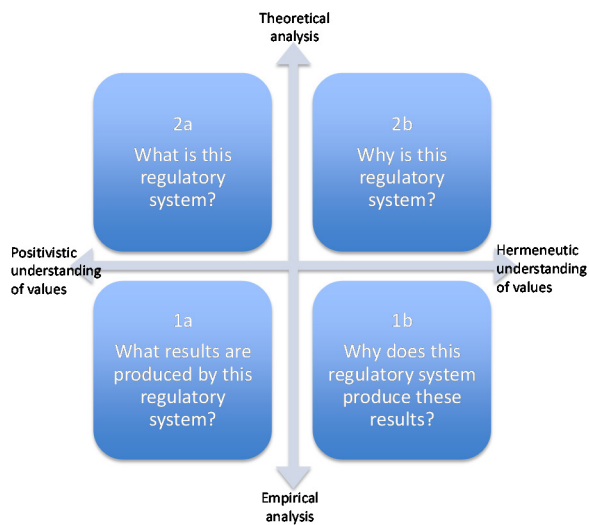


Figure 1. How the understanding of values can affect research questions.

⁹² To some extent this ambition can be understood as transcending the traditional borders that separate research about law from the sociological, jurisprudential and philosophical points of view, in that my methodology accommodates the empirical dimensions of the legal and other systems and the underlying values influencing the programming of systems, and also includes some aspects of doctrinal studies in order to identify certain programmatic sets of the studied systems. On the distinction between sociology of law, legal philosophy and doctrinal studies, see for example Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer, especially chapters 2-3.

It is important to stress that I do not consider the situation and understanding of values as either positivistic or hermeneutic. Instead a research project can display traces of both to various degrees, as well as being a combination of theoretical and empirical analysis. What the figure is trying to explain is rather that in various parts of a research project, differing understandings of the concept of values may be used, and this will generate answers to different questions relating to the research topic. By using Luhmann's theory to explain what a system is and how it functions it ought to be possible also to answer the question of why this is so, through examining what values shape the programming of the system.⁹³ Although Luhmann does not consider such values observable, since in his opinion they exist only in people's consciousness,⁹⁴ I believe that those values can be identified to some extent by carefully examining communication from the system.⁹⁵ The reason for this is that Luhmann himself clearly expressed that consciousness and communication are structurally coupled in a manner that presupposes language,⁹⁶ and so I find it possible to identify values in the hermeneutic sense, by examining the language used in communications. Through the inclusion of all four parts of the methodological model in my study, I will be able to provide a concluding analysis that encompasses a holistic perspective on the field of study. Even though the efforts to some extent seek to answer questions with normative aspects, I am convinced that the usefulness of Luhmann's theory outweighs the possible downsides. In addition there are also good reasons to believe that he himself would not preclude such normative evaluations based on his own theory. As Paterson shows reflexive law is well apt for constructing normative advice based on an analysis fully in line with Luhmann's non-normative theory. The theory on autopoietic systems as such does only provide non-normative answers as to what society is, but it does not preclude the possibility of making suggestions on how to better make use of what we find society is.⁹⁷

In this work I have also sought to keep the various parts of my analysis interconnected; a failure to integrate the four parts would also compromise the holistic aim, as the different parts would drift too far away from each other. The lack of interconnection between the four parts of the methodological model would result

⁹³ The idea that values frame the programming of social systems is also endorsed by Luhmann; see Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 317ff.

⁹⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 172ff.

⁹⁵ I will explain this point further in sections 2.3.2-2.3.3 below on sources and materials.

⁹⁶ Luhmann, N. (1997a) 'Globalization or World Society: How to conceive of modern society?', *International Review of Sociology*, 7(1), pp. 67-79 at p. 73.

⁹⁷ Paterson, J. (2006) 'Reflecting on Reflexive Law', in King, M. & Thornhill, C. (eds.) *Luhmann on Law and Politics: Critical Appraisals and Applications*. London: Hart Publishing, pp. 13-36, especially pp. 30ff.

in a scattered and incomplete study, as the analyses relating to the four different parts would face the risk of not fully covering the same object of study. The arrows in the model symbolise this necessary interconnection among the four parts of the model. The interconnection is achieved by ensuring that the four analytical angles have relevance for my research question and is further strengthened through the choice of materials and sources. By this I mean that all four parts of the methodological model relate to the same material and sources, but depending upon which part of my methodological model I am applying in my analysis, the method for dealing with the material and sources will vary. This leads us further to the method and materials that I have used, which I will describe in the next section.

2.3 Method and materials

Based on the methodological model I have used, my research method can be explained in four steps, as follows:

1. In my research questions: ‘How can the significant differences and similarities between the ESD and the global ITF FOC campaign be understood?’ and ‘Why is the ESD generally regarded as lacking the capacity needed for producing results that improve working conditions, while the ITF FOC is considered to have such capacity?’ I have an assumption/presupposition of how systems of industrial relations ought to function in order to be considered as having the capacity for producing results that improve working conditions. This entails a normative assumption.
2. I have gathered and examined empirical material consisting of or reflecting communication relevant to the autopoietic systems of the ESD and the ITF FOC campaign. The material consists of sources chosen with the intent to cover the semantic field⁹⁸ of the examined systems of industrial relations and communication from other systems relating to the systems of industrial relations.⁹⁹ This material is non-normative in character, in that it is a reflection of communication and thus observable “facts”; it will, in other words, provide me with information on the positivistic values of the systems. However, the material does not exclude the possibility of identifying values

⁹⁸ Francot-Timmermans, L. M. A. (2008) *Normativity's Re-Entry - Niklas Luhmann's Social Systems Theory: Society and Law*. Nijmegen: WLP, pp. 170ff.

⁹⁹ For a more detailed explanation of the materials and sources I have used, see below in sections 2.3.2-2.3.3 on sources and materials.

that shape the programs of the systems' communication.¹⁰⁰ By this I mean that when studying empirical material reflecting communication, whether written or in other forms, this material will be shaped by a normative presence. This normative influence has contributed to framing the studied communication through the programming of the system producing the communication. Thus, the distinction between non-normative theory and normative theory is not that non-normative theory excludes the possibility of answering a normative research question, but rather that the empirical material used for the analysis shall be observable facts, such as communication, which themselves can provide indications of normative values. In this manner the hermeneutic values can be considered as being expressed through the content of the communication, in the form of recurring phrases and expressions.

3. I have performed a first-layer analysis using Luhmann's theory to explain what the systems of industrial relations are and how they can be understood based on the non-normative empirical material. This is, in other words, a non-normative analysis using a non-normative theory to examine the positivistic values found in the material, in order to answer the questions of what results the systems produce and what the systems are. This analysis thus answers first the question of what the systems are (question 1a in the model above) and then the question of what results the systems produce (question 2a in the model above).
4. I have then performed a second-layer analysis attempting to identify the hermeneutic values that shape the programming of the systems, in order to answer the questions of why the systems produce certain results and why the systems are what they are. This analysis is thus also based on Luhmann's theory by considering the values that re-enter the systems through the programming of the systems. This second-layer analysis provides room for a certain degree of normativity and as such it allows for an answer to my normatively based research question. This analysis thus answers first the question of why the systems are what they are (question 2b in the model above) and second why they produce the results they do (question 1b in the model above).

In analysing the texts and contents of the material I have applied a critical approach seeking to understand the meaning of the text, not only as explicitly expressed in words, but also by assessing what is left out or what is said between the lines for example through the structure of the text and the order in which differing

¹⁰⁰ This can be compared to La Torre's argument that law acquires objectivity only within a certain normative framework; see La Torre, M. (1997) 'Rules, Institutions, Transformations. Considerations on the "Evolution of Law" Paradigm', *Ratio Juris*, 10(3), pp. 316-350 at p. 321.

hermeneutic values might be expressed. The analysis has necessarily been structured according to the mentioned steps, since it is essential to understand what something is before it is possible to explain why it is what it is. However, I would like to point out that even though the analysis has been carried out in different steps, the text of this thesis is structured in an integrated manner, which means that the first- and second-layer analyses will not be presented separately. Instead I will incorporate both layers of analysis throughout the chapters and sum them up together at the end of each chapter.

My methodological model and the steps in my research method explain how I use Luhmann's theory and how it fits with the normative aspect of my thesis. There remains the question of why I chose Luhmann's theory for my analytical perspective. I will address this in the next section.

2.3.1 The relevance of analysing international collective bargaining systems as autopoietic systems

I chose Luhmann's system theory as a framework for my analysis for several reasons. I would now like to explain this choice in relation to the purpose of my thesis. Since my research is socio-legal in character, my interest in the law lies in the function of the law and similar regulatory systems as '*institutions within a larger societal context with the objective of securing and protecting social interests.*'¹⁰¹ In my opinion, this description of the law also applies to collective bargaining systems, which secure various social interests including the interests of workers, employers and society at large.

Understanding of the law and regulatory systems in this pragmatic manner is necessary in order to be able to understand developments within today's constantly

¹⁰¹ Trevino, A. J. (2013) 'Sociological Jurisprudence', in Banakar, R. & Travers, M. (eds.) *Law and Social Theory*. Oxford and Portland, Oregon: Hart Publishing, pp. 35-51 at p. 40.

changing society.¹⁰² Thinking of law as a system and the necessity of analysing it as such was highlighted already by Roscoe Pound who described this in terms of a 'regime of social control ... adjusting relations and ordering conduct by systematic application of the force of a politically organized society which we call the legal order.'¹⁰³ This description is close to an understanding of law as fulfilling the function of managing conflict, which is in line with Luhmann's view of law as an autopoietic function system.¹⁰⁴ In my view, the description can also be applied to other institutions that perform the function of managing relations and conduct between different parties, making it no great leap to consider industrial relations and collective bargaining as systems. Rogowski's idea of industrial relations as systems of collective bargaining having the function of managing conflict between collective actors¹⁰⁵ is thus in line with this.

Why then should industrial relations or collective bargaining systems be viewed in terms of regulatory autopoietic systems? The difficulty for law to keep pace with societal changes was pointed out as early as the beginning of the twentieth century by Pound, when he described the idea of law in books versus law in action as a consequence of the rigidity of the legal system.¹⁰⁶ If we consider this insight in relation to the EU and the difficult process of accomplishing legal interventions in the field of labour law, it would seem natural to adopt an analysis that permit us to take into account an alternative regulatory system. In a socio-legal study such as this one,

¹⁰² The effects of globalisation on the labour market and labour market institutions can be viewed in different ways, as can the driving factors behind globalisation. However, it is certain that globalisation impacts labour markets, and it has been suggested that the manner of dealing with these changes needs to be framed in global rather than national terms. See for example Stauvermann, P. J. (2013) 'Does Globalization Lead to a Rat Race of National Labor-Market Institutions?', *Panoeconomicus*, 2013(1), pp. 73-87; Durand, C. and Miroudot, S. (2015) 'Is labour the fall guy of financial-led globalisation? A cross-country inquiry on globalisation, financialisation and employment at the industry level', *Review of World Economics*, 2015(151), pp. 409-432; Koutsiaras, N. (2010) 'How to Spend it: Putting a Labour Market Modernization fund in Place of the European Globalization Adjustment Fund', *Journal of Common Market Studies*, 48(3), pp. 617-640; Basu, K. (2016) 'Globalization of labor markets and the growth prospects of nations', *Journal of Policy Modeling*, 2016(38), pp. 656-669. This in turn highlights the importance of a well-functioning collective bargaining system at the European level to complement the national systems. For an interesting theoretical socio-legal discussion of the effects of globalisation, see chapter 13 in Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer.

¹⁰³ Pound, R. (1951) 'Philosophy of Law and Comparative Law', *University of Pennsylvania Law Review*, 100(1), pp. 1-19 at p. 2.

¹⁰⁴ For a brief explanation see Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, p. 375 and for the in-depth discussion see Luhmann, N. (2004) *Law as a Social System*. Oxford: Oxford University Press.

¹⁰⁵ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 116.

¹⁰⁶ Pound, R. (1910) 'Law in Books and Law in Action', *American Law review*, 44, pp. 12-36.

there is thus a need to adopt a pragmatic view of regulatory systems, whereby the focus of attention for understanding the regulation of labour relations might be fruitfully placed on what Ehrlich could have called the social associations of the labour market,¹⁰⁷ or the institutions and relations through which labour market regulations form and are enacted.¹⁰⁸

We therefore need a theory that can explain how different institutions in society, such as law, politics or collective bargaining, relate to each other when those relations become increasingly complex. In order to understand how various institutions of the globalised society operate and are interlinked through dependencies and interdependencies,¹⁰⁹ viewing them as autopoietic systems in accordance with Luhmann's theory can thus be a fruitful way to construct the analysis in a manner more useful for socio-legal research with a normative character.¹¹⁰ One good argument for applying Luhmann is that his theoretical framework allows for studying processes leading up to the adoption of common rules and standpoints or in other words the outcomes of systems of industrial relations. This thus allows for precisely that further study of systems of industrial relations that Rogowski considers necessary and difficult to achieve by applying Dunlop's theory of industrial relations.¹¹¹

Another manner to apply Luhmann's theory to my analysis could be by conceptualising the ESD as a binding institution, which facilitates structural couplings between different systems by assuring that communications from different stakeholder groups such as management and labour become observable for such different systems.¹¹² However, there are reasons that I don't find this conceptualisation suitable for the analysis in this present text. Firstly, it is in a socio-legal study of industrial relations or collective bargaining at the macro level unsuitable to separate the analytical discussion from the legal field most closely connected to

¹⁰⁷ For Ehrlich's reasoning on social association see for example Ehrlich, E. (2002) *Fundamental Principles of the Sociology of Law*. London: Transaction Publishers, pp. 151ff.

¹⁰⁸ On this see also Trevino, A. J. (2013) 'Sociological Jurisprudence', in Banakar, R. & Travers, M. (eds.) *Law and Social Theory*. Oxford and Portland, Oregon: Hart Publishing, pp. 35-51, at pp. 45ff.

¹⁰⁹ Luhmann, N. (1997a) 'Globalization or World Society: How to conceive of modern society?', *International Review of Sociology*, 7(1), pp. 67-79 at p. 75.

¹¹⁰ Banakar, R. and Travers, M. (2013) 'Systems Theory', in Banakar, R. & Travers, M. (eds.) *Law and Social Theory*. Oxford and Portland, Oregon: Hart Publishing, pp. 53-58 at pp. 57f.

¹¹¹ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at pp. 99ff.

¹¹² For an analysis structured similarly to this see Paterson, J. and Teubner, G. (2005) 'Changing Maps: Empirical Legal Autopoiesis', in Banakar, R. & Travers, M. (eds.) *Theory and Method in Socio-Legal Research*. Oxford and Portland, Oregon: Hart Publishing, pp. 191-211. Conceptualising the work place and industrial relations as a network of stakeholders has also been done early on within industrial relations research as discussed in Hyman, R. (1978) 'Pluralism, Procedural Consensus and Collective Bargaining', *British Journal of Industrial Relations*, 16(1), pp. 16-40 at p. 24.

industrial relations, in other words labour law. Within labour law there is a basic assumption that collective bargaining and/or industrial relations make up a system complementing labour law with rules regulating both employment conditions and relations between the contracting parties at both individual and collective level.¹¹³

Within labour law the term 'collective bargaining systems' is often used without justification simply because the underlying understanding of this form of regulatory model is that it is a specific system of relevance for labour law.¹¹⁴ In my opinion the foremost reason for this is that if industrial relations are not considered as a system it becomes difficult to conceptualise the results stemming from industrial relations or collective bargaining, most notably collective agreements or in relation to the ESD framework agreements. Such agreements are in essence the product of joint efforts from different stakeholder groups and in order to understand this product in a systems theoretical perspective I see no other solution than considering the entirety of those joint efforts as a system.

The core of this thesis deals with questions relating to the regulation of working conditions and employment relations it would thus be odd not accepting the basic premises for conceptualising industrial relations that exist within the field of labour law. In addition this contribution is a socio-legal study of industrial relations in a holistic manner making it a study encompassing a multi-faceted spectra of processes and institutions that serve to regulate labour market issues in the setting of social, political and economic dynamics at the international level. This necessitates a theoretical approach that allows for explaining the complexities involved and by conceptualising the studied systems of industrial relations as autopoietic systems I'm

¹¹³ The fact that research conducted within industrial relations focusing on structures that generate regulation of industrial relations and the labour market often make use of a system approach indicates a useful link between labour law and conceptualising industrial relations as a system. For a discussion on various theoretical approaches within industrial relations and how systems theory can be useful when regulation is at the fore of the research interests see for example Schienstock, G. (1981) 'Towards a Theory of Industrial relations', *British Journal of Industrial Relations*, 19(2), pp. 170-189 at pp. 184ff.

¹¹⁴ This manner of conceiving industrial relations is for example used in Bercusson, B. (2009a) *European Labour Law*. second edn. Cambridge: Cambridge University Press; Iossa, A. (2016) 'Collective Bargaining in a Globalised World: a Multi-dimensional Picture', in Carlsson, L., Edström, Ö. & Nyström, B. (eds.) *Globalisation, Fragmentation, Labour and Employment Law*. Uppsala: iUSTUS, pp. 25-51; Pietrogiovanni, V. (2016) 'The System of Sources of a Globalised Labour Law', in Carlsson, L., Edström, Ö. & Nyström, B. (eds.) *Globalisation, Fragmentation, Labour and Employment Law*. Uppsala: iUSTUS, pp. 241-261; and Edström, Ö. 'The Nordic Industrial Relations Model: Surviving the Impact from European Law?', in Carlsson, L., Edström, Ö. & Nyström, B. (eds.) *Globalisation, Fragmentation, Labour and Employment Law*. Uppsala: iUSTUS, pp. 95-112. A more clear statement of industrial relations as systems analysed in Dunlop's terms can be found for example in the work of Mia Rönnmar and other prominent labour law scholars, see for example Rönnmar, M. (ed.) (2008) *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives*. Alphen aan den Rijn: Kluwer Law International.

convinced that this can be accomplished.¹¹⁵ By applying Luhmann's theory I can for a study that takes '*into account how and where the connectivity of communication lets systemic orders emerge.*'¹¹⁶ This in turn allows for the holistic approach I'm aiming for. If the research conducted is not primarily focused with issues relating to labour law the situation can be different and an analysis based on viewing different stakeholder groups as systems that are structurally coupled through some sort of binding institution could quite possibly serve well.¹¹⁷

My intention is thus to use Luhmann's theory as a socio-legal theory capable of describing society and analysing the way it operates.¹¹⁸ Since globalisation has made society increasingly complex, Luhmann's theory is also appropriate as it is able to encompass that complexity whilst at the same time making it observable and understandable. Luhmann's idea of where focus is placed on reducing complexities, whilst creating a theory that still allows for an analysis that can explain the complex relations between law and institutions, is thus quite serviceable for the complex interdependencies among the various societal institutions that all affect today's labour market. Applying Luhmann's autopoietic systems theory will also make it possible for me to structure my analysis in a way that makes it possible to observe what the studied systems identify as part of the system itself and what they construct as their environment.¹¹⁹

My next reason for choosing Luhmann's theory as the framework for my analysis relates to the material and sources I have used in my research. Since social systems operate through communication, and communication is what is observable, the empirical component of my thesis will need to focus on communication. Choosing communication as a basis for analysis is also in line with the view of law and

¹¹⁵ For a discussion of the potential weakness of Dunlop's theory of industrial relations systems in relation to the European level see Hyman, R. (2001) 'The Europeanisation - or the erosion - of industrial relations?', *Industrial Relations Journal*, 32(4), pp. 280-294 at pp. 291ff.

¹¹⁶ Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191 at p. 183.

¹¹⁷ The example provided by Teubner and Paterson (in Paterson, J. and Teubner, G. (2005) 'Changing Maps: Empirical Legal Autopoiesis', in Banakar, R. & Travers, M. (eds.) *Theory and Method in Socio-Legal Research*. Oxford and Portland, Oregon: Hart Publishing, pp. 191-211.) show well how different stakeholders can be conceptualised as separate systems, but the focus in their example is not primarily relating to issues relating to the regulation of labour or industrial relations, but rather they conceive of a broad spectrum of regulation relating to a specific sector making collective agreements and industrial relations a more marginal factor of analysis instead of the centre of analysis.

¹¹⁸ King, M. (2013) 'The Radical Sociology of Niklas Luhmann', in Banakar, R. & Travers, M. (eds.) *Law and Social Theory*. Oxford and Portland, Oregon: Hart Publishing, pp. 59-73 at p. 59.

¹¹⁹ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 115ff.

regulatory systems as consisting of communicative processes as well as rules, thus making communicative processes of importance for socio-legal research.¹²⁰

However, since it is my aim to reach a holistic understanding of the ESD and the ITF FOC systems, including an overview of their historical development, attempting to observe all communications within these systems live would be an impossible task. First of all, of course, it is not possible for me personally to observe the oral communications that have taken place throughout the history of the two systems. Secondly, it would not be possible through observation to gather material that provides a holistic understanding of what is communicated within these systems in the present, owing both to the vast number of SSDS's and other meetings of relevance for the ESD and the ITF FOC campaign and to difficulties in getting access to such meetings. However, Luhmann does not limit communication to oral utterances. He recognises various forms of communicative media and the notion of symbolically generalised media covering a broad range of communicative results.¹²¹ In essence, communication is not simplistically limited to spoken words, but covers a wide range of possible media,¹²² among which I find printed documents and academic research to be important sources for retrieving communication from the studied systems. I can thus make use of a broad range of written documents that contain communication from the studied systems, are the results of communication from those systems or relate to such communication in various forms. In the next section I will explain what materials I have used, how they can be understood in relation to the communication of the studied systems and how I have analysed them.

2.3.2 Using legal sources and documents as empirical material

The material used in this study consists in large part of various kinds of legal sources and documents.¹²³ As has been well explained by Paterson and Teubner, legal sources can be a useful foundation for the empirical study of autopoiesis.¹²⁴ My intention here is to discuss my reasons for choosing the legal material I will analyse in this thesis and

¹²⁰ Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer, p. 27.

¹²¹ For Luhmann's in-depth discussion on communication media, see chapter 2 in Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press.

¹²² King, M. and Thornhill, C. (2003) *Niklas Luhmann's Theory of Politics and Law*. Basingstoke, Hampshire, New York: Palgrave Macmillan, pp. 14f.

¹²³ Sources that are not to be considered legal sources have also been used. These will be discussed in the next section, 2.3.3.

¹²⁴ Paterson, J. and Teubner, G. (2005) 'Changing Maps: Empirical Legal Autopoiesis', in Banakar, R. & Travers, M. (eds.) *Theory and Method in Socio-Legal Research*. Oxford and Portland, Oregon: Hart Publishing, pp. 191-211.

my treatment of this material. I will begin my explanation by briefly reviewing the various forms of legal sources used as empirical material for the study of the ESD and the ITF FOC systems.

For the ESD, the legal sources and documents used must be understood within the framework of EU law. Firstly, sources of primary law include the Treaties and the Charter of Fundamental Rights of the European Union (Nice Charter). These are the legal sources that have primacy within EU law and are considered at the top of the hierarchy of norms. All Member States are obliged to make sure that their national law is compatible with and interpreted in conformity with the primary law of the EU. Secondly, there are secondary legal sources such as Regulations, Directives and Decisions. Regulations are directed to the Member States and binding in their entirety, whereas Decisions are binding for the legal subject to which they are directed, which may be one or more Member States or private entities. Directives on the other hand are binding as regards their objectives, and Member States must therefore take action at the national level to ensure that the Directives are implemented in a correct manner so that their objectives are met.

EU secondary legal sources also include Recommendations; these, however, are not binding and thus to be considered more as soft-law instruments. The CJEU retains the authority to interpret EU law, and therefore case law from the CJEU is important to provide a proper understanding of the legal material. In addition to these legal sources there are also sources of less dignity within the legal hierarchy, such as preparatory works published by the Commission. Although those documents are not legally binding, they can be useful for an overall understanding and interpretation of EU law. The reason is that communications from the Commission contain rationales relating to the aims of the proposed legislation, and so provide insights that are useful when interpreting law teleologically, which is the foremost method of interpretation within EU law.¹²⁵

In addition to these EU law sources, there are the documents produced by the ESD itself, in the form of agreements, joint opinions, guidelines, specific organisations' statements and responses to Commission consultations. In a strict doctrinal study such documents would not be considered *bona fide* legal sources. However, when discussing issues relating to labour law and a regulatory system for labour market relations and working conditions, the texts produced by the social partners become of interest as well. The reason for this is the tripartite mechanisms of the ESD, whereby the social partners and EU legislators communicate concerning the contents and form of legislative initiatives. The documents produced within the framework of the ESD thus offer insight into such matters as the interests and ambitions of the social

¹²⁵ There are a vast number of educational publications on EU law that explain the EU legal sources in more detail. See for example chapter 3 in Bernitz, U. and Kjellgren, A. (2014) *Europarättens grunder*. Stockholm: Norstedts Juridik.

partners, together and as separate organisations for management and labour. In addition these texts can be considered as the result of decisions or even actual decisions taken by organisations that contribute to the communication within the ESD. As such these texts are part of making the accountability of these organisations observable and can therefore be of aid in seeking to understand the structure of the ESD as a whole.¹²⁶ Thus, both legal sources and texts from the ESD can be studied empirically in order to shed light on how the ESD functions and what communication it is capable of producing.

For the ITF FOC system, the relevant legal sources are the international treaties and conventions governing the seafaring sector. However, these sources leave many issues unregulated or without efficient means for control and enforcement. Therefore the regulation of the seafaring sector needs to be understood in a broader sense, taking into consideration what the regulatory instruments actually affecting working conditions for seafarers are. From this perspective, the global collective agreements concluded within the framework of the ITF FOC system can be considered a regulatory text of higher importance than the international conventions, because these are the regulatory instruments that in practice are enforced. This makes it essential to further study documents that provide insight into how these collective agreements are negotiated and enforced, which makes the internal documents of the ITF concerning the FOC policy and its implementation relevant for understanding this regulatory system. The sources used for studying the ESD and the ITF FOC systems thus vary to some extent regarding their legal relevance. For both, however, the study of less traditional legal sources is required to better understand them as regulatory systems. I also think it appropriate to give the reader some further explanation of how I have used and interpreted the various kinds of legal and other sources that make up my empirical material. I would like to offer a few examples to show how I have systematised and made use of these different documents.

International treaties, conventions and primary legal sources from the EU have mainly been used contextually to provide an idea of the general legal framework applicable for the two systems under study. Some articles from various relevant Treaties or Conventions have been studied in more and varying levels of detail. Articles 152–155 TFEU govern issues of utmost importance for the ESD and as such they not only help show how the ESD works in relation to the EU legal system, but also how the EU legal system is capable of being cognitively open to communication from the ESD. These Articles have been interpreted using teleological methods with the help of additional legal sources such as case law and Commission documents that clarify the contents and meaning of the Treaty Articles.

¹²⁶ For further discussion on decisions of organisations and their role within the structure of function systems see Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191.

Although not all communications from the Commission are considered bona fide legal sources in the strict doctrinal sense, Commission documents of relevance to Articles 152–155 TFEU (or to be precise, the corresponding pre-Lisbon Articles), have nevertheless been examined in order to better understand the policy issues relevant to the ESD. The Commission Communications and Decisions dealing with the ESD, in terms of consultation procedure and requirements for representativeness, show that the ESD must address these issues in order to ensure that its communication stands a chance of being meaningful for the EU legal and policy-shaping systems. The specific Commission Decision relating to the institutionalisation of the sectoral social dialogue sheds further light on these issues. This Decision also provides a deeper understanding of the structural coupling between the ESD and the EU legal and policy-shaping systems; or in other words, how communications from the EU legal and policy-shaping systems can generate results within the ESD, and the other way around.¹²⁷ Regardless of the legal status of these Commission texts, they all shed light on how the Treaty Articles relating to the ESD can be interpreted and they have thus been selected for study on the basis of their relevance for the ESD, rather than their status as legal sources.

At the international level, the example of Article 91 UNCLOS illuminates the lack of clarity within the international legal system governing the flag of ships that has facilitated the FOC system, and thus spurred the development that the ITF is seeking to counteract. In addition, other international Conventions and Treaties relating to maritime transport have been treated contextually in order to show how the global system that focuses on port state control fails to ensure the efficient enforcement of regulations governing working conditions and thereby creates a gap within the global legal order, which the ITF FOC system manages to close to some extent.

ILO Conventions 87 and 98 on Freedom of Association and the Right to Collective bargaining illustrate the scope of action for trade union organisations in relation to the exercise of fundamental labour rights. When the ILO conventions are juxtaposed with Article 11 ECHR as well as EU primary sources relating to fundamental labour rights, these sources show an ambiguity within the EU legal system regarding the exercise of fundamental labour rights. Briefly, this ambiguity can be understood as the EU legal system lacking competence to regulate the exercise of some of the fundamental labour rights, whilst still being obliged to assure that these rights are respected, as they are protected in other international legal acts.¹²⁸ This ambiguity is further highlighted when the issue of fundamental labour rights is discussed in relation to EU legal sources involving measures taken in response to the financial and economic crisis of 2008. In order to understand the interpretation of the various legal

¹²⁷ The term structural coupling is further explained in the theoretical chapter of my thesis. See section 3.2.4 below for further details.

¹²⁸ This issue is discussed and explained in more detail in sections 4.3–4.4 below.

provisions relating to fundamental labour rights, it has been necessary also to discuss the case law relating to those rights as well as documents such as Memoranda of Understanding (MoU), which express the practical implementation of the EU legal measures taken in response to the financial crisis. In practice, it is through the analysis of this case law and such MoUs that the ambiguity within the EU legal system becomes apparent. Through this case law and the MoUs it is actually possible to see that the EU legal system both regulates fundamental labour rights and restricts the exercise of these rights in a manner that can be questioned on the basis of other international legal acts.

Cases from the ECtHR and the CJEU have been chosen that deal with fundamental labour rights, such as the right to freedom of association, the right to collective bargaining and the right to industrial action. Since the ECtHR reviewed its case law on the right to collective bargaining and the right to industrial action not too long ago, the main focus of this study has been on the cases that clarify the current state of the law in accordance with the ECtHR. As for the CJEU, there are not many cases dealing with the fundamental labour rights and I have chosen mainly to focus on the *Laval*¹²⁹ and *Viking*¹³⁰ cases, with a complementary discussion of the *Rüffert*¹³¹ case.¹³² These cases contrast with the interpretation of the ECHR and can thus help us understand the legal framework to which systems of industrial relations must relate in order to communicate meaningfully with the EU policy-shaping systems.

The *Viking* case¹³³ is also interesting for this investigation since it concerns the maritime industry and as such has had repercussions for the global ITF FOC system. Therefore this case has been discussed in several parts of the thesis, as it provides insight not only into fundamental labour rights, but also into how the ITF FOC system deals with improbabilities of communication. The *Viking* case thus highlights both the structural coupling between the ESD and the EU legal and policy-shaping systems, and the structural coupling between the ESD as it concerns maritime affairs and the ITF FOC global system.

¹²⁹ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

¹³⁰ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

¹³¹ *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

¹³² These cases are discussed further in e.g. section 4.4 below.

¹³³ In the *Viking* case, an employer had sought to flag out a ship to a country with lower labour costs in order to stay competitive. This information from the employer triggered the trade unions to take action in accordance with the ITF FOC policy. The case is discussed further in section 11.4 below.

In addition to the legal material mentioned above, I have also made use of EU secondary sources in the form of Regulations, Decisions and Directives relevant to the legal issues discussed in the thesis. I have selected these sources based on their relevance to the specific topic discussed and where necessary I have also used case law to clarify the contents of the legal provisions discussed. Due to the broad spectrum of material legal issues covered in the thesis, my ambition has not been to fully cover the state of the law. I have instead selected legal sources to analyse based on the theme they relate to, making use of legal sources that regulate the issues I discuss in the various chapters of this thesis. Choosing the legal sources thematically also made it possible to trace the preparatory acts from the EU institutions as well as texts produced within the ESD relating to those documents. For example, the legal sources relating to temporary agency work make the various preparatory acts concerning this issue relevant, as well as the different kinds of texts produced on this topic within the ESD and by the social partners .

Legal sources and related documents that illustrate how the ESD and ITF FOC systems generate or fail to generate results, and how such results may be perceived by other systems, have been given priority over other legal sources where such examples are lacking. This has meant that I also use other legal material than traditional legal sources, including soft-law instruments from the EU and various forms of agreements stemming from the ESD or the ITF FOC systems as well as international organisations' internal constitutions. Such documents contain clauses that can shed light on e.g. the membership conditions and decision-making premises for the various organisations that exist within the systems. In this sense these somewhat less traditional legal sources are not used as much to clarify the state of the law as to providing an understanding of the systems under study. The selection of sources has thus been geared towards seeking to understand the studied systems, and the material has been interpreted using a teleological method with the systemic function as guidance. By this I mean that I have studied the material bearing in mind how its content can be understood in relation to the ESD and the ITF FOC. In relation to the ITF FOC system, my interpretation focused on understanding how the contents of the legal empirical material affect a trade union-driven and mainly bipartite system of industrial relations. For the ESD, which is subject to a higher degree of tripartism, my interpretation was instead guided by these tripartite social relations, how they function and how their efficiency is affected by the contents of the empirical material.

2.3.3 Further notes on other sources and materials

For this study it has been necessary to identify sources and material that are either made up of communications from the systems under study or at least reflect that communication in a manner that make the communication itself deducible and

observable.¹³⁴ In addition, it has been important to identify material that can help me to provide the broad and holistic picture that is my goal. I have therefore chosen to collect my data from a broad range of written documents and previous research.

A great deal of my material consists of secondary empirical sources via research published on the ESD and the ITF FOC. The research publications I have used are of diverse character. Some have a qualitative approach and offer in-depth examinations of smaller elements of the objects studied, relating to a specific sector or a specific and limited topic of concern for the system in question.¹³⁵ Other publications take a quantitative approach, offering an overview of larger parts of the system in question.¹³⁶ These sources all have limits, in that they in one way or another fail to

¹³⁴ On the need to flag the communication as actions and use descriptions of events in order to deduce how communication has been understood and further referred in the self-referential processes of social systems, see Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 163ff. For the role of organisations in the production of system communication see also Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191.

¹³⁵ Examples of such research include: Hilal, N. (2006) 'The Case of Rail Freight', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 133-161; Pond, R. (2005) 'Development of social dialogue in the public sector', *Transfer*, 11(3), pp. 375-382; Dufresne, A., Degryse, C. and Pochet, P. (2006b) 'Metalworking, Chemicals and the Public Sector: A Thaw Sets In', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 219-245; Holm Mikkelsen, A. (2005) 'Social dialogue committee in the banking sector', *Transfer*, 11(3), pp. 345-351; Furstenborg, J. 'Social dialogue in retail and commerce', *Transfer*, 11(3), pp. 353-358; Pochet, P. and Degryse, C. (2006) 'Social Dialogue in UNI-Europa Sectors', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 163-191; Kollwe, K. (2005) 'The sub-sectoral social dialogue in the European shipbuilding industry', *Transfer*, 11(3), pp. 383-389; Pochet, P. (2006b) 'Textiles and Sugar', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: Brussels, pp. 193-218; Bercusson, B. and Bruun, N. (1999) 'The Agreement on Fixed-term Work - a First Analysis', in Vigneau, C., Ahlberg, K., Bercusson, B. & Bruun, N. (eds.) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet, pp. 51-131; Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262; Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. and Zappalà, L. (eds.) (2008) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A.

¹³⁶ See for example Pochet, P. (2006a) 'A Quantitative Analysis', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 83-109; Pochet, P. (2005) 'Sectoral social dialogue? A quantitative analysis', *Transfer*, 11(3), pp. 313-332; Pochet, P., Degryse, C. and Dufresne, A. (2006) 'A Typology', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 109-130.

consider the full complexity of the ESD;¹³⁷ but when studied together they yield valuable information that makes possible the reduction of complexities¹³⁸ whilst taking into account the complex societal structures within which the ESD operates. Combining these secondary empirical sources is a way to tackle the problem of not having access to the studied systems in a manner that allows me to extract primary sources. In addition, the use of secondary empirical material also gives me a more holistic picture than I would have been able to assemble by collecting data through observations, interviews or surveys, which would not have been feasible unless limited either in terms of sectors or topics.

The choice to exclude traditional social science methods for data collecting does not mean that my study lacks primary sources. Many of the sources in my study can be considered to be primary sources, in the sense of sources consisting of communications from the systems themselves. Clear examples hereof include texts produced within the ESD, such as agreements, joint opinions, recommendations, as well as agreements, policy documents and reports from the ITF FOC system. These documents are in effect the results of communication within the systems, being produced in dialogue or even through negotiations between members of organisations in those systems, and as such they are in themselves communication produced through the self-referential processes of the systems.¹³⁹ I have studied these texts, both in order to grasp the overall picture and understand what falls within the demarcation of the system, and to find clues about details of the system's communication. This means that the task of discovering the overall structure and creating an understanding of the systems has included reading of a vast number of texts in what can be considered the groundwork for my study. The thesis does not refer to all of these texts; instead I have made a selection of references relevant to this final written product.

Since the focus of Luhmann's theory is on the operation of systems through communication, where the sender of the communication is not *per se* what identifies the text as communication from the system, it would be too simplistic to assume that only text produced by relevant organisations of management or workers should be studied. Instead it is the content of the text and thus the content of the communication that is relevant in my selection of sources. I have thus found that there are a number of documents within the legal field, such as might generally be used for a more traditional legal study, that contain information in the sense of communication from the systems that I study. Therefore, traditional legal sources and

¹³⁷ For a further discussion see section 1.6 above.

¹³⁸ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 26ff.

¹³⁹ On written texts as communication, see Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 150ff.

various forms of preparatory acts and legal research have also been useful as empirical sources for my studies.

By analysing the contents of the abovementioned types of texts and documents, I have been able to distinguish not only what falls within the borders of the system, but also important clues concerning the structural coupling with other systems. This is possible since the communication from the systems that are my main focus also contains references to communication produced by other systems, mainly the legal and political systems. This part of the study can be considered as first-order observations, whereas the study of previous research concerning the ESD and the ITF FOC can be considered as second-order observations. The second-order observations thus complements the first-order observations; they are also complementary in the sense that previous research sheds light on and offers perspectives on communication that occurred in the past in forms not necessarily preserved and available as written communication today.

As the model pictured above explains, I have constructed my study in this way to fulfil my ambition of providing a holistic picture of the field of study. This holistic ambition has governed not only my selection of material but also my manner of analysis. I have analysed my sources first from the viewpoint of value as a positivistic concept to identify binary codes, structural couplings etc., in the sense of what is or what is not and how is or is this not. Thereafter I have analysed the contents of the sources viewing the concept of values from a hermeneutic perspective, in order to shed light on the questions of why the binary codes are as they are and why the structural couplings work the way they do. This means that, although the theoretical framework of this thesis has a descriptive character, I will not limit my analysis to simply offering a description of the systems I study. Instead I will seek explanations for weaknesses and opportunities within the ESD in order to be able to offer a deeper analysis and suggestions for the future. This can only be achieved through an in-depth analysis that makes use of a large number of the various concepts in Luhmann's theory. In the next chapter, therefore, I will explain Luhmann's theory on autopoietic social systems, Rogowski's adaptation of the same for industrial relations and how I will make use of this in my analysis.

3 Theoretical framework

3.1 Introduction

Since the method I have chosen for my project consists of an analysis based on a theoretical framework, it is important to explain this theoretical framework and how it is used in my thesis. The following sections provide an overview of Luhmann's ideas on autopoietic social systems in general, with specific attention to particular aspects of the theory that are relevant to my research questions, and to Rogowski's explication of this theory in relation to systems of industrial relations.

3.2 Luhmann's idea of autopoietic systems

My analysis will be based on Luhmann's theory of self-referring autopoietic social systems. This theory is based on the idea that the world consists of various systems, of which there are three kinds: living systems, psychic systems and social systems. Luhmann focuses on the social systems, since these are, according to him, the basis of the functionally differentiated society of today.¹⁴⁰ The idea is that complex modern society can only be understood or analysed through a theory that reduces the complexity rather than trying to grasp it in its entirety. Aiming to explain society in its full complexity would, in Luhmann's opinion, not generate any answers, and instead only lead to more questions.¹⁴¹ Luhmann's method of reducing complexity can be understood as an approach that focuses on what is possible to observe and explain. Communication, in various forms, is something that is clearly possible to observe, and this might be the reason that Luhmann developed a theory of society consisting of different autopoietic social function systems operating through

¹⁴⁰ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 12ff.

¹⁴¹ See Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 83, where the idea of reducing complexities is explained in the sense of what is observed and how. See also Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 23ff.

communications.¹⁴² This section will explain the foundations of this theory and how I will use it in my analysis in relation to the ESD and the global ITF FOC campaign.

3.2.1 The autopoietic social system

Luhmann formulated his theory of autopoietic social systems by drawing on biological research into the self-organisation and self-production of living organisms within the boundaries of the organism itself. An autopoietic system is thus understood to be a system that is separated from its environment and produces and reproduces itself within the limits of its own boundaries and operations.¹⁴³ An autopoietic social system is created through the system's own distinction from its environment and continues to exist through the reproduction of its own internal operations on the basis of this distinction. The distinction of the autopoietic social system from its environment occurs through the system's definition of a binary code, which determines what is or is not considered part of the system according to the system itself. The system's operations are based on the positive side of this binary code. For an autopoietic social system the operations consist of communications, which are thus communications dealing with the positive side of the system's code.¹⁴⁴

The autopoietic social system is further operationally closed in the sense that neither the environment of the system nor other systems can be integrated in the operations of the system. The system can only exist through its own operations. It is impossible for any system to integrate the operations of another system into itself. This does not mean that a system lacks sensitivity to its environment, however, because the system's operational closure also causes a cognitive openness, meaning that events in its environment can result in an adaptation of the internal functions of the system.¹⁴⁵ It is important to note that the autopoietic reproduction and operational closure of the system either 'is' or 'is not'; there can be no such thing as varying degrees of autopoiesis. The only aspect of social systems that may vary in degree is their complexity.¹⁴⁶ This complexity can be explained and analysed using various concepts

¹⁴² Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 42f.

¹⁴³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press. pp. 34ff.

¹⁴⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 90ff and Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 444f.

¹⁴⁵ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 49ff.

¹⁴⁶ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 346.

developed by Luhmann. The concepts of code, communication, environment and the relation between systems and their environment are central to understanding Luhmann's definition of autopoietic social systems. The following sections are dedicated to explaining how Luhmann defined these concepts and relations.

3.2.2 Codes and programming

The distinction of the social system from its environment occurs through the system's definition and application of its binary code. This code marks what is identified as relevant for the system and what is external to the system. The binary code is thus a form of information selection through which the system categorises information as either positive, and thus relevant to the system, or negative, and irrelevant to the system. For example, the social function system of law has as its binary code legal or non-legal.¹⁴⁷ Information identified as legal information is considered part of the system and non-legal information is considered external to the system. Another example is the function system of science, which works through the binary code of true or not true.¹⁴⁸ The system's code is a universal distinction of a fairly abstract kind and it remains the same, thus is unchangeable as long as the system continues its autopoiesis.¹⁴⁹

Welz concluded in his thesis that the ESD can be considered an autopoietic social sub-system of the EU, with the binary code agreeable/not agreeable as regards the topics listed in Article 137 ECT (now Article 153 TFEU).¹⁵⁰ In other words, according to Welz, the ESD functions as a social system that operates through

¹⁴⁷ In commentaries on Luhmann's theory, the terms non-legal and illegal can both be found. I prefer to use the term non-legal. I find that it better reflects the meaning of the binary code, since information about legal issues can very well relate to the fact that something can be illegal. The term non-legal better explains that the information is irrelevant in a legal sense and instead relates to e.g. issues of aesthetics, morality or economy.

¹⁴⁸ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 222ff.

¹⁴⁹ King, M. and Thornhill, C. (2003) *Niklas Luhmann's Theory of Politics and Law*. Basingstoke, Hampshire, New York: Palgrave Macmillan, pp. 23ff.

¹⁵⁰ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 518.

communications about issues falling within the scope of Article 153 TFEU.¹⁵¹ Welz, thus applies a different definition than Rogowski who suggests a somewhat further defined binary code for the industrial relations system as being '*negotiable or non-negotiable between collective industrial actors*'.¹⁵² In my view, it is necessary to examine further whether or not either of these binary codes actually captures the ESD as an autopoietic social system. Welz's idea seems to be construed from the perspective of the legal system by applying the condition of within or without the scope of Article 153 TFEU. As such I find this definition of a binary code unsuitable in relation to Luhmann's theory focusing on operations internal to systems. Rogowski's explanation of industrial relations as autopoietic systems presupposes a more traditional form of industrial relations that is generally found at the national level. The increased complexity of such systems at an international level might require an adaptation of the model.

The code identifies the system. Programmes exist to organise information in order to allow the system to apply its binary code. The programming can thus be understood as the structures through which communication is organised. This means that the programming of the system plays an important role in filtering the communication produced within the system, setting up a framework for how communication is organised and dealt with within the system. The code can be understood as the abstract definition of the border of the system; the programming fills the code with contents and meaning.¹⁵³ The programming of the system can thus be understood as a set of values that set up conditions and/or goals for the communication of the system. In this sense it is also possible for the programming of the system to change, in spite of the code being unchangeable.¹⁵⁴ In systems of industrial relations, programs could thus work in line with objectives such as assuring decent working conditions. It is also possible that Article 153 TFEU as well as the shadow of law can be understood as programs for the ESD in different forms.

¹⁵¹ For the definition of the ESD used by Welz, work carried out in relation to Articles 138-139 ECT (now Articles 154-155 TFEU), this binary code might well be true. However, my definition of the ESD includes the autonomous work of the ESD, i.e. work conducted outside the scope of Articles 154-155 TFEU (for further discussion on the definition of the ESD in this study see section 1.3 above), and therefore the binary code as defined by Welz is unlikely to be applicable in my study. Regarding my view of the binary code used by the ESD, I will return to this issue in my concluding analysis. Furthermore, the definition of the ESD according to Welz's excludes much of the communication produced within the ESD, and as such I find it a constructed definition that the ESD as an autopoietic system would hardly apply itself.

¹⁵² Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, p. 119.

¹⁵³ King, M. and Thornhill, C. (2003) *Niklas Luhmann's Theory of Politics and Law*. Basingstoke, Hampshire, New York: Palgrave Macmillan, pp. 23f.

¹⁵⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 203f.

3.2.3 Communication, contingency and improbabilities of communication

Autopoietic social systems are organisations of communication. Therefore, systems' codes and programmes, not its structures, institutions and/or personnel, are essential to its identity. The operations of an autopoietic social system are comprised of communications; no other forms of operations exist within such a system. This means that the borders of the system are defined through communication rather than geography or actors. In addition, for a system to exist it is essential that there be continuity in its operations. One instance of communication does not generate a social system. Instead, an autopoietic social system develops when communication relating to the same binary code occurs continuously and with reference back to earlier communication. Such self-reference is essential to the existence of an autopoietic social system, whose continued existence depends upon its ability to produce new communications. This means that autopoietic social systems are forced into constant renewal.¹⁵⁵ Concerning industrial relations, this means that if workers join together on one occasion to express disappointment in a managerial decision, if this instance of communication is not followed by further dialogue or communication about the decision at hand or future potential decisions, then no system of industrial relations has been established. If the first communication does generate ongoing communication about e.g. working conditions and previous agreements, then a system of industrial relations has been established. This system will continue to exist as long as such communication is maintained.

Since communication is such a central concept in Luhmann's theory it is also important to explain in more detail what communication means. Communication can be of various kinds, but conceptually Luhmann identifies communication as consisting of three selections: information, utterance and understanding. The third selection, understanding, is what distinguishes Luhmann's notion of communication from more traditional views. Understanding occurs when it is possible to distinguish between the informational content and the how and why of an utterance. Only when it is possible to make a distinction between *what* information is being provided and *how or why* it is being provided does communication occur. This understanding allows for different ways of proceeding, depending upon whether the distinction leads to an accentuation of the informational value of the content, or the expressive behaviour or the reasons for that expressive behaviour. Conversely, if it is not possible

¹⁵⁵ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 38f.

to draw a distinction between information and utterance, then no communication has occurred.¹⁵⁶

The selection of understanding, however, should not be confused with the actual correct apprehension (or misapprehension) of the information provided in a certain form of utterance. Understanding relates only to whether it is possible to separate information from utterance and proceed with further communication. A potential misapprehension of the intended message does not matter, from the point of view of the autopoiesis of social systems, because it can be as productive as correct apprehension for producing further communication. Subsequent communication tests whether the previous communication was understood. If the results of this test are negative, this often becomes an occasion for reflexive communication about communication. In other words, it becomes clear whether the message was understood or whether further communication is needed in order to clarify it.¹⁵⁷

In order to study the elements of a function system, i.e. its communication, it is, in Luhmann's words, necessary to '*flag the system as an action system*'¹⁵⁸ because it is through action that '*communication become[s] fixed at a point in time as a simple event*'.¹⁵⁹ By considering observable actions stemming from communicative happenings in a social system it thus becomes possible to observe the social system as a whole. For systems of industrial relations, Rogowski explains this in a somewhat more comprehensible manner: '*If the collective communications are defined as negotiations they are perceived as actions of the industrial relations system*'.¹⁶⁰ This makes the process of studying industrial relations systems as social systems more accessible, in that the negotiations, and (according to my understanding) other forms of collective acts as well, can be understood as elements of the industrial relations system. The difficulty lies in defining the content of the communication that the action makes observable.

The operations of an autopoietic social system will nonetheless not fulfil any function in society unless the system's communication is meaningful to society. Luhmann identifies certain obstacles that need to be overcome in order for the system to achieve

¹⁵⁶ See Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 141ff or Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 36f.

¹⁵⁷ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 141ff and Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 113f and 135ff.

¹⁵⁸ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press. p. 165.

¹⁵⁹ *Ibid.*, p. 165.

¹⁶⁰ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 118.

meaningful communication. These obstacles are termed improbabilities of communication. The first improbability relates to understanding, since the meaning of communication always depends upon context, and the context varies for the party expressing communication and the party receiving the message. There is thus always the risk of misunderstanding, and if the misunderstanding becomes too dominant then the communication is unlikely to continue. The second improbability relates to the issue of communication reaching the intended respondent. This becomes more difficult as distance and time from the initial communicative process increase, and points up the need to secure adequate media for disseminating communication. There is always a risk that with increasing space and time, the communication will no longer be considered interesting enough to take note of. The third improbability is success. Success means that the receiver of the communication accepts the content selected by the communication as a premise for his/her own behaviour, instead of rejecting it. In short, communicative success is achieved when the communication is understood, reaches the right correspondent and is accepted by this correspondent.¹⁶¹ In international systems of industrial relations it is thus important for the international actors to ensure that communication resulting in e.g. a framework agreement is transferred in a suitable manner to the implementing actors, thus reaching the correct addressee; that the contents of this agreement are understood by these actors, thus implemented according to the intentions of the negotiating parties; and finally that the implementing parties accept the premises of the communication instead of rejecting it, perhaps as irrelevant or erroneous.¹⁶²

3.2.4 Environment, interference, relations between systems and structural coupling

Although an autopoietic social system is closed, in the sense that it does not integrate other systems' operations into its own, it is not insensitive to the world within which it exists. Due to the cognitive openness of social systems, they also possess sensitivity to external events. Such external events form part of the system's environment, which is identified by the system as everything that falls outside the system's borders, or in Luhmann's terms, binary code. The environment cannot change the system's code, but environmental interference can cause adjustments in the programming of the system in order to ensure the internal effectiveness of the system. Events in its environment are scrutinised by the system, and relevant aspects, i.e. aspects that fall within its binary code, are dealt with through the programming and operations of the

¹⁶¹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

¹⁶² Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 113ff.

system, generating further communication and potential adjustments to the internal operations of the system. Such adjustments occur if the system realises that they are necessary in order for it to survive and retain its internal efficiency.¹⁶³

To take an example relevant to the ESD: the legal system of the EU might produce legislative interventions or decisions that affect trade union rights. This will be perceived by the social system of the ESD, which will then adapt its operations so as to ensure that the ESD retains its systemic organisation. An example of this is the UEAPME case,¹⁶⁴ which brought about cooperation between the then-UNICE (now BUSINESSEUROPE) and UEAPME as a way of ensuring that the former retained its status as a representative social partner organisation on the employer side. Rogowski explains this by differentiating between the function of the industrial relations system and its performances for other systems: as he clarifies, the function of the industrial relations system is to manage conflicts, whereas its performance for e.g. the economic system can be that of improving working conditions.¹⁶⁵ It is thus important to understand that what are often referred to as ‘results’ of the industrial relations system, for example wage moderation or collective regulation of working conditions, do not always mirror the function of the system, but instead the system’s performance for other systems, such as the economic or the legal system.

The environment of any system is defined by the system itself as everything that falls outside the system’s borders, which means that the environment of one system can contain other systems. It is therefore possible for one system to generate outputs that have repercussions for another system. The fact that systems are operationally closed, in other words, does not mean that there exist no relations among different subsystems in society. However, the only thing visible for any given system is the way that the other systems appear to deal with their external environment.¹⁶⁶

Some of society’s subsystems are more closely related than others. Luhmann explains this through the concept of ‘structural coupling’. Structural coupling occurs in the co-evolution of different systems, where each system includes the other in its environment and interprets the outputs of the other in its own terms on a continuous basis.¹⁶⁷ Structural coupling thus entails a long-term intersystemic relation of

¹⁶³ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 53ff.

¹⁶⁴ *Case T-135/96, UEAPME versus the Council. The action of annulment of Directive 96/34/EC on the framework agreements on parental leave.* [1996] 1998 ECLI:EU:T:1998:128 II-2335.

¹⁶⁵ Rogowski, R. (2000) ‘Industrial Relations as a Social System’, *Industrielle Beziehungen*, 7(1), pp. 97-126 at pp. 116 and 121.

¹⁶⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 108ff.

¹⁶⁷ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 49ff.

exchange and performance. For industrial relations, structural coupling often occurs with the legal and political function systems of society.¹⁶⁸ Like Rogowski, I find it important to consider the economic function system as structurally coupled with industrial relations, since economic developments in society tend to have repercussions for the issues that industrial relations need to deal with. This highlights the need for a contextual approach when studying the ESD as a function system, since important exchanges from other systems would otherwise be neglected.

3.2.5 The issue of conflict

According to Rogowski, the function of systems of industrial relations is to manage conflicts between collective actors.¹⁶⁹ However, this concept is somewhat controversial within the context of systems theory, which in general focuses on consensus within systems.¹⁷⁰ Although Luhmann allows for a higher amount of disagreement within a system,¹⁷¹ there is still a need to further consider this concept and how to deal with it when analysing the ESD and the ITF FOC campaign – or any other system of industrial relations, for that matter – on the basis of Luhmann’s theory of autopoietic systems. The need to develop a tool that will allow me to better understand the concept of conflict in relation to the ESD and the ITF FOC campaign is not simply due to the fact that systems of industrial relations per se involve conflicting interests between management and labour. For these kinds of international systems of industrial relations, there is also the difficulty of conflicting interests within each side: trade unions from different countries, for example, might have more contrasting interests than management and labour organisations from the same country.¹⁷² Inherent within these international systems of industrial relations is thus an even higher probability of conflict than we find within strictly national systems. The issue

¹⁶⁸ See for example Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 121.

¹⁶⁹ *Ibid.*, p. 116.

¹⁷⁰ See for example Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 344.

¹⁷¹ In relation to Luhmann’s theory of social systems, this can be explained by the fact that social systems operate through communication and it is always possible for communication to be rejected. See for example Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 147ff. To quote Luhmann: '*To produce obvious dissent requires much more effort than to assume agreement. The social system allows for both possibilities, but is disbalanced in favour of consensus*'. Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 344.

¹⁷² On diverging trade union interests, see for example Busemeyer, M. R., Kellerman, C., Petrin, A. and Stuchlík, A. (2008) 'Overstretching solidarity? Trade unions' national perspectives in the European economic and social model', *Transfer*, 14(3), pp. 435-452.

of conflict within a system therefore needs to be addressed in a suitable manner in order for me to offer a productive analysis and explanation of the ESD and the ITF FOC campaign.

It would be unfair to claim that Luhmann neglected the idea of conflict; he did discuss the issue. However, Luhmann does not deal with conflict as an internal characteristic of a system, but rather as a system of its own. In his words: '*Conflicts are social systems, indeed, social systems formed out of occasions that are given in other systems but that do not assume the status of subsystems and instead exist parasitically*'.¹⁷³ This view leads Luhmann to mainly focus on how a conflict can be understood as a system and how such a system develops and comes to have societal effects, rather than simply dissolving.¹⁷⁴ These ideas about conflict can be useful for understanding, for example, the differences between far-reaching, persistent conflicts and minor, shorter conflicts, but I have some problems with this theoretical model for analysing systems of industrial relations.

As explained by Rogowski, a system of industrial relations can be understood as filling the function of managing conflicts between collective parties.¹⁷⁵ This means that conflicts are a constant probability within these systems, and these systems have developed more or less efficient means for dealing with conflicts, i.e. solving the conflict in one way or another. Luhmann's theory of conflicts, however, does not focus on their resolution; he seeks rather to describe what conflicts are, how they come about and how they evolve towards interdependent systems. To discover the similarities and differences in the ways that the ESD and the ITF FOC campaign systems deal with their inherent conflicts, I thus need a different theoretical model. Since the way conflicts are dealt with within a system of industrial relations is likely to affect the efficacy of the system, I also believe that this is an issue to which I could reasonably suggest solutions, i.e. provide a normative analysis. In this respect I find it useful to return to Luhmann's model of different social systems in order to consider the idea of organisations and their role in function systems, since this model can explain differences and similarities between the outcomes of different function systems and their complexity, in terms of how the organisations make contributions to system communication, are structurally coupled and succeed in overcoming the improbabilities of communication. It is thus relevant to review Luhmann's notions of organisation and membership.

¹⁷³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, p. 389.

¹⁷⁴ *Ibid.*, p. 390ff.

¹⁷⁵ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 116.

3.2.6 Organisation, decision premises and membership

According to Luhmann, organisations are a specific form of social system that can contribute to the production of communication within function systems and work in accordance with the binary code of the function system.¹⁷⁶ The difference between a function system and an organisation is that an organisation consists of a specific form of communication, defined as decisions; or, to be precise, '*the production of decision by communication*'.¹⁷⁷ It is thus not possible for one organisation alone to fulfil the function of a function system. Instead several organisations contribute to the production of communication within one function system and they are structurally coupled.¹⁷⁸ Organisations serve the structuration of function systems and enable reflexivity and self-steering within function systems.¹⁷⁹ An example might prove useful. Consider the legal system, within which specific courts work as organisations producing decisions on specific cases. These decisions can be observed by the legal function system and considered to be meaningful communication, or not; for example, the decision of a lower court might be rejected as uninteresting if the legal question has been examined in a higher court. It is thus possible for there to be several organisations making different kinds of decisions, which are observed and noted in differing manners by the function system as a whole.¹⁸⁰ Within a system of industrial relations, decisions can include such things as collective agreements, if one organisation of the system is a specific negotiating body, or a trade union decision to take industrial action, in which case the organisation is a specific trade union. The organisation as such does not necessarily correspond to the formalised and registered entities that we think of as organisations in everyday language, and a negotiating body for collective bargaining might well be an organisation in the Luhmannian sense. Organisations that contribute to the production of communication within function

¹⁷⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 149f.

¹⁷⁷ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 345.

¹⁷⁸ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 141ff. See also Drepper, T. (2005) 'Organization and Society - On the desideratum of a society theory of organizations in the work of Niklas Luhmann', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann an Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 171-190 at pp. 184ff.

¹⁷⁹ Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191 at p. 188 and Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57 at pp. 52ff.

¹⁸⁰ This can be compared to Luhmann's reasoning on the economic system, where the complexity of the system requires a double differentiation, i.e. a differentiation of both organisations and of markets; see Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 346.

systems can thus be understood as the location for specific communication within the system and as such the organisations make the communicative structures of the function system observable.¹⁸¹

Whereas function systems structure their communication in accordance with system-specific programmes, the organisations working according to the same binary code need to structure their decisions, not least since the organisation is itself shaped by and can change through its own decisions.¹⁸² The structure of decisions within an organisation is managed through the application of specific decision premises that the organisation itself decides on.¹⁸³ These premises for decisions can be grouped into four types, depending on what sort of decision the premise relates to. The first three types of decision premises have to do with the programming of the organisation, its personnel and its communication channels; and the fourth type is that of undecidable decision premises.¹⁸⁴

The decision premises that concern the programming of the organisation can be either goal-oriented or conditional. A goal-oriented decision premise is established so that the organisation can make decisions toward a specific goal, for example improving working conditions. A conditional decision premise employs an if-then condition: for example, 'if industrial conflicts are limited, then industry is more competitive.' The decision premises relating to personnel concern membership, i.e. who is included as a member and what is expected of members. The premises concerning communication channels relate to the hierarchy of the organisation, i.e. who is entitled to make which decisions. Finally, the undecidable decision premises are either set by the organisational culture, for example following the idea of how the organisation normally decides, or by the organisation's cognitive routines, which relates to how the environment is conceptualised by the organisation.¹⁸⁵ The

¹⁸¹ Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191 at pp. 187ff.

¹⁸² Drepper, T. (2005) 'Organization and Society - On the desideratum of a society theory of organizations in the work of Niklas Luhmann', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 171-190 at p. 181.

¹⁸³ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 145; and Luhmann, N. (2005c) 'The Paradox of Decision Making', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business Scholl Press, pp. 85-106 at p. 95.

¹⁸⁴ Seidl, D. 'The Basic Concepts of Luhmann's Theory of Social Systems' in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53 at pp. 42ff.

¹⁸⁵ Seidl, D. and Becker, K. H. (2006) 'Organizations as Distinction Generating and Processing Systems: Niklas Luhmann's Contribution to Organization Studies', *Organization*, 13(1), pp. 9-35 at p. 28. See also Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191 at p. 188.

organisation can work in accordance with more than one decision premise and it can further make decisions about decision premises and thus to some extent plan and control the integration of different subdepartments into the organisation.¹⁸⁶ This leads us to the idea of system integration and membership in relation to organisations.

A Luhmannian organisation includes members, but not in the form of individual people, as the physiological human being is not a component of systems. Instead members are representatives that help produce communication through decisions within the organisations. The members are thus to be considered as decision-making factors within the organisations. The structures of the organisation give different members different kinds of authority to make decisions. The members are also guided by organisational decisions that govern the conditions of membership: that is, decisions that set the conditions for both granting and retaining membership. These decisions about membership are part of the decision-making of the organisation.¹⁸⁷ In other words, the hierarchy of the organisation, its goals and conditions for membership are realised through '*the recursive communication of decisions*'.¹⁸⁸ To sum up: within complex function systems, there is a differentiation of the system into organisations, which use decision premises to produce decisions by communication that can have relevance for the function system as a whole. Membership is important to the organisation, since the organisation as such can be considered as a collective organised to produce decisions by communication. In this sense members become representatives required for the reproduction of communication.¹⁸⁹ The decisions taken are, however, steered by the organisation's decision premises, as these also establish the conditions for membership.

Although membership can be interpreted as a concept relating to a specific individual, I also believe that the concepts of organisation and membership are applicable to international management and labour organisations: that the international body may be considered an organisation and its national affiliates representatives who are granted membership in the international body.¹⁹⁰ Members in international organisations thus have two memberships, with potentially contrasting decision premises for membership, which can result in contradicting decisions. This means that international systems of industrial relations are even more vulnerable than

¹⁸⁶ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 345.

¹⁸⁷ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 142f.

¹⁸⁸ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 106.

¹⁸⁹ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348 at p. 343.

¹⁹⁰ *Ibid.*, p. 344.

national ones, in that international systems have a higher degree of organisational complexity, in addition to being subject to the challenges from irritations generated by other function systems of society.¹⁹¹ In the coming chapters I will attempt to explore the ESD and its reduction of complexities from the perspective of Luhmann's theory in order to provide an understandable answer to my research questions. Before moving on to that analysis I do, however, find it of importance to have a clear understanding of the relevant legal framework concerning industrial relations and trade union rights in the context of the ESD.

¹⁹¹ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126 at p. 123.

4 Legal framework concerning fundamental labour rights

4.1 Introduction

In order to be able to carry out a socio-legal analysis of the ESD it is of importance to have a solid understanding of the legal framework concerning the fundamental rights that form the basis of a system of industrial relations. Such an understanding of fundamental rights will help the reader to better follow the analysis in the coming chapters in terms of providing a base for the understanding of what the legal scope is for communications from the ESD to be recognised and cause results in other function systems of the EU. Since structural coupling between the ESD and the EU legal system is likely to have some effects for the capacity of the ESD to assure that the results the system produces are efficiently implemented I find it of importance to conduct a preliminary analysis of issues of importance in relation to this already in this chapter. I therefore find it relevant to provide the reader with a more traditional legal analysis of the status of the ESD in the Treaties and the interpretation of the fundamental rights: freedom of association, right to collective bargaining and right to industrial action. This analysis will also be related to international legal sources in order to provide the reader with an understanding of the framework related to the ITF FOC system as well. However, the text is framed with the intention of providing a more solid understanding for the ESD as that system is also the main focus of my thesis. The legal analysis will be related to some preliminary thoughts on how the legal issues discussed can be understood from the perspective of autopoietic systems in order to allow for a further discussion relating to this in the following chapters. Since the Lisbon Treaty introduced a new Article focusing on the ESD I find it relevant to start the discussion with a brief introduction to what it means.

4.2 The status of the social dialogue in the Lisbon Treaty

As the Lisbon Treaty entered into force on 1 December 2009, there are a few issues worth commenting upon and discussing briefly. The Lisbon Treaty actually introduced a new article concerning the social dialogue, Article 152 TFEU, which reads as follows:

‘The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.’

Previously the task of facilitating dialogue between management and labour at the Community level had been left entirely up to the Commission. Now, all the institutions of the EU are committed to this task when exercising the competences granted them by the treaties. The Article can be interpreted as a kind of a minimum requirement for the EU institutions to make sure that the social partners are heard in the development of policy proposals and different measures at the EU level, with potential implications for the ESD¹⁹² and perhaps even for systems of collective bargaining in a broader sense. It also creates room to manoeuvre concerning the promotion of the ESD as a tool for transnational wage coordination, in spite of the limitations set on EU competences in relation to pay in Article 153(5) TFEU. The exemption of pay from the competences of the EU is not an absolute prohibition for the EU to monitor the issue, as the question of pay has been dealt with in several other sources of EU law, including Article 157 TFEU on equal pay for men and women as well as several Directives establishing equal pay for different categories of workers.¹⁹³ It thus seems as if the exemption of pay from the competences of the EU

¹⁹² Fischer-Lescano, A. (2014) 'Competencies of the Troika: legal Limitations of the Institutions of the European Union', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81 at p. 80.

¹⁹³ See for example Articles 3.1(f) and 5.1 *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work* (2008): Council of the European Communities (OJ No L 327/2008); Article 1 *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* (2006). Brussels: European Council (OJ No L 204/2006); Article 3.1(c) *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* (2000). Brussels: European Council (OJ No L 180/2000); or Article 3.1(c) *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (2000). Brussels: European Council (OJ No L 303/2000).

is concerned with detailed levels of remuneration rather than a prohibition on linking pay levels to general and principal factors, for example equality. As Deakin points out, it would thus seem possible to develop a system of policy coordination through which wage developments could be linked to productivity¹⁹⁴ and the ESD should be involved in any such policy developments.

Article 152 TFEU obliges all institutions of the EU to promote the ESD, but it is only one aspect of the legal framework that can facilitate and serve to strengthen the ESD. In order for a system of collective bargaining to stand a chance of developing in a manner that provides it with opportunities for fruitful contribution as a function system in society, it is also essential that the founding pillars of such a system be in place. The next section will therefore deal with the fundamental social rights of freedom of association, the right to collective bargaining and the right to industrial action.

4.3 The status of fundamental human rights with specific relevance for the European Social Dialogue

The collective bargaining systems in the Member States have each developed within a specific national context, characterised by specific cultural and historical events and factors. This means that each national collective bargaining system is likely to have its own specific characteristics. The roles of collective bargaining, labour law and trade unions and their functions vary to a greater or lesser extent among the different national labour law systems. Some basic rights do, however, exist in all of these systems,¹⁹⁵ even though the exact form and regulations governing these rights might

¹⁹⁴ Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106 at p. 105.

¹⁹⁵ Further discussion on the recognition of the fundamental labour rights in the Member States' national systems will be provided in each of the following subsections.

not be identical. These rights can therefore be considered fundamental labour¹⁹⁶ rights. They are the right to freedom of association, the right to collective bargaining and the right to industrial action. These rights are, however, to some extent excluded from the competences of the EU and this has led to the conclusion that there is a deficit within the EU system regarding the possibilities for the development of an autonomous system of industrial relations at the EU level.¹⁹⁷ The fundamental labour rights are further considered founding pillars in any labour law or collective bargaining system,¹⁹⁸ and without the recognition of these rights there are very limited possibilities for a proper collective bargaining system to develop. The trade unions will instead be placed in a position of collective begging.¹⁹⁹

Regardless of the fact that some of the fundamental labour rights are excluded from the competences of the EU,²⁰⁰ these rights are nevertheless recognised within EU law, not least because the EU Charter, as a source of primary law, explicitly recognised

¹⁹⁶ The terminology can be discussed, as the use of 'labour' could imply that the rights in question are only accessible to the labour side of the social dialogue, but this is not the true meaning of the right to freedom of association, the right to collective bargaining and the right to industrial action. Instead these rights are primarily given to or demanded by labour, but in order for labour to call upon and make sensible and practical use of these rights they need to establish a relation and interact with management. From this follows that management will have to be given access to these rights, as it would be highly unfair to deny one party in such a relation the rights that the other party has. This means that the rights in question can be seen as accessible to both management and labour, with labour as the primary recipient, and that the terminology simply indicates the pragmatic characteristics and historical development of these rights. Another expression often used is that of fundamental trade union rights (see for example Bercusson, B. (2003) 'The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level', *Transfer*, 9(2), pp. 209-228) but this wording might lead to the conclusion that the exercise of these rights belongs primarily to the trade unions and is restricted to the individual worker. As the concept of labour includes both labour as individual workers and labour organised in trade unions, the term 'fundamental labour rights' is preferred.

¹⁹⁷ See Bercusson, B. (2003) 'The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level', *Transfer*, 9(2), pp. 209-228 at p. 210: '*An EU system of industrial relations is unlikely to deviate from certain basic elements of national systems*' and '*a legal framework for a system of industrial relations at EU level will need to include fundamental trade union rights recognised in the Member States: the rights of association, to collective bargaining and to strike.*'

¹⁹⁸ The ILO has stated that '*sound industrial relations systems are based on the full recognition of freedom of association and the right to collective bargaining.*' See for example Arrigo, G. and Casale, G. (eds.) (2005) *Glossary of labour law and industrial relations (with special reference to the European Union)*. Geneva: International Labour Office, p. 14.

¹⁹⁹ See for example Rojot, J. (2004) 'The Right to Bargain Collectively: an International Perspective on its Extent and Relevance', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(4), pp. 513-532 at p. 520, who states that '*Without bargaining power, there is no collective bargaining*' and further explains the different aspects that contribute to the social partners' bargaining power and the importance of this power.

²⁰⁰ Article 153(5) TFEU excludes the right to freedom of association and the right to strike and impose lock-outs from the competencies of the EU.

these rights.²⁰¹ It has been argued that the EU Charter consolidates the *acquis communautaire* on the protection of fundamental rights and in that manner it reaffirms rights that the EU and the Member State are committed to on the basis of other instruments.²⁰² In this sense the EU Charter provides a framework of values to function as guidance for the CJEU and national courts when ruling on issues related to EU law.²⁰³ In addition, the CJEU has spoken on the role of the Charter, declaring that '*the principal aim of the Charter ... is ... to reaffirm rights*' which are legally binding due to their provenance from other sources recognised by EU law.²⁰⁴

The EU Charter, can in other words, be seen as a guide for affirming the position of fundamental labour rights in the EU, but when interpreting the contents of the rights contained therein it is necessary to consider other legal sources that identify and define the contents of the rights in question.²⁰⁵ It is therefore necessary to consider the legal status of other sources that need to be taken into account in order to reach a correct understanding of the fundamental labour rights within the EU legal order. This debate is of importance for the strategy and actions of the social partners, in particular the ETUC, as its outcome is likely to affect their bargaining power and their possibilities to voice their rights. A result that strengthens fundamental labour rights within the EU legal system could possibly also strengthen the position of the ETUC and other trade union federations at the European level, which in turn might

²⁰¹ In accordance with Article 6 TEU the EU Charter has the status of primary law, but it shall not be interpreted in a manner that extends the competencies of the EU as defined in the Treaties.

²⁰² See for example Menéndez, A. J. (2003) 'The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union', *Ratio Juris*, 16(3), pp. 374-398 at p. 375; Betten, L. (2001) 'The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?', *The International Journal of Comparative Labour Law and Industrial Relations*, 17(2), pp. 151-164 at pp. 157-158; and Bercusson, B. (2003) 'The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level', *Transfer*, 9(2), pp. 209-228 at p. 213. For a more critical approach to the current situation, see Hendrickx, F. (2006) 'Fundamental Social Rights in Pre- and Post-Constitutional Terms', *The International Journal of Comparative Labour Law and Industrial Relations*, 22(3), pp. 407-433 at p. 412, according to whom '*there is no directly binding EU Bill of Rights*'.

²⁰³ See *Case C-173/99, The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, *Opinion of Advocate General Tizziano* [2001] ECR I-4881, paragraph 27 where Advocate General Tizziano states: '*fact remains that it (the Charter) includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments.*'

²⁰⁴ *Case C-540/03, European Parliament v Council of the European Union, Action for annulment under Article 230 EC, brought on 22 December 2003* [2006] 2006 ECLI:EU:C:2006:429 I-5769, paragraph 38.

²⁰⁵ The importance of taking other international legal sources into consideration when interpreting the EU Charter is highlighted in Articles 51 and 52 of the EU Charter, whereby the relationship to corresponding rights in the ECHR is identified as an obligation to interpret the protection of those rights at least at the same level as that granted by the ECHR and furthermore that the EU Charter shall not be interpreted in a manner that adversely affects the application of fundamental rights as recognised by international agreements to which all the Member States of the EU are parties.

impact the power balance and relations between the representatives of management and labour within the ESD.²⁰⁶ On the other hand the result might also work in the opposite direction to retain the current status quo within the ESD. However, it is interesting to see that the development has been towards a more intense debate on the status of these rights within the EU legal order. This can be taken as evidence of European integration moving towards more social aims, allowing for fundamental labour rights to find a place on the integration agenda.²⁰⁷

The discussion is nonetheless essential for further analysis, and the starting point of this debate can basically take two different angles. The first is to turn to other international legislation and EU sources, such as the ILO conventions on labour rights²⁰⁸ and the European Convention on Human Rights (ECHR), considering the content of these legal acts, whether the CJEU has dealt with this legislation and if so how, and the level of ratification of these legal acts amongst the Member States. The second would be to turn instead to the Member States' national legislation concerning these rights, to analyse the core characteristics of these rights and how they are regulated in the Member States' national systems as well as to analyse the case law from the CJEU that addresses common principles related to fundamental rights. This could make it possible to define common traits and practices among the Member States and thus establish a common European tradition or common European principles that ought to be considered part of the EU legal system.²⁰⁹

The exemption of some of the fundamental labour rights from the competences of the EU thus necessitates turning to other legal sources than the Treaties in order to properly discuss and assess the legal content of these rights as protected by the EU

²⁰⁶ In the coming chapters focusing on the ESD I will get back to how these different organisations can be understood in the realms of the ESD as an autopoietic system.

²⁰⁷ The fact that labour rights are closely linked with economic and political developments is not exactly new, but nevertheless it is interesting to note that these rights receive more attention when a link is made to policies promoting European integration. See for example Bercusson, B. (2002b) 'Interpreting the EU Charter in the context of the social dimension of European integration', in Bercusson, B. (ed.) *European labour law and the EU Charter of Fundamental Rights*. Brussels: ETUI, pp. 9-12 at p. 9.

²⁰⁸ Most important for this discussion are ILO Convention number 87 on freedom of association and protection of the right to organise, and ILO Convention number 98 on the right to organise and collective bargaining, below referred to as ILO Conventions 87 and 98.

²⁰⁹ Article 6(3) TEU states that '*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*' Further reference to common constitutional traditions of the Member States being considered general principles of Community law is to be found in *Case 11-70. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. [1970] 1970 ECLI:EU:C:1970:114 1125, paragraph 4 and *Case C-144/04, Werner Mangold v Rüdiger Helm* [2005] 2005 ECLI:EU:C:2005:709 I-9981, paragraphs 74-75.

Charter.²¹⁰ As stated above, there are several international conventions and forms of legislation that deal with the fundamental labour rights. In order to use these sources in this discussion it is necessary to first establish their legal status in the Community legal order. The status of the ILO law on the freedom of association and the right to industrial action can undoubtedly be considered as having legal effect within the Community law. This is due to the following facts: first, all the Member States of the EU have ratified ILO Conventions 87 and 98²¹¹ and the EU Member States are thus bound by these conventions; and secondly, the CJEU has stated that such international legal acts are to be included among the sources that should be used as guidelines within the framework of EU law.²¹² The necessity of respecting the protection that these Conventions grant fundamental rights is clearly stated in the EU Charter itself and relates to the EU institutions when they exercise the powers granted them by the Treaties and the Member States when they implement EU law.²¹³

The ECHR is important in a similar way to ILO Conventions 87 and 98, since it is an international legal document, not adherent to the EU, which has been ratified by all Member States of the EU. It is mentioned in the TFEU, Article 6 TEU established an obligation for the EU to accede to this convention,²¹⁴ and the CJEU has referred to this convention and related case law from the European Court of Human Rights (ECtHR).²¹⁵ Furthermore, the ECHR served as a source of inspiration for the EU Charter, as some of the latter's provisions on fundamental labour rights were taken

²¹⁰ Such a discussion is necessary due to the fact that Article 51(2) EU Charter clearly states that the recognition of rights in the Charter does not extend the competencies of the EU and further by the fact that Article 53 EU Charter refers to such international legal acts in order for interpreting the level of protection for the rights guaranteed by the EU Charter.

²¹¹ These two conventions are further among the seven ILO conventions that are declared to be the fundamental conventions, also known as ILO core conventions, thus establishing principles and rights of such importance as to bind all the ILO Member States regardless of whether they have ratified these conventions or not. For a full list of the fundamental conventions see Arrigo, G. and Casale, G. (eds.) (2005) *Glossary of labour law and industrial relations (with special reference to the European Union)*. Geneva: International Labour Office, p. 9.

²¹² *Case 4-73. J. Nold, Kohlen- und Baustoffgro handlung v Commission of the European Communities*. [1974] 1974 ECLI:EU:C:1974:51 491, paragraph 13.

²¹³ Articles 51(1) and 53 EU Charter.

²¹⁴ When this accession will happen is however unclear, not least since the CJEU declared the accession agreement incompatible with EU law, see *Case Opinion 2/13. Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*. [2014] ECLI:EU:C:2014:2454.

²¹⁵ To mention one example, see *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] 2003 ECLI:EU:C:2003:333 I-5659.

directly from or correspond to Articles in the ECHR.²¹⁶ For these provisions of the EU Charter it is clear that their scope and meaning must be similar to the corresponding provisions in the ECHR.²¹⁷ To some extent this confirms the importance of the ECHR in the EU legal system, rather than asserting the EU Charter, and the CJEU might be more likely to use the ECHR as a source of influence in cases concerning fundamental labour rights.

In relation to the discussion of the importance of the ECHR for the EU legal order it is, however, also necessary to point to the limitations for legally challenging Member State actions taken in order to implement EU law before the ECtHR. These limitations are set by the doctrine of equivalent protection as developed by the ECtHR in the *Bosphorus* case.²¹⁸ In that case the ECtHR established basically that EU law is considered to offer equivalent protection to that of the ECHR and that states doing no more than implementing EU law will thus presumably be considered to have respected the ECHR. This presumption resides upon the idea that EU is an international organisation considered to respect fundamental rights both in terms of substantive measures and the legal procedures available in order to enforce such rights in a manner that is at least equivalent to the protection and procedural mechanisms available within the legal order of the ECHR. This presumption can further only be questioned if circumstances in a specific case show that the protection of rights protected under the ECHR was manifestly deficient.²¹⁹ It therefore will require rather controversial circumstances to challenge Member State actions resulting from implementation of EU law before the ECtHR. Nevertheless, I find it of interest and importance for future discussions to consider potential discrepancies between the interpretation of the ECHR and EU law, not least considering Article 6 TEU.

In relation to the ECHR, the European Social Charter (ESC) is also relevant, not least due to the fact that Article 151 TFEU explicitly refers to the ESC, albeit in a rather vague manner that could raise doubts as to whether the reference as such

²¹⁶ For example Articles 2, 4-7, 10-11, 17, 19, 48-49 in the EU Charter correspond to the Articles concerning the same rights and freedoms in the ECHR. See *Convent 49 Explanatory memorandum relating to the Charter of Fundamental Rights of the European Union*. (2000). Brussels: European Parliament, p. 48 for a more detailed explanation of corresponding articles.

²¹⁷ Article 52(3) EU Charter. For a discussion see also Betten, L. (2001) 'The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?', *The International Journal of Comparative Labour Law and Industrial Relations*, 17(2), pp. 151-164 at p. 155 and *Convent 49 Explanatory memorandum relating to the Charter of Fundamental Rights of the European Union*. (2000). Brussels: European Parliament, p. 48.

²¹⁸ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland (Application no 45036/98)* [2005].

²¹⁹ *Ibid.*, especially paragraphs 155-156. For an interesting comment of the case see Douglas-Scott, S. (2006) 'Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, application No. 45036/98, judgement of the European Court of Human Rights (Grand Chamber)', *Common Market Law Review*, 43, pp. 243-254.

actually creates any binding obligations for the Community to protect the rights established therein.²²⁰ Nevertheless, the CJEU has made reference to the ESC,²²¹ and the CJEU's adopted approach of taking into account international treaties signed by Member States or on which Member States have collaborated²²² would further strengthen the status of the ESC and the rights therein as a legal source providing recognition of rights within the EU. Again we have a legal source that might not be strictly binding, but rather might serve as a tool or part of the guidelines for CJEU rulings on fundamental labour rights. A similar status can be granted to the 1989 Community Charter of the Fundamental Social Rights for Workers (Social Charter), also referred to in Article 151 TFEU.²²³

The CJEU has clearly stated that fundamental human rights are enshrined in the general principles of Community law,²²⁴ and that respect for fundamental rights forms an integral part of the general principles of law protected by the CJEU.²²⁵ Furthermore, case law from the CJEU has clearly stated that if a principle is clearly derived from various international instruments and the constitutional traditions common to the Member States, that principle must be regarded as a general principle of Community law.²²⁶ This means that if the fundamental labour rights can be considered recognised in international instruments which the EU Member States have obliged themselves to respect, as well as being considered part of the constitutional

²²⁰ See for example Blanpain, R. (2008) *European Labour Law*. Eleventh revised edition edn. The Hague: Kluwer Law International, p. 150.

²²¹ See for example *Case 149/77 - Judgment of the Court of 15 June 1978. - Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. - Reference for a preliminary ruling: Cour de cassation - Belgium*. [1978] 1978 ECLI:EU:C:1978:130 1365, paragraph 20 and *Case 24/86 - Judgment of the Court of 2 February 1988. - Vincent Blaizot v University of Liège and others. - Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium* [1988] 1988 ECLI:EU:C:1988:43 379, paragraph 20.

²²² This approach was adopted by the CJEU early on. A case often referred to in this connection is *Case 4-73. J. Nold, Kohlen- und Baustoffgro handlung v Commission of the European Communities*. [1974] 1974 ECLI:EU:C:1974:51 491, where paragraph 33 is of importance since the CJEU (at that time ECJ) here states that that it shall take into account 'the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.'

²²³ The discussion of the contents of these two sources will, however, be very limited in the following paragraphs, since their contents overlap with other sources used for the analysis and the EU Charter can further be considered as to some extent having overshadowed the Social Charter, at least.

²²⁴ *Case 29/69. Erich Stauder v City of Ulm - Sozialamt*. [1969] 1969 ECLI:EU:C:1969:57 419, paragraph 7.

²²⁵ *Case 11-70. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. [1970] 1970 ECLI:EU:C:1970:114 1125, paragraph 4.

²²⁶ *Case C-144/04, Werner Mangold v Rüdiger Helm* [2005] 2005 ECLI:EU:C:2005:709 I-9981, paragraphs 74ff.

traditions common to the Member States, then the fundamental labour rights are doubtlessly to be considered as general principles in Community law.

Regardless of the importance attributed to international conventions and EU acts in the form of political declarations on the fundamental labour rights, it is, however, important to bear in mind that such conventions and acts cannot be used as a basis for EU legislation and their impact will remain limited to serving as guidelines when EU law is interpreted.²²⁷ It is therefore in the hands of the CJEU to develop and ensure the protection of rights that are implicitly recognised in the EU legal order.

4.4 The interpretation of fundamental labour rights in EU law

The case law on fundamental labour rights within the EU legal order was developed before the Lisbon Treaty entered into force and thus before the EU Charter formally became part of the primary law of the EU. Nevertheless, the existing case law seems still to be considered by the CJEU as the fundamental interpretive framework for understanding the contents of these rights in relation to the protection of the free movement provisions.²²⁸ The case law can be considered questionable in relation to the EU Charter and the necessity of considering the ECHR when interpreting the EU Charter and hence the contents of EU law. At the same time, the developed case law goes hand in hand with the programming of the EU policy-shaping systems, favouring economic values over social values.²²⁹ It is therefore relevant to briefly point out the main traits of fundamental labour rights as developed through the case law of the CJEU. The cases that will be at the centre of this discussion, although they will

²²⁷ Betten, L. (2001) 'The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?', *The International Journal of Comparative Labour Law and Industrial Relations*, 17(2), pp. 151-164 at pp. 160ff.

²²⁸ *Case C-83/13, Fonnship A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v. Fonnship A/S* [2014] Court Reports - General ECLI:EU:C:2014:2053 2053, paragraph 41.

²²⁹ The programming of the EU policy-shaping systems will be discussed on several occasions throughout the coming chapters, as for now it is worth noting that the discussed case law has been considered to have placed economic freedoms ahead of fundamental labour rights in situation when such freedoms and rights come into conflict (see for example Velyvyte, V. (2015) 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence', *Human Rights Law Review*, 15, pp. 73-100 at pp. 74f and 84f) and that this is inline with the neo-liberal policy formulation of the EU after the financial crisis (see Barnard, C. (2014a) 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67, pp. 199-237 at pp. 204ff).

not be the only ones considered, are the *Laval*,²³⁰ *Viking*²³¹ and *Rüffert*²³² cases. The discussion will focus on how the CJEU (then the ECJ) has dealt with the fundamental labour rights of freedom of association, the right to collective bargaining and the right to industrial action, rather than the judgments on the material legal questions of the cases discussed.

4.4.1 Freedom of association

The freedom of association should not only be regarded as an individual civil liberty and fundamental human right,²³³ but also as a basic principle essential for the foundation of an autonomous collective bargaining system²³⁴ and of high importance for the sound economic and democratic development of societies.²³⁵ Nevertheless, Article 153(5) TFEU exempts freedom of association from the EU competences. This does not indicate that the right to freedom of association is not recognised within EU law, because the right is indeed recognised in Article 12 of the EU Charter. The exemption of this right from the competencies of the EU is thus merely a limitation on the EU legal system enacting legislative measures that would dictate conditions for the exercise of this right. The EU legislator should not in detail govern the contents of the right in question; instead the EU is committed to protect and secure this right as it is enshrined in the sources relevant for the protection of fundamental human rights

²³⁰ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

²³¹ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

²³² *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

²³³ The fact that the freedom of association is enshrined in all of the most important human rights conventions and instruments (Gravel, E., Duplessis, I. and Gernigon, B. (2001) *The Committee on Freedom of Association: Its impact over 50 years*. Geneva: International Labour Office, p. 7.), ought to leave no doubt that indeed it is a *fundamental* human right. For an in-depth study of this fundamental right, see Herzfeld Olsson, P. (2003) *Facklig föreningsfrihet som mänsklig rättighet (The workers' freedom of association as a human right)*. Uppsala: Iustus.

²³⁴ The ILO has gone even further in stressing the importance of the freedom of association as a factor in the achievement of social justice and one of the principal elements in the achievement of lasting peace and sustained progress. See ILO (1996) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition edn. Geneva: International Labour Office, p. 1 and Gravel, E., Duplessis, I. and Gernigon, B. (2001) *The Committee on Freedom of Association: Its impact over 50 years*. Geneva: International Labour Office, p. 7, where it is also pointed out that the freedom of association constitutes a guarantee for the good functioning of a tripartite body such as the ILO.

²³⁵ ILO (2004) *Organizing for Social Justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Geneva: International Labour Office (Report I (B)), p. 1.

within the EU. I will thus begin this discussion of the contents of the right to freedom of association in EU law by considering the EU Charter, and then place it in relation to ILO law and practises as well the ECHR.

Article 12 (1) of the EU Charter explicitly recognises the right to freedom of association, but it contrasts to some extent with other legal sources concerning the nature of this freedom. Firstly, Article 12 only recognises the positive aspect of the freedom of association, and ignores the negative aspect of the same right, i.e. the freedom to dissociate, which is recognised in many of the Member States national traditions as well as in the principles developed by the ILO Freedom of Association Committee. Secondly, the article is focused on the freedom of association in reference to forming and joining trade unions. Finally, it includes the right to participate in activities organised by the protected organisations.²³⁶ The possibilities of conflict between a minimalist approach and a wider interpretation of the right to freedom of association need to be borne in mind. As such it is highly important that Article 12 EU Charter is interpreted in the light of these other legal sources in order for the EU to fulfil its obligations to protect rights in accordance with national traditions and the international commitments of the EU and its Member States.

In comparing this with ILO law and practises relevant to the right to freedom of association, it is important to bear in mind that the ILO has developed principles concerning the freedom of association, which is one of the fundamental principles on which the ILO is based.²³⁷ It has also adopted several conventions of relevance for the freedom of association, most notably ILO Convention 87 on the freedom of association and the protection of the right to organise, and Convention 98 on the right to collective bargaining. These are two of the ILO core conventions. Furthermore, the ILO has established two bodies that have the freedom of association as their special focus. These are the Fact-Finding and Conciliation Commission on Freedom of Association, created in 1950 by an agreement between the ILO and the Economic and Social Council of the UN,²³⁸ and the Committee on Freedom of

²³⁶ Bercusson, B. (2002a) 'Freedom of assembly and of association (Article 12)', in Bercusson, B. (ed.) *European labour law and the EU Charter of Fundamental Rights*. Brussels: ETUI, pp. 25-28 at p. 27.

²³⁷ Declaration of Philadelphia, adopted on 10 May 1944, Clause I, point (b). As a fundamental principle the freedom of association is also to be accepted by all the members of the ILO, see ILO (2006) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition edn. Geneva: International Labour Office, paragraphs 15-16. The importance of the freedom of association was mentioned already in the Constitution of the ILO, Preamble, second paragraph.

²³⁸ Resolutions of the Economic and Social Council No. 239(IX) of 2 August 1949 and No. 277(X) of 17 February 1950; 110th Session of the Governing Body, Official Minutes, pp. 71ff.

Association, established in 1951 as a tripartite body.²³⁹ The Committee on Freedom of Association legally bases its work on the freedom of association as a fundamental principle in the ILO Constitution and the Declaration of Philadelphia. It meets three times a year and carries out a preliminary examination of complaints and recommends the appropriate course of action to the Governing Body.²⁴⁰ The work of this Committee, as the main examining body for freedom of association,²⁴¹ is therefore of greater interest as it has established a series of principles that can be seen as international law on freedom of association.²⁴²

In its work on interpreting Article 2 of Convention 87, the Committee has concluded that workers and employers are free to choose which organisation to associate with. They should not be forced to use their freedom of association by only joining a specific existing organisation, and they should also be free to withdraw from any such organisation. Thus, the freedom of association undoubtedly also encompasses the choice to not associate. This means that the right to dissociate is implicitly recognised by Convention 87 and explicitly recognised by the decisions and principles developed by the Freedom of Association Committee.²⁴³

²³⁹ ILO (1995) *ILO Law on Freedom of Association - Standards and procedures*. Geneva: International Labour Office, pp.121f. The Fact-Finding and Conciliation Commission has been convened only rarely. The reason for this is that the consent of the member state's government for reference on a complaint is required if the government in question has not ratified the Conventions on freedom of association, and in addition to this the procedure is long and costly due to the need to hear witnesses and visiting the country in question. See ILO (1996) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition edn. Geneva: International Labour Office, pp. 1-2. The Committee on Freedom of Association, on the other hand, as a tripartite body is subject to procedures different from that of the Fact-Finding and Conciliation Commission. Since it was originally set out to be a preliminary and internal stage of ILO procedures it does not require the consent of the Member State before examining allegations (see Gravel, E., Duplessis, I. and Gernigon, B. (2001) *The Committee on Freedom of Association: Its impact over 50 years*. Geneva: International Labour Office, p. 10.). The aim of establishing a special supervisory body and procedure with this focus was to strengthen the ILO's supervision of the application of international labour standards (see *ibid.*, p. 2).

²⁴⁰ ILO (1995) *ILO Law on Freedom of Association - Standards and procedures*. Geneva: International Labour Office., pp. 122 f and ILO (1996) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition edn. Geneva: International Labour Office, pp. 2f.

²⁴¹ Gravel, E., Duplessis, I. and Gernigon, B. (2001) *The Committee on Freedom of Association: Its impact over 50 years*. Geneva: International Labour Office, p. 11.

²⁴² ILO (1995) *ILO Law on Freedom of Association - Standards and procedures*. Geneva: International Labour Office, pp. 122f and ILO (1996) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition edn. Geneva: International Labour Office, pp. 2f.

²⁴³ See ILO (1995) *ILO Law on Freedom of Association - Standards and procedures*. Geneva: International Labour Office, p. 14 and ILO (1996) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition edn. Geneva: International Labour Office, pp. 59-70, paragraphs 273-274, 276-283 and 319.

In relation to the ECHR it is worth noting that the contents of the freedom of association within EU law have been directly influenced by the case law from the ECtHR, as the CJEU (then the ECJ) has made specific reference to this case law in preliminary rulings of importance for this right. In the *Schmidberger* case the CJEU adopted a similar logic to the ECtHR on the fundamental rights of freedom of expression and assembly when concluding that it is possible to restrict these rights in the public interest, as long as such restrictions do not impose disproportionate or unacceptable interference with the risk of prejudicing the very substance of those fundamental rights.²⁴⁴ Since the freedom of association can be understood as an instrumental right in relation to the freedom of assembly, in that it constitutes a precondition for the exercise of the freedom of assembly,²⁴⁵ the freedom of association must also be considered a fundamental right. This is because if the freedom of association is not given proper and adequate protection as a fundamental right, then the freedom of assembly risks being prejudiced in a way that might threaten the very substance of this right.

It is interesting to note that in the *Schmidberger* case,²⁴⁶ the CJEU (then the ECJ) referred directly to case law from the ECtHR²⁴⁷ in discussing the right to freedom of expression and assembly and the justifiable limitations on this right. Interestingly the CJEU chooses a similar wording to the ECtHR when stating that certain limitations of fundamental rights, such as those at stake, may be allowed. The CJEU used the wording '*justified by objectives in the public interest*' and stated further that any restrictions of the exercise of this right should not, '*taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed*'.²⁴⁸ The ECtHR, on the other hand, stated in *Steel and Others v. UK* that any interference must be in the form of '*reasonable and appropriate means to be used to ensure that lawful activities can take place peacefully*', and further that such interference must be '*proportionate to the legitimate aim pursued, due regard being had to the importance of the freedom of expression*'.²⁴⁹ This similarity in standpoint between the CJEU and the ECtHR could indicate that the CJEU in this

²⁴⁴ *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] 2003 ECLI:EU:C:2003:333 I-5659, paragraphs 73-74 and 79-80.

²⁴⁵ Leader, S. (1992) *Freedom of Association - A Study in Labor Law and Political Theory*. New Haven: Yale University Press, pp 22f.

²⁴⁶ *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] 2003 ECLI:EU:C:2003:333 I-5659.

²⁴⁷ To be precise paragraph 79 *ibid.* refer to paragraph 101 in *Steel and Others v. United Kingdom, Application No. 24838/94* [1999] 28 E.H.R.R. 603.

²⁴⁸ *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] 2003 ECLI:EU:C:2003:333 I-5659, paragraphs 79-80.

²⁴⁹ *Steel and Others v. United Kingdom, Application No. 24838/94* [1999] 28 E.H.R.R. 603.

case considered it of some importance to articulate the rights established in the ECHR within the EU legal order, and in doing so sought to minimise divergence in the protection of fundamental rights between these two legal orders.

As stated, both *Schmidberger* and *Steel and Others v. UK* concerned freedom of expression and not directly freedom of association, thus Article 10 ECHR and not Article 11 ECHR, in which the right to freedom of association is enshrined. Considering the standpoint taken by the CJEU in *Schmidberger*, it is thus relevant to provide a brief discussion of Article 11 ECHR and the related case law in order to see how the right to freedom of association is protected by the ECtHR and whether this would fit with the EU legal order. In brief, freedom of association under Article 11 ECHR means the right for workers to form and join trade unions for the protection of their interests, but much of the ECtHR case law relates to the negative aspect of the freedom of association, i.e. the freedom of dissociation.²⁵⁰ In relation to this dual meaning of the right to freedom of association, the ECtHR has succeeded well in balancing the protection of both sides of the right against the promotion of systems of collective bargaining. Whilst ensuring that trade unions have the right to promote and protect their collective bargaining capacity, the ECtHR has also ensured that the individual right to choose whether or not to belong to an association is protected through its reasoning in *Gustafsson v. Sweden*.²⁵¹ Based on the relevance of ECtHR case law for the interpretation of the fundamental rights protected within the EU legal order by the ECHR, the right to freedom of association ought to be protected within the EU legal system in a way that also protects the autonomy of the collective bargaining systems. Since the institutions of the EU also have the obligation to promote the ESD and respect the autonomy of the social partners in accordance with Article 152 TFEU, the ESD should also be considered as a part of the collective bargaining systems whose autonomy is to be protected and respected, in consequence of the meaning of the right to freedom of association.

In other words, the autonomy of transnational or international systems of collective bargaining should be respected in the course of protecting the fundamental right to freedom of association. This is interesting to note in relation to the *Viking* case,²⁵² where the CJEU (then the ECJ) critiqued the system developed by the ITF for the international coordination of collective action as a means to protect worker interests. The CJEU highlighted the necessity of proportionality for coordinated collective

²⁵⁰ For a thorough discussion of Article 11 ECHR and relevant case law see Janis, M. W., Kay, R. S. and Bradley, A. W. (2008) *European Human Rights Law - Text and materials*. third edition edn. Oxford: Oxford University Press, pp. 317ff.

²⁵¹ *Gustafsson v. Sweden (Application no 15573/89)* [1996].

²⁵² *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779. See especially paragraphs 87–89 of the judgment.

action in a manner that can be understood as implicitly questioning the internal democracy of the ITF and thus its autonomy. It seems as if the CJEU considered the actions taken to be obligatory for both the ITF and the Finnish Seaman's Union (FSU), in spite of the fact that these organisations agreed to comply with the ITF FOC policy by exercising the freedom of association at an international level.²⁵³

The implicit granting of leeway to national trade unions in actions related to an internationally implemented policy agreed upon through the democratic internal processes of the international trade union organisation shows little understanding of the need to respect the autonomy of organisations formed by the exercise of the freedom of association, and little understanding of the internal democracy of such organisations. It is thus clear, in my opinion, that the *Viking* ruling diminishes the possibilities for EU-level trade union organisations to develop and promote consistent EU-level strategies for implementation by their national affiliates. The judgment can thus be considered to place legal limitations on the conditions for membership within the organisation capable of making decisions that serve this international system of industrial relations.²⁵⁴ It is further somewhat ironic that the CJEU, whose main tool in the enforcement of EU law is the method of teleological interpretation, chose to interpret the ITF FOC policy literally,²⁵⁵ in a manner that clearly favoured economic interests over social issues. This can only be understood as a sign that the CJEU as a decision-making organisation within the legal system of the EU has incorporated the values of the economic system into its own decision premises.²⁵⁶ I will now move from freedom of association to the right to collective bargaining.

4.4.2 Right to collective bargaining

Community legislation contains a few sources to analyse on the right of collective bargaining in relation to the ESD. To begin, Article 155(1) TFEU states: '*Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.*' In other words, this article would recognise a system of collective bargaining at EU level, if the social partners wish to

²⁵³ A more detailed analysis of this case and its implications for the ITF FOC campaign is provided in section 11.4 below.

²⁵⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

²⁵⁵ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraph 89.

²⁵⁶ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52 at pp. 45ff and Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

establish such relations. If this is interpreted in conjunction with Article 28 of the EU Charter, where the right to collective bargaining is expressed as part of the EU legal system, it is possible to derive an implicit recognition of the right to collective bargaining at the EU level.²⁵⁷ The reason is that the rejection of a right to collective bargaining at EU level, i.e. the ESD, would be completely counterproductive to developing a collective bargaining system, and thus contradict Article 152 TFEU. There would be no logic in recognising a system of bargaining without simultaneously recognising the right to collective bargaining at the level of the system, as this right is a fundamental constituent for establishing such a system.

Worth noting in relation to this is also Article 155(2) TFEU which give the social partner not only the right to conclude agreements, but also the possibility to request that such agreements be implemented through EU legislation, notably by means of a directive. Notably, this possibility comes with a limitation since the competence of the EU within this policy field is limited in accordance with Article 153 TFEU. This means that if the social partners wishes to have an agreement implemented by means of a directive, they will need to assure that the contents of the agreement does not go beyond the scope of Article 153 TFEU, thus limiting the scope of their negotiations and in essence also limiting their right to collective bargaining. In addition the agreements will need to respect EU legislation, if the conclusions of the *Commission v. Germany* case²⁵⁸ are interpreted in analogy for the EU level.²⁵⁹ If they on the other hand would prefer the autonomous implementation without involvement of EU legislation, they will remain freer as to the contents of an agreement. The downside of such autonomous agreements is on the other hand that the assurance of efficient implementation and application of the agreement might be harder.²⁶⁰ The consequences of the borders set by Article 153 TFEU for the negotiating scope of the

²⁵⁷ That Article 28 EU Charter also can be interpreted to include the EU level in the right to collective bargaining is also expressed in Barnard, C. (2014b) 'Right of Collective Bargaining and Action', in Peers, S., Hervey, T., Kenner, J. & Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. London: Hart Publishing, pp. 773-794, at pp. 785f.

²⁵⁸ *Case C-271/08 European Commission v Federal Republic of Germany* [2010] 2010 ECLI:EU:C:2010:426 I-7091. Where the CJEU concluded that collective agreements shall respect EU legislation on public procurement.

²⁵⁹ The question of whether or not these limitations on the scope for collective bargaining at the EU level is consistent with the broader set of international law governing the right to collective bargaining remains to be investigated. It is, however, clear that for the national context recurrent scrutiny as to the legality of collective agreements conducted by national legislators in order for extension of collective agreements *erga omnes* can be questioned on the basis of interpretations of ILO Conventions, see Jacobs, A. (2013) 'Article 11 ECHR: The Right to Bargain Collectively under Article 11 ECHR', in Dorssemont, F., Lörcher, K. & Schömann, I. (eds.) *The European Convention on Human Rights and the Employment Relation*. London: Hart Publishing, pp. 309-332, at pp. 327ff.

²⁶⁰ The challenges for the ESD to assure efficient implementation and application of autonomous agreements will be discussed further on in this thesis and highlighted not least in chapter 7.

social partners could lead to the conclusion that this Article should be considered part of the binary code for the ESD.²⁶¹ However, since that limitation only shall apply for agreements implemented through EU legislation and not autonomous agreements I find it unsuitable to draw such a conclusion. Instead, I find it more likely that Article 153 TFEU shall be considered in terms of a difference minimising program within the ESD.

In addition to the mentioned Treaty provisions, CJEU case law also contains some points of interest concerning the right to collective bargaining. Firstly, it is possible to find at least a vague protection of the autonomy of collective bargaining structures in the EU through the immunity granted to collective agreements in relation to Article 101 TFEU in the *Albany* case,²⁶² which has also been confirmed in the *FNV Kunsten* case.²⁶³ Even though these cases concern national collective agreements, it is highly probable that this protection would also apply to the social dialogue at the EU level, not least in light of Article 152 TFEU. Secondly, the UEAPME case, even though the then Court of First Instance (now the Tribunal) did not refer to the fundamental right of collective bargaining, can be considered as clarifying that the right to collective bargaining at the EU level is a dual right, encompassing both the right to enter into negotiations and the right to refrain from participating in such negotiations.²⁶⁴ This dual understanding of the right to collective bargaining falls well

²⁶¹ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 518.

²⁶² This case assures a certain extent of protection for the social partners' right to collective bargaining and collective autonomy via the statement of the CJEU (then the ECJ) that '*the social policy objectives pursued by such agreements [collective agreements] would be seriously undermined if management and labour were subject to Article 85(1) [now Article 101 TFEU, ex Article 81 ECT] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.*' See *Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] 1999 ECLI:EU:C:1999:430 I-5751, paragraph 59.

²⁶³ *Case C-413/13 FNV Kunsten Informatie en Media v. Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

²⁶⁴ *Case T-135/96, UEAPME versus the Council. The action of annulment of Directive 96/34/EC on the framework agreements on parental leave.* [1996] 1998 ECLI:EU:T:1998:128 II-2335. The case concerns the right of UEAPME to participate in the procedure established in Articles 154-155 TFEU (then Articles 3 and 4 ASP, ex. Articles 138-139 ECT). Interestingly, the right to negotiate discussed in the case was analysed only as a right to negotiate in relation to the procedure established in the ASP. The fact that negotiations under this procedure could fall under the fundamental right to collective bargaining was completely missed by all parties involved. Not even the applicant UEAPME used this right as an argument in favour of its own case. Perhaps this is not surprising, as the social dialogue procedure at that time was newly established and focus was mainly on how this procedure should function, not what fundamental rights management and labour on the European level could claim. Considering the specific circumstances of the negotiating procedure in question it is not unlikely that the CFI would have come to the same conclusions, had the right to collective bargaining been referred to as a fundamental right in the case.

in line with the general understanding of this right,²⁶⁵ in the sense that organisations of management and labour have the right to call for negotiations with other organisations, but other organisations are also free to choose whether or not to respond to the call. In conflicts of interest between these two sides of the right to collective bargaining, it will be necessary to strike a balance and weigh both rights in context.²⁶⁶ The lack of any discussion of the right to collective bargaining in the UEAPME case can actually be considered as an argument for the need of securing a protection of this right within the EU legal order, a protection that can now be found through Article 28 of the EU Charter in conjunction with Article 155(1) TFEU. The value of Article 28 EU Charter has been questioned as merely symbolic, not least in the aftermath of the *Laval* and *Viking* cases.²⁶⁷

The dual and voluntary aspect of the right to collective bargaining is highlighted by ILO law based on Convention 98, which established that workers and employers or their organisations have the right to freely and voluntarily negotiate conditions of employment, and also that such voluntary negotiation of collective agreements is a fundamental aspect of the freedom of association.²⁶⁸ Regarding the need to strike a balance between the positive and negative aspects of the right to collective bargaining, the ILO law further established the principle of bargaining in good faith in order to provide best opportunities for developing a system of harmonious industrial relations with a high level of confidence between the parties. According to the Freedom of Association Committee, implicit in the principle of bargaining in good faith is that collective agreements are binding for the parties and there shall be mutual respect for the commitments undertaken within such agreements. Along the same lines, the contents of collective agreements may not be unilaterally changed by the employer, and failure to implement the agreed-upon conditions is a clear violation of the right to bargain collectively as well as the principle of bargaining in good faith.²⁶⁹

²⁶⁵ Veneziani, B. (2002) 'Right of collective bargaining and action (Article 28)', in Bercusson, B. (ed.) *European labour law and the EU Charter of Fundamental Rights*. Brussels: ETUI, pp. 53-61, at p. 56.

²⁶⁶ This indicates a clear and close connection between the right to collective bargaining and the duty to negotiate. Thus, it can be argued that the right to collective bargaining will be difficult to enforce effectively if the duty to negotiate is neglected within the system.

²⁶⁷ The Solidarity Title of the EU Charter, where Article 28 is placed, has also been discussed as having a differing value as rather principles than rights and as such their protection requires implementation by the EU institutions according to Article 52(5) EU Charter. On this see Barnard, C. (2014b) 'Right of Collective Bargaining and Action', in Peers, S., Hervey, T., Kenner, J. & Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. London: Hart Publishing, pp. 773-794, and Barnard, C. (2014a) 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67, pp. 199-237.

²⁶⁸ ILO (2006) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition edn. Geneva: International Labour Office, paragraphs 881 and 925-926.

²⁶⁹ *Ibid.*, paragraphs 934-935 and 939-943.

The right to collective bargaining, in accordance with practice established by the ILO, in other words includes both the duty of the parties to negotiate in good faith and the duty to obey the conditions set up in a concluded collective agreement. The voluntary principles of EU level collective bargaining can thus to some extent be questioned in the light of this, since it is doubtful whether it fully implements the duty to negotiate in good faith.²⁷⁰ A less stringent, but still clear, recognition of the right to collective bargaining can be found in Article 6 ESC, where emphasis is also placed on the importance of negotiations being carried out voluntarily.

In addition, case law from the ECtHR concerning the right to freedom of association and the inherent elements of this right might serve to further strengthen the right to collective bargaining. The case law that provides this drastic and interesting change of position from the ECtHR is found in the *Demir and Baykara v. Turkey* judgment.²⁷¹ In this case, the ECtHR found that international, regional and national developments concerning the right to bargain collectively required the ECtHR to also change its case law concerning this right,²⁷² and that the right to bargain collectively should indeed be considered as ‘*one of the essential elements of the ‘right to form and join trade unions for the protection of [one’s] interests’ set forth in Article 11 of the Convention.*’²⁷³ The ECtHR thus concluded that there is a dynamic link between the right to freedom of association and the right to collective bargaining, whereby failure to recognise the right to bargain collectively would prejudice the possibility for individuals to exercise their freedom of association.

In its reasoning the ECtHR relies on several legal sources in addition to the ECHR, because the understanding of the ECHR and the definition of terms and notions therein requires that other international sources, the interpretation of these legal texts as well as practise developed in the contracting states all reflect their common values. The ECtHR further concludes that the ‘*consensus emerging from [such] specialised international instruments and from the practise of the contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.*’²⁷⁴ The ECtHR chooses to refer to the ESC and the EU Charter when interpreting the meaning of Article 11 ECHR.²⁷⁵ Its conclusion that the right to

²⁷⁰ See the above discussion of the *UEAPME* case (*Case T-135/96, UEAPME versus the Council. The action of annulment of Directive 96/34/EC on the framework agreements on parental leave.* [1996] 1998 ECLI:EU:T:1998:128 II-2335.).

²⁷¹ *Demir and Baykara v. Turkey* (*Application no. 34503/97*) [2008].

²⁷² The previous position of the ECtHR was that the right to bargain collectively did not constitute an inherent element of Article 11 ECHR; see *ibid.*, paragraph 153.

²⁷³ *Ibid.*, paragraph 154.

²⁷⁴ *Ibid.*, paragraph 85.

²⁷⁵ See for example paragraphs 149-150 in *ibid.*

bargain collectively constitutes an essential element of the right to form and join trade unions is interesting for two reasons. Firstly, it allows the ECtHR to change its previous case law and strengthen the protection of fundamental labour rights offered by the ECHR. Secondly, it strengthens the link between different sources of human rights protection as well as the legal status of these sources, both within their specific legal order and other international legal orders.²⁷⁶ The case might thus create a need for the CJEU to further strengthen the protection of the right to collective bargaining, not least due to the Treaty-based recognition of the rights established in the ECHR and ESC.²⁷⁷

Considering the importance accorded to respect for collective bargaining autonomy in relation to protecting the right to collective bargaining, the judgments in the *Laval*²⁷⁸ and *Rüffert*²⁷⁹ cases appear as somewhat problematic. In neither case does the CJEU make any reference to the autonomy of the collective bargaining systems. The cases are problematic because the judgments undermine possibilities for local-level collective bargaining, even though this level is the main level for determining wages and working conditions in both of the national systems of industrial relations concerned. This is not very surprising, considering both the legal basis for the Posted Workers Directive and the fact that the Directive stipulates that working conditions and wages be determined according to national regulations and/or collective agreements.²⁸⁰

Nevertheless, it is interesting to note that the legal system of the EU favours centralised collective bargaining in this case, when the adequate level of collective

²⁷⁶ For an interesting analysis of the methodology adopted by the ECtHR in the *Demir and Baykara* case see Lörcher, K. (2013) 'The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgement, its Methodology and Follow-up', in Dorssemont, F., Lörcher, K. & Schömann, I. (eds.) *The European Convention on Human Rights and the Employment Relation*. London: Hart Publishing, pp. 3-46.

²⁷⁷ In this respect it is worth highlighting once again that the EU has committed itself to acceding to the ECHR through Article 6 TEU.

²⁷⁸ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

²⁷⁹ *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

²⁸⁰ See the original Directive: *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services* (1997): European Parliament and Council of the European Union (OJ No L 18/1997). Following issues involving the interpretation and enforcement of the Directive, a complementary Directive was enacted: *Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')* (2014): The European Parliament and the Council of the European Union (OJ No L 2014/159).

bargaining for ensuring the same working conditions for different workers at the same workplace would be the local level, in accordance with the autonomy of the collective bargaining systems concerned. This is not to say that the Posted Workers Directive fails in fulfilling its social objectives.²⁸¹ Instead it is clear that the Directive is a legal measure that protects economic rights: a balancing act between social and economic objectives that at the same time ensures that the social rights in question will not infringe upon the economic rights.²⁸² This implies that the values of the economic system are embedded within the programming of the EU legal system.²⁸³ The next section, on the right to industrial action, will extend this discussion further.

4.4.3 Right to industrial action

Like the freedom of association, the right to industrial action is considered a fundamental labour right as well as a principle facilitating collective bargaining. In terms of theoretical conception, the right to strike is closely linked to the right to freedom of association, but it can be conceptualised in two different ways. Either it can be considered an instrumental right, as it is a necessary means of effectuating the right to freedom of association and trade union activities; or it can be seen as an independent right, a species of the right to freedom of association based on the idea that individuals should not be penalised for doing collectively what they are entitled to do alone.²⁸⁴ In this second conceptualisation, the right to strike is seen as an individual right that is exercised collectively.

The instrumental conception is closely linked to a basic assumption in theories on industrial relations and collective bargaining: that of a power imbalance between labour and management and the need to create a system in which the weaker party, i.e. labour, can be ensured some protection so that it is not exploited. The

²⁸¹ By means of this Directive 'the EU legislature has had some success in trying to protect national law' as pointed out by Barnard, C. (2014a) 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67, pp. 199-237, at p. 219.

²⁸² As pointed out by Schmitt in relation to the *Rosenblatt* judgment. See Schmitt, M. (2014) 'Evaluation of EU Responses to the Crisis with Reference to Primary Legislation (European Union Treaties and Charter of Fundamental Rights)', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing, pp. 195-241, at p. 219 and *Case C-45/09 Gisela Rosenblatt v. Oellerking Gebäudereinigungsges. mbH* [2010], paragraph 68.

²⁸³ See Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff and Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

²⁸⁴ Leader, S. (1992) *Freedom of Association - A Study in Labor Law and Political Theory*. New Haven: Yale University Press, pp. 182f specifically on the right to strike and pp. 22ff for a more general discussion on independent and derivative/instrumental conceptions of a right.

instrumental conception of the right to industrial action includes both the right to strike and the right to impose lock-outs, and it gives the same rights, in principle, to both employers and employees. This principal recognition of the same rights for both sides of industry is often referred to as the principle of equality of arms and is found in most countries where the right to industrial action is based on the instrumental conception. In financial terms, the trade unions probably gain more from having this right acknowledged, as the practical exercise of the right to industrial action is likely to cause financial damage to the employer. This means that the right to industrial action can be seen as a means of levelling out the balance of power between labour and management and thus improving the chances for labour to have their requests heard by employers.

As for the freedom of association, Article 153(5) TFEU exempts the right to strike and impose lock-outs, i.e. industrial action, from the competences of the EU. Nonetheless, the right to take collective action, including strike action, is recognised in Article 28 of the EU Charter and it is thus relevant to further discuss how this right should be interpreted and protected in EU law. Again, I will begin by considering ILO law as the basic foundation for interpreting the right to collective action. The right to collective action is actually not mentioned in either ILO Convention 87 or 98. However, the Freedom of Association Committee has in its decisions developed principles concerning the right to strike,²⁸⁵ and these principles are to be respected within all the EU Member States, due to their membership in the ILO and ratification of the relevant Conventions. The Committee has decided that the right to strike is a fundamental right of workers and their organisations, a legitimate and essential means of promoting and defending workers' and trade unions' economic and social interests, and that prohibiting federations and confederations to call for strike action is incompatible with Convention 87.²⁸⁶

As for the employers' right to impose lock-outs, ILO law seems to exclude this right for employers. All reference to industrial action in the digest of the Freedom of Association Committee has to do with the right to strike as a means for workers and their organisations to promote and defend their economic and social interests.²⁸⁷ The

²⁸⁵ The Committee has stated that '*the right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87*', ILO (2006) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition edn. Geneva: International Labour Office, paragraph 523.

²⁸⁶ ILO (1996) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition edn. Geneva: International Labour Office, paragraphs 473-475 and 478 and ILO (2006) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition edn. Geneva: International Labour Office, paragraphs 520-522 and 525.

²⁸⁷ See for example ILO (2006) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition edn. Geneva: International Labour Office, paragraphs 520-522, 524, 526-527 and 540.

closure of an enterprise in the event of a strike is considered to be an infringement of the freedom of work of persons not participating in a strike,²⁸⁸ but this does not clearly imply that a lock-out would be considered in the same manner. It is thus somewhat unclear what the legality of a lock-out would be under ILO law.

Another international source worth debating when considering the right to industrial action is the ECHR. Article 11 ECHR protects the freedom of association, and the ECtHR has adopted an instrumental view of the right to collective action, similar to its view on the right to collective bargaining. In the case of *Enerji Yapi Yol Sen*,²⁸⁹ the ECtHR concluded that there is a dynamic link between the right to freedom of association and the right to collective action, thus applying the instrumental view to this right, and that the right to collective action is therefore protected under Article 11 ECHR. The ECtHR further concluded that restrictions on the exercise of the right to industrial action can be justified on grounds of public interest and the safety of others. However, such restrictions cannot be considered to be in accordance with the ECHR if the restrictions serve to empty the right to collective action of its contents.²⁹⁰ There are thus limitations on how far-reaching potential restrictions of the right to collective action may be. If restrictions are set up in a manner that imperils the autonomy of the social partners, they should be considered as contrary to the ECHR and thus also the EU Charter, since the ECHR is an important source for interpreting the meaning of the rights enshrined in the EU Charter.

If we compare this case law from the ECtHR with the case law from the CJEU concerning the right to collective action, some questions arise. Since the *Enerji Yapi Yol Sen* case was delivered after the *Laval* and *Viking* cases, in which the CJEU also recognises the right to industrial action as a fundamental right within EU law, it is natural that the CJEU has not made any reference to the ECtHR case law in those two cases. However, there are some issues worth highlighting in the *Laval* and *Viking* cases in relation to the *Enerji Yapi Yol Sen* case, because differences exist that might justify a future reconsideration from the CJEU, at least concerning the interpretation of the scope for restrictions on the exercise of the right to industrial action. I will therefore discuss the *Laval* and *Viking* cases in a bit more detail.

To begin, it is clear that both judgments give an answer to the question of when industrial action is considered not to comply with EU law. The *Laval* case²⁹¹ clearly

²⁸⁸ ILO (2006) *Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition edn. Geneva: International Labour Office, paragraph 676.

²⁸⁹ *Enerji Yapi-Yol Sen v. Turkey* (Application no. 68959/01) [2009].

²⁹⁰ *Ibid.*, paragraphs 31-33.

²⁹¹ Although having implications mainly for trade unions at the national level and in cross-border situations, the contents of the right to industrial action as granted in the *Laval* case are so important that a discussion here is motivated.

states that industrial action cannot be considered lawful when exercised for the purpose of concluding a collective agreement that would override an existing collective agreement, solely because the existing agreement applies terms and conditions determined in accordance with the law and practice of another Member State than the one where the collective action is exercised or intended to be exercised.²⁹² In other words, collective action cannot be exercised in a manner that conflicts with Community principles on non-discrimination based on nationality. However, taking industrial action in order to conclude a collective agreement that would replace an existing agreement may very well still be in accordance with EU law, if the main reason for doing so does not conflict with the principles of non-discrimination. Thus trade unions might take action to push an employer to conclude a collective agreement to replace a previously existing agreement with a significantly lower level of protection than found in the collective agreements concluded by the most representative employers' and workers' organisations at the national level.²⁹³

The *Laval* case further addresses the demands trade unions may make in situations concerning posted workers, strictly limiting the demands of the trade unions in the host country to issues specifically contained in the Posted Workers Directive²⁹⁴ and thus excluding the possibility of taking collective action to push for broader demands.²⁹⁵ The possibility for trade unions to take collective actions in cross-border situations is thus limited, both in terms of using collective action as a means to push an employer to sign a collective agreement and in terms of the demands the trade union in the host state can make on behalf of posted workers. This means that possibilities have been limited for trade unions, especially in high-cost countries, to combat social dumping and assure the same level of protection to all workers performing work, as nationals or as temporarily posted workers, on the labour market for which the trade union in question is representative. Even though this case deals with industrial action at the national level and in cross-border situations and does not address collective action at the European level, the proportionality requirement for industrial action is likely to have consequences for the ESD. This issue is further

²⁹² *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

²⁹³ This is also the solution suggested for the problematic issue of the Swedish Lex Britannia in Ahlberg, K., Bruun, N. and Malmberg, J. (2006) 'The *Vaxholm* case from a Swedish and European Perspective', *Transfer*, 12(2), pp. 155-166, at p. 166.

²⁹⁴ *Directive 96/71/EC of the European Parliament and the of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services* (1997): European Parliament and Council of the European Union (OJ No L 18/1997).

²⁹⁵ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

clarified when considering the judgement in the *Viking* case, which we will turn to now.

As for the *Viking* case and the limits it identifies on the right to industrial action, this issue could be considered more complex and also of greater importance for the ESD, since the case concerns collective action and trade union strategies with an international character and scope. First of all, the CJEU (then the ECJ) states that '*the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty ... and that the protection of workers is one of the overriding reasons of public interests recognised by the Court.*'²⁹⁶ Bercusson's comment on the position taken by the CJEU in this case is worth noting: '*the question is not whether fundamental rights justify restrictions on free movement; rather free movement must be interpreted to respect fundamental rights*',²⁹⁷ with reference to the opinion of the Advocate General in the *Omega* case. Advocate General Stix-Hackl stated that it is '*necessary to examine the extent to which fundamental rights admit of restrictions*', and further that '*the fundamental freedom concerned and particularly the circumstances in which exceptions are permissible must then be construed as far possible in such a way as to preclude measures that exceed allowable impingement on the fundamental rights concerned and hence preclude those measures that are not reconcilable with fundamental rights.*'²⁹⁸

However, also in the *Omega* case, the CJEU (then the ECJ) maintained that the protection of fundamental rights 'is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty',²⁹⁹ and thus continued to follow this line in the *Viking* and *Laval* cases. This stance is understandable in the sense that the EU was built up and developed with a focus on economic interests, rights and policies, and therefore the Court finds itself limited to interpreting which restrictions on the economic freedoms might be allowed, rather than considering when such an economic freedom might justify a limitation of a fundamental (social) right.³⁰⁰ This is

²⁹⁶ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraph 77.

²⁹⁷ Bercusson, B. (2007) 'The Trade Union Movement and the European Union: Judgement Day', *European Law Journal*, 13(3), pp. 279-308, at p. 303.

²⁹⁸ *Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Opinion of Advocate General Stix-Hackl* [2004] ECR I-09609, paragraph 53 also quoted in Bercusson, B. (2007) 'The Trade Union Movement and the European Union: Judgement Day', *European Law Journal*, 13(3), pp. 279-308, at pp. 303f.

²⁹⁹ *Ibid.*, paragraph 35.

³⁰⁰ For a more recent example of the CJEU reasoning according to this logic see *Case C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* [2016] Court Reports - General ECLI:EU:C:2016:972 972.

a clear example of how the programming of the legal system³⁰¹ of the EU is highly influenced by the values promoted by the economic system, thus underlining the strength of the economic function system in the EU society. Bercusson's comment, though published before the judgment was delivered, successfully points out that the social deficit within the EU is reflected in the reasoning of the CJEU. The question thus remains as to whether the CJEU will compensate for this social deficit, or is even capable of doing so.

The CJEU conclusion that the protection of workers is a legitimate interest that justifies a restriction, by means of collective action, on one of the fundamental freedoms could still, at first glance, allow for a fairly broad interpretation of when collective action is lawful under Community law. However, the CJEU continues to interpret the right to collective action as also including a proportionality requirement, analogous to the principal requirement of proportionality for restrictions on the fundamental freedoms. First, the CJEU requires that the jobs or conditions of employment must be jeopardised or under serious threat in order for collective action, such as was at stake in the Viking case, to meet the objective of protecting workers.³⁰² This requirement strictly limits the cases where collective action that has a transnational character, in that it is coordinated by an international trade union federation, can be used to promote worker interests. As pointed out by Barnard the traditional motive of improving working conditions has now been ruled out as a legitimate reason for strike action in such situations.³⁰³

If the requirement that jobs or conditions of employment be jeopardised or under serious threat is fulfilled, the CJEU secondly states that collective action must be '*suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.*'³⁰⁴ This requirement of proportionality further includes the requirement that the organisation exercising the right to industrial action should not '*have other means at its disposal which [are] less restrictive of the freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into ... and [that the organisation has] exhausted those means before initiating such action.*'³⁰⁵ Undoubtedly, the proportionality requirement strongly limits the right to

³⁰¹ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

³⁰² *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraph 81.

³⁰³ Barnard, C. (2014b) 'Right of Collective Bargaining and Action', in Peers, S., Hervey, T., Kenner, J. & Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. London: Hart Publishing, pp. 773-794, pp. 789f.

³⁰⁴ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraph 84.

³⁰⁵ *Ibid.*, paragraph 87.

industrial action, to an extent that might even be at odds with the protection granted to this right in the Member States.

As Bercusson points out, the courts in the Member States have been very cautious about adopting such a principle for the right to strike, not least due to the close link between this right and the process of collective bargaining and the necessity therefore of examining the right to strike within the context of the bargaining process. Applying a test of proportionality when examining the legality of collective action would seriously prejudice the state's impartiality in economic disputes and therefore has been avoided in most Member States.³⁰⁶ In addition it is contrary to the ECtHR, which has sooner highlighted the need for proportionality in order to justify restrictions on the right to industrial action.³⁰⁷ In addition it is worth noting that the formulation of the proportionality test leaves barely no margin of appreciation for the trade unions in these situations.³⁰⁸ Again, in the reasoning of the CJEU it is possible to detect values stemming from the economic system in the programming of the communication of the EU legal system.

The principle of proportionality applied by the CJEU on the right to industrial action is, however, applicable only in situations that fall under the scope of EU law: i.e. collective action with a transnational or cross-border character. The national systems are thus not affected. As regards the ESD, this raises the question of whether there are any good reasons for placing stricter limitations on coordinated collective action than on action taken by a single national trade union. Examining the ITF policy on FOCs would suggest that the answer is a clear no. In fact, the action taken by the ITF in relation to the coordination of collective action can only be considered modest, as it consists of issuing a circular to the affiliates and leaving it at the discretion of the

³⁰⁶ Bercusson, B. (2007) 'The Trade Union Movement and the European Union: Judgement Day', *European Law Journal*, 13(3), pp. 279-308, at p. 304. It is also worth noting that the proportionality test in effect has caused '*the paradox that the more successful the strike action, the less likely it would be proportionate*' as noted by Barnard, C. (2014a) 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67, pp. 199-237, at p. 205.

³⁰⁷ *Enerji Yapi-Yol Sen v. Turkey (Application no. 68959/01)* [2009], paragraphs 31-33. For discussions of this difference in approach see for example Barnard, C. (2014b) 'Right of Collective Bargaining and Action', in Peers, S., Hervey, T., Kenner, J. & Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. London: Hart Publishing, pp. 773-794, at pp. 790ff and Velyvyte, V. (2015) 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence', *Human Rights Law Review*, 15, pp. 73-100.

³⁰⁸ Velyvyte, V. (2015) 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence', *Human Rights Law Review*, 15, pp. 73-100, at pp. 89ff.

affiliates to decide whether or not collective action is lawful and advisable.³⁰⁹ Placing stricter limitations on coordination promoted by the ITF than on collective action taken on the initiative of an individual and sole national trade union would thus seem disproportionate. Furthermore, if collective action was to be taken on the initiative of a European trade union federation, should it necessarily be considered coordinated collective action, subject to the proportionality requirement? Could it not, in the striving for European integration, be considered a collective action initiated by one trade union, the only difference being that its scope is European and not national? In the next section I will sum up my conclusions from the above discussion of specific relevance for the ESD as an autopoietic system.

4.5 Summary of conclusions

In this chapter the fundamental labour rights have been discussed as necessary pillars for a system of collective bargaining to develop and contribute to the improvement of working conditions. These rights are recognised by the EU legal system, but they are also limited in several manners, which affect the ESD. The right to collective bargaining limit is subject to the ESD needing to adopt a difference minimising program in order to be able to assure implementation of agreements by means of EU legislation. The right to industrial action is further limited in a manner that in practice makes it more or less impossible for EU trade union organisations to exercise it and thus avails them of their most efficient toll for putting pressure on employers during negotiations.

Even though the existing case law from the CJEU can be criticised for not adhering to the interpretation of these rights, not least in relation to the ECHR, there are limited possibilities for challenging the current state of EU law on these issues. The economic values as promoted by the EU legal system will therefore render effects for the ESD, which will face difficulties for finding acceptance of communication that places social values ahead of economic interests. In this respect it is thus likely that the ESD will

³⁰⁹ The ITF FOC campaign will be further discussed in chapters 10-11 in this thesis. For other contributions concerning the ITF policy on FOCs, see for example Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423; Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402; or Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67. The modesty of the ITF action in the *Viking* case has also been pointed out in Bercusson, B. (2007) 'The Trade Union Movement and the European Union: Judgement Day', *European Law Journal*, 13(3), pp. 279-308, at p. 305 and footnote 158 on that page.

face problems with overcoming improbabilities of communication. Unless a future accession of the EU to the ECHR provokes a change of interpretation concerning the fundamental labour rights the ESD will thus need to find other ways to solve the improbabilities of communication if it is to stand a chance of producing communication that will counterbalance the social deficit of the EU. With this discussion as a backdrop for the legal aspects of the field of study I will now move on to the second part of the thesis focusing on the ESD.

5 The institutionalisation of Sectoral Social Dialogue Committees

5.1 Introduction

The aim of this thesis is to provide a deeper understanding of the ESD by exploring differences and similarities between the ESD and the ITF FOC system and seeking to answer the question of why the ESD is perceived as lacking capacity to produce results that improve working conditions whereas the ITF FOC campaign is generally considered to have such capacity. The ESD is a broad concept that involves the cross-industry level as well as the sectoral level, and it is necessary to deal with the ESD in a manner that encompasses its entirety. Since the sectoral part of the ESD can be considered the first to have been established this chapter will focus on the sectoral level, and specifically on the developments leading to the institutionalisation of the sectoral social dialogue committees (SSDC). This perspective will allow for a discussion that acknowledges the complexity of the ESD as an autopoietic system (as it is best understood), drawing on Luhmann's notion of reducing complexities but without ignoring the complex characteristics of the ESD. The chapter will further address the issue of structural coupling between the ESD and other function systems of the EU, to help explain how and why the ESD functions the way it does. Methodologically, this chapter will mainly focus on *what* the ESD is and *what* results it produces (questions 2a and 1a in my methodological model). However, as I will show, it will not be possible to separate this discussion completely from questions about *why* this is so (questions 1b and 2b in my model). These questions will thus also be touched upon. I will begin by briefly explaining why it is important to take the sectoral social dialogue into consideration when analysing the ESD as a whole.

5.2 Sectoral social dialogue

While the cross-industry social dialogue has received much attention from academics, the European sectoral social dialogue has long received much less, in spite of it being

subject to the earliest developments of social dialogue within the Community. There have been reports and articles on specific sectors, but few works that give an overall picture. Since the turn of the millennium, more and more researchers have directed their attention to the sectoral social dialogue.³¹⁰ Probably this is because, whilst the cross-industry social dialogue is currently seen as failing to fulfil the promises once given, the sectoral social dialogue offers grounds for hope for the future of European industrial relations. Furthermore, in most Member States, the sectoral social dialogue is the key level for collective bargaining, despite having been downgraded at the Community level in favour of the cross-industry social dialogue. In addition, the increased focus on subsidiarity in social policy debates has highlighted the importance of involving non-state actors, such as social partner organisations, in the policymaking processes.³¹¹

The sectoral social dialogue has thus become increasingly important to the future development of European industrial relations. It is quite likely here that we will find the most interesting and important contributions to European social policy in the future. However, the sectoral social dialogue is a complex phenomenon, even more so than the cross-industry social dialogue, not least because developments differ across sectors.³¹² In addition, the sectoral social dialogue has by no means developed according to the same general patterns that can be identified for the cross-industry

³¹⁰ See for example de Boer, R., Benedictus, H. and van der Meer, M. (2005) 'Broadening without Intensification: The Added Value of the European Social and Sectoral dialogue', *European Journal of Industrial Relations*, 11(1), pp. 51-70; Dufresne, A., Degryse, C. and Pochet, P. (eds.) (2006a) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang; Keller, B. (2003b) 'Social Dialogues at Sectoral Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate; Pochet, P. (2005) 'Sectoral social dialogue? A quantitative analysis', *Transfer*, 11(3), pp. 313-332; and also the entire issue no. 3, 2005, of the journal *Transfer*.

³¹¹ See Dufresne, A. and Pochet, P. (2006) 'Introduction', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 13-30, at pp. 13f and Keller, B. and Bansbach, M. (2000) 'Social dialogues: an interim report on recent results and prospects', *Industrial Relations Journal*, 31(4), pp. 291-307, at p. 305, who state that '*the interprofessional level is of less importance than the still highly underdeveloped sectoral one for the future of European industrial relations in general, and collective bargaining in particular ... due to the importance of the sectoral level in the vast majority of continental EU-member states.*'

³¹² Considering that the sectoral social dialogue committees number at least 40 (see CEU (2010a) *Commission staff working document on the functioning and potential of the European sectoral social dialogue*. Brussels (SEC(2010) 964 final), p. 5), it is unsurprising that the historical and contextual factors affecting the development of the social dialogue differ greatly. For a full list of the sectoral social dialogue committees established so far, see CEU (2016) *Website of the European Commission - Employment, Social Affairs & Inclusion - Policies and Activities - Agencies and Partners - Social Dialogue Texts Database*. Brussels: European Commission. Available at: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en&day=&month=&year=§orCode=SECT22&themeCode=&typeCode=&recipientCode=&keyword=&mode=searchSubmit> (Accessed: 2 July 2017).

social dialogue.³¹³ The cross-industry social dialogue has moved from focusing on and producing non-binding texts, through a phase of agreements extended *erga omnes* by Council Directive, to voluntary agreements and other instruments characterised by a higher level of flexibility. Within the sectoral social dialogue, developments have shown ‘no evidence of a gathering momentum from ‘tools’ towards ‘agreements.’³¹⁴ Furthermore, the variances between sectors are still large. In addition to these variances the role of the Commission and the ways the Commission has acted to promote social dialogue differ for the sectoral social and the cross-industry social dialogues.

The specific role of the Commission in relation to the sectoral social dialogue can be clearly seen in the institutionalisation of the sectoral social dialogue that occurred in the late 1990s. In order to fully understand this, it is necessary to first understand the developments leading up to this institutionalisation. This chapter will therefore deal with these early stages as well, beginning with the first committee. Throughout the chapter, specific issues of importance to the development of the sectoral social dialogue will be highlighted through examples from various sectors³¹⁵ with the aim of identifying critical factors for the social dialogue.³¹⁶

5.2.1 The early stages

The ECSC Treaty established a Consultative Committee that was to be consulted on general objectives and programmes. It was set up by an equal number of producers, workers, consumers and dealers. The scope for the ECSC Consultative Committee was both social and economic. This was followed by the High Authority establishment of two joint committees to work on harmonising working conditions and standard of living in the coal and steel sectors. However, these mixed committees

³¹³ An analysis of the historical developments of the cross-industry social dialogue will follow in the next chapter of this thesis.

³¹⁴ Pochet, P. (2005) 'Sectoral social dialogue? A quantitative analysis', *Transfer*, 11(3), pp. 313-332, at p. 329.

³¹⁵ Because some of these examples are best explained within the context of a specific section, there will be some unavoidable overlap between sections. However, the division of the sections is based on the chronology of the most important events in establishing the sectoral social dialogue in each sector taken as an example. Thus, one example might be placed in the section on informal working parties, as the social dialogue was established under these conditions, but the example might cover more recent events.

³¹⁶ It should be pointed out that because this thesis deals with the social dialogue as a whole and not specifically with the sectoral level, a full and complete analysis of sectoral level developments will not be given. Instead, important moments, actions and developments have been chosen that clearly illustrate the development of the social dialogue, in order to provide an answer as to why the European sectoral social dialogue has developed in this manner.

never fulfilled the promise of making a true contribution to social harmonisation, mainly due to the belief of employers that such harmonisation would be a natural result of economic integration.³¹⁷

This was not, however, the only factor to diminish the possibility for Community action in the field of social policy. Nor can the lack of influence by these committees be attributed to a sole focus by the Rome Treaty on economic integration. On the contrary, initial initiatives by the Commission in the early 1960s indicated the possibility of developing a legislative debate aimed at strengthening the social dimension of the economic community. It was thus not Community, but rather Member State politics that played an important part in social policy. The French position, in particular, worked to the great detriment of social policy creation within the Community in the 1960s. Citing a commitment to national sovereignty, France opposed a Community decision-making process in which the role of the Commission was to put forward initiatives that would then be decided upon by qualified majority in the Council. France's opposition to such a process was, however, not only based on a regard for national sovereignty, as France was one of the main promoters of the common policy in agriculture. The French political stance can instead be explained by a focus on economic liberalisation and the view that the Treaty of Rome was nothing more than a Treaty governing commercial and economic issues.³¹⁸ The values promoted by the economic system were thus the main priority, indicating that those values also had an impact on the programming of the Community policy-shaping systems.

Five 'joint committees' were later established at the sectoral level, mainly in common policy areas: agriculture in 1963; road transport in 1965; inland waterways in 1967; fisheries in 1968; and railways in 1972. These five sectoral joint committees can be divided into two categories, institutional and semi-institutional, driven by mainly external or also internal factors. The three different transport sectors fall into the institutional category, whereas the agriculture and fisheries sectors fall into the semi-institutional category. Depending on the category, these joint committees have thus either functioned as a mere consultative forum for the Commission, i.e. institutional driven by external factors, or have also had an internal function of producing reciprocal commitments between the social partners, i.e. semi-institutional. The semi-institutional committees have thus had somewhat greater autonomy than the institutional ones. In addition to the five formal joint committees, an informal

³¹⁷ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 50f.

³¹⁸ Mias, A. (2005) *Le Dialogue Social Européen (1957-2005) - Genèse et Pratiques d'une Institution Communautaire*. Doctorat en sociologie, Conservatoire National des Arts et Métiers, Paris, pp. 68f.

working group was also created, at the request of the social partner organisations, in the sugar sector.³¹⁹

The institutional committees were the three first joint advisory committees set up, in accordance with the Treaty requirements, in specific areas of European common transport policy: road transport, inland waterways and railways. Although their intended function was to draw up Community guidelines, these three joint committees in fact merely functioned as advisory committees in the development of a common transport policy. The results achieved did not at all stem from autonomous work within the committees, but rather followed from the Treaty requirements.³²⁰ In the road transport sector, a regulation intended to harmonise the composition of crews, rest periods and working time as well as overtime arrangements and the introduction of a control book was adopted in 1969³²¹ and implemented after some difficulties caused by initial resistance from the employers' side. It is worth noting that this regulation was not a result of negotiations between the social partners, but rather a mere standardisation of issues such as crew composition, working time matters and documentation of the same. The social partners merely functioned as an advisory body in the preparation of the regulations.³²²

These three joint committees demonstrate the Community will to establish a dialogue between employers and workers. In addition, they also provide an example of what could be considered a European social dialogue as a construction of Community law, intended as a remedy for the Community decision-making bottle-necks and implementation problems in the fields of labour law and social policy.³²³ In other words, these sectors, and the road transport sector in particular, are clear examples of the ESD having the function of legitimising the Community's legislative action. At this stage the idea of a system of industrial relations that managed conflicts between collective actors³²⁴ was not a reality. This does not necessarily imply that these joint

³¹⁹ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 50ff.

³²⁰ These committees were established in 1965, 1967 and 1972 respectively; see *ibid.*, p. 54.

³²¹ *Regulation (EEC) No. 543/69 of the Council of 25 March 1969 on the Harmonisation of Certain Social Legislation relating to Road Transport* (1969): Council of the European Union (OJ No L 77/1969).

³²² Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 54.

³²³ This is how the function of the European social dialogue has been defined by Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing, p. 52.

³²⁴ On the idea that systems of industrial relations have the function of managing conflicts between collective actors, see Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126.

committees should not be considered systems based on communication, nor that the ESD as a whole could not be viewed as an autopoietic system. In fact the joint committees did have structures for communication, did have specific members assigned to the committees and did to some extent make decisions in the form of joint opinions or statements formulated about Community policy in their respective sector.³²⁵ In this sense these committees can be understood as organisations producing decisions as part of the communication of the autopoietic system of the ESD, although they should not be confused with a bargaining organisation making decisions in the form of collective agreements in a more traditional system of industrial relations.³²⁶ The three committees in the transport sectors, however, were not the only ones established at this early stage, and the other two present a different picture of the sectoral social dialogue.

The semi-institutional joint committees were set up in 1963 for the agricultural sector and 1968 for the fisheries sector. These two joint committees had the aim of drawing up joint recommendations from the sectoral social partners. The intention was to achieve ongoing negotiations based on a general program of identifying issues, concerning the status of workers, which had reached a level of maturity that made them suitable for discussion. Although these sectors were subject to Community common policies, no Community rules were adopted, nor was there any Community intention to act unilaterally. In other words, these joint committees pursued their work on their own initiative, giving them a large degree of autonomy and providing a first example of autonomous collective bargaining at the Community level. In fact, it was within the agricultural sector that the first voluntary EU-level framework agreement³²⁷ falling strictly under the scope of what is now Article 155 TFEU was concluded. The agreement was, in other words, not concluded as a result of a Commission consultation in accordance with today's Article 154 TFEU.³²⁸ Thus for these two semi-institutional joint committees, developments were more in line with the notion of autopoietic systems of industrial relations working in accordance with a binary code of 'negotiable/non-negotiable between collective actors' and thus coming

³²⁵ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 54.

³²⁶ See Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press., p. 149 f and compare with Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 115ff.

³²⁷ GEOPA/COPA and EFA/CES 1997. Recommendation framework agreement on the improvement of paid employment in agriculture in the Member States of the European Union.

³²⁸ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 54ff.

closer to fulfilling the function of managing conflicts between those actors.³²⁹ In the context of the ESD as a whole, it is thus possible to see these two committees as collective bargaining organisations whose decision premises made the conclusion of collective agreements possible.³³⁰ The simple fact that negotiations occurred within these committees does not necessarily imply that their binary code would have to be set to 'negotiable/non-negotiable between collective actors'. A somewhat broader binary code ('discussable/non-discussable') would still allow for negotiations to take place. The difference from other sectoral committees could then be explained on the grounds that different organisations within the autopoeitic system can have different sets of decision premises, making different outcomes possible.

The two semi-institutional joint committees in the agriculture and the fisheries sectors thus make it clear that the theory, assuming that the ESD was created in a top-down manner and empty of autonomy, cannot be applied generally across the broad spectrum of developments that comprise the social dialogue. Furthermore, these two sectors also give an indication of the potential of the ESD to function as a resource in the creation of Community norms, and thus a resource within Community legislative procedures. By this I mean that decisions taken within these committees might well generate results in other function systems of the EU:³³¹ the legal system, for example, through the incorporation of EU-level sectoral agreements as legal acts. Depending upon the future interests of the social partners in these sectors and considering the autonomy of the same, the potential certainly exists for these sectoral social dialogue organisations to develop even further. The potential for development towards systems of industrial relations that actually create and implement regulations is present, and thus the possibility for the ESD to function as a regulatory process in and of itself at the EU level.

5.2.2 Joint committees and informal working parties

Whereas the establishment of the first five joint committees was driven by the existence of a Community common policy in the sectors concerned, a new driving force emerged in the 1980s, following the completion of the internal market. This driving force was the growing trend toward liberalisation, generating a need for sectoral regulations in the areas concerned. Four more joint committees were

³²⁹ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126.

³³⁰ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 149ff.

³³¹ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 121f.

established: sea transport in 1987; civil aviation in 1990; telecommunications in 1990; and postal services in 1994. The joint committees in sea transport and civil aviation were a complement to the previously established joint committees in the transport industry. The telecommunications and postal services joint committees were established mainly in response to the liberalisation of these sectors.³³² That the liberalisation of these sectors was a driving force behind these joint committees is evident, as all the Decisions establishing them, in addition to mentioning the improvement and harmonisation of living and working conditions, also mentioned the need to improve the economic and competitive position of the sector in question.³³³ In these cases it is thus possible to identify the liberalisation of markets as a force for communication in various function systems, including the ESD. Since the liberalisation of markets can be seen as an objective pursued in order to promote the values of the economic system, such as increased competitiveness and profit, it is possible to interpret this as a multi-systemic response to communication from the economic system. This highlights the role of the economic system as a system with the capacity to produce results that affect other function systems, at least as regards the values framing the programming of those systems.³³⁴

Several informal working groups were also established as a result of the Commission's 1984 social action programme. The informal working groups covered as many as 14 sectors, including tourism, commerce, banking, construction, textile and electricity. The main job of these informal working parties was to analyse employment and training, and they had the rather vague aim of establishing a link of trust and mutual understanding between the parties.³³⁵ Despite their vague and non-binding results, analyses have concluded that the informal working groups were often established '*on the basis of interests shared between the social partners*'.³³⁶ They were all formed on grounds similar to those for the informal working group set up for the sugar sector in the 1960s: the impact of economic change gave both sides of industry an interest in dialogue as a means to solving their problems. Their work, however, focused on exchange of information and not on negotiations. Although the Commission

³³² Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 52f.

³³³ *Ibid.*, p. 57.

³³⁴ See Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press., pp. 203 f and Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 121f.

³³⁵ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 59ff.

³³⁶ *Ibid.*, p. 59.

provided backing, the main impetus behind the informal working groups was shared interests between the sectoral social partners.³³⁷

These informal working groups can thus be viewed as additional steps in the development of the ESD as an autonomous system of industrial relations. Economic change and the policy changes that resulted provoked an irritation in the system of industrial relations and set off a series of communications that became self-referential.³³⁸ Decisions were taken to set up committees for discussions, i.e. communication, and subsequent discussions in the committees referred back to these decisions. Because established structures already existed for the ESD as a whole, it is possible to view these committees as newly formed organisations for potential bargaining.³³⁹ The focus on information exchange rather than negotiation further strengthens the argument that the binary code for the system and its organisations is the broader 'discussable/non-discussable between collective actors' rather than 'negotiable/non-negotiable'. Here also, economic changes were an important factor in kicking off communication, again highlighting the importance placed on economic values by different function systems of the EU.

The dynamics powering the establishment of these informal working parties are well illustrated by the example of the construction sector. The construction sector was fairly early in establishing informal procedures for social dialogue. Social partners in the construction sector initiated dialogue in the 1970s and contacted the Commission on issues including employment problems and employee entitlements under supplementary pension schemes, social security and unemployment benefits. In the early 1990s, the sectoral social partners FIEC³⁴⁰ and EFBWW³⁴¹ took up a dialogue independently of the Commission about the question of the posting of workers. The issue was one of great concern to both sides of industry, as it presented a risk of having to deal with competing sets of legislation within the same country.³⁴²

³³⁷ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 60.

³³⁸ Luhmann, N. (2005a) 'The Autopoiesis of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 64-84, at pp. 72ff.

³³⁹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 143ff.

³⁴⁰ The European Construction Industry Federation.

³⁴¹ The European Federation of Building and Woodworkers.

³⁴² This concern was also expressed by the social partners in a joint declaration following the adoption of the Directive. See FIEC and FETBB 1997. Joint FIEC-FETBB Position. Brussels: European Commission.

The social partners in the construction sector adopted a common position on the issue of posted workers in 1993. The position was later used in their work on a joint declaration, signed in 1997, on the implementation of the Directive³⁴³ adopted in 1996. This issue thus generated discussion and cooperation between the parties, which in turn strengthened their mutual trust and enabled them to embark upon social dialogue on other issues. In 1995 they established a joint forum on European training and they have also drawn up joint recommendations on health and safety.³⁴⁴ The construction sector is thus a good example of a sector within which a dialogue between the sectoral social partners existed, independently of Commission initiatives, before the Treaty recognition of such dialogue. Their dialogue was not created in response to Treaty provisions; rather, the social partners used the opportunities granted to them by the Treaty to further their common interests. This also makes the construction sector a good example of a bargaining organisation established by members, where the membership conditions are that members must be relevant for the sector, represent either management or labour and want to make decisions that affect conditions in the sector.³⁴⁵ In this sense the construction sector informal working party thus produced decisions making part of the communication within the ESD as a function system. Worth noting is that economic issues were essential in kicking off communication and can be considered a ready means that allowed members to overcome the improbabilities of communication.

The sugar and the textiles sectors also illustrate well the interests and factors that lay behind the establishment of the informal working parties. In the sugar sector, the two sides of industry voluntarily established contacts, without the involvement of the Commission, as early as 1969. The establishment of direct contacts was spurred by the economic changes affecting this sector in the 1960s, changes that caused problems for both management and labour and which the two parties saw a possibility of solving through a joint effort. The dialogue between the two sides of industry focused on the exchange of information; it did not include negotiations.³⁴⁶

The social partners in the textile sector, where production structures were threatened by competition from third countries, also found a common interest in establishing a

³⁴³ Directive 96/71/EC of the European Parliament and the of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services (1997): European Parliament and Council of the European Union (OJ No L 18/1997).

³⁴⁴ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 60f.

³⁴⁵ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142f.

³⁴⁶ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 60.

dialogue in the 1960s. Their first talks were held in 1963. However, employers were not willing to discuss social problems connected with the difficulties in the sector. Therefore, the only measures taken were such as aimed to safeguard the industry in economic terms. Regular social dialogue within this sector was established in the form of an informal working party in 1992, spurred above all by the internationalisation of the sector. The main issues discussed were those dealt with at the cross-industry level, and dialogue took place whenever the sectoral social partners considered that sectoral discussions might add value to the process.³⁴⁷ Initially, however, the aim of the dialogue in this sector was merely to foster mutual understanding between the social partners, since the employers' association, and especially the national affiliates from the Nordic countries, rejected any form of dialogue that would result in binding measures.³⁴⁸

These examples once again highlight both the importance of economic values and the need for a broader interpretation of the ESD binary code. It is clear that the ESD is not governed by a binary code of 'negotiable/non-negotiable between collective actors'. Too many examples show that the communication occurring within the ESD is actually framed in accordance with a code of 'discussable/non-discussable between collective actors' (although such communication can still include negotiations). It is also apparent that the need to deal with economic values repeatedly has driven the establishment of various decision-making organisations of importance for the production of communication within the system of the ESD, and economic values have thus been part of the programming of the ESD for a long time.³⁴⁹

5.2.3 The social agreement protocol and the following period

When the Maastricht Treaty entered into force, new opportunities opened up for the sectoral social dialogue – despite it not being explicitly mentioned in the ASP, the Commission did make use of the ASP procedures at the sectoral level as well. The

³⁴⁷ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 61f and Pochet, P. 'Textiles and Sugar', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 193-218, at pp. 196f.

³⁴⁸ Dufresne, A. 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, p. 61.

³⁴⁹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 203ff.

reason for doing so was the exclusion of the transport sectors³⁵⁰ from a Council Directive concerning certain aspects of the organisation of working time.³⁵¹ Seeking to ensure the same conditions for all workers, while taking the specific characteristics of the transport sectors into account, the Commission published a White Paper devoted to these sectors. The motives for the revision mainly focused on the health and safety of workers and the security of the general public, although economic issues such as the distortion of competition were also used as an argument to emphasize the need for the review.³⁵² The introduction of quality majority voting on these issues had also made the process of adopting legislation more likely to success as single Member States no longer would be able to block a proposal. At this stage there was thus a certain level of momentum for the promotion of social values within the programming of the EU policy-shaping systems. This momentum produced a shift in the values that framed the programming of the political system, allowing that system to overcome the improbabilities of communication and having communication framed by social values accepted.

The Commission further urged the social partners in the joint committees for the various modes of transport to make recommendations for how the principles of the Directive could be adapted for each sector. This launched a second round of consultations of the transport sector social partners, who were requested to amend the Directive so as to extend all of its rules to all non-mobile workers and provide sufficient protection for mobile workers and workers at sea.³⁵³ During this process it remained clear that the Commission wished for an extension of the Directive to the excluded sectors, and a legislative proposal would be published either way, but the social partners had the opportunity to negotiate the specific terms amongst themselves, in order to better adapt regulations to the specific characteristics of the sectors concerned.³⁵⁴ The Commission thus used the shadow of law³⁵⁵ to get the

³⁵⁰ Fisheries, other offshore activities and trainee doctors were also excluded from the Working Time Directive. See Article 1(3) *Council Directive 93/104/EC of 23 November 1993 concerning Certain Aspects of the Organisation of Working Time* (1993): Council of the European Union (OJ No L 307/1993).

³⁵¹ *Ibid.*

³⁵² CEC (1997) *COM(97) 334 final - White Paper on Sectors and Activities Excluded from the Working Time Directive*. Brussels: European Commission (COM(97) 334 final).

³⁵³ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 62f.

³⁵⁴ CEC (1997) *COM(97) 334 final - White Paper on Sectors and Activities Excluded from the Working Time Directive*. Brussels: European Commission (COM(97) 334 final), p. 16.

social partners to negotiate. This can be understood in terms of the political system setting the condition that legislation will be issued regardless of whether the industrial relations system manages to conclude agreements with the hope that this condition could result in adaptation of the programming of the ESD or decision premises of the relevant bargaining organisations. As explained by Luhmann such conditions can be observed though the conceptualisation of steering of systems, but since it is only possible for systems to steer themselves and not other systems it is not possible to predict the outcome of such conditions in another system.³⁵⁶ This also becomes evident when considering the fact that even though negotiations took place in all five transport sectors, only three managed to conclude agreements: railways, sea transport and civil aviation. We can say that the shadow of law framed the decision premises for these bargaining organisations:³⁵⁷ ‘if there is a shadow of law, then we will make a decision to negotiate’.

A social sectoral dialogue committee was established in the railway sector in 1998 following a Commission decision on reform of the sectoral social dialogue,³⁵⁸ but dialogue between the social partners in this sector started more than ten years before that. The joint committee in this sector adopted 17 joint opinions during the years 1986–1997, mainly in response to Community actions, expressing their strong opposition to deregulation and liberalisation of the sector. Railway companies and trade unions from the sector thus joined forces in criticising the unfair competitive advantages other modes of transport enjoyed, in particular road transport. According to the joint committee, road transport was highly favoured over rail transport, in that the rail sector financed its own infrastructure, whereas the road transport sector had its infrastructure financed by motorists and the States. They also saw difficulties for rail transport to compete with road transport as long as social dumping continued to be practiced within the latter sector. They demanded that measures be taken to increase control and enforcement of social legislation in the road sector. In the view of the joint committee, liberalisation of the railway sector could not be an alternative while these unfair competitive advantages persisted. They called for a European transport policy that would restore the balance between the road and rail transport

³⁵⁵ The shadow of law can be understood as a mechanism that leverages the structural coupling between the ESD and the policy-shaping systems of the EU. By threatening to legislate, the policy-shaping systems produce a result that impacts the ESD, in that it removes the improbability of having communication accepted for the trade union members in the bargaining organisation of the ESD. For further explanation of ‘the shadow of law’ see sections 1.3 above or 6.5 below.

³⁵⁶ Luhmann, N. (1997b) ‘Limits of Steering’, *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 48ff.

³⁵⁷ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 145.

³⁵⁸ CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998).

sectors. The cooperation between employers and trade unions in the rail transport sector was thus provoked by the fear both parties felt about the potential risks and effects of liberalisation of the sector. Whilst the trade unions feared that working conditions and social benefits would suffer from liberalisation, employers feared competition from new operators and difficulties arising from not having enough time to introduce internal reforms.³⁵⁹

Since both management and labour in this sector felt a need to promote economic values within the sector, albeit for differing reasons, values of ensuring competitiveness and profit within the sector became the driving force for the establishment of a bargaining organisation. Promoting economic values was a way to address the worries of members, and as such these values framed the decision premises for this organisation.³⁶⁰

In 1997, the employers changed their view of liberalisation and started to focus more on preparations for its implementation. As the trade unions still held their tough line, it became more and more difficult to reach agreements on joint opinions within the committee. Put another way, when members of the organisation sought to make decisions establishing new decision premises, then the improbability of having communication accepted once again became a problem for the organisation.³⁶¹ This in turn caused difficulties within the FST³⁶² on matters of strategy, and divides opened between national affiliates. An agreement on working time was nevertheless concluded in 1998. The reason the agreement could be reached was twofold. Firstly, neither the trade unions nor the employers considered that an agreement on working time put much at stake; there were other issues they considered more important or threatening.³⁶³ In other words, a decision considered less important for future decisions will not face as strong challenges in terms of the improbability of having communication accepted.³⁶⁴ Secondly, it was clear from the start that the

³⁵⁹ Hilal, N. (2006) 'The Case of Rail Freight', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 133-161, at pp. 135ff.

³⁶⁰ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 203f and Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 145f.

³⁶¹ On membership, decision premises and improbabilities of communication see Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348.

³⁶² Later the ETF.

³⁶³ Hilal, N. (2006) 'The Case of Rail Freight', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 133-161, pp. 144f.

³⁶⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

Commission would put forward a legislative proposal regardless of the outcome of the social dialogue, so in this case the worked as a condition from the political system generating a result of adapted programming for this specific bargaining organisation making decisions as part of the communication produced within the ESD. This again shows the potential for the shadow of law to influence the basis for the decision premises applied by organisations within the ESD, even though such influence can not be guaranteed, but rather depends on whether the ESD as a system will perceive the condition of the shadow of law in the manner that the political systems intends.

In the civil aviation sector, employer interests are fragmented, with five different organisations representing the industry's employers. There, the agreement on working time is the most substantial result of the SSDC. The successful conclusion of this agreement was undoubtedly the result of the pressure exerted by the shadow of law. The significance of the shadow of law is highlighted by the fact that after the working time agreement was signed; union demands for negotiations on additional flight time limitation were completely rejected by employers. Employers here also disagree on the economic effects of the increased liberalisation of their sector. Their main objective in participating in social dialogue has been to fast-track their access to the European institutions in order to lobby for their respective interests.³⁶⁵ In other words, this bargaining organisation struggles to act on decision premises relating to when decisions should be taken,³⁶⁶ except for the premise that 'decisions are taken when legislation is considered a real possibility'.

In the sea transport sector, which was the first transport sector to sign a working time agreement, the shadow of law was only one factor contributing to the success of negotiations on working time. Here, the negotiations on working time within the European sectoral social dialogue coincided with international negotiations on working time, conducted by the same people. ILO Convention 180,³⁶⁷ which established maximum working hours and minimum rest periods, was adopted in 1996 and intensified the debate between the social partners when the Commission published its White Paper on the issue in 1997. The debate between representatives for employers and workers in this sector resulted in 1998 in an agreement that enshrined the rules of the ILO Convention. In 1999 this agreement was implemented in a directive covering all seafarers on board vessels registered in an EU Member

³⁶⁵ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 65f.

³⁶⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142ff and Seidl, D. (2005) 'The Basic Concepts of Luhmann's Theory of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53, at pp. 42ff.

³⁶⁷ *Convention 180 on Seafarers' Hours of Work and the Manning of Ships* (2006): ILO.

State.³⁶⁸ The negotiations that took place, and to some extent were initiated even before the Commission consultations began, show that the structures for communication already existed. A bargaining organisation capable of producing decisions making part of the communication within the ESD had thus developed, and the impact of the shadow of law indicates its structural coupling with the policy-shaping systems of the EU.³⁶⁹ The role of the Commission in establishing an arena for sectoral negotiations on working time also indicated that the Commission had a clear idea of how it wanted this part of the ESD to develop, and can thus be seen as a sign of the impending institutionalisation of the sectoral social dialogue. The policy-shaping systems of the EU used their structural coupling with the ESD to secure their own recurring communication, using decisions in the form of sectoral agreements from bargaining organisations within the ESD. In this manner, the policy-shaping systems of the EU could continue their own communication about matters that otherwise would might have fallen outside the binary codes of these systems.

5.3 Institutionalisation of the sectoral social dialogue

Until the mid 1990s there had been no specific mention of the sectoral social dialogue, either by the Commission or in the Agreement on Social Policy and subsequent Treaty provisions on social dialogue. In fact, the only indication that the sectoral social dialogue was included under the Articles 154-155 TFEU procedure was that sectoral organisations were listed as meeting the criteria of representativeness in the Annex to the Commission Communication of 1993.³⁷⁰ However, with its 1996 Communication on developing the social dialogue,³⁷¹ the Commission indicated the importance of the sectoral social dialogue and the need to pay it further attention. As a result, 1998 was an important year for the sectoral social dialogue. Structural changes to the former joint committees and informal working parties came with the launch of the Sectoral Social Dialogue Committees (SSDC). The Commission introduced these changes in its Decision on the Establishment of Sectoral Social

³⁶⁸ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 64. For a further analysis of the social dialogue in the maritime transport sector, see chapter 11 below.

³⁶⁹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142ff.

³⁷⁰ CEC (1993) *COM(93) 600 final - Communication from the Commission on the Application of the Protocol on Social Policy*. Brussels: European Commission (COM(93) 600 final).

³⁷¹ CEC (1996a) *COM(96) 448 final - Communication from the Commission concerning the development of the social dialogue*. Brussels: European Commission (COM(96) 448 final).

Dialogue Committees Promoting the Dialogue between the Social Partners at European level.³⁷² There were several reasons for the changes.³⁷³ In the sections below I will first examine the reasons for this institutionalisation and then analyse the results it has generated, for and within the ESD.

5.3.1 The reasons for the institutionalisation and its implications for the sectoral social dialogue

The Commission decided to institutionalise the sectoral social dialogue for several reasons. Firstly, consultations had not been exploited to their full potential (outside of mandatory consultations). When the Commission sought the opinions of the social partners, responses had often not come until after the adoption of the proposal in question. Secondly, the consultation of the social partners had been restricted to the social aspects of Community policies. Despite often having a social impact, economic aspects of Community policies had been excluded, which frequently resulted in social aspects being neglected. Thirdly, the existing social dialogue bodies imposed financial and administrative burdens on the Commission, due to their vast number of meetings and participants. Finally, the Commission pointed out a lack of interaction between different sectors as well as at the sectoral and cross-industry level and regretted the resulting loss of opportunities to learn from the experiences of other sectors and understand issues and important policy considerations at both the sectoral and cross-industry levels.³⁷⁴

The setting up of SSDCs and the accompanying changes were intended to address these problems and find better, more efficient and productive solutions for the future.³⁷⁵ The Commission saw a need to change social dialogue structures in order to

³⁷² CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998).

³⁷³ Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 68ff.

³⁷⁴ In 1994 there were more than 130 meetings, each with between 24 and 50 participants. CEC (1996a) *COM(96) 448 final - Communication from the Commission concerning the development of the social dialogue*. Brussels: European Commission (COM(96) 448 final), pp. 6f.

³⁷⁵ In Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 69, three objectives for the reform are identified: reduce the members on each committee; cover all strategic sectors; and improve intersectoral information and coordination. These objectives are clearly part of the reform, but the importance the Commission has placed on its own role and function in developing the social dialogue is not fully recognised here. The role of the Commission as the main actor coordinating and assuring cooperation within the consultative procedures needs to be taken into account as well.

develop an overall strategy for sectoral dialogue and come to grips with ‘inconsistencies in the sectoral dialogue coverage’, so that ‘more substance could be given to the social dialogue at sectoral level by focusing it on strategic issues and sectors, particularly where the social partners are clearly active’.³⁷⁶ More specifically, the changes were intended to ‘strengthen co-operation and co-ordination ... concerning the consultation procedures’³⁷⁷ with regard to the Commission’s role in these procedures, by reducing the number of members of the Joint Committees in order to ‘ensure efficiency’;³⁷⁸ and to ‘strengthen inter-sectoral co-ordination, bringing together representatives from the different sectoral dialogues for information from the Commission [in order to] provide for a more efficient way of informing social partners, avoiding duplication and ensuring that important information went to all sectors’.³⁷⁹ The Commission further pointed out the need for sectoral Joint Committees and Informal Working Parties to be ‘able to operate in a more flexible manner and under a restricted linguistic regime, in order to make consultation in advance more feasible’,³⁸⁰ suggesting that communications technology be made available to the social partners as a means to improve the conditions for consultations. The institutionalisation of the sectoral social dialogue can thus be seen as a means for the policy-shaping systems of the EU to overcome the improbabilities of communication, specifically the difficulties of reaching the correct addressee and assuring that the communication is understood.³⁸¹

The structural changes to the sectoral social dialogue were implemented through the Commission Decision on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue Between the Social Partners at European level.³⁸² This decision replaced both the former joint committees and the informal working parties with SSDCs, thus applying the new rules to all sectoral social dialogue bodies. The

³⁷⁶ CEC (1996a) *COM(96) 448 final - Communication from the Commission concerning the development of the social dialogue*. Brussels: European Commission (COM(96) 448 final), p. 7. What this strategy actually meant was, however, not defined, but the Commission urged the social partners to give their opinions on the matter.

³⁷⁷ *Ibid.*, p. 7.

³⁷⁸ *Ibid.*, p. 8.

³⁷⁹ *Ibid.*, p. 8.

³⁸⁰ *Ibid.*, p. 8.

³⁸¹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

³⁸² CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998). In accordance with Article 7(3) of this decision, the date of implementation was January 1, 1999.

new rules required the social partners in each sector to make a joint request³⁸³ to set up an SSDC, and with the Commission establish its rules of procedure.³⁸⁴ The requirements for setting up internal rules of procedure meant that all the sectoral committees would now possess a foundation for developing structures for communications and/or decisions. The Commission recommendations provide generally similar programming of a system for social dialogue, while the internal rules of procedure allow each sectoral bargaining organisation to develop its own conditions for membership and decision premises. The communication becomes self-referential in the sense that future communication within the organisations refers back to the rules of procedure in some manner, for example by referring to who is considered a member of the organisation or what the organisation has set out to achieve.³⁸⁵ The maximum number of representatives on each SSDC was set at 40, with an equal number of representatives to come from both labour and management.³⁸⁶ These representatives would henceforth be considered representatives of their European organisations, and no longer individuals appointed by the EU institutions.³⁸⁷ This meant that the social partners gained a higher level of autonomy regarding the selection of representatives to the SSDCs, as compared to the earlier joint committees. In other words, the SSDCs were granted the autonomy they required as organisations to determine their conditions of membership.

In another way, however, the autonomy of the SSDCs was limited, especially by comparison to the former Informal Working Parties. The Commission determined that a Commission representative would attend SSDC meetings as a meeting secretary,³⁸⁸ meaning that all work in the committees would be carried out under the

³⁸³ In order for the Commission to approve such a request the social partners must meet certain criteria for being organised at the European level, as set up in Article 1(a)-(c) of the Decision. European organisations must relate to specific sectors, consist of organisations that are part of Member States' industrial relations systems and are representative of several Member States with the capacity to negotiate agreements, and have adequate structures to assure effective participation in the work of the sectoral social dialogue committees.

³⁸⁴ CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998), Articles 1 and 5(1).

³⁸⁵ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 143.

³⁸⁶ CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998), Article 3.

³⁸⁷ For the ECSC Committee the Council appointed the representatives; for the Joint Committees the Commission appointed the representatives. See Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at p. 70.

³⁸⁸ *Ibid.*, p. 70.

eyes of the Commission. By assigning itself the function of reviewing the work of the committees, the Commission retained its position as the foremost actor promoting social dialogue.³⁸⁹ Thus, even as it promoted and developed the social dialogue by seeking new and better-equipped structures for it, the Commission also ensured itself a certain level of control, thus limiting the autonomy of the social partners. Perhaps this is not surprising, given that the Commission has the task of promoting and developing the social dialogue³⁹⁰ and also bears a large part of the financial burden of the SSDC meetings.³⁹¹ When considering the potential future of the ESD, however, it is important to bear in mind how the autonomy of the social dialogue is either facilitated or limited. The fact that the Commission assumed a certain level of control over the SSDCs also guaranteed a continued strong link between the EU policy-shaping systems and the SSDCs, a link that might have repercussions for the potential autopoiesis of the ESD. While not necessarily implying that the SSDCs are disqualified from consideration as bargaining organisations that contribute to the production of communication within the ESD, the Commission representative within these bodies will ensure that impulses from the EU policy-shaping systems are transposed to or dealt with within them, thus ensuring a strong structural coupling between the EU policy-shaping systems and the ESD through its organisations in the form of SSDCs.

The issue of an omnipresent Commission representative within the SSDCs will, however, need to be assessed in Luhmann's terms in relation to the issue of communication. After all, it is not the representative as such that is important; rather it is the communication produced within the system and the capacity of the system for self-referential communication that are decisive for the system's autopoiesis.³⁹² I would therefore like to relate this to the research highlighted by Léonard, where it is implied that an active role taken by the Commission generates a better working SSDC.³⁹³ Perhaps then the role of the Commission within the SSDCs could be that

³⁸⁹ CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998), Article 5(4).

³⁹⁰ Article 154(1) 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.*'

³⁹¹ Meeting expenses are reimbursed for a maximum of 30 representatives, 15 each on the management and labour sides, in accordance with Article 5(3) CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998).

³⁹² For a concise contribution on autopoiesis, see Luhmann, N. (2005b) 'The Concept of Autopoiesis', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organizational Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 54-63.

³⁹³ Léonard, E. (2008) 'European Sectoral Social Dialogue: An Analytical Framework', *European Journal of Industrial Relations*, 14(4), pp. 401-419.

of a communicative facilitator, and the apparent limitation of the autonomy of the SSDCs should rather be considered as an element that increases the potential for self-referential communication. Things can thus be viewed in a more positive light, in that the presence of a Commission representative to the SSDCs is likely to increase the probability of outcomes or communications within the EU policy-shaping system that generate results or at least communications within the EU system of industrial relations.³⁹⁴ In other words, the structural coupling in this case might actually work to facilitate decisions within the SSDCs and thus contribute to further developments of the organisations and hence the ESD autopoietic system at large. In order to better understand what implications the institutionalisation of the European sectoral social dialogue has had for the potential future of these bodies as bargaining organisations contributing to the production of communication within the ESD, I will now highlight some of the developments that have resulted from this institutionalisation.

5.3.2 Developments in the sectoral social dialogue as a result of its institutionalisation

First of all, it is important to bear in mind that the institutionalisation of the European sectoral social dialogue has reinforced the institutional framework, providing clearer structures and formal competencies for the social partners involved in the SSDCs.³⁹⁵ The number of SSDCs is increasing,³⁹⁶ opening up for an even broader range of sectors covered by the communication taking place within the ESD. The new system, which guarantees institutional support from the Commission for each SSDC set up, is quite likely to be an important factor in the increase in SSDCs. European trade union and employers' organisations have emphasised the scarce financial resources for European organisations as an obstacle to engaging in social

³⁹⁴ Compare to reasoning on collective agreements as outcomes of industrial relations systems that generate results in the economic system, in Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126.

³⁹⁵ Léonard, E. (2008) 'European Sectoral Social Dialogue: An Analytical Framework', *European Journal of Industrial Relations*, 14(4), pp. 401-419.

³⁹⁶ The Commission now recognises more than 40 SSDCs (43 were mentioned on the Commission webpage <http://ec.europa.eu/social/main.jsp?catId=480&clangId=en> as of 26 September 2016); previously there were nine joint committees and 14 informal working groups. See Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82; Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158; and Perin, E. and Léonard, E. 'European sectoral social dialogue and national social partners', *Transfer*, 17(2), pp. 159-168.

dialogue at the EU level.³⁹⁷ Thus, Commission support in providing meeting rooms and other useful facilities is likely to be a strong facilitator in the setting up of new SSDCs.

Given the above, I consider the signing of a 2006 multi-sectoral agreement to protect workers' health through proper handling of crystalline silica³⁹⁸ to be a development facilitated by the new structures for the European sectoral social dialogue. This agreement was negotiated and concluded within the framework of an ad hoc body set up by representatives from 17 employer and trade union organisations spanning several sectors.³⁹⁹ The agreement defines clear procedures for implementation and follow-up,⁴⁰⁰ including the establishment of a supervisory body in charge of follow-up with the competence to resolve any disputes on the interpretation of the agreement.⁴⁰¹ The evaluations of the implementation of the agreement indeed show significant improvements between the first round of follow-up in 2008 and the second round in 2010.⁴⁰² In addition, the agreement requires the signatory parties to meet to discuss the consequences for the agreement if the EU in the future proposes legislative measures concerning crystalline silica.⁴⁰³ Thus, this agreement has opened up for and established self-referential communication on issues relating to the agreement. It can thus be considered as another bargaining organisation making decisions that form part of the communication within the ESD. The concluded agreement can thus be

³⁹⁷ This is particularly notable for social partners in Member States who acceded to the EU in 2004 and later. See for example Wild, A. (2008) *Joint Project of the European Social Partner Organisations Social Partners' Participation in the European Social Dialogue: What are the Social Partners' Needs? - Interim report «A review of activities and conclusions from the project to date as they relate to the phase involving Bulgaria, Croatia, Romania and Turkey»*, Brussels: ETUC, BUSNIESSEUROPE, CEEP, UEAPME.

³⁹⁸ APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe and UEPG Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it.

³⁹⁹ See CEC (2006g) Millions of workers' health to be protected by Europe's first multisector agreement. Brussels.

⁴⁰⁰ In respect to implementation and follow-up procedures, this agreement is also highlighted as a good example by the Commission. CEU (2010a) *Commission staff working document on the functioning and potential of the European sectoral social dialogue*. Brussels (SEC(2010) 964 final), p. 18, note 38.

⁴⁰¹ Articles 7 and 8 APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe and UEPG Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it.

⁴⁰² Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158.

⁴⁰³ See Article 12(4) APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe and UEPG Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it.

considered a decision that sets conditions for membership and decision premises in a manner that seeks to guarantee that future decisions will be taken within the organisation.⁴⁰⁴ Even though not all parties involved in the negotiation of the agreement belonged to existing SSDCs,⁴⁰⁵ it is likely that the SSDC structures already established by the Commission also facilitated the setting-up of this ad hoc multisectoral committee. This, in combination with the fact that the Commission had made clear its intent to regulate the issue, provided the necessary impetus to commence negotiations.

In relation to the abovementioned multisectoral agreement and the implications of further development of the ESD as a self-referential system, it is also worth mentioning the multisectoral guidelines signed in September 2010 to tackle third-party violence and work-related harassment. Although the legal status of this document can be debated, its contents established structures for follow-up, which ensure that the signatory parties will continue to discuss the issue.⁴⁰⁶ A follow-up report was also published,⁴⁰⁷ providing a good example of how, when structures for continuous self-referential communication are set up, these structures can also generate further development for the ESD as a system of communication. The fact that the ESD developed in a manner whereby '*institutionalisation [came] before action*',⁴⁰⁸ or in other words in a top-down manner,⁴⁰⁹ does not necessarily mean that it is condemned to forever remain '*far from the good old definition of industrial relations*'.⁴¹⁰ Instead, we might be witnessing the establishment and development of self-referential communicative structures, indicating an increased potential for the ESD to develop further as an autopoietic system of industrial relations. The

⁴⁰⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142ff.

⁴⁰⁵ Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158.

⁴⁰⁶ See Stage 3 in the guidelines EPSU, UNI-EUROPA, CEMR, EFEE, ETUCE, EuroCommerce, HOSPEEM, CoESS 2010. Multi-Sectoral Guidelines to Tackle Third-Party Violence and Harassment Related to Work. Brussels: European Commission.

⁴⁰⁷ EPSU, H., CEMR, UNI-EUROPA, EUROCOMMERCE, ETUCE, EFEE, CoESS 2013. Joint EPSU-HOSPEEM-CEMR-UNIEUROPA-EUROCOMMERCE-ETUCE-EFEE-CoESS Report on the follow-up and implementation of the multi-sectoral guidelines to tackle work-related third-party violence. European Commission.

⁴⁰⁸ Léonard, E. (2008) 'European Sectoral Social Dialogue: An Analytical Framework', *European Journal of Industrial Relations*, 14(4), pp. 401-419, at p. 416.

⁴⁰⁹ See for example Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82.

⁴¹⁰ Léonard, E. (2008) 'European Sectoral Social Dialogue: An Analytical Framework', *European Journal of Industrial Relations*, 14(4), pp. 401-419, at p. 417.

institutionalisation of the SSDCs is not the only or main factor contributing to these developments, but it has had an impact.⁴¹¹ I will therefore continue with a brief, more general consideration of the texts produced within the European sectoral social dialogue.

Looking more broadly at the results coming out of the sectoral social dialogue after its institutionalisation, we also find interesting developments. The texts produced since 1998, Commission control over the social dialogue notwithstanding, have shifted in terms of their addressees. Previously primarily addressing the EU Institutions, these documents have increasingly been directed to the national member organisations.⁴¹² In other words, the sectoral social partners appear to be seeking more autonomy for their dialogue and to be using it as a tool for their member organisations instead of merely a way to lobby the EU Institutions. The structures for these bargaining organisations are apparently becoming more developed; allowing the organisations to make decisions based on other decision premises than the shadow of law. With decisions directed more at their own member organisations, it seems that the conditions for membership are in the process of developing further.⁴¹³ Although this conclusion is not fully generalizable – vast differences between sectors remain – it is nevertheless an interesting tendency to keep in mind. Although the number of texts produced within the European sectoral social dialogue had already begun to increase by 1996, after the institutionalisation of the SSDCs a more stable increase is apparent. More importantly, the number of texts entailing some form of reciprocal commitment between the parties involved has trended upwards, most notably from 2003 and onwards.⁴¹⁴

These developments indicate increased communicative activity within the sectoral bodies of industrial relations, signalling a potential for further establishment or strengthening of system-specific structures for communication. The developments are probably best explained as the definition of various bargaining organisations that make decisions contributing to the communication within the autopoietic system of the ESD; perhaps even providing the potential for development towards a system of industrial relations where organisations take decisions in the form of collective

⁴¹¹ The main impact is probably that of generating an increase in the number of SSDCs established; see Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158.

⁴¹² Pochet, P. (2006a) 'A Quantitative Analysis', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 83-109, at p. 98. and more recent Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158.

⁴¹³ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

⁴¹⁴ Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158.

agreements. As of yet, however, most of the results produced within these bargaining organisations are of a soft character, and follow-up clauses are relatively vague, except for texts concerning issues where a Community legislative proposal has been suspended due to negotiations within the SSDC in question.⁴¹⁵ The decisions taken in the form of agreements have also, in most cases, been taken in accordance with the decision premise based on the shadow of law, as they have followed a Commission consultation procedure.⁴¹⁶ This indicates that many of these bargaining organisations are still struggling with the improbabilities of communication as regards the further development of decision premises,⁴¹⁷ and therefore the structural coupling with EU policy-shaping systems will probably be the most important factor spurring the future development of these organisations.

In relation to this it is worth taking up a more recent example that show the importance of the structural coupling between the ESD and the EU policy-shaping systems in order for the ESD to produce communication with effects for individual workers. The example concerns the hairdressing sector where the social partners of that sector autonomously reached an agreement on health and safety for workers in the sector.⁴¹⁸ This agreement was originally intended to cover not only workers, but also self-employed since the sector to a vast extent consist of self-employed. However, after the social partners had consulted the Commission legal services the aim was changed to cover self-employed when they work together with someone holding an employment, but in the preamble the Member States are encouraged to extend the coverage to self-employed in a broader sense.⁴¹⁹ The fact that the social partners originally intended the agreement to cover self-employed persons is a clear indication that the scope Art. 153 TFEU shall not be considered part of the binary code of the ESD,⁴²⁰ but instead is to be considered a condition of the policy-shaping systems of

⁴¹⁵ CEU (2010a) *Commission staff working document on the functioning and potential of the European sectoral social dialogue*. Brussels (SEC(2010) 964 final), p. 17.

⁴¹⁶ Degryse, C. and Pochet, P. (2011) 'Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?', *Transfer*, 17(2), pp. 145-158, at p. 156.

⁴¹⁷ On improbabilities of communication see Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff and on decisions framing future decisions in organisations see Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 143f.

⁴¹⁸ CoiffureEU and UNI-Europa-Hair&Beauty 2012. European Framework Agreement On the Protection of Occupational Health and Safety in the Hairdressing Sector. Brussels: The Commission of the European Union.

⁴¹⁹ Bandasz, K. (2014) 'A framework agreement in the hairdressing sector: the European social dialogue at crossroads', *Transfer*, 20(4), pp. 505-520, at pp. 510ff.

⁴²⁰ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 541.

the EU in order for them to recognise communication from the ESD. The alignment of the coverage of the agreement to the legal competence of the EU as defined in Art. 153 TFEU can thus be understood as a form of difference minimising program of the ESD in relation to conditions laid down by the EU policy-shaping systems.⁴²¹

After having concluded an agreement the sectoral social partners called upon the Commission to propose to the Council that the agreement should be implemented as a Directive. However, this has not happened instead the Commission has blocked this proposal in the name of the RE-FIT agenda, quite likely under political pressure from some of the Member States.⁴²² This act of the Commission undermines the autonomy of the social partners and disregards the obligations laid out in Art. 152 TFEU. It further highlights the dominant position of the policy-shaping systems in relation to the ESD where the ESD will face difficulties having its communication accepted as meaningful in society unless it manages to assure that the policy-shaping systems of the EU recognises it and allows it to generate results within those systems. The structural coupling between the ESD and the policy-shaping system of the EU is thus stronger in the direction from the policy-shaping systems to the ESD than the other way. Worth noting is that the social partners in the hairdressing sector after this have concluded a new less ambitious agreement on the same issue,⁴²³ again requesting that it be implemented by means of a directive. The question remains whether their request will be heard this time since the current focus of the Commission in the field of occupational health and safety is rather to decrease than to increase the number of directives governing these issues.⁴²⁴ In fact, the agreement is not even mentioned in

⁴²¹ Compare with the discussion in Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 53ff.

⁴²² Bandasz, K. (2014) 'A framework agreement in the hairdressing sector: the European social dialogue at crossroads', *Transfer*, 20(4), pp. 505-520, at pp. 510ff.

⁴²³ The new agreement does not contain the provisions concerning maternity protection and mental health as the original agreement see CoiffureEU and UNI-Europa-Hair&Beauty 2016b. European Framework Agreement On the Protection of Occupational Health and Safety in the Hairdressing Sector. Brussels: The Commission of the European Union. Compare with CoiffureEU and UNI-Europa-Hair&Beauty 2012. European Framework Agreement On the Protection of Occupational Health and Safety in the Hairdressing Sector. Brussels: The Commission of the European Union. The issues of maternity protection and mental health have instead been placed in a joint declaration that the sectoral social partners undertake to make public in all Member States, see CoiffureEU and UNI-Europa-Hair&Beauty 2016a. Declaration of the European Social Partners on Health and Safety in the Hairdressing Sector. Brussels: The Commission of the European Union.

⁴²⁴ Ponce Del Castillo, A. (2016) 'Occupational safety and health in the EU: back to basics', in Vanhercke, B., Natali, D. & Bouget, D. (eds.) *Social policy in the European Union: state of the play 2016*. Brussels: ETUI and OSE, pp. 131-155, at p. 142ff.

the Commission communication relating to the measure to be taken in terms of health and safety under the REF-FIT agenda.⁴²⁵

The institutionalisation of the European sectoral social dialogue has in other words not safeguarded it from challenges and it is thus also important to point out some of the difficulties that have been identified after institutionalisation. These difficulties largely concern the relations between the various actors involved, both between employers' and trade union representatives at the EU level, and between the EU-level organisations and their national members. Regarding relations between management and labour organisations at EU level, the main difficulty is that there seems to be a fairly great difference in how the two sides define the concept of dialogue in relation to the ESD. To management, dialogue means merely the exchange of views or discussions, while labour would rather define dialogue as something that should generate regulation – something closer to negotiations in traditional industrial relations systems.⁴²⁶

These challenges are highly similar to those faced by the cross-industry social dialogue,⁴²⁷ and I find it sensible to adopt the view that the ESD should be considered as an autopoietic system of industrial relations based on the binary code of 'discussable/non-discussable between collective actors'.⁴²⁸ This system should be considered a function system, whose communication also comprises decisions made by several diverse bargaining organisations, all making decisions on the basis of the same binary code. The bargaining organisations can exhibit differences in terms of which decision premises and conditions for membership they adopt; those differences also generate differences in outcomes.⁴²⁹ This understanding of the ESD, in my opinion, encompasses its full complexity whilst simultaneously serving to reduce complexity⁴³⁰ by allowing the ESD to be understood as one autopoietic system.

⁴²⁵ CEU (2017) *COM(2017) 12 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy*. Brussels: The Commission of the European Union (COM(2017) 12 final).

⁴²⁶ See for example Léonard, E. (2008) 'European Sectoral Social Dialogue: An Analytical Framework', *European Journal of Industrial Relations*, 14(4), pp. 401-419, at pp. 406f.

⁴²⁷ A further discussion of the cross-industry social dialogue will follow in the next chapter.

⁴²⁸ For a general discussion of the concept of binary code see Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 90ff.

⁴²⁹ Compare with Rogowski's scepticism of considering systems of industrial relations as networks of organisations Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 108ff.

⁴³⁰ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 25ff.

The next difficulty of actor relations in the sectoral social dialogue concerns the relation between the EU and the national levels. Heterogeneous structures of industrial relations, both between Member States and between sectors, are obstacles to implementation, follow-up and representativeness, impairing the link between the EU and the national levels. In some cases, national member organisations pay little attention to the EU level, and it is also difficult for the EU-level organisations to get the necessary mandate from their national affiliates to actually engage in anything except discussions within the framework of the SSDCs.⁴³¹ In the civil aviation sector, for example, it proved impossible to find a common position on how to address the work of the SSDC even within the management side of the committee – apart from the issue of working time, for which the decision premise was related to the shadow of law.⁴³² This means that it is difficult to view the ESD as an integrated system of industrial relations in the traditional sense, since there are fundamental problems in getting outcomes at the European level to generate actual results at the national level. The difficulties that the EU-level organisations have in getting mandates to negotiate from their national affiliates also impedes the development of the ESD into an autopoietic system based on the binary code ‘negotiable/non-negotiable’. Adopting the view that the ESD is based on the binary code ‘discussable/non-discussable between collective actors’ and consists of communication that comprises decisions from several diverse bargaining organisations, which in themselves have a high degree of complexity (in that their members are also organisations) could help explain these issues. There exists thus a high degree of complexity and a number of challenges relating to the ESD as an autopoietic system of industrial relations.

As for an overall brief assessment of the results produced within the sectoral social dialogue in terms of improving working conditions the most prominent results remain those agreements that have been implemented through directives, possibly with the exception of the multi sectoral agreement on crystalline silica. Concerning other forms of texts produced, the potential for having an impact on working conditions at the national level is completely at the hands of the will and ability of the national social partners to secure their implementation.⁴³³ There are thus reasons to question the value of these results. In spite of the number of SSDCs increasing and an increase in the amount of texts produced it is possible to see that the developments

⁴³¹ See for example CEU (2010a) *Commission staff working document on the functioning and potential of the European sectoral social dialogue*. Brussels (SEC(2010) 964 final). and Léonard, E. (2008) 'European Sectoral Social Dialogue: An Analytical Framework', *European Journal of Industrial Relations*, 14(4), pp. 401-419.

⁴³² Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 65f.

⁴³³ Perin, E. and Léonard, E. (2016) 'Soft procedures for hard impacts: the European sectoral social dialogue's potential for regulation', *Transfer*, 22(4), pp. 475-490, p. 486.

after the financial crisis show a drop in the number of texts with reciprocal commitments, whereas the number of joint lobbying texts towards EU institutions have increased.⁴³⁴ This implies that the momentum of the sectoral social dialogue has staggered at a halt and it remains to be seen whether this will be revived in future developments. In the next section I will present a brief summary of the conclusions from this chapter.

5.4 Summary of conclusions

First of all, it is important to consider the analytical consequences of the vast number of variances in the development of the many different SSDCs, and their developments in relation to the cross-industry social dialogue. Luhmann consistently emphasises the importance of reducing complexities.⁴³⁵ I therefore find it relevant to adopt a view of the ESD as a single autopoietic system, albeit one where the decisions of several different bargaining organisations contribute to the communication of the system. This view accommodates the idea of reducing complexities whilst acknowledging the fact that complex differences exist between the cross-industry social dialogue, SSDCs and multi-sectoral committees. Interpreting the ESD as a system of industrial relations based on the binary code of ‘discussable/non-discussable between collective actors’ further accommodates the fact that many of the bargaining organisations are not inclined to negotiate binding agreements, whilst still allowing for negotiations of agreements to occur. Negotiations are a possibility within the bargaining organisations that produce decisions making up part of the communication within the ESD system, but the main events of communication take the form of discussions.

As concerns the institutionalisation of the sectoral social dialogue, a few other issues also need to be highlighted. On the one hand, this institutionalisation has contributed to the development of the ESD, such that it now has greater potential for developing further as an autopoietic system of industrial relations. The establishment of structures and rules of procedure generated by institutionalisation led to the development of organisations capable of making decisions that give the system a clearer foundation for its communicative structures and the programming of its communication. In addition, Commission support in the form of financial and other

⁴³⁴ Degryse, C. (2015) *The European sectoral social dialogue: an uneven record of achievement?*, Brussels: ETUI (Working Paper 2015.02, pp. 38ff.

⁴³⁵ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press.

resources has facilitated the establishment of an increasing number of SSDCs, furthering the development of a system of industrial relations at the EU level. The institutionalisation of the SSDCs can be understood as the policy-shaping systems of the EU seeking a means to overcome the improbability of their communications reaching the right addressee, i.e. problems occurring during the consultation process. In seeking to overcome these problems, EU policy-shaping systems produced results recognised as communication within the ESD and then used by the ESD to clarify the system's communicative structures, not least in the establishment of bargaining organisations. On the other hand, institutionalisation also strengthened the structural coupling between the ESD and EU policy-shaping systems in a manner that makes the latter more powerful in relation to the ESD. This in turn generates a situation in which the programming of the ESD is more likely to adapt to the values promoted by the policy-shaping systems than the other way round. In this sense it could be possible to say that the ESD has been pushed further down a potential hierarchy between the systems.

In addition, the difficulties posed by the relationship, or perhaps to some extent the lack of a relationship, between the SSDCs' EU-level organisations and their national affiliates mean that the link between the EU level and the national level is impaired or dysfunctional. It is impaired in that the national affiliates have a lack of commitment to and interest in the EU level, and in the lack of a mandate for the EU-level organisations to discuss issues in a way that could generate results at the national level. The organisations that could contribute to the communication within the ESD thus face challenges involving all three improbabilities of communication: reaching the right addressee, being understood and being accepted. These problems make it difficult to settle on either decision premises or conditions for membership that would serve the organisations' capacity to take decisions in a fruitful manner. This creates a situation in which the issues to be discussed or negotiated at EU level will be largely limited to vague, EU-related general issues, rather than including issues that are more likely to have an actual effect at the national level. The communication of the system is thus limited to issues that are unlikely to impact the individual worker.

Finally, with respect to my methodological model, the main focus of this chapter has been the question of what the ESD is (question 2a in my model). I have found answers by considering the concept of values in a positivistic manner, considering how different sectoral organisations can be considered part of the ESD based on the same binary code, but having different sets of conditions for membership and decisions. The issue of values in its positivistic understanding has also been used to answer the question of whether or not the ESD and the policy-shaping systems of the EU are capable of recognising communication from each other and thus structurally coupled. In these discussions, the question of what results the ESD produces (question 1a in my methodological model) has also been addressed. The analysis in this chapter has also taken into consideration the systems to which the ESD is

structurally coupled and also sought to explain that structural coupling by highlighting how the programming of different systems has been framed. Here I have made use of the parts of my methodological model involving a hermeneutic understanding of the concept of values, seeking answers to the question of why the ESD functions and produces the results it does (questions 2b and 1b in my model). In this part of the analysis it has become clear that the political system is capable of shifting the values framing its programming and that such changes are picked up through the cognitive openness of the legal system and of the ESD, influencing the programming of these systems too.

6 The events leading up to the inclusion of the European Social Dialogue in the Agreement on Social Policy

6.1 Introduction

The aim of this study is to provide a deeper understanding of the ESD through exploring differences and similarities between the ESD and the ITF FOC campaign as well as seeking to answer why their capacity to produce results that improve working conditions is perceived differently. In this chapter I will continue to answer these questions by examining some of the history of the cross-industry part of the ESD in order to explain how and why the ESD can be understood as an autopoietic system, how this system works and the problems it has faced throughout its development. The main focus of this chapter will thus be on the aspects of my methodological model that relate to the questions of *what* the ESD is and *what* results it has produced (questions 2a and 1a in my methodological model), and thus deal with values mainly in the positivistic sense of the concept. As for the previous chapter, however, it is not possible to demarcate strictly between the discussions of what and why. Therefore, this chapter will also contain some preliminary comments on the questions of *why* the ESD functions the way it does and *why* it produces the results it does (questions 2b and 1b in my methodological model), applying a hermeneutic understanding of the concept of values.

Several events in the historical development of the ESD are key to a thorough analysis of the capacity of this system of industrial relations. One of the most important is, in my view, the developments that led to the conclusion of the Agreement on Social Policy (ASP), whereby the ESD became a formalised part of the processes that shape Community social policy. Since the procedures that led to the ASP involved the organisations representing the social partners in the cross-industry social dialogue,

that aspect of the ESD will be the focus of this chapter.⁴³⁶ The cross-industry social dialogue has repeatedly struggled owing to reluctance or even unwillingness on the employer side to participate in negotiations. It is thus questionable whether the traditional binary code for systems of industrial relations – the code of negotiable/non-negotiable between collective actors⁴³⁷ – can be applied to the ESD. It is therefore relevant to discuss to what extent the ESD uses a different binary code to distinguish itself from its environment.

The cross-industry social dialogue is the part of the ESD that has received the most attention in the academic debate. Over the years it has been viewed both positively, as a promising resource for the creation of EU labour law, and negatively, for failing to live up to that promise.⁴³⁸ Greatly simplified, the shift from optimism to pessimism is explained by the fact that after the conclusion of a series of binding agreements,⁴³⁹ negotiations for a fourth agreement failed.⁴⁴⁰ Since then, the social partners have only managed to initiate negotiations on binding agreements that concern revisions to previously adopted agreements. Their focus can be considered as having shifted towards softer instruments such as joint opinions, recommendations and

⁴³⁶ The sectoral social dialogue will be dealt with in more detail in chapter 5, where the events that preceded the institutionalisation of the sectoral social dialogue, as well as the institutionalisation as such, will be analysed.

⁴³⁷ See Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 119.

⁴³⁸ See for example De Vos, M. (ed.) (2003) *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. The Hague: Kluwer Law International; Keller, B. (2003a) 'Social dialogue: the state of the art a decade after Maastricht', *Industrial Relations Journal*, 34(5), pp. 411-429; Barnard, C. (2002) 'The Social Partners and the Governance Agenda', *European Law Journal*, 8(1), pp. 80-101; or Dorssemont, F. (2003) 'Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue', in De Vos, M. (ed.) *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. The Hague: Kluwer Law International, pp. 3-32.

⁴³⁹ These binding agreements concern the issues of parental leave, fixed-term work and part-time work, see *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* (1996): Council of the European Communities (OJ No L 145/1996); *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work* (1998): Council of the European Communities (OJ No L 14/1998); and *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999).

⁴⁴⁰ The negotiations on temporary agency work broke down after the social partners locked their positions on the scope of the agreement, not least due to the involvement of the Commission's legal advice. See Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountourous, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, especially pp. 209-211. For further discussion see also chapter 6 and 8 below.

guidelines.⁴⁴¹ The process by which the social partners may conclude binding agreements was established by the entry into force of the Maastricht Treaty, and this event may be seen as a starting point for developments concerning negotiations on binding agreements within the ESD. To better understand how the ASP came into being and what it meant for the ESD, I will begin by analysing the historic developments leading up to the Maastricht Treaty.

6.2 The early stages of the European Social Dialogue at the cross-industry level

The signing of the Treaty of Rome came about as a result of growing concerns for a unified Europe in the light of the recently ended war. Chief political concerns at that time included limiting the potential power of the Eastern Bloc and a commitment to a unified Europe. The ECSC was an important step towards bringing former enemies, and countries on the same continent, closer together by regulating economic activity in the sectors considered to be the foundation of industry: coal and steel.⁴⁴² The main ambition in creating a European Community was not economic integration as such, but, rather, the maintenance of political and economic stability as a means of keeping the peace within the continent.

⁴⁴¹ Since the breakdown of negotiations on temporary agency work, the European cross-industry social partners have produced several so-called new generation texts on a broad spectrum of issues, but none of these documents are binding, either for the social partners themselves or for their member organisations. See for example BUSINESSSEUROPE, UEAPME, CEEP and ETUC 2010. Framework Agreement on Inclusive Labour Markets. Brussels: The European Commission; ETUC, BUSINESSSEUROPE, UEAPME and CEEP 2007a. Framework Agreement on Harassment and Violence at Work. Brussels: The European Commission; ETUC, BUSINESSSEUROPE, UEAPME and CEEP 2009. "Framework of Actions on Gender Equality" - Evaluation Report 2009. Brussels: The European Commission; ETUC, BUSINESSSEUROPE, UEAPME and CEEP 2006. "Framework of Actions for the Lifelong Development of Competencies and Qualifications" - Evaluation Report 2006. Brussels: The European Commission. As concerns binding agreements such have been reached only concerning the revision of previous agreements implemented through Community directives. See *Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC* (2010). Brussels: European Commission (OJ No L 68/2010).

⁴⁴² Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 38f. See also Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 21, who claims that even though the fundamental aim of the ECSC and EEC was to 'secure peace and political co-operation in continental Europe, the central means of achieving this goal have been, from the outset, economic in nature.'

A founding ambition of the EEC was to promote horizontal integration within the area it covered. It had the explicit goal of improving job opportunities for workers and raising the standard of living. The EEC as such was an economic project, but the preamble to the Treaty of Rome (1957) stated that economic integration would naturally engender improvements in living and working conditions.⁴⁴³ The Treaty of Rome can even be seen as the initiator of what later became the European cross-industry social dialogue through the development of social partner consultations. This evolution took place in the 1960s, when various ‘cross-industry advisory committees’ were set up to facilitate joint consultations of representatives from governments, trade unions and employers’ organisations.⁴⁴⁴ It is worth noting, however, that the social objectives of the Treaty of Rome were not considered necessary to establishing a common market; they were more of a general objective. This rather vague conception of the social dimension can be considered as a concession by the French socialist Guy Mollet, then president of the Council and leader of the Treaty of Rome negotiations, in order to please the majority who were in favour of economic liberalisation.⁴⁴⁵ This somewhat negligent approach towards social issues was partly an effect of positive economic developments during the 1960s, when there was little cause for concern about employment and social security.⁴⁴⁶ Economic issues were, in other words, given higher priority by the policy-shaping systems from the very outset of the Community. This can be considered as an indication that the values framing the programming of systems have effects on the results those systems produce.

⁴⁴³ Degryse, C. (2006) ‘Historical and Institutional Background to the Cross-industry Social Dialogue’, in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at pp. 31f. There are different views of the importance placed upon this aim of the Treaty of Rome and some are of the opinion that ‘social policy was given low priority from the outset, reflecting the assumption that upward harmonisation of living and working conditions would ensue as a result of market integration’; see Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 21.

⁴⁴⁴ Degryse, C. (2006) ‘Historical and Institutional Background to the Cross-industry Social Dialogue’, in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at p. 33.

⁴⁴⁵ Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 39ff and Mias, A. (2005) *Le Dialogue Social Européen (1957-2005) - Genèse et Pratiques d'une Institution Communautaire*. Doctorat en sociologie, Conservatoire National des Arts et Métiers, Paris, pp. 62f.

⁴⁴⁶ This gives some indication of how reigning political trends in combination with the state of the economy can affect the social dialogue and social policy initiatives. See also Degryse, C. (2006) ‘Historical and Institutional Background to the Cross-industry Social Dialogue’, in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at p. 33, who states that this is worth noting, but does not say explicitly that the positive economy might have been a reason for the lukewarm interest in social matters.

The Commission's attempts to create a cross-industry joint group to work on the harmonisation of social policy suffered a setback during the 'empty chair' diplomatic crisis of 1965, when de Gaulle, protesting the proposal to extend the powers of Community bodies, forbade all French officials to attend meetings and working groups in Brussels and also recalled the permanent French Community representative to Paris. The crisis had serious effects on Community action in the field of social policy and can be considered as having weakened the Commission vis-à-vis the Council, especially regarding the Commission's capability to launch legislative proposals concerning social policy.⁴⁴⁷ The crisis strengthened the intergovernmentalism of the Community and to some extent forced trade unions to 'concentrate mainly on influencing national governments to block unwanted Community policies and pay little attention to the build-up of joint European influence and institutions.'⁴⁴⁸ It also showed that the political system of the Community is capable of producing communication perceived as results that necessitate adjustments to the values underlying the programming of the legal system. Nevertheless, in the late 1960s the cross-industry social dialogue witnessed the birth of a new phase. A process of concertation was initiated by a call from Raymond Barre, then Vice President of the European Commission. Barre established a practice of informal but regular meetings for the exchange of views between the leaders of European trade unions and employers' confederations.⁴⁴⁹

Although this might not seem like a major step forward, it was indeed a success by the standards of what was possible to achieve at that time. The position of the Member States and the scope of the Treaty of Rome ruled out any possibility of horizontal integration based on initiatives from private actors. Instead, vertical integration prevailed, establishing a legal relationship between the Community and the Member States as well as focus on market mechanisms.⁴⁵⁰ This can thus be seen as the first step towards establishing an autopoietic system of industrial relations, albeit not focusing on negotiations, but rather on dialogue.⁴⁵¹ In this sense it is thus possible to assume that a system had formed, but one based on the binary code of 'discussable/non-discussable between collective actors' rather than a code focusing on negotiations.

⁴⁴⁷ Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 42f.

⁴⁴⁸ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 22.

⁴⁴⁹ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, pp. 32f.

⁴⁵⁰ Bercusson, B. (2009a) *European Labour Law*. second edn. Cambridge: Cambridge University Press. pp. 104ff.

⁴⁵¹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 2ff.

However, this autopoietic system faced serious difficulties regarding the improbabilities of communication,⁴⁵² as there was no scope for the legal or political systems to accept – and only limited possibilities for them to recognise – potential decisions from the ESD as communication. Due to the fact that there was no organisation of collective bargaining⁴⁵³ established within the ESD at this time, the focus of the system was on discussions, and the lack of scope for EU policy-shaping systems to recognise decisions from an organisation within the ESD was not an obvious problem at this stage.

The first tripartite summit was held in 1970, at the request of both trade unions and employers' organisations. The explicit ambit of the summit was employment issues, as permanent unemployment rates, although still fairly low, increasingly appeared likely to pose a threat. At the end of the summit, the General Secretariat of the Council concluded that the summit had resulted in an approximation of the principal suggestions and proposals contained in the documents presented by the social partner organisations. This approximation needs to be considered in relation to the complexity of the meeting, as the discussions were not simply between the three major actors: Community institutions, trade unions and employers' organisations. In fact there was great divergence of opinions within each of these groups, due to the fragmentation of employers' and workers' organisations at the European level at this time.⁴⁵⁴ Nevertheless, the tripartite summit of 1970 did place employment, rather than the free movement of workers, at the heart of discussions around a potential Community social policy.⁴⁵⁵ This first tripartite summit shows that the social partners had an interest in establishing industrial relations at the European level, and furthermore that they could potentially find common grounds of interest and work to set common goals. This clearly shows that an autopoietic system had been established, with communication within the system framed by the common interests shared by the social partners.⁴⁵⁶ However, no negotiations took place. The system was still based on dialogue and discussions, supporting the notion that the ESD as an autopoietic

⁴⁵² Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁴⁵³ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 149f and Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, p. 345.

⁴⁵⁴ For a more detailed analysis of this fragmentation of the social partner organisations, see Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 49ff.

⁴⁵⁵ Mias, A. (2005) *Le Dialogue Social Européen (1957-2005) - Genèse et Pratiques d'une Institution Communautaire*. Doctorat en sociologie, Conservatoire National des Arts et Métiers, Paris, pp. 72ff.

⁴⁵⁶ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 33ff.

system was constructed on the basis of the binary code 'discussable/non-discussable between collective actors'.

In 1970 the Standing Committee on Employment was formed with the aim of facilitating the coordination of Member States' employment policies, through dialogue, consultation and concertation between the Council, the Commission and social partner representatives.⁴⁵⁷ In spite of, or perhaps as a result of, economic challenges in the 1970s that created rising unemployment, the first social action programme was drawn up and adopted in 1974, at the same time as the ETUC was established.⁴⁵⁸ The programme focused on the issues of full employment and employment quality; equal progress on living and working conditions; and involving the social partners in the Community's economic decision-making and workers in the life of their companies. This led to the establishment of a more committed concertation between the European institutions and the cross-industry social partner organisations, and a series of tripartite conferences were held between 1970 and 1978. Several directives and decisions were adopted throughout this period.⁴⁵⁹ However, not much was done to further a proper and autonomous social dialogue between the European cross-industry employers' and trade union confederations.⁴⁶⁰ Quite likely the lack of initiatives promoting the social dialogue in this period was partly due to the entry of the UK into the Union, as the Thatcher government reduced possibilities for trade unions to take advantage of social policy activism so that they instead had to

⁴⁵⁷ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at p. 34.

⁴⁵⁸ An agreement on founding the ETUC was reached at a conference in Luxembourg of 30 November–1 December 1972. The founding congress of the ETUC was held in Brussels on 8-9 February 1973. See Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 58.

⁴⁵⁹ *Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women* (1975): Council of the European Communities (OJ No L 45/1975); *Council Directive 75/129/EEC of 17 February 1975 on the Approximation of the Laws of the Member States Relating to Collective Redundancies* (1975): Council of the European Communities (OJ No L 48/1975); *Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion* (1976): Council of the European Communities (OJ No L 39/1976); *Council Directive 77/187/EEC of 14 February 1977 on the Approximation of the Laws of the Member States Relating to Safeguarding Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses* (1977): Council of the European Communities (OJ No L 61/1977); *Council Directive 79/7/EEC of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for men and Women in Matters of Social Security* (1979): Council of the European Communities (OJ No L 6/1979).

⁴⁶⁰ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at pp. 34f.

focus on protectionist actions within the national spheres.⁴⁶¹ This highlights the complexity both within and among the political, legal and industrial relations systems of the Community, and points up the need for the political system to facilitate developments in the legal system in order to open up legal possibilities for the further development of a system of industrial relations. It also points up the necessity that social partner organisations be dedicated to the European level, instead of merely focusing on the national level. The next section continues with an examination of these organisations.

6.3 The development of the European social partners' organisations

In addition to the political constraints on developing an autonomous system of industrial relations, during this period there were also difficulties concerning the establishment of the social partners' organisations. Both labour and management faced challenges in establishing proper organisations for a system of industrial relations at the Community level. I will therefore explain these developments briefly, beginning with the establishment of the European Trade Union Confederation (ETUC).

6.3.1 Establishing the European Trade Union Confederation

The ETUC was established in 1973 in order to promote the interest of workers at the EU level. The stated aim of the organisation today is '*to ensure that the EU is not just a single market for goods and services, but is also a Social Europe, where improving the wellbeing of workers and their families is an equally important priority.*'⁴⁶² The establishment of the ETUC was, however, a lengthy process and to some extent subject to difficulties, disagreements and competition among trade union federations with different ideological stances.

Although the ETUC was not formally established until 1973,⁴⁶³ its origins can be traced to European trade union structures that developed in the early days of the

⁴⁶¹ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 23.

⁴⁶² ETUC (2016) *ETUC web site - About us - Aims and priorities*. Available at: <https://www.etuc.org/aims-and-priorities> (Accessed: 25 February 2016).

⁴⁶³ Compared to the establishment of several European employers' or industry organisations, including UNICE in 1958 and CEEP in 1961, the establishment of the ETUC came fairly late.

ECSC. In fact, trade union interest in plans for European integration developed in response to the Schuman plan and the establishment of the ECSC. In order to accommodate these interests, the European Regional Organisation of the International Confederation of Free Trade Unions (ERO-ICFTU)⁴⁶⁴ was founded in 1950. Shortly thereafter the 'Committee of 21' was set up, representing industrial federations in the coal and steel sectors as well as ERO-ICFTU-affiliated confederations from the six ECSC Member States. As governments at this time recognised the need for trade union support and also wanted to promote non-Communist trade unions, the ERO-ICFTU-affiliated unions managed to secure a treaty commitment to improving working and living conditions as well as a consultative committee with labour representation attached to the High Authority. However, the same influence was not achieved in the preparation of the Rome Treaties. In fact, only after bringing considerable pressure to bear did trade unions manage to secure one body of proper institutional representation in the advisory Economic and Social Committee.⁴⁶⁵ This shows, nevertheless, that at this time a structural coupling already existed between the ESD and the policy-shaping systems of the Community.

Debate on how and why to organise stronger and more influential trade union structures at the European level followed, but several differences in national trade union interests and ideals slowed down and even obstructed the process. The German unions, which had strong bargaining capacity at the national level, were not interested in '*acting as the protector of weaker unions in the ECSC*'.⁴⁶⁶ Instead they saw the emerging supranational level as an opportunity to improve the international competitiveness of German industry, rather than tool for improving working conditions and increasing wages across the Community. The Belgian unions, on the other hand, focused on the opportunities for harmonising labour policies. The ERO-ICFTU thus struggled mightily with efficiency and the adoption of common objectives, as all decisions were subject to compromise among different national standpoints and nothing more far-reaching than 'lowest- common-denominator

⁴⁶⁴ The ERO-ICFTU was formed in 1949, as disagreements between social-democratic unions and Communist unions in the World Federation of Trade Unions (WFTU) caused the social-democratic unions to leave the organisation and establish a new international federation.

⁴⁶⁵ Considering that the ERO-ICFTU had called for representation of labour at all levels of Community decision-making, and the harmonisation of economic and social policies, the representation of labour within an advisory committee only must be considered a setback for the European trade unionists. Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 49f.

⁴⁶⁶ *Ibid.*, p. 52.

positions' could be achieved. The 'Committee of 21' therefore never managed to function as anything more than a lobbying centre in Luxembourg.⁴⁶⁷

In the late 1950s and early 1960s various European trade union committees at both the confederal and industry levels were established, with different aims for and opinions on the future of European integration. Diverging interests created tensions between social democratic and Christian trade unions as well as between industry-level committees and the European Trade Union Secretariat set up by the ERO-ICFTU. In addition, the employers' associations, mainly governed by UNICE (now *BUSINESSEUROPE*) approach at the European level, consistently refused to participate in any exchange with European trade unions that could lead to binding arrangements at the Community level. The result was a fragmented trade union movement at the European level, with trade unions mainly functioning as labour representatives vis-à-vis the Community institutions.⁴⁶⁸ This again suggests that the binary code for the ESD is not really that of 'negotiable/non-negotiable between collective actors', but rather 'discussable/non-discussable between collective actors', since negotiations did not take place, but discussions did occur.

In the late 1960s, increased economic restructuring and internationalisation, in addition to initiatives aimed at deepening and enlarging the Community, revitalised efforts to create more integrated trade union structures at the European level. The unions of the ERO-ICFTU established a European Confederation of Free Trade Unions (ECFTU); Christian unions created the European Organisation of the World Confederation of Labour (EO-WCL); and Communist trade unions, led by the Italian CGIL and the French CGT, set up a liaison office in Brussels. The European Free Trade Association (EFTA) unions also set up a Secretariat in Brussels comprising all ERO-ICFTU trade unions in the EFTA countries. In the early 1970s, the ECFTU began internally discussing the possibility of merging with the EO-WCL, but this was opposed by French and Belgian members due to their domestic conflicts with Christian unions.⁴⁶⁹ If the ETUC is considered to be an organisation producing specific decisions of importance for the autopoietic system of the ESD, then it is possible to say that this organisation faced problems relating to its communicative structures. These problems were caused by unclear conditions for membership and generally unclear decision premises,⁴⁷⁰ which increased the threat of the

⁴⁶⁷ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 51f.

⁴⁶⁸ *Ibid.*, p. 53.

⁴⁶⁹ *Ibid.*, p. 54.

⁴⁷⁰ Seidl, D. (2005) 'The Basic Concepts of Luhmann's Theory of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53, at pp. 43f and Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142f.

improbabilities of communication.⁴⁷¹ As I will show later, these problems have lingered and continued to cause difficulties within the organisation.

The possibility of EEC enlargement generated discussions about a territorial enlargement of the ECFTU, leading to the organisation of a conference that convened all European ERO-ICFTU unions. There were several meetings during which the need for European-level union representation was recognised, followed by the establishment of a working group to examine the forms and functions of closer cooperation. The working group soon ran into several difficulties, as opinions diverged on territorial scope, objectives and modes of cooperation, inclusiveness in terms of ideology and links to the ERO-ICFTU. The British Trades Union Congress (TUC), which strongly opposed British EEC membership, argued for a very broad scope for trade union action, comprising not only all trade union confederations in Western Europe but also the Communist trade unions. The Nordic unions agreed with the TUC on geographical scope, but were sceptical about including Communist unions. The Nordic approach was supported by the Italian Confederation of Trade Unions (CISL) and the Italian Labour Union (UIL) as well as the General Federation of Belgian Labour (FGTB). In contrast, the Confederation of German Trade Unions (DGB) favoured an organisation restricted to the enlarged Community, fearing that a broader scope would open up the organisations to non-ERO-ICFTU members, and cause a broadening of organisational ideology that would generate problems of complexity and incoherence.⁴⁷²

Within the organisation there were thus discussions on shaping the conditions of membership as well as a development of internal structures and decision premises.⁴⁷³ These discussions were based on the need to develop structures that would limit the difficulties posed by the improbabilities of communication so as to help ensure acceptance and success for the communication expressed in the decisions of the organisation.⁴⁷⁴ This can further be understood as the autopoiesis of the system being self-referential and reflexive.⁴⁷⁵

⁴⁷¹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁴⁷² Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI., pp. 54 f.

⁴⁷³ Luhmann, N. (2005c) 'The Paradox of Decision Making', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business Scholl Press, pp. 85-106, at p. 98.

⁴⁷⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁴⁷⁵ Luhmann, N. (2005a) 'The Autopoiesis of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 64-84, at pp. 72ff.

In the end a compromise was struck whereby a broad geographical scope was accepted, but Communist and Christian trade unions were excluded from the new organisation. In other words the compromise can be considered as the formulation of difference minimization relating to membership conditions in order to develop the self-steering of the organisation.⁴⁷⁶ Tensions regarding the main objectives of the organisations proved more difficult to resolve, and these tensions still affect European trade union collaborations. Questions arose as to whether the new European organisation should promote union transnationalisation or the building up of a union counter force in general, as well as whether it should focus on union action in relation to multinational enterprises or representing union interests in relation to the Community institutions. Related to this was a disagreement on integrating the European industry committees. The German, Belgian and French unions favoured integration and the British and the Nordic unions strongly opposed it. The British TUC feared that such integration would lead to a transference of fragmented British union structures to the European level, while Nordic unions feared an erosion of the International Trade Secretariats and the creation of a dual channel of industry union representation that would lead to inconsistency. The opinions of the British and Nordic unions also revealed a preference for international trade union action against multinational enterprises over improved union cooperation within the Community. On this issue, too, a compromise was struck, granting the industry committees an advisory representation in ETUC bodies and some voting rights in the Congress, although not on financial and statutory issues.⁴⁷⁷

Disagreements continued, however, as both internal and external opinions on relations with the ERO-ICFTU diverged greatly. The non-European members of the ERO-ICFTU voiced their concern that the new European organisation would display less influence on European matters as well as less interest in organised labour worldwide, with negative effects for developing countries. The European organisations insisted on their organisation being complementary to the global, which ultimately solved these problems. Further difficulties arose when the debate on geographical scope was raised once again by the adoption of a radical anti-EC programme by the TUC and the Norwegian 'No' vote on EC membership. This led the German DGB to withdraw its acceptance of the previous compromise and several efforts to solve these problems were made. In the end, under some pressure from other EC unions that favoured the broader geographical scope, the German DGB gave in. The new compromise did, however, include one additional element, as it was agreed that only those organisations directly affected should vote on issues related to

⁴⁷⁶ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at p. 52.

⁴⁷⁷ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 55f.

the EEC or EFTA.⁴⁷⁸ Here, the communication of the organisation referred back to previous communication to allow the adaptation of decision premises and membership conditions, indicating that this organisation is part of what makes the ESD capable of adapting to developments in its environment through the cognitive openness and reflexive character of the system.⁴⁷⁹

The difficulties in establishing a European organisation for trade union interests make clear that the process was closely linked to the integration and enlargement of the Community; that ideological and structural diversity among member organisations strongly affected the process of integration; and that the organisation would face a high level of complexity in the creation of interests and internal coalitions.⁴⁸⁰ They stand in stark contrast to the development of national trade union structures, in that the establishment of this European organisation was characterised by the need to deal with policies and decisions created at the European level with potential impact on workers. In comparison to national trade union structures, which to a large extent have been developed to deal directly with the working conditions at the grassroots level, instead of primarily focusing on policy, the difficulties faced by the ETUC in identifying common goals and values and the means to achieve them are evident. The improbabilities of communication thus posed challenges for the ESD in ways not generally found in systems of industrial relations. The members of the potential bargaining organisation of the ESD have been used to systems where the binary code was different, and therefore also the conditions of membership and decision premises. The members have thus needed to find new methods for dealing with these issues.⁴⁸¹

The difficult and complex task of finding common ground amongst the member organisations of the ETUC also led the organisation to formulate general and vague overall aims. The objective of the ETUC as stated at the founding Congress in 1973 was to '*represent and advance the social, economic and cultural interests of workers on the European level in general and towards the European institutions in particular – including the European Communities and the European Free Trade Association*'.⁴⁸² This aim has

⁴⁷⁸ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 56ff.

⁴⁷⁹ Drepper, T. (2005) 'Organization and Society - On the desideratum of a society theory of organizations in the work of Niklas Luhmann', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann an Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 171-190, at p. 181 and Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at p. 345.

⁴⁸⁰ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 58.

⁴⁸¹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁴⁸² Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 67.

been subject to some changes over the years but has remained fairly broadly and vaguely defined.⁴⁸³ The first ETUC Action Programme was also stated in general and vague terms; it has been described as encompassing a catalogue of issues rather than defining political activities.⁴⁸⁴ The formulation of its objectives shows that the improbabilities of communication, especially as regards the acceptance of communication, are an important obstacle for this organisation.⁴⁸⁵ In order to assure that its communication is accepted, there has been a need to keep the communication and decisions of the organisation vague rather than risk their rejection. The difference minimization of the organisation is thus rather formulated in terms of minimising differences in opinion amongst the members of the organisation than seeking to achieve a certain objective.⁴⁸⁶ The situation becomes even more complex if we take into account the history of organisations representing management within the ESD. This is the subject of the next section.

6.3.2 The establishment of Community employers' organisations

The employer side of the ESD suffers from a higher degree of fragmentation overall than the trade union side. This is the case especially at the sectoral level, but also at the cross-industry level, where we find several organisations representing management. The main organisations at cross-industry level are BUSINESSEUROPE (previously UNICE), UEAPME and CEEP. Since BUSINESSEUROPE is not only the largest of these organisations, but also the most influential and most powerful within the ESD, it will be the main focus of this chapter.

The development of European industry federations kicked off shortly after the Second World War, when there was a need for cooperation on economic development to deal with the problems caused by the war. This led to the establishment of several European organisations for economic cooperation. The Council of European Industrial Federations (CIFE) was established in 1949, with the aim of influencing the Organisation for European Economic Cooperation.⁴⁸⁷ Within the CIFE, the Union des Industries des pays de la Communauté européenne was set

⁴⁸³ On developments up until the 1990s, see Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125.

⁴⁸⁴ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 67.

⁴⁸⁵ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, p. 158f.

⁴⁸⁶ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, pp. 51ff.

⁴⁸⁷ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 141.

up by the national industrial federations from the six Member States of the ECSC, and in March 1958 this body became the Union des Industries de la Communauté européenne (UNICE), with the task of following the political ramifications of the Community created by the Treaty of Rome. The organisation's focus at the outset was thus not to act as a negotiating partner with the trade union side, but rather to lobby for industry at the Community level.⁴⁸⁸ Eight federations⁴⁸⁹ representing all six Member States of the ECSC were the founding members of UNICE.⁴⁹⁰

During the 1970s UNICE also admitted non-EC organisations as associate members and transformed into a peak organisation of European employers' confederations. It was later renamed the Union of Industrial and Employers' Confederations of Europe.⁴⁹¹ It changed its name again on its 50th anniversary in 2007 to BUSINESSEUROPE, the Confederation of European Business.⁴⁹² The focus on business representation rather than employers' representation was again evident. This focus on industry representation and lobbying, rather than industrial relations and negotiations, shows that the binary code for the ESD cannot be 'negotiable/non-negotiable between collective actors',⁴⁹³ since the idea of negotiations is rejected within the system itself. The binary code must instead be something along the lines of 'discussable/non-discussable between collective actors', as indeed, communication is recurrent and self-referential within the ESD.⁴⁹⁴ The ESD as an autopoietic system will therefore have to be understood somewhat differently than is traditional for systems of collective bargaining, where the binary code is framed according to the concept of negotiations, and organisations produce decisions making part of the communication of the system in the form of collective agreements. The organisations framing the communicative structures of the ESD will have to be understood in other terms, and it might be possible to understand management and labour, respectively, as organisations in Luhmann's sense. The decisions of these organisations could then

⁴⁸⁸ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 145.

⁴⁸⁹ These were the BDI and the BDA (Germany), the CNPF (France), Confindustria (Italy), the FEDIL (Luxembourg), the FIB (Belgium), and the VNO and FKPCWV (the Netherlands). See <http://www.businessseurope.eu/content/Default.asp?PageID=414>, visited on 2007-11-29.

⁴⁹⁰ <http://www.businessseurope.eu/content/Default.asp?PageID=414>, visited on 2007-11-29.

⁴⁹¹ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 141.

⁴⁹² BUSINESSEUROPE (2016) *BUSINESSEUROPE website - About us - History of the organisation*. Available at: <https://www.businessseurope.eu/history-organisation> (Accessed: 25 February 2016).

⁴⁹³ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 119.

⁴⁹⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 32ff.

be seen as decisions on what system specific communication to contribute to. Decision premises and conditions for membership would also relate to the internal functioning of these organisations and serve to explain the problems relating to the results achieved within the communicative structures of the ESD.⁴⁹⁵

However, it is not entirely fair to say that BUSINESSEUROPE's only aim is to act as an industry representative. Instead it is possible to see something of a dual-interest representation that takes into account both product market and labour market interests. Nevertheless, the internal difficulties for the organisation are vast, involving both highly consensual decision-making processes⁴⁹⁶ and the need to accommodate various national and sectoral interests while still striking a balance between product and labour market interests. This means that UNICE at this time faced even greater challenges than the ETUC in accommodating diverse membership interests. UNICE thus had even less possibility than the ETUC to identify decision premises and coherent conditions for membership and overcome the improbabilities of communication in relation to the decisions of the organisation.⁴⁹⁷ The self-steering of this organisation is therefore even more than the ETUC characterised by the focus of minimising differences in opinion between its members,⁴⁹⁸ which in turn can cause problems of enabling decisions that contribute to communication from the ESD that can be perceived as meaningful for society. The chances were thus slim that this organisation could contribute to the communication within the autopoietic system of the ESD, where further challenges in terms of improbabilities of communication were to be found. Nevertheless, the 1980s did witness some progress in the development of the ESD, due in large part to initiatives by Jacques Delors. I will continue with an examination of these developments.

⁴⁹⁵ Luhmann, N. (2005c) 'The Paradox of Decision Making', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business Scholl Press, pp. 85-106, at p. 95.

⁴⁹⁶ Although the organisation changed its internal voting procedures in the 1980s to require opposition from the federations of at least three countries in order to block a proposal, the unanimous consent of all members of the organisation's Council of Presidents is still required in order to receive a mandate for negotiations on issues relating to the social chapter. See for example Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 114.

⁴⁹⁷ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 342ff.

⁴⁹⁸ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 48ff.

6.4 The Delors era

In 1989, following a call from Jacques Delors, the social dialogue became more firmly established with a formal structure. At this point two main areas of priority were identified: education and training, and problems related to the emergence of a European labour market. Furthermore, the consultation of the social partners in the drawing up of the Social Charter was announced. Over the following years several joint opinions, statements and declarations were produced, and although some argued that the results were too general and lacked specific application, others spoke in favour of these efforts, viewing it as highly positive that parties with such different interests and points of view on the labour market and social politics could work together towards a stronger and more competitive EU.⁴⁹⁹ The social partners themselves had varying opinions of the value of the social dialogue results: UNICE (now BUSINESSEUROPE) considered them to have demonstrative value; the European Centre of Employers and Enterprises Providing Public Services (CEEP) shared that opinion, but also expressed a wish to take things further; and the ETUC was more ambivalent, acknowledging the potential of the dialogue established while also pointing out its inadequacies and the weak commitment between the parties and stressing the need to move towards European framework agreements and collective agreements.⁵⁰⁰

The main cause of increased activity in the development of a European social dialogue was the Single European Act and the insertion into the Treaty of Rome of Article 118b, which stated; '*The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.*' With this new article, the Treaty acknowledged the possibility for the social partners to establish contractual relations. The processes for bipartite negotiations and the status and scope of agreements resulting from such negotiations were, however, not defined. Delors nevertheless had an important impact on the development of the social dialogue, as in his first year as President of the Commission in 1985 he initiated the first social dialogue summit, a meeting between the two sides of industry held at Val Duchesse.⁵⁰¹ This was the beginning of the so-called Val Duchesse social dialogue, with important results for the ESD that included not only the aforementioned joint opinions, declarations and

⁴⁹⁹ Dølvik, J. E. (1997) *Redrawing boundaries of solidarity? – ETUC, social dialogue and the Europeanisation of trade unions in the 1990s*. Oslo: ARENA, FAFO, p. 184ff.

⁵⁰⁰ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at p. 37.

⁵⁰¹ *Ibid.*, pp. 35f.

statements, but also the furthering of social partner organisations at the European level.⁵⁰²

In order to fully understand the importance of the Val Duchess social dialogue and its results, we need to look more closely at what occurred during the Delors era. The main focus of the Delors Commission was supposed to be the establishment of an internal Community market. Probably this project was what made Germany and the UK agree to make Delors the president of the Commission. Delors, however, used the internal market project to achieve even larger political goals.⁵⁰³ In the work on the White Paper on the completion of the internal market,⁵⁰⁴ Delors made sure that the social partners were continuously consulted in order to incorporate the collective social partner dimension into the program for establishing the internal market. Although some liberals might have found that the White Paper did not do all they wished to facilitate international commerce and liberalise public markets, it did place the European institutions in the position of encouraging and developing the internal market.

The White Paper on the internal market was followed by the adoption of the Single European Act, inserting Articles 118a⁵⁰⁵ and 118b⁵⁰⁶ into the EC Treaty. Article 118b placed the social dialogue within the framework of Community law, giving the Commission the role of developing the social dialogue and recognising the right of

⁵⁰² Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, pp. 249ff.

⁵⁰³ See for example Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUL., p. 25, according to whom the Delors Commission 'relied on a neo-functional understanding of the Community dynamics', in that it took the single market as a starting point to be complemented by a social dimension, thus taking advantage of the political spillover effects to promote social values within the Community.

⁵⁰⁴ CEC (1985b) *COM(85) 310 final - Completing the Internal Market, White Paper from the Commission to the European Council*. Brussels: European Commission (COM(85) 310 final).

⁵⁰⁵ This article read as follows:

'1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.
2. In order to achieve the objective laid down in the first paragraph, the Council, acting by qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.'

⁵⁰⁶ Article 118b stated:

'The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.'

the social partners to conclude agreements.⁵⁰⁷ By creating public authority to delegate negotiating powers to the social partner organisations, one important obstacle to the development of a collective bargaining system at the European level was removed.⁵⁰⁸ As regards the understanding of the ESD as an autopoietic system, it is possible to say that it is from this point forward that a clear potential existed for developing a bargaining organisation potentially producing decisions that could make up part of the communicative structures of the ESD.⁵⁰⁹ The members of that organisation would then correspond to the various interest organisations within the ESD.⁵¹⁰ The insertion of Article 118a further increased the capacity of the Community to intervene in issues concerning worker health, safety and security by allowing qualified majority voting in these fields.⁵¹¹

In 1985–1986, the effect of the Single European Act, with the insertion of Articles 118a and 118b into the EC Treaty, and the Delors presidency was thus to shift focus from issues of immediate concern to structural considerations and the construction of a general plan for the Community.⁵¹² Moreover, the position of the social dialogue and the social partners in the legislative process of the Community changed drastically. Before the adoption of the Single European Act the dialogue between the social partners merely served as discussion in the preparation of future legislative proposals by the Commission. The ETUC was not inclined to influence the choices of the Commission and UNICE did not find itself under immediate threat of regulatory intervention. With the adoption of the Single European Act this changed drastically as the social partners were now legally recognised as participants in the social dialogue at Community level. Furthermore, the Commission found itself in a position in which its capacity as initiator in the fields of worker health, safety and security was strengthened vis-à-vis the Council. In addition, the possibility for a single

⁵⁰⁷ Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 82ff and Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at pp. 35f.

⁵⁰⁸ See Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 97ff where three obstacles are identified and the impact of the Delors strategy on removing these obstacles is discussed.

⁵⁰⁹ Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191, at pp. 188ff.

⁵¹⁰ See Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at p. 344.

⁵¹¹ See Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 24, according to whom the reform of these articles promoted 'the idea of complementing the single market with a social dimension.'

⁵¹² Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, p. 93.

Member State to block a proposal in this area was eliminated by the introduction of qualified majority voting under Article 118a.⁵¹³

In other words, the political system of the Community was strong enough to at least temporarily shift the values of its programming, and through its communication create a need for the legal system and the ESD to adapt their programming accordingly, thus allowing for other values than purely market values or economic interests to frame the communication of the system. This can be understood as the situation where the political system initiated steering towards achieving objectives relating to the regulation of certain aspects of working conditions. In turn this was observed by the ESD, which identified a need for developing difference minimising programs in order to deal with communications in its environment that the ESD identified as relevant to its own internal functioning.⁵¹⁴

Delors thus succeeded in creating cognitive openness within the policy-making processes of the Community to communication from the ESD, in that his internal market initiative led to the recognition (both legally and conceptual) of the social dialogue as part of the decision-making process. By establishing procedures for regular meetings and bring the social partners together, Delors managed to get the social partners involved. This made the social partners also realise to some extent that their strategies could not focus on simply opposing each other's points of view, but should instead focus on what can be accomplished at the European level. If it was possible to question whether or not the ESD could be regarded as an autopoietic system before these developments, from this point on I believe that can no longer be questioned, since communication within the ESD could now be recognised by the legal system. If the ESD had not been an autopoietic system generating communication, then the policy-shaping systems of the Community would not have seen the need to be cognitively open to recognising such communication.⁵¹⁵ With the structuration of organisations that contribute to the production of communication within the autopoietic system of the ESD the specific locations for decisions to concentrate and enable communicative routines and structures for the system had been established.⁵¹⁶ The communicative structures, that allowed a bargaining organisation to form and make decisions as part of the communications of the ESD, were in place. However,

⁵¹³ Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, at p. 253.

⁵¹⁴ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at p. 53.

⁵¹⁵ Structural coupling occurs between different autopoietic systems, not between one such system and its environment in general. See Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 58.

⁵¹⁶ On the role of organisations in relation to autopoietic systems see further Nassehi, A. (2005) 'Organizations as decision machines: Niklas Luhmann's theory of organized social systems', *Sociological Review*, 53(1), pp. 178-191.

since the binary code of the ESD was already set to 'discussable/non-discussable between collective actors', a collective bargaining organisation contributing to the production of communication within the ESD would also use that binary code,⁵¹⁷ thus distinguishing it from traditional systems of industrial relations.

The documents stemming from the Val Duchesse social dialogue are perhaps important, therefore, not so much the contents of the opinions, etc., but rather for the establishment of proper procedures for regular meetings and dialogue between the two sides of industry. The social dialogue summit in 1989 adopted internal conclusions for future work and set up a steering group to give structure and momentum to the social dialogue.⁵¹⁸ Delors' ambition for the establishment of an internal market stretched beyond the simple removal trade barriers; he saw the need to develop relations between the market actors, i.e. management and labour, to help the internal market stay competitive. Moreover, Delors saw the involvement of the social partners as necessary to prevent social dumping and increase democratic participation in Community decision-making processes.⁵¹⁹

Through his work with the internal market, Delors thus succeeded in identifying and establishing structures for the social dialogue and developing the social partners' understanding of the potential uses of the ESD for industry, work and employment, thus organising the social partners more effectively at the European level.⁵²⁰ However, it is important to keep in mind that the social partners had already demonstrated the will to develop industrial relations:⁵²¹ had they not been interested in doing so, it is unlikely that Delors would have succeeded. This history can be seen as part of the development of the necessary structure for the Community system of industrial relations. In Luhmann's terminology,⁵²² I would call this the further development of the system's programming and structures for communication by adopting difference minimising programs in a reflexive manner in order to assure the autopoiesis of the

⁵¹⁷ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 150ff.

⁵¹⁸ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, p. 37.

⁵¹⁹ Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 94ff.

⁵²⁰ *Ibid.*, pp. 120f.

⁵²¹ See *ibid.*, p. 166, where they point out that Delors changed the working methods for the social dialogue, but he did so within the context of issues that already had received the attention of the social partners.

⁵²² Luhmann, N. (2005a) 'The Autopoiesis of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 64-84, at pp. 66ff.

system as a response to environmental irritations.⁵²³ It is an indication of the importance of the structural coupling between the ESD and EU policy-shaping systems, highlighting the strength of the policy-shaping systems in relation to the ESD. The inclusion of social values within the programming of the political system can therefore be understood as having caused irritations for the ESD that in turn generated an adaptation of the values framing the programming within this function system.

6.5 The Social Agreement Protocol

The fall of the Berlin Wall greatly impacted the political context of the European Community,⁵²⁴ and the Member States saw the need to complement their work on an economic and monetary union with a political union. Negotiations for a new treaty began, culminating in the Maastricht Treaty. The European social partners' steering group took an active part in developing the institutional framework for the social dialogue in this Treaty. It negotiated an agreement that laid out the roles of the two sides of industry, the rules governing consultation on Commission initiatives and the method for implementing social partner agreements in the Community. This agreement on the ESD was, however, rejected by the UK, and rather than being incorporated into the Maastricht Treaty, it was signed by the other eleven Member States as the Agreement on Social Policy (ASP) and annexed to the Treaty.⁵²⁵ This established a negotiating organisation within the ESD, and this organisation communicated a decision that was also recognised by the political and legal systems of the Community. Within the political system, the improbability of communication, in terms of the acceptance of the communication, caused problems that were solved through the exclusion of the UK.

The ratification of the Maastricht Treaty was actually beset by several difficulties, owing to increased polarisation among the Member States. Instead of having the expected spillover effects on social and political integration, criticism was raised regarding the increased Community competences. This scepticism was further strengthened by the onset of an economic recession and a rise in unemployment,

⁵²³ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 49ff.

⁵²⁴ See Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 25, who states that these historical events introduced a 'vision of pan-European unification' that had the effect of encouraging the EFTA countries to apply for EC membership.

⁵²⁵ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at pp. 37f.

raising doubts about the feasibility of the EMU project. Several concessions were made, exempting Denmark and the UK from the EMU and allowing the UK to opt out of the ASP. In addition, the subsidiarity principle was strengthened in the Treaty, thus diminishing expectations for proper political integration.⁵²⁶ This indicates the high degree of importance granted to the values promoted by the economic system, and this system's potential to strongly influence the values framing the programming of policy-shaping systems, due to the structural coupling between the different function systems.

Nevertheless, in spite of reflecting a restrictive monetarist approach via the concept of the EMU, the Maastricht Treaty brought a clear breakthrough in the field of social policy,⁵²⁷ as it actually did increase the capacity for Community action in this field.⁵²⁸ At least in theory, the ASP ushered in a new era in the social policy field; but the UK opt-out limited possible future developments to some extent. At the drafting of the Amsterdam Treaty, however, the ASP was finally accepted by a new UK government, being incorporated in the Amsterdam Treaty in 1997.⁵²⁹

The social partners themselves, through negotiations, formulated the provisions in the ASP governing the social dialogue. These negotiations took place within an ad hoc group set up by the social partners' steering group in 1991. The negotiations did experience some difficulties owing to the different aims of the parties and the complexity of the interaction with other relevant actors, including the Commission, the European Parliament and national governments (especially the UK).⁵³⁰ The major difficulties are worth mentioning as they highlight some of the important factors in the development of the ESD. The main ideas in the ASP were actually elaborated by the Commission,⁵³¹ working closely with the ETUC. The basic idea was to promote a

⁵²⁶ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 25ff.

⁵²⁷ *Ibid.*, p. 28.

⁵²⁸ Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 113.

⁵²⁹ See Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at pp. 37ff, or Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 112.

⁵³⁰ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 158ff.

⁵³¹ However, see Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge, pp. 90ff, who points out that the Belgian delegation to the Intergovernmental Conference pushed hard for reforms on social policy issues with the involvement of the social partners, and prepared a proposal for such reforms that the Commission used as a basis for its own proposal.

system wherein European legislators could push the social partners to the negotiating table with a simple threat: 'negotiate or we will legislate'.⁵³² The idea was thus to exploit the structural coupling between the ESD and the policy-shaping systems.

Being fully cognisant of the complicated processes of intergovernmental bargaining and the resultant difficulties ahead for the treaty reform, the Commission invited the social partners to participate in the design of the proposal. UNICE received the proposal from the Commission with reservations, feeling it had been agreed upon in advance with the trade unions and also extended far beyond the mandate for the social dialogue. Nevertheless, UNICE agreed to participate in an ad hoc working group on the role of the social partners at the European level, so long as the group's results were not automatically used as a basis for treaty reform.⁵³³ The communication was thus not truly framed as the negotiation of an agreement. Instead the system decided that it was possible to discuss the potential for negotiating an agreement and structures for potential future negotiations. The developments therefore strengthen the idea that the binary code of the ESD should be considered 'discussable/non-discussable'⁵³⁴ between collective actors'.

One factor that possibly influenced employers' will to participate in the negotiations was the 1989 European Framework Directive on Safety and Health at Work. The implementation of this Directive stirred debate, and employers realised that it was now possible for the Community to legislate in the field of labour law and it would thus serve their purposes better to exert influence in such a situation.⁵³⁵ In addition, the UK attitude towards European-level industrial relations and EU-level social policy developments resulted in key issues for representatives of management and labour being dealt with outside of the social dialogue. This was the case for the European Social Charter and the European Company Statute, for example. The importance of having influence over regulations on such issues spurred UNICE to become active

⁵³² This 'threat' later become known as the concept of 'negotiations under the shadow of law'. See for example Bercusson, B. (2009b) 'Maastricht: A fundamental change in European labour law', in Bruun, N., Jacobs, A.T.J.M., Veneziani, B., Blanke, T., Vigneau, C., Kollonay-Lehoczy, C., Lörcher, K., Dorsemont, F., Deakin, S. & Passchier, C. (eds.) *Labour Law and Social Europe - Selected writings of Brian Bercusson*. Brussels: ETUI, pp. 89-114, at pp. 107ff.

⁵³³ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 158ff.

⁵³⁴ Although negotiations occur at times within the ESD, the use of the binary code 'negotiable/non-negotiable between collective actors' would be misleading since negotiations are rather the exception than the rule. Discussions, on the other hand, occur repeatedly, and the broader concept can also encompass actual negotiations.

⁵³⁵ *Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work* (1989). Brussels: European Commission (OJ No L 183/1989). See also Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 158ff.

and help shape its own possibilities for exerting such influence.⁵³⁶ This indicates the importance of the structural coupling between the ESD and the policy-shaping systems of the EU. It is also illustrative of how the ESD functions as a cognitively open system that is reflexive and capable of adapting its programming in order to secure its own continuation.

The ideas of the Commission, however, were pre-empted at the Intergovernmental Conference in Luxembourg. The Commission had developed a 'negotiate or we will legislate' formula that had been further elaborated upon by the social partners. At the Intergovernmental Conference, however, this formula was changed to the mere inclusion of the possibility for the social partners to ask the Commission to recommend to the Council that framework agreements between them be made legally binding across the EC. This new proposal met with scepticism from several actors: the European Parliament feared that it would be completely excluded from the legislative process; the ETUC feared that the incentives for employers to engage in negotiations would be undermined without the overhanging threat of legislation; and UNICE saw great disadvantages to the proposal, envisioning that the Parliament might press for straightforward legislation and employers would then lose the possibility of substituting or influencing legislation through negotiations. These reservations ultimately led to the acceptance of the original 'negotiate or we will legislate' formula with the elaboration of what became the ASP.⁵³⁷

The text that was finally adopted basically consisted of the proposal in the form laid out by the social partners, without any major changes.⁵³⁸ The negotiating organisation within the ESD thus identified decision premises⁵³⁹ based on the common interest of retaining potential control over decisions falling within the binary code of 'discussable/non-discussable between collective actors'. The organisation was thus able to overcome the improbability of having communication accepted, in order to secure a decision-making capacity for the organisation within the system.⁵⁴⁰ In other words, the ESD as an autopoietic system exercised the system capacity of self-referential

⁵³⁶ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, pp. 250ff.

⁵³⁷ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 165ff.

⁵³⁸ Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge, p. 95.

⁵³⁹ Luhmann, N. (2005c) 'The Paradox of Decision Making', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business Scholl Press, pp. 85-106, at p. 95.

⁵⁴⁰ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, p. 159.

communication.⁵⁴¹ A decision was made about communicative structures for the system, ensuring communication to which future system communication could refer.

UNICE originally opposed both Community competences in the field of social policy being subject to qualified majority voting, and any formalisation of negotiations at the European level; but they ended up accepting both. In fact, they participated in a process that clearly resulted in a stronger ESD. Even though the initiatives behind this process were top-down, we can see that the contents of the regulative framework involved elements of a horizontal character concerning those who would be negotiating and working within the framework.⁵⁴² The importance of involving the social partners and ensuring that they would take the lead in developing their own dialogue and work structures was later stressed by the Commission⁵⁴³ and was most likely a strategy to increase the internal legitimacy of the process for the European social partners, not least the management side. The course of events makes clear that UNICE saw no other option. Presented with two bad alternatives, they had to choose the lesser evil. The 'negotiate or we will legislate' formula offered better opportunities for control and influence, and this was probably why UNICE accepted it.⁵⁴⁴ These developments signal the cognitive openness of the ESD, allowing the system to adapt its internal programming⁵⁴⁵ and develop communicative structures, including organisations capable of making decisions⁵⁴⁶ recognised as communication within the system.

The changed strategy of UNICE at this stage can be seen as the first result of the pressure from the Community legal system that would later be dubbed 'the shadow of

⁵⁴¹ Luhmann, N. (2005a) 'The Autopoiesis of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 64-84, at p. 68.

⁵⁴² An interesting related point is that the Commission also involved the social partners in formulating the criteria for representativeness that allowed social partner organisations to be consulted under the ASP; see Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at pp. 113f. For the criteria see CEC (1993) *COM(93) 600 final - Communication from the Commission on the Application of the Protocol on Social Policy*. Brussels: European Commission (COM(93) 600 final), paragraph 24.

⁵⁴³ See CEC (1996a) *COM(96) 448 final - Communication from the Commission concerning the development of the social dialogue*. Brussels: European Commission (COM(96) 448 final), paragraph 70.

⁵⁴⁴ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 171.

⁵⁴⁵ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 53ff.

⁵⁴⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 159ff.

law'.⁵⁴⁷ This concept has been used to explain the willingness of the social partners to participate in negotiations. It is based on the history of the ESD and the reactions of the social partners to the possibility of Community legislation in various fields. The basic principle is that the social partners will be more likely to participate in negotiations if it is likely that a legislative proposal will be put forward, whether or not they exercise their option to negotiate the content of that legislation. The probability of legislation can therefore be considered as a decision premise for the social partner organisations, since they would rather control the content of the legislation and thus negotiate the terms among themselves, than see the EU institutions set less favourable conditions.⁵⁴⁸ This has led to the conclusion that the social partners are more likely to negotiate when there is an evident threat of law, and from there to the expression 'negotiations under the shadow of law'. The concept of the shadow of law not only points out the strong structural coupling between the Community policy-shaping systems and the ESD, but can also be seen as a significant factor in distinguishing between what is and what is not discussable between the Community social partners. The shadow of law can thus be understood as part of the ESD's application of its binary code. The shadow of law, in other words, has helped reinforce the ESD as an autopoietic system.

The importance of this concept and its function as an incentive for negotiations are, however, generally different for labour and for management. Whereas the trade unions have always promoted collective bargaining as a method of regulation, the opposite is true for the employers' organisations, which would rather keep issues unregulated.⁵⁴⁹ This means that the trade union movement is likely to be always willing to negotiate, while the threat of legislation is more or less essential for the management side to be willing to negotiate. In other words, the shadow of law has a stronger impact on the side of management than on the trade union side. In this sense

⁵⁴⁷ Bercusson, B. (2009b) 'Maastricht: A fundamental change in European labour law', in Bruun, N., Jacobs, A.T.J.M., Veneziani, B., Blanke, T., Vigneau, C., Kollonay-Lehoczky, C., Lörcher, K., Dorssemont, F., Deakin, S. & Passchier, C. (eds.) *Labour Law and Social Europe - Selected writings of Brian Bercusson*. Brussels: ETUI, pp. 89-114, at pp. 107ff.

⁵⁴⁸ Several authors have discussed or made comments about this. Interesting contributions include Falkner, G. (2003) 'The Interprofessional Social Dialogue at European Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate, pp. 11-29; Ashiagbor, D. (2001) 'EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy'', *European Law Journal*, 7(3), pp. 311-330; Keller, B. (2003b) 'Social Dialogues at Sectoral Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate; or Barnard, C. (2002) 'The Social Partners and the Governance Agenda', *European Law Journal*, 8(1), pp. 80-101.

⁵⁴⁹ See for example Degryse, C. (2000) *European Social Dialogue: a Mixed Picture*: ETUI, pp. 6f; Barnard, C. (2002) 'The Social Partners and the Governance Agenda', *European Law Journal*, 8(1), pp. 80-101; or Falkner, G. (2003) 'The Interprofessional Social Dialogue at European Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate, pp. 11-29.

the shadow of law can be understood as a decision premise for the negotiating organisations that produce decisions as part of the communication within the ESD-More clearly this decision premise can be understood in the sense that, if the shadow of law is present, then decisions can be taken, i.e. agreements can be negotiated. Without pressure exerted by the shadow of law, decisions are less likely, as the improbabilities of communication become too dominant for the decision premises within the organisation to overcome.⁵⁵⁰

These events point out two important aspects of the history of the social dialogue. First, it is clear labour can force management into negotiations if sufficiently strong means for doing so are available to them: in this case, the strong support of the Commission via the shadow of law. The other chief means would be a strike action. In other words, the decision premises of the negotiating organisations, which can make decisions that serve to produce communication within the ESD, are to some extent related to the members of the organisation.⁵⁵¹ By this I mean that there are decision premises that are set up according to a formula: 'if the shadow of law exists, then the trade union side member is allowed to make a decision'. A similarly framed decision premise could potentially substitute the term 'shadow of law' with 'coordinated industrial action at EU level'. Secondly, the importance of the Commission as the actor promoting and facilitating the European social dialogue is clear, as the actions taken and the potential future measures resulting from those actions functioned as a strong incentive for UNICE to adhere to the requests of the Commission and engage in the treaty reform process. Thus the values framing the programming of communication in the policy-shaping systems of the EU are highly important, since the ESD, as a cognitively open system, will adapt its own programming and the decision premises of its organisations in response to such communication, if needed.⁵⁵² That is, when communication from the policy-shaping systems is considered to fall within the ESD system of 'discussable between collective actors', then the ESD will also adapt its programming if need be, to be able to deal with such communication. In this sense, the values that frame the programming of the policy-shaping systems of the EU also exert influence on the values that frame the programming of the ESD.

⁵⁵⁰ Since one of the decision premises for the organisation is framed as 'if legislation is probable, then we will make a decision,' the lack of pressure from the shadow of law actualises the improbabilities of communication. On conditional decision premises, see Seidl, D. (2005) 'The Basic Concepts of Luhmann's Theory of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53, at p. 43.

⁵⁵¹ On the relationship between members and decisions in organisations, see Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at p. 345.

⁵⁵² Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 53ff.

In order to understand how the ASP changed the European social dialogue, we should now take a closer look at the contents of its relevant provisions. The most important provisions in the ASP relating to the social dialogue were Articles 3 and 4, later implemented as Article 118a and 118b of the Amsterdam Treaty. Articles 3 and 4 of the ASP read:

‘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.’

The ASP, in other words, recognised the social partners as legitimate actors in the legislative process, establishing not only their right to be consulted, but also their right to negotiate and conclude agreements that would be implemented through

Community legislation.⁵⁵³ Even though agreements between the social partners most likely had been possible even before the ASP, this marked a new phase in the social dialogue, since such agreements now had clear Treaty recognition and could thus be considered as legal acts of the Community. The possibility for the legal system to recognise decisions taken by the bargaining organisations of the ESD as communication again strengthened the structural coupling between these two systems.⁵⁵⁴ Depending on the decision premises within the bargaining organisation of the ESD and the overall programming of ESD communication,⁵⁵⁵ these new provisions could thus allow a *'fresh momentum in the interplay between European legislation and negotiation.'*⁵⁵⁶

The changes meant that when the Commission launched a legislative proposal that had the credibility of being adopted by qualified majority voting, UNICE's general strategy of lobbying would no longer be the most efficient or best way to promote the interests of its members.⁵⁵⁷ UNICE was forced to change its strategy and engage in negotiations in order to retain a high level of influence and control, and this change in strategy was essential for the further development of the ESD. We can say that the communication that resulted in the ASP both developed decision premises for a bargaining organisation within the ESD and adapted the programming of the ESD, strengthening the structural coupling between the ESD and the Community legal system as a result. Specifically, the structural coupling was strengthened in the sense

⁵⁵³ See Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge, p. 83, who states that *'the social partners are now formal co-actors within the social policy process. Without their consultation, no action may be taken by the EC institutions'* and further that agreements between the European social partners *'are in fact not simply one of two routes towards common social norms. They actually enjoy primacy on the path towards social legislation.'*

⁵⁵⁴ The structural coupling between the EU legal system and the ESD is thus similar to the structural coupling between law and politics, in that the legal system enables the ESD to make decisions that the legal system can convert to legal acts. See Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 112.

⁵⁵⁵ The fact that these new provisions also could give the social partners, especially the management side, the opportunity to obstruct legislative proposals has been pointed out by several authors. See for example Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, p. 189 or Streeck, W. (1994) 'European Social Policy After Maastricht: The 'Social Dialogue' and 'Subsidiarity'', *Economic and Industrial Democracy*, 15(2), pp. 151-177, at p. 169.

⁵⁵⁶ Degryse, C. (2006) 'Historical and Institutional Background to the Cross-industry Social Dialogue', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48, at p. 39. See also Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge, pp. 81f, who shows the potential of the ASP to increase the Community activities and measures within the field of social policy.

⁵⁵⁷ Keller, B. and Bansbach, M. (2000) 'Social dialogues: an interim report on recent results and prospects', *Industrial Relations Journal*, 31(4), pp. 291-307, at p. 294.

that the ESD would now be able to produce communication that generated results in the legal system.⁵⁵⁸ From this, however, it should not be concluded that the ASP alone created the ESD. Communicative structures for the ESD system were already established. Rather, the ASP formalised structures for the social dialogue and provided a legal basis for agreements between the European social partners.

This legal basis for negotiations should not be confused, however, with the binary code of the ESD, which was already set to 'discussable/non-discussable between collective actors' (and not 'negotiable/non-negotiable between collective actors').⁵⁵⁹ Instead it can be considered as communication from the legal system, generating a result of the legal recognition of decisions taken by a bargaining organisation within the ESD. This is because the recognition in the ASP of the right for the European social partners to conclude agreements can be viewed as a recognition of the right to collective bargaining,⁵⁶⁰ which is a basic element required for a system of industrial relations to develop a bargaining organisation capable of making decisions in the form of collective agreements.

Through the incorporation of the ASP in the EC Treaty, the so-called European collective agreements became part of EC law. The European social parties had, as stated above, been active in the Community cooperation since the 1950s, but the bargaining organisation of the ESD and its decisions in the form of collective agreements were now recognised as communication by the legal system, providing for a structural coupling between these systems, in the sense that communication from the ESD could now feed into the legal system in the form of legal acts.⁵⁶¹ The ASP and its later incorporation into the EC Treaty provided a legal foundation for the recognition of the social partners and their involvement in the shaping of Community social policy through a more formalised structure than the previous pluralist model of interest mediation.⁵⁶² The fact that the social dialogue became a part of the legislative

⁵⁵⁸ The structural coupling between systems creates a situation in which communication from one system can generate results in another, if that other system recognises the communication and picks it up as communication in accordance with its own binary code. For an explanation of how systems of collective bargaining can generate effects in the economic system, see Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 121.

⁵⁵⁹ The latter is the binary code that has been suggested for systems of industrial relations. See *ibid.*

⁵⁶⁰ Although it is worth noting that this recognition was somewhat vague and also could hardly be considered as a right to collective bargaining in any other than a purely voluntary manner, not generating any duty to negotiate. See Hartzén, A.-C. 'Fundamentalisation of industrial rights in the EU – an intricate network of legal sources and interpretations.', *THE FUNDAMENTALISATION OF SOCIAL RIGHTS*, Florence: EUI Working Paper, pp. 69-94.

⁵⁶¹ Structural coupling between systems is bidirectional, as Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 108ff.

⁵⁶² Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 113.

process within the EU means that the European social partners gained importance as normative actors at the EU level.⁵⁶³ The changes from unanimity to qualified majority voting for Community legislation on employment issues further increased the strength of the shadow of law. Subsequent events in the 1990s suggested that the European social dialogue was developing towards a strong and legally important industrial relations system.⁵⁶⁴ Three framework agreements concerning different topics were successfully negotiated between the social partners and implemented through Council Directives: parental leave in 1995; part-time work in 1997; and fixed-term work in 1999.⁵⁶⁵ The inclusion of the ESD in the ASP, in other words, did generate some important developments for the ESD, raising hopes that the social

⁵⁶³ Maier, L. (2000) *EU, arbetsrätten och normgivningsmakten (The EU, labour law and the legislative authority)*. Stockholm: Jure AB, p. 46, and Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 113.

⁵⁶⁴ See for example Falkner, G. (2000) 'The Council or the social partners? EC social policy between diplomacy and collective bargaining', *Journal of European Public Policy*, 7(5 Special Issue), pp. 705-724 and her previous work in Falkner, G. (1998) *EU Social Policy in the 1990s - Towards a corporatist policy community*. London: Routledge, p. 205, where she suggested that 'even in this extremely controversial area [social policy], an incremental exit from the joint-decision-trap has been accomplished. In parallel, the corporatist decision gap has been closed.' Some authors claimed that the social dialogue could be assessed as 'the second pillar of European social policy.' See Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 112.

⁵⁶⁵ Implemented through: *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* (1996): Council of the European Communities (OJ No L 145/1996); *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work* (1998): Council of the European Communities (OJ No L 14/1998); and *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999). Discussions on this productive period of the European social dialogue can be found in a vast number of works. For interesting examples see: De Vos, M. (ed.) (2003) *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. The Hague: Kluwer Law International; Falkner, G. (2000) 'The Council or the social partners? EC social policy between diplomacy and collective bargaining', *Journal of European Public Policy*, 7(5 Special Issue), pp. 705-724; Falkner, G. (2003) 'The Interprofessional Social Dialogue at European Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate, pp. 11-29; Franssen, E. (2002) *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia, Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing; Degryse, C. (2000) *European Social Dialogue: a Mixed Picture*: ETUI, Smismans, S. (2004) *Law, Legitimacy, and European Governance: Functional Participation in Social Regulation*. *Oxford Studies in European Law* Oxford: Oxford University Press; Barnard, C. (2002) 'The Social Partners and the Governance Agenda', *European Law Journal*, 8(1), pp. 80-101.

dialogue would continue to develop towards a corporatist regulatory system that might influence future social policy in the EU.⁵⁶⁶

In relation to this it is thus worth mentioning what results the cross-industry social dialogue has achieved after this and I will thus briefly discuss this. As for the results produced after the fixed-term work agreement, the only legally binding agreement has been that of the revised agreement on parental leave. However, some autonomous agreements have been produced concerning the following issues: telework in 2002,⁵⁶⁷ work related stress in 2004,⁵⁶⁸ harassment and violence at work in 2007,⁵⁶⁹ inclusive labour markets in 2010⁵⁷⁰ and active ageing and inter-generational approach in 2017.⁵⁷¹ In addition to this the cross-industry social partners have produced a number of joint statements, declarations and a few frameworks of action.⁵⁷² The actual value of these documents can be questioned, however, since not even the agreements are binding for the parties and merely contain formulations in terms of inviting national social partners to implement them.⁵⁷³ The actual value of these texts is instead dependent upon the interest and capacity of national social partners to implement them, leading in general to outcomes that are even more vague and uncertain than the

⁵⁶⁶ See for example Falkner, G. (2000) 'The Council or the social partners? EC social policy between diplomacy and collective bargaining', *Journal of European Public Policy*, 7(5 Special Issue), pp. 705-724, who, in spite of recognising several difficulties and obstacles in the way of such a development, has a generally positive outlook on the European social dialogue as part of a corporatist policy community.

⁵⁶⁷ ETUC, UNICE, UEAPME and CEEP 2002. Framework Agreement on Telework. Brussels: The European Commission.

⁵⁶⁸ ETUC, UNICE, UEAPME and CEEP 2004. Framework Agreement on Work-Related Stress. Brussels: The European Commission.

⁵⁶⁹ ETUC, BUSINESSEUROPE, UEAPME and CEEP 2007a. Framework Agreement on Harassment and Violence at Work. Brussels: The European Commission.

⁵⁷⁰ BUSINESSEUROPE, UEAPME, CEEP and ETUC 2010. Framework Agreement on Inclusive Labour Markets. Brussels: The European Commission.

⁵⁷¹ ETUC, BUSINESSEUROPE, UEAPME and CEEP 2017. European Social Partners' Autonomous Framework Agreement on Active Ageing and an Inter-generational Approach. Brussels: The Commission of the European Union.

⁵⁷² For an overview see CEU (2016) *Website of the European Commission - Employment, Social Affairs & Inclusion - Policies and Activities - Agencies and Partners - Social Dialogue Texts Database*. Brussels: European Commission. Available at: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en&day=&month=&year=§orCode=SECT22&themeCode=&typeCode=&recipientCode=&keyword=&mode=searchSubmit> (Accessed: 2 July 2017).

⁵⁷³ See for example ETUC, BUSINESSEUROPE, UEAPME and CEEP 2017. European Social Partners' Autonomous Framework Agreement on Active Ageing and an Inter-generational Approach. Brussels: The Commission of the European Union, p. 9.

contents of the texts.⁵⁷⁴ It is thus likely that the productive era was merely a result of the shadow of law as a strong decision premise for the ESD following the increased potential for legislation after introducing qualified majority voting on employment issues.

The Fixed-term work Directive probably remains the result that has generated the most effects in terms of improving working conditions⁵⁷⁵ and the other agreements implemented through directives have also had effects, at least in some Member States. As for the autonomous agreements and other forms of results the situation is different though. Even though these results might have effects for working conditions there are no mechanisms guaranteeing that it will and this of course affects how the capacity of the ESD is perceived in terms of improving working conditions. Whether there are possibilities for improving the situation in future remains to be seen, but judging by the current state of developments the chances seem slim indeed.⁵⁷⁶ Below, I will summarise how we can understand the developments as discussed in this chapter within the theoretical framework of an autopoietic system of industrial relations.

6.6 Summary of conclusions

The developments leading to the inclusion of the ESD in the ASP show that there is a high level of complexity both within and between the political, legal and industrial

⁵⁷⁴ See for example Prosser, T. J. and Perin, E. (2015) 'European tripartism: chimera or reality? The 'new phase' of the European social dialogue in the light of tripartite theory and practice', *Business History*, 57(3), pp. 376-397, pointing out not only the problems of implementation, but also the lack of relevance for employment conditions that the actual topics dealt with show.

⁵⁷⁵ See comment made in Barnard, C. (2014a) 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67, pp. 199-237, at p. 220.

⁵⁷⁶ See for example Prosser, T. (2016) 'Economic union without social union: The strange case of the European social dialogue', *Journal of European Social Policy*, 26(5), pp. 460 - 472, at pp. 468ff. In relation to this I also find it indicative of the considered value of the ESD that the ETUI's annual publication (for 2014 I have however not been able to find a publication on their website) on social developments in the EU (from 2015 titled Social Policy in the EU) has not included a chapter on the ESD since the evaluation of social developments in the EU in 2011, where the conclusion concerning the ESD was basically that it had reached its end, see Degryse, C. and Clauwaert, S. (2012) 'Taking stock of European social dialogue: will it fade away or be reformed?', in Natali, D. & Vanhercke, B. (eds.) *Social developments in the European Union 2011*. Brussels: ETUI and OSE, pp. 131-157. For the last five publications see Natali, D. and Vanhercke, B. (eds.) (2012) *Social developments in the European Union 2011*. Brussels: ETUI and OSE; Natali, D. and Vanhercke, B. (eds.) (2013) *Social developments in the European Union 2012*. Brussels: ETUI and OSE; Natali, D. (ed.) (2014) *Social developments in the European Union 2013*. Brussels: ETUI and OSE; Natali, D. and Vanhercke, B. (eds.) (2015) *Social policy in the European Union: state of play 2015*. Brussels: ETUI and OSE; Vanhercke, B., Natali, D. and Bouget, D. (eds.) (2017) *Social policy in the European Union: state of play 2016*. Brussels: ETUI and OSE.

relations systems of the Community. The structural coupling between the systems generates a situation in which the political system needs to facilitate developments within the legal system in order to open up legal possibilities for the further development of a subsystem of industrial relations. It further seems that the values framing the programming of these systems are important, as a more dominant system is likely to influence the values framing the programming of other systems.

The complexity within the ESD suggests that it is possible to view the organisations of management and labour as organisations that make decisions forming part of the communication of the ESD, and that those organisations in turn constitute members of possible bargaining organisations accountable for decisions with potential of being recognised by other function systems structurally coupled to the ESD. This generates difficulties and a high level of complexity surrounding the definition of conditions for membership and decision premises within the bargaining organisations that form part of making the structures of the ESD observable. The problems of unclear or vague membership conditions and decision premises mean that the ESD faces severe challenges in regards to the improbabilities of communication, not least the improbability of having communication accepted within the system.

From the developments reviewed here, it is also evident that the binary code of the ESD cannot be considered to be 'negotiable/non-negotiable between collective actors', since negotiations are an exception within the system. Rather the binary code should be viewed as 'discussable/non-discussable between collective actors', which in turn affects the bargaining organisations within the ESD, since this organisation will have the same binary code as the autopoietic system within which it produces decisions as part of the system communication. This bargaining organisation is quite likely weaker and less capable of making decisions in the form of collective agreements than a bargaining organisation working under the binary code of 'negotiable/non-negotiable'.

As for the structural coupling between the ESD and the policy-shaping systems of the EU, it is clear that the ASP did clarify the bidirectional nature of this structural coupling, in that communication from the ESD could now enter the legal system as communication in the form of legal acts. The possibility for the policy-shaping systems to produce results within the ESD was, however, still greater, due to the shadow of law that caused irritations in the ESD and can also be said to have been integrated as a decision premise within the bargaining organisation of the ESD. Over the years, however, the influence exerted by the shadow of law has varied. At times when the programming of the legal system has integrated the values of the economic system to a higher extent, the shadow of law has had less influence. This indicates that the values of the economic system also frame the programming of the ESD and it is likely that in order to produce effects in the ESD today, the shadow of law would have to be fashioned as 'a shadow of law that promotes social values'. There is thus an

indication of some sort of hierarchy between the different function systems, where the economic system seems very strong with respect to values that frame the programming of the other function systems, but the political system can generate enough resistance to counter this value formation.

To return to my methodological model, the main focus of this chapter has been the question of what the ESD is (question 2a in my model). I have found answers to this question by considering the concept of values in a positivistic manner, considering how the binary code of the ESD can be understood and what falls within or outside that code. The issue of values in the positivistic sense has also been used to answer the question of whether or not the ESD and the policy-shaping systems of the EU are capable of recognising communication from each other, and thus structurally coupled. The discussion has also touched on the question of what results the ESD produces (question 1a in my methodological model), albeit in a less detailed manner. In seeking to understand the nature and function of the ESD, it has been important to also consider the systems to which the ESD is structurally coupled. To understand that structural coupling, I have made some comments on the framing of the programming of different systems. This has been necessary to arrive at an integrated understanding of the field of study. Here, I have used the parts of my methodological model involving the hermeneutic understanding of values, seeking answers to the question of why the ESD functions as it does and produces the results it does (questions 2b and 1b in my model). It would not have been possible to provide the same analysis and understanding of the historical developments without including this focus on values as ideals that frame the programming of systems.

7 Enlargement and its effects on the European social dialogue

7.1 Introduction

The purpose of this thesis is to shed light on the questions of what the significant similarities and differences are between the ESD and the ITF FOC campaign as well as seeking to understand why these two systems are perceived as having differing capacity in terms of producing results that improve working conditions. To answer those questions it is important to understand how variances and differences among the regulatory systems within the Member States of the EU might affect the ESD. It is helpful to consider how events where differences have been at the forefront have affected the development of the ESD and its communicative structures. This chapter is therefore dedicated to the enlargement of the EU in 2004. In the two preceding chapters I provided a picture of what the ESD is and what results it produces (relating to questions 2a and 1a in my methodological model) and some indications of why this is so (relating to questions 2b and 1b in my methodological model). This chapter will provide more information on what the ESD is, based on the challenges it has faced due to the enlargement in 2004, and I will also continue to deepen our understanding of why this is so. Let me begin with some background and my reasons for examining the 2004 enlargement of EU in more detail.

7.2 Background

The enlargements to the EU are an important sequence of events that is often portrayed as a challenge for the ESD, as it has increased the diversity of national systems of industrial relations as well as the diversity of socio-economic conditions among Member States. The largest addition of new Member States to the EU to date came with the 2004 enlargement. Enlargements occurred before and after 2004 as well, but the 2004 enlargement remains the one that has generated the greatest degree of diversification among Member States, as regards the political, legal and social

context. This chapter therefore focuses on the 2004 enlargement, the challenges it produced for the ESD and how these challenges have been dealt with so far.

In general, for the industrial relations systems in the Member States that acceded to the EU in 2004, a basic legal framework was in place regarding structures and procedures as well as social partners and their rights and obligations. It is worth noting that this legislation was still fairly new and therefore likely to undergo adjustments on its way to becoming fully consolidated. However, the issue of the social partners' representativeness was not fully developed, and there was a general lack of transparent criteria for representativeness. In some cases the representativeness of the social partners had more of a political dimension.⁵⁷⁷ In my opinion, this is not an issue of major concern for industrial relations in the new Member States, as a similar evolution can be seen at the EU level, where the criteria for representativeness as defined by the Commission⁵⁷⁸ could initially have been criticised as merely reflecting the characteristics of the social partner organisations favoured by the Commission for participating in the social dialogue. An evolution of the criteria for representativeness for the social partners is thus likely to also occur in the Member States that joined the EU in 2004. In other words, there are other serious issues that need to be addressed, besides the issue of representativeness.

Even though the 10 new Member States in 2004 differed in various ways in their histories and in the cultural specifics for their industrial relations systems, a larger difference was apparent between the Central and Eastern European (CEE) and the Mediterranean states. Malta and Cyprus, in particular, were more similar to the older Member States. The problems raised by integration of their national industrial relations systems into the ESD processes were similar to those that had occurred in previous enlargements,⁵⁷⁹ and thus less troublesome, and so they will be discussed less than the issues that arose for the CEE states. In the coming sections I will discuss the challenges for the ESD generated by the 2004 enlargement, and in particular the key elements specific to the CEE states that acceded to the EU at that time. Since some time has elapsed since then, it is also relevant to discuss more recent developments. Therefore, each of the coming sections will begin with an explanation of the situation at the time of enlargement and continue with comments on more recent developments. The first challenge to be discussed is the challenge to the social

⁵⁷⁷ See e.g. Ladó, M. (2002) 'EU Enlargement: Reshaping European and National Industrial Relations?', *The International Journal of Comparative Labour Law and Industrial Relations*, 18(1), pp. 101-124, at pp. 108ff.

⁵⁷⁸ CEC (1993) *COM(93) 600 final - Communication from the Commission on the Application of the Protocol on Social Policy*. Brussels: European Commission (COM(93) 600 final).

⁵⁷⁹ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 7.

partners' representativeness, indirectly at the EU level, owing to problems with weak social partner structures in the new 2004 members.

7.3 Lack of autonomous, strong and independent social partners

In many of the Member States that joined the EU in 2004, governments had used tripartite national cooperation as a tool for economic transformation. There was a tendency to appreciate social dialogue when it generated political results that corresponded to the will of the government. Therefore, the major part of the social dialogue work in these newer Member States had been conducted within tripartite committees initiated by the government. For many of these Member States, this system was a way for the governments to tackle internal difficulties in the transition from centrally planned to market-based economies.⁵⁸⁰

In order to legitimise and gain public acceptance for reform schemes and restructuring of the economic and social system, which included unavoidable compromises in levels of social protection, wage development etc., the governments sought the social partners' approval.⁵⁸¹ At the time of enlargement in 2004, this tripartism had not created a solid foundation upon which to build strong, autonomous social partner organisations. Therefore, weakness characterised the autonomous social dialogue and collective bargaining in the new 2004 Member States. The number of agreements concluded by collective bargaining was small, as was the scope of their coverage.⁵⁸² As an example, in 2005 the collective bargaining coverage in Lithuania was 11 per cent, in Hungary 35 per cent and in Slovakia 48 per

⁵⁸⁰ Dimitrova, D. and Petkov, K. (2005) 'Comparative Overview: Changing Profiles, Action and Outcomes for Organised Labour in Central and Eastern Europe', in Dimitrova, D. & Vilroks, J. (eds.) *Trade Union Strategies in Central and Eastern Europe: Towards Decent Work*. Budapest: International Labour Office, pp. 15-62, at pp. 24ff.

⁵⁸¹ Vaughan-Whitehead, D. (2003) *EU Enlargement Versus Social Europe? The Uncertain Future of the European Social Model*. Cheltenham: Edward Elgar, pp. 227ff.

⁵⁸² Ladó, M. (2002) 'EU Enlargement: Reshaping European and National Industrial Relations?', *The International Journal of Comparative Labour Law and Industrial Relations*, 18(1), pp. 101-124, at pp. 110ff.

cent, while the average of the EU15 at that time was 68.8 per cent.⁵⁸³ The problem of insufficiently developed bipartite autonomous social dialogue in the new 2004 Member States was not even recognised by the social partner organisations themselves until shortly after the enlargement, as they had tended to regard tripartite concertation and bipartite negotiations as alternative instead of complementary approaches to partnership.⁵⁸⁴ Still, participation in tripartite committees had brought some positive effects for the social partners, as several organisations had used their participation as a way of gaining credibility and legitimacy to help strengthen their roles as well as their possibilities of gaining some sort of representativity.⁵⁸⁵

In general, the transformation of the economic systems in the CEE states had weakened the role the social partners could play. Trade unions had lost members as well as credibility and very few proper employers' organisations had emerged, as the public did not regard these organisations as representing their interests as employers or employees. The few employers' organisations that existed had generally developed as lobbying organisations that focused much more on economic lobbies than the function of representing interests. In other words, they held an attitude that was largely similar to that of EU-level employers' organisations. In addition, most of these employers' organisations more or less only organised and represented the large enterprises that had been or still were state-owned.⁵⁸⁶ The main part of the economy in the new 2004 Member States consisted of small and medium-sized enterprises (SMEs), and the few larger companies that existed were mainly formerly state-run businesses that were being or had recently been privatised.⁵⁸⁷

⁵⁸³ CEC (2008b) *Industrial Relations in Europe 2008*, Brussels, p. 78. Slovenia had at this time a high level of collective bargaining coverage (95 per cent), which was largely due to national legislation on employers' mandatory membership in the chamber of commerce through which bargaining coverage was achieved. The figures for Slovenia for both trade union density and bargaining coverage also dropped after changes to this national legislation (see Keune, M. and Pochet, P. (2010) 'Conclusions: trade union structures, the virtual absence of social pacts in the new Member States and the relationship between sheltered and exposed sectors', in Pochet, P., Keune, M. & Natali, D. (eds.) *After the euro and enlargement: social pacts in the EU*. Brussels: ETUI, pp. 395-415, at pp. 401ff).

⁵⁸⁴ Wild, A. (2005) *Final report - Joint Project of the European Social Partner Organisations: "CEEC social partners' participation in the European social dialogue: What are Social Partners' needs?" (Phase 2A)*, Brussels: Social Partner Organisations - UNICE and ETUC Resource centres. Available at: <http://212.3.246.118/content/default.asp?PageId=367>, p.12.

⁵⁸⁵ Vaughan-Whitehead, D. (2003) *EU Enlargement Versus Social Europe? The Uncertain Future of the European Social Model*. Cheltenham: Edward Elgar, pp. 224ff.

⁵⁸⁶ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at pp. 7ff.

⁵⁸⁷ Ladó, M. (2002) 'EU Enlargement: Reshaping European and National Industrial Relations?', *The International Journal of Comparative Labour Law and Industrial Relations*, 18(1), pp. 101-124, at pp. 112f.

Both trade unions and employers' organisations had reported declining memberships and/or difficulties in convincing potential members of the benefits of membership.⁵⁸⁸ These recruitment difficulties, in combination with a lack of interest in social dialogue amongst the very few and weak employers' organisations that existed, had led to a situation in which collective bargaining was an exception.⁵⁸⁹ Reasonable coverage of companies by multi-employer collective bargaining arrangements was only to be found in Slovenia and to some extent in Slovakia.⁵⁹⁰ In the other new 2004 Member States, collective bargaining existed mainly at the company or plant levels, and bargaining with more than one employer did not in general take place, outside of the formerly state-owned enterprises. At the sectoral and national levels there was basically no collective bargaining at all. The result was that the coverage of collective agreements was very low and more or less without importance for private SMEs.⁵⁹¹

Furthermore, the social partners had limited institutional resources, as many lacked well-educated and experienced staff. They were also financially dependent on political and market activities, as their main income was generated by these means instead of through membership subscriptions.⁵⁹² In addition, many of the new Member States had a long history of government intervention in labour market policy with no recognition of an autonomous social dialogue or any possibility for the social partners to influence this policy. This limited the space for social partners to develop autonomous activities and impeded the development of a system of bipartite negotiations.⁵⁹³ These new members of the bargaining organisations of the ESD thus

⁵⁸⁸ Wild, A. (2005) *Final report - Joint Project of the European Social Partner Organisations: "CEEC social partners' participation in the European social dialogue: What are Social Partners' needs?" (Phase 2A)*, Brussels: Social Partner Organisations - UNICE and ETUC Resource centres. Available at: <http://212.3.246.118/content/default.asp?PageId=367>, p. 12.

⁵⁸⁹ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 9.

⁵⁹⁰ Marginson, P. and Meardi, G. (2006) 'European Union enlargement and the foreign direct investment channel of industrial relations transfer', *Industrial Relations Journal*, 37(2), pp. 92-110, at p. 93.

⁵⁹¹ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 9.

⁵⁹² Ladó, M. (2002) 'EU Enlargement: Reshaping European and National Industrial Relations?', *The International Journal of Comparative Labour Law and Industrial Relations*, 18(1), pp. 101-124, at pp. 109f. See also Wild, A. (2005) *Final report - Joint Project of the European Social Partner Organisations: "CEEC social partners' participation in the European social dialogue: What are Social Partners' needs?" (Phase 2A)*, Brussels: Social Partner Organisations - UNICE and ETUC Resource centres. Available at: <http://212.3.246.118/content/default.asp?PageId=367>, especially p. 12, on the difficulties caused by scarce financial resources as a result of declining revenues due to falling membership.

⁵⁹³ Wild, A. (2005) *Final report - Joint Project of the European Social Partner Organisations: "CEEC social partners' participation in the European social dialogue: What are Social Partners' needs?" (Phase 2A)*, Brussels: Social Partner Organisations - UNICE and ETUC Resource centres. Available at: <http://212.3.246.118/content/default.asp?PageId=367>, p. 13.

increased the improbabilities of communication, in terms of who the right addressee should be in these contexts and whether or not the correct addressee would be capable of understanding the communication.⁵⁹⁴

Projects were established on initiatives from both the EU-level social partners⁵⁹⁵ and the EU institutions⁵⁹⁶ to identify the main challenges and ways forward for the ESD following the enlargement. The Commission expressed continuous critique of the unsatisfactory progress in strengthening the social dialogue in several of the new Member States throughout the accession process, but this critique was not accompanied by any sanctions, and in the end the only EU instrument that actually helped strengthen the social dialogue in the new Member States was probably the mandatory participation of social partners in the Open Method of Communication (OMC) concerning the European Employment Strategy (EES).⁵⁹⁷ This again highlights the importance of the structural coupling between the ESD and the policy-shaping systems of the EU,⁵⁹⁸ not least as regards the capacity of the policy-shaping systems to produce results that generate effects within the ESD.

The problems with unorganised employers and employees, creating weak social partner organisations with little capacity to generate credible results in collective bargaining or tripartite concertation processes, have not lessened since the enlargement.⁵⁹⁹ Instead, the tendency seems to be toward a continuous decline in membership for social partner organisations across both the former CEE countries

⁵⁹⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁵⁹⁵ See for example Wild, A. (2005) *Final report - Joint Project of the European Social Partner Organisations: "CEEC social partners' participation in the European social dialogue: What are Social Partners' needs?" (Phase 2A)*, Brussels: Social Partner Organisations - UNICE and ETUC Resource centres. Available at: <http://212.3.246.118/content/default.asp?PageId=367>. It is also worth mentioning the so-called TRACE project that was led by what was then the ETUCO (now the ETUI-REHS) with support from the Commission, an interesting commentary on which is in Walker, S., Martínez Lucio, M. and Trevorrow, P. (2007) 'Tracing trade union innovation: a framework for evaluating trade union learning projects in a time of complexity', *Transfer*, 13(2), pp. 267-290.

⁵⁹⁶ See for example Welz, C. and Kauppinen, T. (2004) *Social dialogue and conflict resolution in the acceding countries*, Luxembourg: European Foundation for the Improvement of Living and Working Conditions.

⁵⁹⁷ Keune, M. 2008. EU enlargement and social standards: exporting the European Social Model? Brussels: ETUI-REHS.

⁵⁹⁸ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

⁵⁹⁹ Keune, M. and Pochet, P. (2010) 'Conclusions: trade union structures, the virtual absence of social pacts in the new Member States and the relationship between sheltered and exposed sectors', in Pochet, P., Keune, M. & Natali, D. (eds.) *After the euro and enlargement: social pacts in the EU*. Brussels: ETUI, pp. 395-415.

and the older Member States.⁶⁰⁰ In fact, Italy is the only country in which trade union density did not decline between 2001 and 2012–2013.⁶⁰¹ This will probably perpetuate the problem of scarce resources for national social partner organisations, as the likely result of a decline in membership is a decline in revenues.

The challenges posed for the ESD by the enlargement have thus increased, and these problems need to be addressed when considering the potential impact of ESD results for the individual worker. In light of a recent absence of legislative initiatives, with little or no incentive for EU-level social partners to consider negotiating anything but autonomous agreements that must be implemented by weak national affiliates without the resources to do so, the hope that the ESD can make a difference for individual workers remains slim indeed.⁶⁰² This becomes an even more pressing issue for the European social partners if we consider that the European-level structures to ensure the best potential implementation of autonomous agreements are not fully in place, when it comes to aiding national affiliates in questions about interpretation and useful forms of implementation.

Some progress has been made, for example by the Commission-backed establishment of a Translation Fund to support the translation of the ESD agreements and instruments into all the official EU languages, making it a structure that potentially could increase the efficiency of communicative channels between the national and the EU levels of the ESD.⁶⁰³ But the improbabilities of communication pose great challenges to the ESD in terms of the communicative structures that link the EU and national levels. The improbability of communication reaching the right addressee has increased, and so has the improbability of that communication being understood. If these two improbabilities are not solved, the communication has a limited chance of being accepted.⁶⁰⁴ Since the structural coupling between the EU policy-shaping systems and the ESD has in some cases contributed to the development of communicative structures, as for example when the shadow of law has provided

⁶⁰⁰ Sweeney, B., Curtarelli, M., Broughton, A., Aumayr, C., Vargas, O. and Cabrita, J. (2011) *Industrial relations and working conditions developments in Europe 2010*, Luxembourg: European Foundation for the Improvement of Living and Working Conditions.

⁶⁰¹ For Romania figures were only available for 2007. In Belgium and France the decline has been comparatively small, whereas trade union density in Slovakia and Slovenia has dropped more sharply. See CEU (2015) *Industrial Relations in Europe 2014*. Luxembourg: Publications Office of the European Union, p. 20.

⁶⁰² See for example the conclusion that 'the current social dialogue looks like not-too-effective governance in the absence of government' on p. 178 in Smismans, S. (2008) 'The European Social Dialogue in the Shadow of Hierarchy', *Journal of Public Policy*, 28(1), pp. 161-180.

⁶⁰³ See Clauwaert, S. (2011) '2011: 20 years of European interprofessional social dialogue: achievements and prospects', *Transfer*, 17(2), pp. 169-179.

⁶⁰⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

impetus for communication within the ESD, it may be useful to briefly examine the workings of the legal systems in the new 2004 Member States. This is the subject of the next section.

7.4 Lack of enforceable legislation in practice

With a general legislative framework (as mentioned above) already in place, the Member States that joined the EU in 2004 all managed to successfully transpose the EU *acquis communautaire* into their own legal systems. This was, however, no guarantee that this legislation would enter fully into force at the practical level. In fact, a large gap remained between written law and actual practice.⁶⁰⁵ In several of the new Member States, for example the Czech Republic and Slovakia,⁶⁰⁶ no specialised labour courts existed, and civil courts perhaps did not pay sufficient attention to claims brought by workers. In addition, the courts were generally overburdened, meaning that the time span between the putting forward of an action by a worker and the judgment of the court could be very long. In the meantime, the worker was often forced to leave his or her position in order to avoid future conflicts with the employer, leading to no real victory even if financial compensation was made. The situation reinforced bad practices amongst employers and discouraged employees from filing complaints.⁶⁰⁷ Although some improvements having been made, including measures adopted to strengthen labour inspectorates,⁶⁰⁸ problems relating to the lack of specialised labour courts and insufficient resources for the courts in general seem to remain.⁶⁰⁹

Another reason for this problematic contrast between law and actual practice was that a large part of EU legislation requires the involvement of social partners or other forms of worker representation. As these actors were in large measure absent from industrial relations and from the structures for the practical implementation of labour

⁶⁰⁵ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 24.

⁶⁰⁶ Falkner, G. (2010) 'Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia', *Journal of Public Policy*, 30(1), pp. 101-116, at p. 111.

⁶⁰⁷ Cazes, S. and Nesporova, A. (2003) *Labour markets in transition: Balancing flexibility and security in Central and Eastern Europe*. Geneva: International Labour Office, pp. 141f.

⁶⁰⁸ This has happened, for example, in Hungary; however, the main task of the inspectorate is to focus on illegal work and the enforcement of labour law is not prioritised. See Causse, E. (2008) 'Hungary', in Falkner, G., Treib, O. & Holzleithner, E. (eds.) *Compliance in the Enlarged European Union: Living Rights or Dead Letters*. Hampshire, England: Ashgate, pp. 61-92, at pp. 85f.

⁶⁰⁹ Falkner, G. (2010) 'Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia', *Journal of Public Policy*, 30(1), pp. 101-116, at pp. 110ff.

law, it comes as no surprise that the written law was not properly enforced on the labour market.⁶¹⁰ The EU tendency to favour soft law measures based on voluntary self-regulation was also problematic,⁶¹¹ since the actors that would have had to assure the implementation of such measures were either too weak or uninterested in doing so. The problems were augmented by the fairly large proportion of grey market in the economies of the new Member States, whereby any form of regulation is circumvented, and the impotence of potential labour market control organs, whether labour inspectorates or trade unions, made it difficult to come to terms with this situation.⁶¹² The weakness of the industrial relations systems in the new 2004 Member States has thus generated a situation in which the legal system is less likely to produce outcomes that generate effects in systems of industrial relations at the national level. The lack of efficiency in enforcement through the legal system makes the outcomes of the legal system less of a threat to the systems of industrial relations, and effects similar to that of the shadow of law⁶¹³ at EU level are thus less likely. The structural coupling between these systems is likely to also exist in these countries,⁶¹⁴ but the industrial relations systems are so weak that chances are small that they will recognise and use communication from the legal system.

Although these problems have largely persisted, there are indications that the situation might be improving, at least in terms of increased levels of remuneration and improved working conditions. At least, such a tendency was apparent in the new Member States until 2008, when the financial and economic crisis again changed the situation. The improvements up until 2008 are to some extent explained by the fact that employers in the new Member States found it increasingly difficult to hire skilled workers, since workers exercised their right to free movement to leave low-paid labour markets for higher paid jobs in other countries, forcing employers (and to some

⁶¹⁰ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 24.

⁶¹¹ Woolfson, C. (2006) 'Working Environment and 'Soft Law' in the Post-Communist New Member States', *JCMS: Journal of Common Market Studies*, 44(1), pp. 195-215, at p. 196.

⁶¹² In spite of the fact that illegal labour and an increased use of self-employed workers do pose challenges for systems of industrial relations, these issues fall outside the scope of my thesis, as the aim of this thesis is to focus on regulatory systems and not on how such systems are avoided. For an introduction to these problems and further reading, see for example Keune, M. 2008. EU enlargement and social standards: exporting the European Social Model? Brussels: ETUI-REHS; or Marginson, P. and Traxler, F. (2005) 'After enlargement: preconditions and prospects for bargaining coordination', *Transfer*, 11(3), pp. 423-438.

⁶¹³ For a discussion of the effects of the shadow of law and the meaning of this concept, see sections 1.3 and 6.5 above.

⁶¹⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

extent also governments) to make concessions.⁶¹⁵ This situation generated increased influence for trade unions and worker representatives. In spite of declining membership, the actual scope for action for trade unions increased to some extent during the period between enlargement and the financial crisis, due to the power shifts caused by labour shortage in some of the new Member States.

However, increasing levels of unemployment after the financial crisis is likely to have made the situation worse again.⁶¹⁶ This shows the importance of neo-liberal economic values – i.e. that the market has the task of balancing supply and demand and will do so in a rational manner – in relation to the dynamics between and within systems. When these values guide the programming of systems, the decision premises of potential bargaining organisations within systems of industrial relations will adapt accordingly. In situations where there is a surplus of workers, decision premises will generate decisions that lower the cost of labour. When there is a shortage of workers, decision premises will raise the cost of labour to attract more workers. In this sense the members of potential bargaining organisations within systems of industrial relations participate in promoting the neo-liberal values of the economic system. The fairly strong impact of neo-liberal attitudes in the Member States that acceded to the EU in 2004 can be viewed as a reaction against the earlier Communist systems in those countries. Since this has implications for the development of systems of industrial relations in these countries, I will briefly discuss this issue in the next section.

7.5 Neo-liberal attitudes

The former Communist systems in many of the Member States that joined the EU in 2004 had implications for the development of industrial relations systems in these countries, and were often used to justify the prevailing the individualistic, neo-liberal mentality.⁶¹⁷ Neo-liberal groups argued that the over-regulation of working conditions would diminish the comparative advantage held by workers from CEE states over higher-paid workers in Western nations, pointing out the importance of low costs as a factor for competitiveness. It was further suggested that legislation that

⁶¹⁵ Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120.

⁶¹⁶ Falkner, G. (2010) 'Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia', *Journal of Public Policy*, 30(1), pp. 101-116, at p. 112. For a further discussion on the effects of the financial crisis for the ESD see chapter 9.

⁶¹⁷ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 7.

within the EU had been regarded as a means to combat social dumping would not contribute to better working conditions, but rather make the situation for workers worse. These kinds of arguments become popular in the former Communist countries, especially in the Baltic States,⁶¹⁸ and affected attitudes and politics in these states. Worth noting here is that, although there are examples of the transposition of the EU social *acquis* leading to increased worker protections, in some instances the transposition of EU legislation was actually used to decrease the level of protection.⁶¹⁹

One result of this mentality was, to some extent, to create a threshold for increasing the level of organisation amongst workers, but it also had effects on legislation and how legislation was implemented that were more important. Generally, legislation made it easy for companies to sign contracts based on civil law in order to skirt existing laws that protected employees.⁶²⁰ These structures further enhanced neo-liberal attitudes that promoted free market forces as a means of improving competitiveness and economic growth.⁶²¹ In the transition from Communist to market-based systems, these attitudes generated a significant imbalance between labour and management in the workplace.⁶²² This imbalance was indirectly supported by the business and political elites, who praised the free playing field for market forces as a means of increasing competition. The result was a further weakening of the social

⁶¹⁸ Woolfson, C. (2006) 'Working Environment and 'Soft Law' in the Post-Communist New Member States', *JCMS: Journal of Common Market Studies*, 44(1), pp. 195-215, at pp. 204ff.

⁶¹⁹ For example, the transposition of the Working Time Directive was used to decrease the possibility of trade union or worker influence on working time issues in Hungary, Poland and Slovakia; see Keune, M. 2008. EU enlargement and social standards: exporting the European Social Model? Brussels: ETUI-REHS.

⁶²⁰ The basic assumption in business and management theories of a link between productivity and satisfied employees seems to be neglected in these discussions. Instead of considering productivity as the key factor in generating profit, and ensuring good working conditions and employee empowerment in order to raise productivity, employers seem to consider low labour costs as a key factor in improving competitiveness. On the problems caused by the lack of linkage between productivity levels and wages and a lone focus on wage costs, see Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at pp. 92ff. For interesting contributions concerning the questionable link between wage costs and unemployment, see Amlinger, M., Bispinck, R. and Schulten, T. (2016) *The German Minimum wage: Experiences and perspectives after one year* Düsseldorf: WSI Institute of Economic and Social research WSI-Report No. 28e, 1/2016); and Deakin, S., Malmberg, J. and Sarkar, P. (2014) 'How do labour laws affect unemployment and the labour share of national income? The experience of six OECD countries, 1970–2010', *International Labour Review*, 153(1), pp. 1-27.

⁶²¹ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at p. 10.

⁶²² Woolfson, C. (2006) 'Working Environment and 'Soft Law' in the Post-Communist New Member States', *JCMS: Journal of Common Market Studies*, 44(1), pp. 195-215, at p. 196.

dialogue.⁶²³ This approach towards deregulation and the preference for soft law measures over hard law was somewhat supported by the Commission and within the EU institutions as well, as part of a quest to modernise the European social model.⁶²⁴ This encouragement of more liberal approaches seemed likely to gain support in the new Member States and thus preserve the existing imbalance between labour and management, which in turn might make the necessary work of strengthening the social dialogue in these states more difficult. It is also worth pointing out that the increased heterogeneity amongst the Member States in combination with the neo-liberal political attitudes spreading hardly would enhance the possibilities for the adoption of Community legislation within the field of employment law. Rather the results is likely to be in the opposite and thus weakening the power of the shadow of law, making legally binding ESD agreements less likely and leaving the effect of potential voluntary agreements to the hands of national social partners.

From the above follows that in order for systems of industrial relations to be capable of communicating in a manner that will generate improved conditions for workers, these systems need structures that can help overcome the improbabilities of communication relating to decisions about working conditions.⁶²⁵ When the values guiding the programming of systems are geared towards favouring economic interests over social interests, the tools available for ensuring the communicative success of decisions relating to improved working conditions become scarce.⁶²⁶ Communication within the system thus needs to be framed so as to ensure results that have an impact on the economic system,⁶²⁷ i.e. that can threaten the economic system values of profit and competitiveness. As shown above, such tools could include workers simply exiting the market, creating a labour shortage, or industrial action, which is costly for employers. In order for industrial action to be effective, the trade unions need a certain measure of strength and capacity, which is less likely in the new Member States from 2004, due to low trade union density and economic weakness of the

⁶²³ Woolfson, C. (2006) 'Working Environment and 'Soft Law' in the Post-Communist New Member States', *JCMS: Journal of Common Market Studies*, 44(1), pp. 195-215; Keune, M. 2008. EU enlargement and social standards: exporting the European Social Model? Brussels: ETUI-REHS, pp. 206f.

⁶²⁴ Woolfson, C. (2006) 'Working Environment and 'Soft Law' in the Post-Communist New Member States', *JCMS: Journal of Common Market Studies*, 44(1), pp. 195-215; Keune, M. 2008. EU enlargement and social standards: exporting the European Social Model? Brussels: ETUI-REHS, pp. 207f.

⁶²⁵ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁶²⁶ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 226f.

⁶²⁷ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 121.

unions in these states. This means it is worth considering to what extent the communicative structures could allow for communicative success concerning the improvement of working conditions. In this respect the potential to develop bargaining organisations is important, and so is the extent to which such organisations could set up decision premises to permit a certain degree of decision-making capacity for trade union members.

As far as the general framework for worker involvement and participation in management decision-making, this was more or less in place at the time of enlargement, even though much of the legislation had been implemented without the support of the social partners. Furthermore, the systems for this kind of worker involvement were sometimes modelled upon Western European structures, without taking into account the countries' own specifics, and worker involvement played a role solely in the larger enterprises. This created multiple problems, and there was also a generally negative attitude towards worker participation as a feasible system in a successful market economy. Within trade unions there was a general opposition to this implementation of workplace influence, and no proper system separated trade unions and workplace representation. This lack of defined structures and functions within the industrial relations systems gave rise to competition between these different workers' representatives, which in turn further weakened and delegitimised both labour bodies.⁶²⁸ Establishing potential bargaining organisations with capacity for making decisions that can contribute to the production of communication within these systems of industrial relations is thus difficult, since the communication concerning membership conditions is unclear. It is unlikely that an organisation can exist without clear decisions as to who its members are.

However, the problems of weak bargaining organisations in the newer Member States is not the only issue that needs to be addressed and analysed in order to understand developments in the ESD. When analysing the ESD through the eyes of Luhmann, it is also important to consider developing communication and communicative structures.⁶²⁹ Here, the national affiliates to the EU-level social partners should not be considered in isolation. One national affiliate might come off as weak in the purely national context, but this might change in other contexts. At least in terms of communication and communicative structures, differences might exist between the national context and the transnational or EU contexts. Thus a weak national organisation does not automatically equate to a lack of communication. I will develop this further next in the section, on the posting of workers.

⁶²⁸ Weiss, M. (2004) 'Enlargement and Industrial Relations: Building a New Social Partnership', *The International Journal of Comparative Labour Law and Industrial Relations*, 20(1), pp. 5-26, at pp. 9f.

⁶²⁹ Communication forms the basis for the system and thus it is communication and communicative structures that are relevant for the analysis, rather than actors. See Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press.

7.6 Posting of workers and labour migration

The posting of workers has been and continues to be an issue of concern within the EU. The matter is important for the development of the single market and fair competition between Member States and for companies of different nationalities. The Posted Workers Directive was put forward as a means of securing a level playing field,⁶³⁰ but can also be interpreted as a measure aimed at preventing social dumping within the EU.⁶³¹ After enlargement, the posting of workers, especially in relation to the free movement of services, became a subject of intensified discussion within the EU and its Member States. In general, higher-cost countries feared that workers from the old Member States would be forced to compete with workers from the new Member States through reduced pay and working conditions, leading to social dumping across the EU. This fear also resulted in the possibility for old Member States to apply restrictions on labour market access for workers from the new Member States during a transition period, although only Austria and Germany applied the restrictions until the end of the transition period.⁶³²

Nevertheless, the issue of posted workers generated not only discussions and tensions between old and new Member States within the EU, but also court intervention in the form of the CJEU rulings in the cases *Laval*,⁶³³ *Rüffert*⁶³⁴ and *Luxembourg*.⁶³⁵ The questions raised in these cases highlight important issues relating to trade union competence and action, the application of collective agreements in situations involving posted workers, and thus also industrial relations and the ESD. First of all, the conflicts concerning salary levels and working conditions for workers posted from

⁶³⁰ Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services (1997): European Parliament and Council of the European Union (OJ No L 18/1997), motives, point 5.

⁶³¹ On this see for example Barnard, C. (2000) 'Social Dumping and the Race to the Bottom: some Lessons for the European Union from Delaware', *European Law Review*, 25(1), pp. 57-78.

⁶³² Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120, at p. 105.

⁶³³ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

⁶³⁴ Case C-346/06 *Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

⁶³⁵ Case C-319/06 *Commission of the European Communities v. Grand Duchy of Luxembourg* [2008] 2008 ECLI:EU:C:2008:350 I-4323.

the usually low-paying new Member States⁶³⁶ to the often higher-paying old Member States tend to be highlighted as nationalistic and protectionist actions on the part of trade unions in the high-cost countries, even though this might not be the case. This suggests a risk that such conflicts could provoke tensions between national trade unions in the old and new Member States.

However, some studies have shown that this tension might be more of a media construction than an actual conflict of interest between different national trade unions, which instead see protecting precarious workers as a common interest. This being said, the studies also show that the communication between the national trade unions as well as the communication between the EU-level organisations and their national affiliates in such conflicts lacks efficiency and opens up the possibility of misunderstandings based on media coverage rather than direct communication.⁶³⁷ In other words, the different levels and different national contexts are not automatically connected in one and the same communicative system, or at least the communicative structures as such struggle to render the ESD into an efficient communicative system that integrates all the aspects European industrial relations. Another way to see it is that the ESD struggles to establish communicative structures that can ensure that the improbabilities of communication are overcome. It is clear that the improbability of communication reaching the right addressee and the improbability of communication being understood pose challenges for the ESD. If these two improbabilities are not overcome, then the improbability of having communication accepted will prove an insoluble challenge, because communication cannot be accepted if it does not reach the right addressee or is not understood.⁶³⁸ There is thus a need for the European social partners and their national affiliates to improve the efficiency of the communicative channels between the national and EU levels, as well as transnationally. If they do not, it is unlikely that bargaining organisations capable of making decisions that can secure efficient communication within the ESD can be established, due to the lack of accepted decisions on membership conditions and necessary decision premises.

⁶³⁶ For a thorough discussion of the working and employment conditions in the new Member States in comparison to the average level in EU15 states, see Vaughan-Whitehead, D. (2003) *EU Enlargement Versus Social Europe? The Uncertain Future of the European Social Model*. Cheltenham: Edward Elgar, especially pp. 35ff and 165ff, or Vaughan-Whitehead, D. (2005) 'The World of Work in the New Member States: Diversity and Convergence', in Vaughan-Whitehead, D. (ed.) *Working and Employment Conditions in New EU Member States: Convergence or Diversity?* Geneva: International Labour Office, pp. 1-44.

⁶³⁷ Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120.

⁶³⁸ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

Secondly, the court cases clarified limits for trade union action in order to enforce working conditions as established in collective agreements. In this respect it is of importance that the trade union action not be in any way discriminatory, i.e. industrial action is only allowed against a foreign service provider under circumstances in which industrial action would also be allowed against a national service provider.⁶³⁹ Nor is it possible to take industrial action in order to push through working conditions that are more advantageous than those explicitly covered by the Posted Workers Directive.⁶⁴⁰ Both the scope of action for national trade unions and the objectives for which action is taken have thus been limited by EU law, and the possibilities for transnational organisation and trade union cooperation also seem to have been limited. This is not only because of the CJEU rulings in the abovementioned cases, but also because of the segregation of both interests and workplaces for posted workers and national workers.⁶⁴¹ The possibility for a trade union member of a bargaining organisation within the ESD to overcome the improbability of having communication accepted by making a decision that will render effects in the economic system is thus limited. The legal system has, in other words, produced a result that will have an impact on decision premises, specifically

⁶³⁹ From the perspective of EU law this is quite logical, and Swedish regulations governing industrial action were changed as a result of the *Laval* case (*Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767. and *Regeringens proposition 2009/10:48 - Åtgärder med anledning av Lavaldomen* (2009). Stockholm: The Swedish Government. Nevertheless, the principle was criticised by – mainly Nordic – trade unions since the result, at least in the Swedish model, is that posted workers from low-wage countries actually can be paid less than a Swedish worker performing the same tasks. In the view of the trade unions the principle of non-discrimination of service providers comes at the cost of discrimination against workers and thus represents greater protection of economic interests than of social objectives (for critical reviews of the *Laval* judgment, see for example Deakin, S. (2008) 'Regulatory Competition after Laval', *Cambridge Yearbook of European Legal Studies*, 10, pp. 581–609; Barnard, C. 2008. *Employment Rights, Free Movement Under the EC Treaty and the Services Directive*. *Europa Institute Mitchell Working Paper Series*. Edinburgh; Davies, A. C. L. (2008) 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', *Industrial Law Journal*, 37(2), pp. 126–148; Joerges, C. and Rödl, F. (2008) 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', *European Law Journal*, 15(1), pp. 1–19.

⁶⁴⁰ For the Directive and its application see *Directive 96/71/EC of the European Parliament and the of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services* (1997): European Parliament and Council of the European Union (OJ No L 18/1997); and *Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')* (2014): The European Parliament and the Council of the European Union (OJ No L 2014/159).

⁶⁴¹ Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99–120.

decision mandates for particular members of bargaining organisations within the ESD.⁶⁴²

However, the potential for transnational trade union cooperation and/or coordination can be viewed more positively, looking at labour mobility and situations involving trade unions in other instances of free movement than just the posting of workers. Since enlargement, the number of workers exercising their right to free movement has actually increased. In the first two years after enlargement, the number of workers estimated to have moved from new to old Member States was approximately one million.⁶⁴³ There were also fears that this movement would lead to downward competition in terms of working conditions, and thus produce tensions between Eastern and Western workers and their unions. This fear does not seem to have wholly come true. Instead, there are examples of innovative practises and strategies to improve prospects for organising migrant workers and securing transnational trade union cooperation and coordination.

In the UK there are examples of successful organisation of migrant workers through cooperation with ethnic associations and the establishment of specific language sections. In addition, some Western and Eastern unions, for example British and Polish unions, have managed to establish transnational cooperation and exchange in order to find better structures for promoting the interests of workers from both countries. An important factor in the success of such initiatives has been an inclusionary approach and a focus on the precarious employee rather than the migrant worker as a common ground. Even within countries such as Germany, where a more exclusionary approach has dominated, there has been movement towards a focus on organising migrant workers.⁶⁴⁴ There is thus potential for developing communicative structures transnationally and perhaps even transnational bargaining organisations within the ESD. If the programming of the communicative structures within the ESD can allow for the establishment of bargaining organisations based on membership conditions and decision premises that allow for a transnational focus on the precarious worker, instead of aiming at aligning sometimes contrasting national

⁶⁴² Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 145.

⁶⁴³ CEC (2006e) *Enlargement, two years after: an economic evaluation*. Brussels: Bureau of European Policy Advisers and the Directorate-General for Economic and Financial Affairs (Occasional Papers No. 24).

⁶⁴⁴ Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120. The importance of establishing such trade union cooperation come off as even more pressing when considering the increased risk for exploitation that migrant workers from the former CEE countries face when taking up work outside their home country, see Barnard, C. and Ludlow, A. (2016) 'Enforcement of Employment Rights by EU-8 Migrant Workers in Employment tribunals', *Industrial Law Journal*, 45(1), pp. 1-28.

interests, then there is also greater potential for the ESD to generate results for individual workers.⁶⁴⁵ The challenges that enlargement has brought for the ESD thus persist, but are also opening up opportunities for further development.

7.7 Summary of conclusions

Enlargement has intensified the challenges for the ESD by increasing the need to strengthen national systems of industrial relations in order for the ESD to retain and/or regain credibility and efficiency in producing results that can make a difference to individual workers. At the same time enlargement has also, most notably through the increase of labour movement, opened new possibilities for increased transnational trade union activities, which may offer good opportunities for developing and improving the communicative channels between different national trade unions. The fact that various forms of cooperation based on a transnational common understanding of what aims to strive for amongst national trade unions, notably even those traditionally considered as weak, as well as amongst trade unions and other forms of civil society movements might pose good prospects for the future. This could thus open up for new developments in the ESD programming and communicative structures that could help overcome the improbabilities of communication. If the communicative structures are clarified, in the sense that communication between national trade unions and EU-level organisations is based on a common ground, then the risk of misunderstandings will also lessen, and the communication will have a better chance of being accepted.

I have continued to apply my methodological approach in this chapter, which complementing the preceding chapters with further discussion of what the ESD is and what results it produces (questions 1a and 2a in my methodological model) by considering how the communicative structures of the ESD were challenged by the EU enlargement in 2004. Concerning the hermeneutic understanding of the concept of values (relating to questions 1b and 2b in my methodological model), I have further developed my discussion on how different values frame the programming of systems, causing different effects for systems of industrial relations and hence the ESD. The importance of values understood in the hermeneutic sense has been demonstrated and explained further here than in the two preceding chapters. It seems that when the programming of the political system is adapted to the values promoted by the economic system, this carries consequences for function systems with a regulatory

⁶⁴⁵ See Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227 and Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

task, such as the legal system or the system of industrial relations. In such a situation it seems that in order for bargaining organisations within systems of industrial relations to be able to make decisions that positively impact individual workers, the trade union members of the bargaining organisation need to be able to use tools that can credibly challenge the values promoted by the economic system in order to influence the decision premises of the organisation. Without such tools to hand, the management members of the bargaining organisation will remain in a position to reject communication and prevent decisions from being taken.

Enlargement has thus provided challenges as well as opportunities for the ESD, in terms of both the internal communicative structures of the system as well as the structural coupling with the policy-shaping systems and the values promoted through the programming of systems. In order to develop a better understanding of the importance of such values and the structural coupling between the ESD and the policy-shaping systems of the EU, in the next chapter I will discuss the regulatory process concerning the issue of temporary agency work, since the legislative process leading up to the adoption of the Directive includes failed negotiations within the ESD that can be explained by the structural coupling with the legal system.

8 Temporary agency work – a failure or a lesson for the European Social Dialogue?

8.1 Introduction

The purpose of this thesis is to deepen the understanding of the ESD by answering the questions of what the main differences and similarities are between the ESD and the ITF FOC campaign as well as why these two systems are perceived as having differing capacity to produce results that improve working conditions. This chapter will shed light on those questions by examining the system dynamics that can contribute to or undermine the possibilities for reaching agreements at the EU level. In order to do so, the chapter will focus on an issue where negotiations have failed, but regulations have nevertheless been put into place at the EU level. The analysis provided will further my discussion of how values, understood hermeneutically, can help explain why the ESD is what it is and produces the results it does (relating to questions 2b and 1b in my methodological model). This chapter also offers a more detailed, albeit still topical, discussion about what the ESD is and what results it produces based on a positivistic concept of values (relating to questions 2a and 1a in my methodological model). Let me begin by explaining my reasons for choosing to include a study of the negotiations and regulations concerning temporary agency work in this chapter.

Over the years, the cross-industry social dialogue has received much attention in the academic debate and many works have been published that address its potential

success or failure.⁶⁴⁶ Assessments have to a large extent focused on the texts produced and especially the three framework agreements that have been implemented as directives within the legal order of the EU.⁶⁴⁷ The autonomous work and agreements,

⁶⁴⁶ See for example Dølvik, J. E. (1997). *Redrawing boundaries of solidarity? – ETUC, social dialogue and the Europeanisation of trade unions in the 1990s*. Oslo: ARENA, FAFO; Ahlberg, K. (1999). 'The Negotiations on Fixed-term Work.' in C. Vigneau, K. Ahlberg, B. Bercusson and N. Bruun. *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: National Institute for Working Life, Arbetslivsinstitutet, pp. 13-38; Keller, B. and B. Sörries (1999). 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy* 9(2), pp. 111-125; Falkner, G. (2000). 'The Council or the social partners? EC social policy between diplomacy and collective bargaining.', *Journal of European Public Policy* 7(5 Special Issue), pp. 705-724; Lo Faro, A. (2000). *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Oxford: Hart Publishing; Franssen, E. (2002). *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia; De Vos, M., Ed. (2003). *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. Studies in Employment and Social Policy. The Hague: Kluwer Law International; Dorssemont, F. (2003). 'Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue.' in De Vos, M., *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. The Hague: Kluwer Law International, pp. 3-32; Falkner, G. (2003). 'The Interprofessional Social Dialogue at European Level.' in B. Keller and H.-W. Platzer. *Industrial Relations and European Integration*. London: Ashgate; Degryse, C. (2004). 'Dialogue social européen: des résultats modestes dans un contexte conflictuel.' in Degryse, C. and Pochet, P. *Bilan social de l'Union européenne 2004*. Brussels: Observatoire Social Européen; Clauwaert, S. (2005). 'News and background - 1985-2005: Celebrating 20 years of EU social dialogue, but what about its future?' *Transfer* 11(3), pp. 457-461; Goetschy, J. (2005). *Bilans et rôles successifs de la construction de l'Europe sociale (1957-2005): élément de marché, compensation à l'intégration économique européenne, appui aux réformes nationales*. VIIIème congrès de l'association française de science politique, Lyon; Goetschy, J. (2005). 'The European social dialogue in the 1990s: institutional innovations and new paradigms.' *Transfer* 11(3), pp. 409-422; Degryse, C. (2006). 'Historical and Institutional Background to the Cross-industry Social Dialogue.' in Dufresne, A., Degryse, C. and Pochet, P. *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 31-48; Degryse, C. (2007). 'Cross-industry social dialogue in 2006.' in Degryse, C. and Pochet, P. *Social developments in the European Union 2006 - Eighth annual report*. Brussels: ETUI-REHS, pp. 69-98.

⁶⁴⁷ The directives concerning parental leave, part-time work and fixed-term work (*Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* (1996): Council of the European Communities (OJ No L 145/1996); *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work* (1998): Council of the European Communities (OJ No L 14/1998); *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999).) Many authors have discussed these agreements and the added value of the social dialogue; see for example Lo Faro, A. (2000) *Regulating Social Europe - Reality & Myth of Collective Bargaining in the EC Legal Order*. Translated by: Inston, R. Oxford: Hart Publishing; Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125; Franssen, E. (2002) *Legal Aspects of the European Social Dialogue*. Antwerpen - Oxford - New York: Intersentia; Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes*. Studies in Employment and Social Policy The Hagues: Kluwer Law International.

being a somewhat more recent phenomenon, have received less attention, as have failed negotiations.⁶⁴⁸

The complexity of the social dialogue cannot be fully captured or understood, however, without considering and analysing the full range of different processes.⁶⁴⁹ In the preceding chapters, some of the so-called successes and challenges for the social dialogue have been dealt with under the presupposition that fruitful negotiations can generate results and outcomes with some sort of impact on the legal system of the EU. The autonomy of the ESD has also been briefly considered. However, failures can be very useful ways to learn and develop further. This chapter will therefore analyse the failed ESD negotiations on temporary agency work.⁶⁵⁰

The issue of temporary agency work is of interest for several reasons besides the institutional processes connected to it, including the adoption of the Temporary Agency Work Directive.⁶⁵¹ Firstly, the breakdown of negotiations within the ESD bargaining organisation had more causes than just those directly related to the interests and strategies of the social partners themselves. External factors that highlight the complexity of the Art. 154–155 TFEU process also contributed to the final breakdown. Secondly, the difficulties concerning the adoption of the Directive further highlight the importance of political deals, concessions and bargains struck in

⁶⁴⁸ See for example Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, sections 5.1.2, 5.4.1.4 and 5.4.2.4 on autonomous agreements as well as sections 5.2.1-5.2.2 and 5.4.2.5 on failed negotiations, and Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. and Zappalà, L. (eds.) (2008) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A. on the failed negotiations on temporary agency work.

⁶⁴⁹ For a contribution covering all forms of agreements within the cross-industry social dialogue, see Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International.

⁶⁵⁰ For this section I am most grateful to Kerstin Ahlberg, who kindly provided me with advice and valuable information.

⁶⁵¹ *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work* (2008): Council of the European Communities (OJ No L 327/2008). On September 15th 2008 the Council adopted a common position concerning the proposed Directive (see *Common Position (EC) No 24/2008 adopted by the Council on 15 September 2008 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the council of... on temporary agency work* (2008): Council of the European Communities (OJ No C 254/2008).). The Commission issued a communication in response to the Council's common position on September 18th 2008 (see CEC (2008a) *COM(2008) 569 final - Communication from the Commission to the European Parliament: pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a European Parliament and Council Directive on temporary agency work - Political agreement on a common position (QMV)*: The European Commission (COM(2008) 569 final.) and the European Parliament voted to support, without amendment, the proposal on October 22nd 2008 (see MEMO/08/646: Temporary Agency Work Directive. 2008. Brussels: European Union.).

relation to other issues on the agenda of the EU legislator. The issue of temporary agency work, in other words, can shed light on the complex political processes through which EU law and policy are adopted, which includes the involvement of the ESD. As such, the topic of temporary agency work poses the possibility of finding useful elements for analysing not only the ESD from a systems-theoretical perspective, but also the structural couplings between the ESD and the EU policy-making systems.

Thirdly, temporary agency work has a specific character that differentiates it from other, more traditional forms of employment. This specificity does not relate to the length of employment contracts, but instead to the so-called triangular relationship between the worker, the temporary agency business and the user business. If the situation is considered as a relationship between two companies wherein one agrees to provide the other with a specific service (a service which consists in work carried out by a worker employed with the service provider), then it is not difficult to arrive at the conclusion that this kind of business is likely to have a cross-border character. This is exactly what makes temporary agency work such a special, interesting and challenging form of employment, at least from the perspective of a lawyer. In fact, the sector as such is highly prominent in the sphere of EU cross-border activities, and this creates a need to consider not only employment issues such as non-discrimination etc., but also EU law on the freedom to provide services and the posting of workers.⁶⁵² The issue of temporary agency work is thus far more complex than other forms of atypical work such as part-time or fixed-term contracts. The cross-industry character of temporary agency work also makes this topic highly relevant for discussions concerning EU-level and transnational industrial relations. In this sense the topic excellently illustrates the communicative structures between the national and EU levels, as well as the structural couplings between the EU policy-shaping systems and

⁶⁵² There are thus situations involving temporary agency work where other legislative acts from the EU are applicable in conjunction with the Temporary Agency Work Directive (*Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work* (2008): Council of the European Communities (OJ No L 327/2008)), such as the Services Directive (*Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market* (2006): Council of the European Communities (OJ No L 376/2006)) and the Posted Workers Directive (*Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services* (1997): European Parliament and Council of the European Union (OJ No L 18/1997); *Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')* (2014): The European Parliament and the Council of the European Union (OJ No L 2014/159)). This chapter, however, does not aim to clarify the legal situation in such cases through doctrinal research, as the topic for this thesis concerns the ESD as a regulatory system.

the ESD.⁶⁵³ The difficulties that the improbabilities of communication pose for achieving results⁶⁵⁴ within these systems are also well illustrated by the story of the Temporary Agency Work Directive.

Finally, this topic also serves to illustrate that the ESD can have the function of serving as a resource for social dialogue at other levels, in an intriguing manner, clearly explaining the potential added value of the work carried out within the ESD. Because the social dialogue negotiations on temporary agency work failed, and the legislative process for adopting a directive on the issue suffered several setbacks over the years, the issue has been termed a double failure.⁶⁵⁵ However, as we shall see, the story is better described in terms of both failure and success.⁶⁵⁶ In order to explain this duality I will first review the historical developments, focusing on the social dialogue activities, the standpoints of the social partners, and a changed understanding of the function of the social dialogue. Then I will further explain and analyse more recent developments around the adopted Directive and the interesting example of its German implementation, both of which explain the story as a success.

8.2 Historical background concerning the regulation of temporary agency work

The Temporary Agency Work Directive has a long history dating back to the early 1980s or even the late 1970s.⁶⁵⁷ In 1982 the Commission presented the first draft directive on the issue of temporary agency work, on the grounds that vast differences in national regulations on temporary agency work caused unfair competition within

⁶⁵³Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

⁶⁵⁴Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁶⁵⁵Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 456.

⁶⁵⁶Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 260.

⁶⁵⁷Zappalà, L. 'Legislative and Judicial Approaches to Temporary Agency Work in EU Law - An Historical Overview', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 155-168, p. 156.

the internal market. The proposal contained various forms of regulations to prevent abuse of the use of temporary agency workers and fixed-term contracts, but it proved impossible for the Council to reach unanimity, which was required at that time, and the proposal was therefore withdrawn.⁶⁵⁸

In the 1990s the situation changed, allowing for qualified majority voting and the involvement of the social partners in the legislative process.⁶⁵⁹ Temporary work again came under the focus of the EU legislator, who wished to establish a framework that would help strike a balance between companies' need for flexibility and workers' need for protections and also ensure a certain amount of legal certainty for cross-border situations involving temporary work.⁶⁶⁰ The first step was the adoption of Directive 91/383/EEC⁶⁶¹ of June 1991, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (i.e. workers on fixed-term contracts and temporary agency workers).⁶⁶² Nevertheless, and in spite of the efforts of the Commission, the issues of working conditions and non-

⁶⁵⁸ See CEC (1982) *COM(82) 155 final - Proposal for a Council Directive concerning temporary work*. Brussels: European Commission (COM(82) 155 final); CEC (1984) *COM(84) 159 final - Amended proposal for a Council Directive concerning the supply of workers by temporary employment businesses and fixed-duration contracts of employment*. Brussels: European Commission (COM(84) 159 final); but also Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 192.

⁶⁵⁹ For a further discussion of these developments and their implications for the ESD, see chapter 6 of this thesis.

⁶⁶⁰ Zappalà, L. (2008) 'Legislative and Judicial Approaches to Temporary Agency Work in EU Law - An Historical Overview', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 155-168, at p. 159.

⁶⁶¹ *Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship* (1991): Council of the European Communities (OJ No L 206/1991).

⁶⁶² At the same time two other proposals were issued, one relating to working conditions and one aimed at creating a level playing field for the employment of atypical workers. However, neither was adopted. See CEC (1990) *COM(90) 228 final - Proposal for a Council Directive on certain employment relationships with regard to working conditions - Proposal for a Council Directive on certain employment relationships with regard to distortions of competition - Proposal for a Council Directive supplementing the measures to encourage the improvements in safety and health at work of temporary workers*. Brussels: European Commission (COM(90) 228 final); and Zappalà, L. (2008) 'Legislative and Judicial Approaches to Temporary Agency Work in EU Law - An Historical Overview', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 155-168, at pp. 159ff.

discrimination for temporary agency workers remained largely unregulated.⁶⁶³ However, three successful negotiations within the social dialogue that led to the adoption of three directives raised hopes that the process under Art. 154-155 TFEU (at that time Art 138-138 ECT) would prove the proper path to follow. The social partners themselves stated their intention to embark on negotiations concerning temporary agency work at the conclusion of the framework agreement on fixed-term work.⁶⁶⁴

Before turning to the negotiations and proceedings it is important to understand the context within which the social partners were to embark upon negotiations. During the 1980s and 1990s the labour market changed and the use of temporary agency workers increased drastically. Attitudes towards temporary work agencies also changed dramatically with the increased use of temporary workers, bringing the agencies higher levels of acceptance. Governments even encouraged the use of temporary agency workers as a tool for promoting employment. In this sense the topic of temporary agency workers also had import for the values framing the programming of the policy-shaping systems, which quite likely, as concerns employment issues, focuses on economic growth, so that social values are likely considered in terms of how their promotion can increase growth. The ILO recognised the importance of temporary agency work in relation to employment growth and adopted a new Convention⁶⁶⁵ and a Recommendation⁶⁶⁶ on Private Employment Agencies, balancing workers' needs for protection with the desire of governments to use temporary agency work to raise employment and the desire for recognition on the part of temporary work agencies.⁶⁶⁷

⁶⁶³ In situations involving the posting of workers, temporary agency workers gained a certain level of protection in the *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services* (1997): European Parliament and Council of the European Union (OJ No L 18/1997).

⁶⁶⁴ See the fourth paragraph of the preamble to the framework agreement in *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999). This clear indication of intent by the social partners prompted the idea of a shift of legislative initiative from a situation where negotiations were conducted under the shadow of law to a situation where legislative proposals would be put forward under the shadow of negotiations. See Bercusson, B. and Bruun, N. (1999) 'The Agreement on Fixed-term Work - a First Analysis', in Vigneau, C., Ahlberg, K., Bercusson, B. & Bruun, N. (eds.) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet, pp. 51-131, at p. 72.

⁶⁶⁵ *Convention 181 Private Employment Agencies Convention* (1997). Geneva: ILO.

⁶⁶⁶ *Recommendation 188 Private Employment Agencies Recommendation* (1997). Geneva: ILO.

⁶⁶⁷ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 193f.

The issue of temporary agency work was thus integrated into the communications of the EU policy-shaping system as well as the ESD.

8.3 The negotiations on temporary agency work

Although the social partners declared their intent to address temporary agency work, it is debatable whether or not they were actually committed to negotiating the issue. In the framework agreement on fixed-term work, they committed themselves only to considering it, and never clearly stated that they would actually enter into negotiations.⁶⁶⁸ UNICE, especially (now BUSINESSEUROPE), had clearly stated in its response to the Commission consultation in 1995 that it saw no need for Community regulations on atypical work.⁶⁶⁹ Thus their willingness to enter into negotiations was solely provoked by the shadow of law and as such can be interpreted as a result of the structural coupling between the EU policy-shaping systems and the ESD.

The ETUC, on the other hand, saw a pressing need to begin negotiations on temporary agency work, although some affiliates who had been disappointed with the agreement on fixed-term work were less enthusiastic. CEEP faced fewer problems, having stated that it favoured an EU-level agreement in its response to the Commission consultation.⁶⁷⁰ The start of the negotiations was thus delayed by

⁶⁶⁸ See the fourth paragraph of the preamble to the framework agreement where the parties stated that they would 'consider the need for a similar agreement relating to temporary agency work' (*Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999).) and also Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 195.

⁶⁶⁹ UNICE 1995. Flexibility in working time and security for workers UNICE response to first-stage consultation with the social partners, 15 December 1995 UNICE. This document was previously available on the UNICE website, but on the BUSINESSEUROPE documents are only available from 1998 onwards. For a comment on the position of UNICE, see Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 195.

⁶⁷⁰ Flexibility in working time and security for employees (other than full-time open-ended working patterns). Second stage consultation with the social partners pursuant to Article 3(3) of the Agreement on Social Policy. Available in French CEC (1996b) *SEC(96) 658 - Deuxième phase de consultation des partenaires sociaux sur la flexibilité du temps de travail et la sécurité des travailleurs*. Brussels: European Commission (SEC(96)658, 9 April 1996).

UNICE, which took four months longer than expected to offer a positive response to the ETUC's call for negotiations. Because an SSDC for temporary agency work had recently been established, the potential for sectoral negotiations – between the employers' federation, Euro-CIETT, and the ETUC industry federation, Euro-fiet⁶⁷¹ – if cross-industry negotiations were not taken up also generated an interest from the cross-industry organisations to negotiate. The reason was that UNICE did not consider Euro-CIETT capable of representing user companies, and the ETUC was of the opinion that Euro-fiet was not representative of temporary agency workers in all sectors.⁶⁷² This indicates that it is possible to consider the ESD as comprising several bargaining organisations, each capable not only of producing independent decisions, but also of recognising decisions from other organisations as communication within the ESD.⁶⁷³ The different organisations seem, however, to give precedence to their own decisions over decisions from other organisations within the ESD. In situations where there are decisions from different organisations on the same issue, the competition between decisions can hinder the acceptance of communication within the ESD.⁶⁷⁴

With negotiations set to begin, both sides struggled to determine their negotiation mandates. On the trade union side there were diverging ideas about how best to protect worker interest, due to the widely differing character of temporary agency work across the Member States. In the end, the actual mandate ended up as a two-page wish list. The employers, on the other hand, were to be formally represented by a joint UNICE mandate, even though Euro-CIETT had set up their own list of demands, formulated as a draft directive.⁶⁷⁵ The employers' side thus also experienced problems at the outset of negotiations, in that membership conditions and decision

⁶⁷¹ Since 1st January 2000 UNI-Europa.

⁶⁷² Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 196f.

⁶⁷³ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 143ff.

⁶⁷⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁶⁷⁵ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 197.

premises were unclear in the sense of which members were allowed to decide on what.⁶⁷⁶

As for the composition of the negotiating teams, over 60 people attended the sessions. The ETUC had one representative from each Member State and from each of the eight industry federations, one from the Women's Committee, one from Europadres and two from the Secretariat. On the employers' side, UNICE had one representative from each Member State, nine from CEEP and five from Euro-CIETT as well as two observers from the European Association of Crafts, Small and Medium-sized Enterprise (UEAPME), following an agreement of cooperation between UNICE and UEAPME. ETUC Deputy Secretary General Jean Lapeyre, who had also been the spokesperson for previous negotiations, chaired the trade union side. Wilfred Beinert, chairman of the UNICE social affairs committee, was the spokesperson for the employers' side and new to the game. Within the negotiating teams each side had set up one drafting committee, consisting of eight people including the spokespersons. The negotiating teams were to meet monthly, and every member of the delegations would have the right to voice his or her opinion (even if the spokespersons would likely do most of the talking). The drafting committees would draft texts on issues agreed upon during the meetings, and try to seek compromises as well as clarifying possible question marks.⁶⁷⁷ Considering the large number of interests represented during the negotiations, in conjunction with the somewhat unclear membership hierarchy and unclear decision mandates of members, it is little surprise that the negotiations suffered several setbacks. The unclear decision premises for the bargaining organisation increased the risk of communication being rejected already from start since there were no clear ideas on what kind of decision could be taken under what conditions.⁶⁷⁸

The negotiating teams met for the first time on 23 June 2000. The meeting basically consisted of presenting their respective mandates, and it was clear that the two sides were far from each other. The employers were open to discussing a non-discrimination clause, but considered additional forms of regulation for temporary agency work unnecessary, whereas the trade union side considered both the non-discrimination clause and regulations conditioning the use of temporary agency work to be equally important. After this meeting, the people involved in the negotiations

⁶⁷⁶ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

⁶⁷⁷ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 198.

⁶⁷⁸ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at p. 345.

left for the summer holiday. The second meeting was not held until 11-12 September. During this time the sectoral social partners of Euro-CIETT and UNI-Europa met and agreed upon a joint declaration in which they stated that '*agency work may play a positive role in the labour market, the sectoral social dialogue should work towards improving the quality and the operation of the European labour market, the employment and working conditions of agency-supplied workers, as well as the further professionalization of the sector.*'⁶⁷⁹ In addition, they recognised each other as representative organisations in the sector and expressed support for the on-going cross-industry negotiations. The action was met with critique from the ETUC, especially with respect to the view of agency work as a positive contribution to the labour market.⁶⁸⁰ The sectoral declaration can be viewed as a decision taken within another bargaining organisation of the ESD.⁶⁸¹ Although the decision expressed support for potential decisions from the cross-industry temporary agency work bargaining organisation, it was not fully accepted by that organisation due to diverging ideas within the organisation on the proper decision to take.

Within the trade union delegation, there thus existed dual perspectives on whether the sectoral joint declaration would positively impact the on-going negotiations or not. This reveals differences of interest and will, both between the management and trade union side and within the groups on these two sides. But it is also possible to see the situation from another point of view. The specific sectoral social partners did agree on common goals for the negotiations. They managed, in other words, to unite in some sort of decision concerning potential decision premises for the negotiations on temporary agency work, which they sought to transpose to the cross-industry organisation through communication within the system.⁶⁸² However, the sectoral social partners were not successful in their communication of their decision and their ambition thus failed. This failure of communication can be seen as a consequence of the improbability of communication,⁶⁸³ as the cross-industry parties on both

⁶⁷⁹ Euro-CIETT and UNI-Europa 2000. Joint Declaration on the Sectoral Social Dialogue on Agency Work.

⁶⁸⁰ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 200f.

⁶⁸¹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 145f.

⁶⁸² Luhmann, N. (2005c) 'The Paradox of Decision Making', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business Scholl Press, pp. 85-106, pp. 93ff.

⁶⁸³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

management and trade union sides rejected the communication on decision premises from the sectoral social partners.

At the second round of negotiations in September not much was achieved. Due to the long break, the situation was that of a restart, with further presentations of the mandates. It became clear that the employers would not accept any clauses dealing with preventing the abuse of temporary agency work, as had been done in the fixed-term work agreement, because in their view this would imply that the use of temporary agency work was considered abuse per se. The third round of negotiations on 11-12 October opened the door to slightly more constructive work. Both sides presented a list of points they wanted to be included in the negotiations, along with drafts for a clause on non-discrimination. However, clear differences of opinion between the two sides now emerged. Unions wanted to guarantee the equal treatment of temporary agency workers and workers employed at the user company, whereas employers requested that the concept of 'comparable worker' be left for Member States or national social partners to define. In addition, employers refused to have the agreement specify which employment conditions would be covered, especially in respect to pay. These differing opinions led each side to question the other's intentions and raised doubts about whether an agreement would be possible.⁶⁸⁴ The impasse shows that economic values can present a significant obstacle to overcoming improbabilities of communication. The question of pay was a difficult threshold to pass before communication could be accepted within the bargaining organisation.

In this connection, it is worth pointing out the unclear situation concerning the cross-industry bargaining organisations' decision-making process. Firstly, the members of the organisation held diverging views on whether a decision needed to be taken: the union side wanted to conclude an agreement, but the management side was more sceptical. Secondly, there were also difficulties in establishing decision premises for the framework for a potential decision, where the union side strove for a more detailed decision and employers wanted a decision that was as open as possible.⁶⁸⁵ These unclear decision premises of the organisation, in combination with the unclear situation concerning the delegation of mandates to the different members of the organisation, severely diminished the organisation's chances to reach a decision.

At the fourth round of negotiations in November, no progress was made. At the fifth round in December, there had still been no meetings with the drafting committees,

⁶⁸⁴ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 201ff.

⁶⁸⁵ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 143ff.

and proper negotiations had yet to really begin. By this time, however, the ETUC had realised that since the non-discrimination clause was the top priority, the ETUC could probably profit from discussing that clause in conjunction with conditions for the use of temporary agency work, and therefore had drafted a text that was close to a full draft agreement. The employer side, however, only responded to the non-discrimination clause. Their refusal to discuss other issues met with disappointment from the trade union side. Nevertheless, the two sides decided that the drafting committees should meet, and at their meeting on 18 December the ETUC committee again presented a draft agreement, somewhat revised from the draft presented at the earlier plenary meeting. The union side was again disappointed as employers rejected their communication by stating they were unable to respond at this stage and would instead draft a compromise for the next meeting of the negotiating teams.⁶⁸⁶ The improbability of communicative success⁶⁸⁷ thus caused further problems for the negotiations.

When the teams met for the sixth time in January 2001, the employers presented their draft, which contained some of the ideas that the ETUC had taken up in their proposal, but had a much narrower scope. The main differences between the employer and ETUC proposals concerned the scope of application, the role of collective bargaining and trade union rights. Regarding the scope of application, the employers had responded by narrowing it to only cover workers with temporary employment contracts with the agency. On the other issues – the ideas that collective bargaining could play an important role in improving the quality of agency work; that the exercise of trade union rights, individual and collective rights for agency workers should be promoted by the Member States; and that agency workers should not be used to replace workers on strike – the employers offered no response. The ETUC did manage, however, to get the employers' side to agree to discuss a prohibition on using agency workers to replace other workers on strike, on the condition that the teams would ask the Commission Legal Service for advice on whether this was consistent with the Treaty and the exclusion of industrial action from the Community competence.⁶⁸⁸ The impartial chair would administer the contact with the Legal

⁶⁸⁶ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 204ff.

⁶⁸⁷ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 158f.

⁶⁸⁸ At that time the Article referred to was 137(6) ECT, but now the exclusion of industrial action from the Community competence is found in Article 153(5) TFEU.

Service. At the same time, the parties wished to ascertain whether the concept of employment conditions included pay.⁶⁸⁹

The structural coupling between the legal system and the ESD was, in other words, recognised by the social partners, who sought to ensure that a potential agreement struck by them would also stand a chance of becoming recognised and accepted within the legal system of the EU.⁶⁹⁰ In addition, the discussions and the decision to ask for advice made it clear that questions for which a potential decision could generate results in the economic system (and to some extent challenge the values promoted by the economic system) faced difficulties in terms of overcoming the improbability of communicative success. The importance of economic values for the programming of the ESD and the shaping of decision premises within the system's bargaining organisation is thus evident.⁶⁹¹

On February 13 Jean Degimbe presented the oral response from the Legal Service, which refused to provide a written opinion. The social partners were discouraged from referring to strikes in the binding clauses of the agreement, although such reference could be made in the preamble. Employment conditions were stated to include pay, but specific mention of the word 'pay' in the text was not advised owing to the lack of ECJ (now CJEU) case law concerning the scope of the relevant Treaty provision. Surprisingly, the Legal Service also chose to answer a question that the negotiating teams had not asked.⁶⁹² This additional answer can be seen as an instance of the improbability of communicative success, in that it was not a clean acceptance of the communication from the negotiating teams, but instead rejected their communication by shifting the focus to another issue.⁶⁹³

The extra advice concerned the issue of agency workers receiving the same salary as comparable workers within the user company, a condition that the Legal Service

⁶⁸⁹ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 206f.

⁶⁹⁰ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

⁶⁹¹ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 226ff.

⁶⁹² Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 209.

⁶⁹³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 158f.

considered contrary to the Treaty, since it would lead to regulation of wage levels within the temporary agency work sector. This worked in favour of the employers, and the trade union side noticed a shift in attitude from the employers, who were now sure to get their point through on this issue even if negotiations failed and the Commission again took over the initiative. The ETUC delegation did, however, see some indications of differing opinions within the employers' team, especially between the UNICE representatives and those from Euro-CIETT. Jean Degimbe closed the meeting by summing up the negotiators' task as the need to agree upon an obligation for the Member States to address the issue of equal treatment in relation to either the user company or the agency.⁶⁹⁴ Through the advice of the Legal Service, the legal system thus produced communication whose result within the ESD was to limit the possibility for the bargaining organisation to make a decision that could impact the economic system.⁶⁹⁵ In other words, the communication of the legal system was programmed in such a way as to protect the values of the economic system.

The ETUC was forced to reconsider its strategy and lower its ambitions. Before the eighth round of negotiations, however, its Steering Committee found a possible way to keep negotiations going. Drafts were worked out in which the non-discrimination principle contained two different concepts of employment conditions: basic employment conditions, for which the comparable worker would be one employed by the user company, and other working conditions. The ETUC thought that this differentiation would make it possible to ensure that the basic conditions would include pay by providing this definition in the preamble, while still leaving the words 'pay' and 'remuneration' completely out of the binding clauses of the agreement. When the eighth round began, however, it became clear that the employers had not changed their opinion on the issue of who was to be considered a comparable worker, nor on most of the other core issues.⁶⁹⁶ The extra advice served to reinforce the position of the management side, strengthening its mandate and giving it increased decision capacities,⁶⁹⁷ which in turn diminished the chances of reaching an agreement.

⁶⁹⁴ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 209.

⁶⁹⁵ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 121.

⁶⁹⁶ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 209f.

⁶⁹⁷ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

Further concessions were made by the ETUC by drafting one more proposal for the non-discrimination clause, whereby the definition of 'comparable worker' could be decided by the national social partners by means of collective agreements. The employers decided to consider this proposal. Meanwhile the ETUC began working on a compromise proposal for conditions of use of temporary workers, hoping to gain employer acceptance by describing the clause as measures to improve the quality of agency work. However, the employers were not satisfied with a draft proposal for only one more clause. They wanted the ETUC to present a full compromise proposal before continuing any discussion of the non-discrimination clause. Therefore, this text was never presented to the employers. The ETUC delegation saw no chance of reaching an agreement and was no longer willing to keep working on proposals without getting anything in return. When the employers' delegation suggested asking the Commission for a three-month extension to the original nine months, ETUC negotiators agreed to ask for only one more month in order for them to consult their Executive Committee. The ETUC by now considered the negotiations more or less terminated.⁶⁹⁸

In a last effort to revive the negotiations, Commission President Romano Prodi asked Commissioner Anna Diamantopoulou to arrange a meeting with the social partners in order to try and find a compromise solution. This proved impossible, since the two sides could not agree on the scope of the agreement: the trade union side wanted it to cover all temporary agency workers, but the employers refused to discuss anything that would extend its scope beyond workers on temporary contracts. The negotiations were now definitely considered terminated and the Commissioner declared her intent to put forward a legislative proposal.⁶⁹⁹ This shows that in spite of the ETUC having a weaker mandate for decisions within the bargaining organisation, as members they were still capable of rejecting decisions. This indicates that there was at least one clear decision premise for the organisation: that all members must agree that a decision will be taken before it can be put in place.⁷⁰⁰

⁶⁹⁸ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 210f.

⁶⁹⁹ Ibid., pp. 211ff.

⁷⁰⁰ Seidl, D. (2005) 'The Basic Concepts of Luhmann's Theory of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53, at pp. 42ff.

8.3.1 The position of the ETUC

The main objective of the ETUC delegation during the negotiations was to achieve an agreement that would guarantee equal treatment between temporary agency workers and workers in the user company, not least as regards the level of remuneration. The trade union point of view was that if this principle was limited to equal treatment as compared with other workers in the same agency, the non-discrimination clause would be emptied of its meaning. As pointed out by Ahlberg: '*It would be a bit like saying that equal treatment for women means that women should be paid equally to other women.*'⁷⁰¹ The ETUC also argued that using a worker in the user company as the reference for equal treatment was already practice in most of the Member States, and therefore it would be the best solution at the European level as well.⁷⁰² The ETUC remained committed to this opinion throughout the developments concerning European legislation on temporary agency work, and was pleased that the Directive finally approved⁷⁰³ states that temporary agency workers shall be treated equally to workers in the user company from the first day of their assignment.⁷⁰⁴

The second issue of great importance for the ETUC delegation was conditions of use. Here, however, the ETUC position might seem a bit less clear, as delegates diverged on which interests should be taken into consideration. Some argued in favour of assuring the best possible conditions for temporary agency workers, thus allowing for longer and more stable contracts with user companies. Others wished to see measures that would protect permanent employments with the user companies, and so argued for stricter limitations and shorter periods of use for temporary agency workers.⁷⁰⁵ This is perhaps unsurprising considering the highly divergent attitudes towards

⁷⁰¹ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 217.

⁷⁰² Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 451.

⁷⁰³ *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work* (2008): Council of the European Communities (OJ No L 327/2008).

⁷⁰⁴ ETUC 2008. Adoption of Temporary Agency Work Directive breaks deadlock on social Europe. Brussels: ETUC.

⁷⁰⁵ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 216.

temporary work agencies in the Member States. The social values that the trade union members of the bargaining organisation wished to protect were, in other words, too vague for the members to be able to express their contents clearly. The situation caused difficulties in the sense that it generated unclear decision mandates for the members of the bargaining organisation, and these unclear membership mandates increased the challenges posed by the improbability of getting communication accepted.⁷⁰⁶

This highlights a major problem within the ETUC delegation, i.e. the lack of a coherent and strong European strategy. Instead of focusing on the best solution for the European level, it seems that the ETUC delegation tried to accommodate as many diverse national interests as possible in shaping its negotiating strategy. The result was a mandate lacking flexibility and efficiency at the European level.⁷⁰⁷ This is a problem stemming from both the national affiliates and the ETUC as a whole. The national affiliates were too concerned with protecting their interests at the national level and therefore failed to grasp the bigger picture and what would guarantee the best results over the longer term for workers across Europe. The ETUC, on the other hand, was not daring enough to adopt and push a strategy that would best serve European interests; instead it yielded to divergent national interests, resulting in a weak and unclear mandate that was not suitable to address the problems at the European level. This shows that the bargaining organisation, at least for its trade union members, lacked conditions of membership with respect to requirements for remaining a member of the organisation.⁷⁰⁸

It also shows the dangers of the improbabilities of communication,⁷⁰⁹ as the EU level did not manage to reach out with the message about a need for a European strategy, most certainly did not manage to get the national level to understand the need for a common strategy, and did not succeed in getting this message accepted amongst the national affiliates. For union members of a bargaining organisation contributing to the production of communication within the ESD, it is thus important to agree upon

⁷⁰⁶ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁷⁰⁷ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 215.

⁷⁰⁸ Seidl, D. (2005) 'The Basic Concepts of Luhmann's Theory of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53.

⁷⁰⁹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

not only the need to promote social values of protecting the workers, but also the best way to express that aim and fill it with content.

8.3.2 The employers' position

UNICE apparently pursued a twofold objective during the negotiations. On the one hand, it wished to ensure that the outcome of the negotiations would not endanger the development of the temporary agency sector.⁷¹⁰ This explains its refusal or at least reluctance to negotiate a clause setting up conditions of use. On the other hand, as an organisation mainly representing the user companies, it was also important for UNICE to guarantee that costs for these companies would not rise. This explains its rejection of a non-discrimination principle that would have given temporary agency workers the same pay as comparable workers in the user companies.⁷¹¹ The mandate for the employers' members of the bargaining organisation was thus highly influenced by values promoted by the economic system, such as competitiveness and cost reduction.

As for the role of CEEP, it is important to remember that temporary agency work, at least at the time of the negotiations, figured differently in the public sector than in the private sector. Given the informal and minor role granted to CEEP within the social dialogue, it is not surprising that the organisation had no strongly declared opinion. What is clear is that CEEP regretted the breakdown of negotiations.⁷¹²

As the sectoral employers' federation, Euro-CIETT had a different agenda from that of UNICE. For Euro-CIETT, the negotiations and the potential of an agreement were a means of granting the sector and its employers proper recognition, and improving the image of the sector as a whole. They were therefore more inclined than UNICE/UEAPME to agree on clauses that would improve working conditions and wages for temporary agency workers. For them, the non-discrimination clause would

⁷¹⁰ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 217.

⁷¹¹ *Ibid.*, p. 216.

⁷¹² Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 451.

have helped ensure their desired recognition of the sector.⁷¹³ The promotion of economic values was thus expressed differently, or filled with different content, by different management members of the bargaining organisation. However, the strong position of UNICE meant that the divergent expression of these values did not challenge communicative success as strongly as did the diverging interests amongst the trade union members.

Both CEEP and Euro-CIETT were granted smaller fractions of the employers' bargaining team, and thus found themselves further down the member hierarchy of the bargaining organisation than UNICE.⁷¹⁴ They therefore had less influence over the decision-making process; but even so, diverging interests amongst the members on the employer side of the organisation still made it harder for the organisation to make a decision. Here, too, there was a lack of conditions for remaining a member of the bargaining organisation, and this posed additional problems given the prominent position of UNICE. The position of the sectoral organisations was likely to have been more agreeable to the trade union side, and could have opened the way to compromises if it had gained stronger influence amongst the employers. However, since the negotiations were conducted under the cross-industry label, UNICE maintained a position of strength and was unwilling to make space for the position of the sectoral organisations. The membership hierarchy that granted UNICE a rather dominant position – especially after the advice from the Legal Service – generated a situation in which the decision premises for the bargaining organisation were framed such that only decisions that protected economic values would be possible, and then only if all members agreed to such a decision. Since such a decision was impossible for the trade union members of the organisation to agree to, no decision was made. As has been shown above, communication within the ESD does not stem solely from labour or management members of bargaining organisations that can make decision that contribute to the production of communication within the ESD. Communication also stems from other senders. The Commission was involved throughout the negotiations, participating in the production of communication in a way that proved important to the final outcome. The next section will discuss the role of the Commission during the negotiations.

⁷¹³ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 213ff.

⁷¹⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 146.

8.3.3 The role of the Commission

During the negotiations the Commission played the usual role of allocating necessary resources to the social partners, e.g. arranging meeting rooms and paying for interpreters. The impartial chair for the negotiations also came from the Commission: Jean Degimbe, with his assistant Diego Mellado from the Directorate General for Employment and Social Policy. Having chaired the negotiations on fixed-term work, Jean Degimbe knew that his role was to ensure that the social partners received any assistance they asked for, without interfering in the negotiations.⁷¹⁵

However, when the social partners' negotiators asked the Legal Service for advice, the response they received contained more answers than asked for. The Legal Service advised negotiators not to formulate the non-discrimination clause in a manner that generated a comparison between the temporary agency worker and a comparable worker in the user company in terms of pay. The Legal Service argued that this would lead to a European-level regulation of salaries in the temporary agency work sector, which would be contrary to what was then Art. 137(6) ECT (now Art. 153(5) TFEU).⁷¹⁶

This interference raises two questions. The first is whether or not the Commission played its role according to the rules of the game. Considering that the Commission had full insight into the on-going negotiations and the positions held by the two counterparts, it is unlikely that Commission representatives were unaware of how the Legal Service advice would shift the balance of power between the two sides. In other words, it must have been evident to the Commission, or at least to the impartial chair Degimbe, that this advice would turn the situation in favour of the employers. As stated above, this situation can be explained in terms of a structural coupling between the legal system and the ESD in combination with challenges posed by the improbabilities of communication. We can say that difficulties arose from an unclear acceptance of communication in which additional answers were given, shifting the focus of the communication and thus highlighting the importance of improbabilities of communication.⁷¹⁷

⁷¹⁵ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 198f.

⁷¹⁶ *Ibid.*, pp. 209f.

⁷¹⁷ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 113f.

Secondly, the correctness of the advice as such can be debated, and indeed ETUC delegates doubted that the interpretation was truly correct.⁷¹⁸ Considering that temporary agency work is carried out within a broad spectrum of sectors, by blue-collar and white-collar workers as well as academics, a rule stating that a temporary agency worker should be paid the same as a comparable worker in the user company would not provide a very clear indication of the levels of remuneration within the temporary agency work sector. In fact, a customer service worker from a temporary work agency could receive a different salary from one assignment to another, simply because different user companies pay their customer services workers differently. Can a regulation that generates differing salaries for the same qualifications and similar jobs truly be considered as regulating wages in a sector? The answer is probably no.⁷¹⁹ This advice from the Commission's Legal Service was not the only reason the negotiations failed, but it does seem to have been a contributing factor and the question remains as to the reason for this interference. It is not entirely unlikely the legal system sought to minimise the risk of the ESD making a decision that could impact the economic system, i.e. that the legal system sought to protect the values of the economic system. The situation can thus be understood in terms of the steering of the legal system towards the protection of economic interests having the effect in the ESD of limiting possibilities for decisions with potential of generating results in the economic system.⁷²⁰ This again shows that the structural coupling between the ESD and the EU policy-shaping system is strong enough for each to produce results in the other system. This is not a mere environmental irritation, but instead a continuous relation between the systems.⁷²¹ In the next section, I will analyse the possible reasons for the breakdown of the negotiations and how the breakdown affected views on the function of the social dialogue.

⁷¹⁸ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 209.

⁷¹⁹ Another issue is whether such a system would be advisable, given that the temporary agency workers would experience a certain level of salary insecurity when moving from one user company to another.

⁷²⁰ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 53ff.

⁷²¹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

8.4 Failure and changed ideas of the function of the social dialogue?

As just noted, the unsolicited advice from the Commission's Legal Service probably had an important impact on the outcome of the negotiations. The advice made it clear to employers that a potential Commission draft directive would probably favour their position, thus strengthening the employers' negotiating position and making them less willing to compromise on the non-discrimination principle.⁷²² However, the Commission is not the only black sheep in this story. Several other factors also contributed to the breakdown of negotiations.

Firstly, on the employers' side there were several more actors involved than during the previous negotiations on fixed-term work, part-time work and parental leave. In addition to UNICE and CEEP, the sectoral organisation Euro-CIETT and the organisation representing small and medium sized companies, UEAPME, were also involved. Considering that UNICE, UEAPME and CEEP mainly represent the user companies, it is predictable that Euro-CIETT had a different standpoint and that interests on the employer side diverged. Euro-CIETT had a desire to improve the image of the industry as such, so it took a more positive stance on measures that would help agency workers. However, since such measures are likely to increase costs for user companies, UNICE, UEAPME and CEEP were unlikely to accept an agreement containing such rules. There was thus a clear division of interests amongst the employers, which most likely caused difficulties for them in agreeing or responding to proposals. Even though all management members of the bargaining organisation framed their communication in accordance with how economic values would best be promoted, it is evident that the promotion of economic values differs depending on context. In this specific bargaining organisation, this result was competition between different economic interests, which in turn caused problems in terms of having communication accepted.⁷²³ Given as well that the negotiations concerned more than just specific forms of employment, so that their outcome would affect the temporary work agency sector – including the user companies – as a whole, it is hardly astonishing that employers were unwilling to accept or even negotiate any

⁷²² Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 217.

⁷²³ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 113f.

conditions of use.⁷²⁴ There were, in other words, opposing interests on the employer side that made it difficult for the bargaining organisation to establish conditions for membership and decision premises in terms of what was required to remain a member and how decision mandates should be distributed amongst the members of the organisation.⁷²⁵ If these issues were unclear for the employer side, how could it be possible for the bargaining organisation as a whole to clarify them?

The ETUC delegation, meanwhile, was not wholly positive toward the negotiations. Some of its affiliates were sceptical or even critical of the outcomes of the previous agreements, finding them too weak and too vague. This scepticism, combined with the fact that the social partners had already proved through previous agreements that they were capable of concluding Europe-wide framework agreements, increased pressure on the ETUC *'to prove that it would not accept an agreement at any price.'*⁷²⁶ The flexibility and scope for compromises on the trade union side of the negotiating table were thus slimmer than during previous negotiations. Given both this and the aforementioned greater interests at stake compared to previous negotiations, in combination with the varying views of temporary agency work across the Member States and the differing national systems of industrial relations, it is not surprising that the negotiations on temporary agency work failed. The scepticism towards previous outcomes generated a more hard-headed attitude, and the improbability of having communication accepted became a higher hurdle to clear. The result was a situation in which the decisions of the organisation were conditioned by acceptance of all members of the bargaining organisation.⁷²⁷ Since the trade union members of the organisation were not inclined to accept a decision that did not meet their demands in full, it proved impossible to reach an agreement.

Not unexpectedly, the failure of these negotiations renewed the debate on the European social dialogue and the value it added to the legislative and policy-shaping processes of the EU. The social partners, especially the employers' organisations

⁷²⁴ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 215ff.

⁷²⁵ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff.

⁷²⁶ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 217.

⁷²⁷ Seidl, D. (2005) 'The Basic Concepts of Luhmann's Theory of Social Systems', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business School Press, pp. 21-53, at pp. 42 f.

UNICE and UEAPME, feared a loss of legitimacy and credibility. Both organisations therefore strongly expressed their regret at the failed negotiations and the importance of not jumping to conclusions and assuming that the failed negotiations indicated problems with the ESD per se. UEAPME also implied that the voluntary social dialogue might offer a better option for the positive future development of the ESD.⁷²⁸ There was thus a chance for a changing mindset amongst the employers that could possibly open a door to dialogue. This might have brought an increased potential, at this stage, for overcoming improbabilities of communication through the potential for establishing decision premises⁷²⁹ aimed at retaining the credibility for the ESD by shifting the focus of the work towards the autonomous processes. The issue of temporary agency work was, however, now off the negotiation table for the ESD. Within the EU policy-shaping systems, on the other hand, the issue was not closed, and the process for adopting a directive went forward. Since this process is also instructive for understanding the ESD, I will discuss the events leading up to the adoption of the Directive.

8.5 The legislative process: difficulties, disagreements and compromises

The process concerning possible EU legislation on temporary agency work took an interesting turn and largely unexpected turn after the breakdown of negotiations. The change of direction that may have surprised several actors was the adoption of the Commission's proposed Directive.⁷³⁰ Although the Commission, immediately after the termination of the negotiations, clearly stated that a legislative initiative would be launched, the Directive went through several ups and downs and was the subject of intense debate and a great many disagreements that raised doubts as to whether it

⁷²⁸ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 451.

⁷²⁹ See Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff and Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press. pp. 157ff.

⁷³⁰ *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work* (2008): Council of the European Communities (OJ No L 327/2008).

would ever become reality.⁷³¹ Since this process includes a few elements of interest for my discussion here, I will give a short explanation of the most important twists and turns.

After the negotiations between the social partners failed and the Commission's work with a legislative proposal began, both employer and trade union representatives made sure to hand over all of their drafted texts, including those that their counterparts had never seen, to the Commission. The point of doing so was to influence the Commission's drafting of the proposal, i.e. lobby for their own interests.⁷³² In addition, Diego Mellado, the secretary for the impartial chair during the negotiations, made sure to give the Commission official who was responsible for the work on the legislative proposal information about the negotiations.⁷³³

After five months the Commission presented a proposal that contained several ideas from the social partners' drafted texts, and according to the Commission was based on points on which the social partners had reached consensus during the negotiations.⁷³⁴ The main issues on which there was strong disagreement among the Member States were the aim of the Directive, its scope, the requirement for reviewing restrictions of and prohibitions on temporary agency work, the principle of non-discrimination, possibilities for exceptions through collective agreements and the exception for assignments of limited duration.⁷³⁵

An interesting point in this respect is that Germany, despite opposing the Directive within the EU institutions, implemented a national law on temporary agency work. This law included a principle of non-discrimination, saying that temporary agency workers should receive a salary equivalent to the salary they would have received if they had been employed with the company where the work was carried out.

⁷³¹ The topic was until recently considered a dual failure, i.e. a failure of both the social dialogue and the Community method. See for example Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 456 or Ahlberg, K. (2008b) 'Regulating Temporary Agency Work', in Rönmar, M. (ed.) *Industrial Relations - Comparative and Interdisciplinary Perspectives*. The Hague: Kluwer Law International, pp. 57-82, at pp. 81f, who does, however, point out the fact that the dossier was still considered an open dossier.

⁷³² Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 218.

⁷³³ *Ibid.*, p. 218.

⁷³⁴ *Ibid.*, pp. 220ff.

⁷³⁵ Ahlberg, K. (2008b) 'Regulating Temporary Agency Work', in Rönmar, M. (ed.) *Industrial Relations - Comparative and Interdisciplinary Perspectives*. The Hague: Kluwer Law International, pp. 57-82, at pp. 68ff.

Derogations from this principle were possible, but only through collective agreements.⁷³⁶ This increased the number of collective agreements concluded in the sector,⁷³⁷ indicating that the possibility for the national social partners to create exemptions from important legal principles by means of collective agreements might serve as an incentive for them to engage in negotiations. In more system theoretical terms it can be understood as the legal system setting a condition that can generate results in the industrial relations system. In turn an increase of collective agreements concluded is likely to strengthen and positively impact national industrial relations, as the coverage of collective agreements might increase. The relations between the social partners might then develop further, possibly even leading to an increased level of organisation amongst workers and employers, improving the representativeness of national organisations and in the longer term strengthening the European social partners. This is therefore a useful example of how the ESD can function as a resource for collective bargaining at the national level.

The German example highlights the structural coupling between the legal system and the system of industrial relations and how these systems can work to strengthen each other.⁷³⁸ If the legal system produces legislation that leaves space for adaptation or derogation by collective agreements, such legislation might also generate results in the system of industrial relations in terms of increased production of communication by means of collective bargaining. As the initiator of the EU legislative process and an actor that has the important task of formulating legislative proposals, the Commission could learn from this as a way to further its role as a promoter of the ESD. Other important actors within the EU legal system need to consider this as well. The CJEU, especially, should take it into account when interpreting EU law and balancing different legal interests that involve collective agreements. After all, if the interpreting body of the EU legal system decreases the chance of influencing labour market rules through collective agreements, then the initial act of promoting legislation that could serve to increase the number of collective agreements will be counteracted and the desired effect nullified.

On this point it is worth considering Article 152 TFEU that was inserted by the Lisbon Treaty and reads as follows:

⁷³⁶ For further discussion of the German law implementing the drafted Directive, see Ahlberg, K. (2008a) 'Germany: "Premature Implementation" of the Draft Directive in Spite of Resistance in the Council', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 119-138.

⁷³⁷ Berg, A. (2008) *Bemanningsarbete, flexibilitet och likabehandling - En studie av svensk rätt och kollektivavtalsreglering med komparativa inslag*. Lund: Juristförlaget i Lund, p. 341.

⁷³⁸ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff and Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 121f.

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

This means that the task of facilitating the ESD, previously reserved for the Commission, now belongs to all of the EU institutions, including the CJEU. There is thus reason to reflect upon how CJEU decisions will affect the ESD in future case law. As has been seen in *Laval* and subsequent cases,⁷³⁹ the CJEU tends to interpret EU law in a manner that gives precedence to rigid hard-law rules from the EU level over rules stemming from collective agreements, thus limiting the scope for application of collectively bargained regulations. The question is whether this approach would be possible if the EU-level legislation provided for exemptions or opt-out clauses through collective agreements. As seen in the German case, the possibility of exemptions or so called opt-out clauses is not necessarily negative in terms of encouraging lower levels of protection for the workers. Instead, such clauses might serve as an incentive to negotiate collective agreements, which in turn might strengthen the collective voice of workers through trade unions and thus provide them with stronger possibilities to influence working conditions. This shows that the programming of the legal system can be framed so as produce results that, through structural coupling with systems of collective bargaining, lead to increased communication and decision-making in the collective bargaining systems. In other words, the programming of the legal system and its framing can also be important to systems of collective bargaining.

Independently from Germany's premature implementation of the Directive, discussions continued with the Member States offering various criticisms. The UK completely opposed the adoption of the Directive; other countries suggested changes and requested possibilities for derogations from the Directive. The 2004 addition of 10 new Member States made agreeing upon a text for the Directive no easier.⁷⁴⁰ By late 2005 it seemed as if the temporary agency work issue would be a failure not only

⁷³⁹ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767; *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989; *Case C-319/06 Commission of the European Communities v. Grand Duchy of Luxembourg* [2008] 2008 ECLI:EU:C:2008:350 I-4323.

⁷⁴⁰ Schömann, I. and Guedes, C. (2012) *Temporary agency work in the European Union - Implementation of Directive 2008/104/EC in the Member States*, Brussels: ETUI.

within the ESD, but also within the Community legislative process.⁷⁴¹ As the next section shows, however, the story was not yet at an end.

8.6 Adoption of a Directive: reasons and effects for the social dialogue

As stated above, the text of the Directive under discussion had incorporated different interests in order to seek as broad acceptance as possible. Three derogations from the principle of equal treatment had been included. The first accommodated the wish of the Nordic countries to allow for derogations through collective bargaining at the national level, in order not to undermine the bargaining power of the social partners in these countries. The second derogation was in response to a German request to allow for a collectively bargained exemption of temporary agency workers under permanent contract with their temporary work agencies from the equal treatment principle as regarded the issue of pay. The third derogation was an attempt to win over the UK by allowing for the implementation of a qualifying period for temporary agency workers to be protected by the principle of equal treatment.⁷⁴²

Considering the various interests at stake, and apparently in conflict, as the Commission worked to get the proposed Directive adopted, it is remarkable that the final proposal did not contain more changes than it actually did. As pointed out by Ahlberg before the final stages of the legislative process: *'It will be interesting to see whether the flexibility-supporter, the security-defender, the marginalization advocates and the normalization promoters will eventually come to understand each other better. A European regulation of temporary agency work will have to meet the concerns of all these groups.'*⁷⁴³ The question, however, is whether the reason the Directive finally was adopted was truly that its text took all these interests into account. The answer is

⁷⁴¹ See CEC (2005a) *COM(2005) 33 final - Communication from the Commission on the Social Agenda*. Brussels: European Commission (COM(2005) 33 final) and also Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 250f and Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 455.

⁷⁴² Schömann, I. and Guedes, C. (2012) *Temporary agency work in the European Union - Implementation of Directive 2008/104/EC in the Member States*, Brussels: ETUI.

⁷⁴³ Ahlberg, K. (2008b) 'Regulating Temporary Agency Work', in Rönmar, M. (ed.) *Industrial Relations - Comparative and Interdisciplinary Perspectives*. The Hague: Kluwer Law International, pp. 57-82, at p. 82.

probably no. Instead it seems likely that the dynamics and structural couplings between the EU policy-shaping system and the ESD as well as the national levels of these systems finally solved the problem of adoption. Efforts to get the Directive adopted were stepped up in 2007, and after realising that there were enough Member States in favour of the suggested text, during the Portuguese Presidency the issue was ready to be voted on. After the sectoral social partners again pushed for regulation in 2008 with the publication of a joint opinion⁷⁴⁴ that showed an EU-level sectoral agreement in line with the suggested text of the Directive, the pressure on the national level increased. In the UK this led to an agreement on the principle of equal treatment between the government and the main national social partners, shifting the UK opposition to acceptance of the Directive. The main obstacles for adoption of the Directive were thus overcome and the final text was sent to the Parliament, which adopted the Directive on 22 October 2008.⁷⁴⁵

This highlights the importance of several issues. The first is the structural coupling between the EU policy-shaping systems and the ESD, whereby communications from the ESD can exert pressure on the policy-shaping systems, in this case when the joint declaration by the sectoral social partners increased the will to regulate temporary agency work at the EU level.⁷⁴⁶ This in turn encouraged discussions between government and social partners at the national level, thus pointing up not only the existence of structural couplings at the national level, but, perhaps more importantly, the *need* for such structural couplings at the national level in order to increase the chances of communicative success between different levels and between systems.⁷⁴⁷ By assuring that the communication reached the correct addressee and was understood, the likelihood that the communication would be accepted also increased. In addition, the final developments that led to the adoption of the Directive also point up the importance of considering the relation between the national and the EU levels. This relation is important both as regards the communicative structures between these levels and for paving the way for nationally adopted measures in the effort to get EU-level decisions accepted by national members of the organisations that contribute to the production of communication within the EU systems.⁷⁴⁸

⁷⁴⁴ Euro-CIETT and UNI-Europa 2008. Joint Declaration on the Directive on working conditions for temporary agency workers. Brussels: European Commission.

⁷⁴⁵ Schömann, I. and Guedes, C. (2012) *Temporary agency work in the European Union - Implementation of Directive 2008/104/EC in the Member States*, Brussels: ETUI.

⁷⁴⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

⁷⁴⁷ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, p. 159.

⁷⁴⁸ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 150.

8.7 Summary of conclusions

Several conclusions can be drawn from the events leading up to the adoption of the Temporary Agency Work Directive. Firstly, it is clear that the structural coupling between the ESD and the EU policy-shaping systems is strong. As such it can be used as a tool or it can cause problems. The Legal Service's unclear acceptance of the communication from the social partners made reaching an agreement more difficult, whilst clear communication from the Commission about a planned legislative initiative was the main reason negotiations began in the first place.

Furthermore, the communicative links between the cross-industry and sectoral organisations indicates that the ESD cannot be understood correctly by dividing it into different systems. Rather it should be seen as one autopoietic system involving both cross-industry and sectoral issues, but consisting of a broad set of organisations capable to various extents of making decisions that will serve as communication within the system of the ESD. These organisations are likely to take various forms – they may be sectoral, cross-industry, EU-level or national level organisations – and the communicative structures of the system will either facilitate or limit the possibilities for such organisations to make fruitful contributions to the communication of the ESD. It is in this context therefore also relevant to ponder the communicative links between the national and the EU levels, where the UK's final acceptance of the Directive shows that communication between these levels is important for the system to produce results as a whole. This means that the ESD and the EU levels can also learn from national examples. Germany's premature implementation of the draft Directive shows how legislation that gives an industrial relations system scope for action can strengthen that system. However, it is necessary to consider that such legislation might not have the same effects in countries where the social partners are weak.

As has been discussed, the story of the Temporary Agency Work Directive clearly shows that the lack of coherent and clear EU level strategies from the trade union side helped decrease the possibilities for overcoming the improbabilities of communication. Since the management side exhibited a strategy aimed at protecting the values of the economic system, there is a pressing need for the trade union side to find an EU-level strategy to address such issues. Otherwise the improbabilities of communication will remain an impossible challenge for the ESD.

With respect to my methodological approach, this chapter has offered an analysis of the issue of temporary agency work as a way to identify and describe what the ESD is and what results it produces, based on a positivistic understanding of values (related to questions 2a and 1a in my methodological model). This analysis has developed a greater understanding of how bargaining organisations contributing to the production of communication within the ESD need to develop clear premises for decisions and

membership. This chapter has also furthered the discussion of how values, hermeneutically understood (relating to questions 2b and 1b in my methodological model) have importance for the dynamics of ESD bargaining organisations and the effects which results from one system can generate in other systems. It has become evident that the issue of values in the hermeneutic sense is a complex one, and even though multiple members of a bargaining organisation might clearly express that a certain value should be promoted, those members might still diverge in their interpretation of the content of that value, causing further difficulties for the bargaining organisation in defining decision premises. It is also evident that there is a contrast between social and economic values: economic values have a stronger influence in the programming of systems, which is difficult to override. For social values to receive priority in communication and decisions, it is necessary to find means through which social values can challenge or cause a credible threat to economic values. It is thus also of interest to consider how challenges to the values promoted by the economic system can be dealt with and what consequences such challenges might have for the ESD. The next chapter will therefore deal with the effects of the financial crisis for the ESD.

9 The effects of the financial crisis on the European Social Dialogue

9.1 Introduction

Over the years the ESD has undergone different phases of development, several of which have been debated as a response to criticisms of the social deficit of the EU integration project. Part of my research question concerns the issue of why the ESD is considered lacking capacity to produce results that improve working conditions and thus contribute to the social objectives of the EU. When considering the ESD as an autopoietic system it is also evident that a strong structural coupling exists between the ESD and the EU policy-shaping systems. It is therefore worth examining the extent to which changes in the EU policy-shaping systems have affected the ESD and its development. In recent years, certain developments within the societal financial and economic systems have provoked an intensified focus on economic policy within the EU. The financial crisis that erupted in 2008 generated a situation within the EU wherein the focus of politicians and the legislator again has become primarily economic, at the expense of social issues.

It is thus of interest to discuss these developments, how they have affected the ESD and how the ESD has developed during this period, in order to figure out to what extent the ESD might balance up the social deficit of the EU. The hermeneutic understanding of the concept of values will thus be further deployed in the analysis presented here and examining why the ESD is what it is and why it produces the results it does (in other words, the analysis will relate to questions 1b and 2b in my methodological model). The discussion in this chapter is framed in relation to the more thorough legal analysis concerning fundamental labour rights undertaken in chapter four. In this chapter I will, however, focus my attention on some of the measures taken to counterbalance the threats of the financial crisis for the EU and analyse these measures in relation to the legal framework and their effects for the ESD and the future potential of this system of industrial relations.

9.2 The financial crisis reaffirming the strength of the economic system in relation to other function systems in the EU?

The financial crisis with the initial risks of banks collapsing in turn followed by the risk of actual states becoming bankrupt generated several responses within the EU policy-shaping systems focusing mainly on financial reform, stabilisation of the financial situation and improvement of economic governance.⁷⁴⁹ The changes relating to the economic governance of the EU that the financial crisis provoked stretched further than the Articles already adopted relating to the EMU area of the Lisbon Treaty. In fact, the response to the financial crisis from the EU policy-shaping systems generated additional interventions with the amendment of Article 136 TFEU and the introduction of additional legislative interventions for the euro area through intergovernmental agreements between the Member States and secondary legislation at the EU level.⁷⁵⁰ These measures have been criticised not only for infringing fundamental social rights, but also on procedural and judicial grounds relating to the adoption of the measures and their ambiguous relation to EU law.⁷⁵¹ The criticism has highlighted the developments as ‘a European hegemony of economic governance principles and structures over member states and other fields of European law.’⁷⁵² The following sections will consider the responses to the crisis and its implications for the future development of social policy and systems of industrial relations at large, with

⁷⁴⁹ Whether measures to facilitate growth have been included in the response of the EU to the financial crisis can be debated, but it is at best the least developed part of such a response. See Barnard, C. (2012) ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’, *Industrial Law Journal*, 41(1), pp. 98-114, at pp. 99ff.

⁷⁵⁰ Schömann, I. (2014) ‘Changes in the General European Legal Framework’, in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 11-24, at pp. 12ff.

⁷⁵¹ See for example Oberndorfer, L. (2014) ‘A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism’, in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 25-54; Schömann, I. (2014) ‘Changes in the General European Legal Framework’, in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 11-24; Schmitt, M. (2014) ‘Evaluation of EU Responses to the Crisis with Reference to Primary Legislation (European Union Treaties and Charter of Fundamental Rights)’, in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing, pp. 195-241.

⁷⁵² Schömann, I. (2014) ‘Changes in the General European Legal Framework’, in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 11-24, at p. 24.

specific focus on the ESD. As I will show, there are several examples from among the events following the crisis and the measures taken to overcome it that further clarify the hierarchical dominance of the economic system over other function systems of the EU.

9.2.1 Austerity measures as the main focus for overcoming state financial challenges

The measures taken to address the financial crisis consisted of various legislative interventions in primary and secondary law as well as the establishment of additional intergovernmental treaties. As regards primary law, the measure adopted was an amendment of Article 136 TFEU⁷⁵³ aimed at legalising the European Stability Mechanism Treaty (ESMT),⁷⁵⁴ an intergovernmental treaty that set up an intergovernmental organisation tasked with securing the financial stability of the euro zone as a whole. In conjunction with the ESMT, the so-called Fiscal Treaty or TSCG (the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union)⁷⁵⁵ was also adopted.⁷⁵⁶ The changes introduced through secondary

⁷⁵³ *European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.* (2011) (OJ No L 91/2011).

⁷⁵⁴ *Treaty Establishing a European Stability Mechanism*, Mechanism, E.S. (2012) (T/ESM 2012-LT/en 1).

⁷⁵⁵ See Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at p. 96.

⁷⁵⁶ As stated by the CJEU, the ESMT was adopted outside the scope of EU law but was not contrary to EU law since nothing precludes the Member States from concluding an agreement such as the ESMT. See *Case C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] Court Reports - General ECLI:EU:C:2012:756 756 and Schömann, I. (2014) 'Changes in the General European Legal Framework', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 11-24, at pp. 17ff.

law measures are commonly referred to as the ‘Six-Pack’⁷⁵⁷ and the ‘Two-Pack’⁷⁵⁸. Although a few of these instruments made reference to the involvement of social partners ‘where appropriate’, the issue of fundamental social rights or securing the involvement of collective bargaining structures in relation to measures aimed at labour market regulation is remarkably weak or even absent.⁷⁵⁹

Worth noting is that the main focus of the measures addressing the crisis has been on limiting costs for states through controlling public expenditure and minimising state budgetary deficits. In other words, the measures have been aimed at preventing expansive economic and social policy measures as a means to boost the economy. The overall values framing the actions taken are in other words framed by the promotion of economic values.⁷⁶⁰ In addition, the general framework for economic policy coordination leaves Member States and the European Central Bank (ECB) in the hands of the financial markets for public refinancing. Furthermore, the measures taken limit the democratic control of economic and budgetary policy, since the

⁷⁵⁷ Adopted in 2011, it consists of five Regulations and one Directive. *Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States* (2011) Council of the European Union (OJ No L 306/2011); *Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area* (2011) Council of the European Union (OJ No L 306/2011); *Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area* (2011) Council of the European Union (OJ No L 306/2011); *Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policy* (2011) Council of the European Union (OJ No L 306/2011); *Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances* (2011) Council of the European Union (OJ No L 306/2011); *Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure* (2011) Council of the European Union (OJ No L 306/2011).

⁷⁵⁸ Adopted in 2013, this consists of two regulations. *Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability* (2013) Council of the European Union (OJ No L 140/2013); *Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area* (2013) Council of the European Union (OJ No L 140/2013).

⁷⁵⁹ Dorsemont, F. (2014) ‘Collective Action Against Austerity Measures’, in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 154-170, at pp. 156f.

⁷⁶⁰ See for example Barnard, C. (2012) ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’, *Industrial Law Journal*, 41(1), pp. 98-114, who also discusses the voluntary Euro Plus Pact and highlights how even those parts of the recommendations that seemingly could accommodate more social values in terms of focusing on increasing growth and employment actually steers further towards economic values.

Parliament is allowed only limited consultation rights and no co-decision rights.⁷⁶¹ The values underlying the programming of the policy-shaping system in this respect are thus clearly framed by the values of the economic system, providing an indication of the strength of the economic system in relation to the other function systems of the EU.

The concrete measures taken to address the state financial deficits of e.g. Greece and Ireland are found in the Memoranda of Understanding (MoU) negotiated between the indebted states and the so-called Troika (the European Commission, the European Central Bank [ECB] and the International Monetary Fund [IMF]). The actual legality of the contents of documents can be debated, as can their potential effects on future developments in the ESD and the role of collective bargaining in a balanced economic development within the EU. As pointed out by Fischer-Lescano, the MoUs contain clauses that directly set up requirements for pay levels,⁷⁶² an issue that is excluded from the competences of the EU under Article 153(5) TFEU. Although the MoUs were negotiated under the framework of the ESMT, an intergovernmental treaty outside of EU law in accordance with the *Pringle* case,⁷⁶³ the EU institutions are still bound by the TFEU in their actions and have thus acted outside of their competences when taking measures to intervene with pay levels in the Member States. In addition the MoUs have served to further decentralise and weaken collective bargaining systems in the Member States concerned,⁷⁶⁴ which in turn increases the difficulty of establishing a more centralised and transnational system of collective bargaining, thus having the opposite effect than that of promoting social dialogue in accordance with Article 152 TFEU. In this sense the ESD has been indirectly challenged by the measures taken to address the financial crisis. When considering how those measures have affected fundamental labour rights we will find further challenges as well. These are discussed in the next section.

⁷⁶¹ Oberndorfer, L. (2014) 'A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 25-54, at pp. 38ff.

⁷⁶² Fischer-Lescano, A. 'Competencies of the Troika: legal Limitations of the Institutions of the European Union', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81, at pp. 72f.

⁷⁶³ *Case C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] Court Reports - General ECLI:EU:C:2012:756 756, paragraphs 98-106.

⁷⁶⁴ In addition to the detriment of the ESD, the 'dismantling of sector-level collective bargaining under the MoUs has led to increasing inequality in the debtor member states, with knock-out effects for social cohesion.' Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at p. 103 with further reasoning on the following pages.

9.2.2 Challenges to fundamental labour rights

As the discussion in chapter four on the place of fundamental labour rights within the EU legal order has shown, there is a clear requirement that these rights shall be protected and respected in accordance with the law and practices developed in relation not only to EU legal sources, but also to international legal sources such as ILO Conventions and the ECHR. This protection shall, in accordance with Article 152 TFEU, be guaranteed not only in relation to national systems of industrial relations, but also in relation to transnational and EU level industrial relations, i.e. the ESD.⁷⁶⁵ In this respect it is interesting to note that even before the financial crisis, the EU legal system limited the autonomy of the social partners and especially trade unions in respect to their capacity to freely choose the level of collective bargaining⁷⁶⁶ as well as their autonomy in decisions concerning transnational coordinated industrial action.⁷⁶⁷ The measures taken to address the financial crisis further show how the EU legal system through decisions in various forms has encroached upon the fundamental labour rights and thus challenged the future development of a fruitful system of collective bargaining at the EU level, i.e. the ESD.

There are several examples of these encroachments. Fischer-Lescano points out two relating to MoUs concluded with Ireland and Greece that stipulate obligations for the national governments: in Ireland, concerning reductions to the national minimum wage; and in Greece, changes to the collective bargaining system that would favour the decentralisation of collective bargaining and limit the possibilities for broadening

⁷⁶⁵ See for example Veneziani, B. 'Austerity Measures, Democracy and Social Policy in the EU', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 109-151, at pp. 124f, who points out the need to amend Article 153(5) TFEU in order to ensure proper protection for the freedom of association and right to industrial action at the transnational level.

⁷⁶⁶ As mentioned above, the legal system has limited the role of decentralised local collective bargaining in situations where the Posted Workers Directive applies, through the cases *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikersförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767; *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

⁷⁶⁷ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

the coverage of collective agreements.⁷⁶⁸ These are just two examples. Studies of the implications of the crisis measures at national level in the seven countries worst affected by the crisis show that the notion of establishing a decentralised collective bargaining system with the company level in focus as an ideal model was generally adopted, without paying due regard to the specific characteristics of the national systems. Instead the overarching idea has been to allow companies the best possibilities to adjust conditions following economic developments.⁷⁶⁹ The EU legal system, through decisions put forward by its institutions that should act within the competencies granted to them by the treaties, has thus encroached upon the fundamental labour rights by infringing the autonomy of the collective bargaining systems⁷⁷⁰ and by acting outside of its competencies in stipulating specific regulations concerning pay that are contrary to Article 153(5) TFEU. These encroachments have not even been acknowledged by the legal system, whose communication and decisions are clearly based on a programming steered by values picked up from the economic system.

This conclusion is based on the fact that it seems that the legal system of the EU at any given time will favour the interpretation and/or implementation of the right to collective bargaining in a manner that advantages economic interests over the autonomy of the social partners. When economic interests are gaining from favouring centralised collective bargaining, this will be what the legal system seeks to establish, and vice versa. In other words, the legal system will produce outcomes that result in restricting the possibilities for the collective bargaining system to frame its

⁷⁶⁸ Fischer-Lescano, A. (2014) 'Competencies of the Troika: legal Limitations of the Institutions of the European Union', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81, at pp. 72f. For another discussion of the MoU for Ireland see also Barnard, C. (2012) 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective', *Industrial Law Journal*, 41(1), pp. 98-114. For further and more detailed information on the adopted and intended measures taken at national level, see CEU, ECB, IMF and Ireland (2010b) *Memorandum of Understanding on Specific Economic Policy Conditionality (Ireland)*, 3 December, 2010. Brussels; CEU, ECB, IMF and Greece (2010a) *Memorandum of Understanding on Specific Economic Policy Conditionality (Greece)*, August 6, 2010. Brussels; CEU (2010b) *The Economic Adjustment Programme for Greece*. Brussels: European Commission (Occasional Papers 61, May 2010).

⁷⁶⁹ See Koukiadaki, A., Távora, I. and Martínez Lucio, M. (eds.) (2016) *Joint regulation and labour market policy in Europe during the crisis*. Brussels: ETUI, pp. 32ff and chapters 2-8 for the specific country studies of Greece, Ireland, Italy, Portugal, Romania, Slovenia and Spain. For a further discussion on the decentralisation of labour law and collective bargaining, see Jacobs, A. (2014) 'Decentralisation of Labour Law Standard Setting and the Financial Crisis', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 171-192.

⁷⁷⁰ Critique of this has also been raised from the ILO Freedom of Association Committee, see Ghailani, D. (2016) 'Violations of fundamenta rights: collateral damage of the Eurozone crisis?', in Vanhercke, B., Natali, D. & Bouget, D. (eds.) *Social policy in the European Union: stateof play in 2016*. Brussels: ETUI and OSE, pp. 157-188, at p. 172.

programming in a manner that would allow the system to promote other values than those set by the economic system.⁷⁷¹ The autonomy of such a collective bargaining system is thus highly limited and the ESD will thus have only very slim possibilities to contribute in overcoming the social deficit of the EU. Other issues concerning these measures point in the same direction. The next section will discuss effects on employers' rights.

9.2.3 Market oriented neo-liberal politics favouring employers' rights

The measures taken to overcome the economic and financial crisis within the EU were, as stated, largely austerity measures shaped within the framework of a neo-liberal policy consensus. This market-oriented neo-liberal framework has been directed toward cutting costs in order to increase competitiveness in the short term, whilst at the same time decreasing the potential for development of long-term stability and growth. This is because the austerity measures have resulted in decreased consumption strength due to wage cuts, leading in turn to an increase in bankruptcy and a further increase in unemployment and poverty.⁷⁷²

The neo-liberal paradigm of regulatory measures has focused on two issues as essential for overcoming the crisis: the need to increase competitiveness of industry and the need to increase employment rates. In seeking to achieve both, measures have sought to cut costs for employers by reducing wage levels and reducing levels of employee protection, based on the assumption that such changes will increase the level of employment.⁷⁷³ The changes have thus served the interests of employers in two ways. The first is through a redistribution of capital, since lowered wage levels tip the distribution of capital between management and labour towards the management side further. The second is through a redistribution of power, since deregulating labour protection laws and undermining worker representation and collective bargaining systems gives employers more power to decide on employment conditions and relationships.

⁷⁷¹ See Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press., pp. 109 ff and Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

⁷⁷² Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at pp. 93ff.

⁷⁷³ Veneziani, B. 'Austerity Measures, Democracy and Social Policy in the EU', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 109-151, at p. 131. For a more detailed study on various countries see Koukiadaki, A., Távora, I. and Martiñez Lucio, M. (eds.) (2016) *Joint regulation and labour market policy in Europe during the crisis*. Brussels: ETUI.

The overall effect of the crisis measures on labour market relations has thus been to strengthen employers' rights at the expense of trade unions' and workers' rights. The claim that '*collective bargaining is now seen as an obstacle to a restrictive wage policy and the general prevailing policy aim is to dismantle collective bargaining and to weaken trade unions*'⁷⁷⁴ might sound drastic, but it accurately describes the current state of affairs.⁷⁷⁵ The result will be to make it more difficult for trade unions and workers to voice their rights, since they are now in a weaker position than before. The situation of collective begging rather than collective bargaining has therefore become more likely to occur. In Luhmann's terms, the improbabilities of communication⁷⁷⁶ have increased for communication that seeks to establish or protect worker interests within affected national systems of industrial relations. This is because the favouring of employers' rights has decreased the chances for the acceptance and success of worker-protective communication. By way of the structural coupling between the legal system and the industrial relations systems, the crisis measures are likely to further strengthen the values of the economic system within the programming of the collective bargaining systems and steer communication towards a focus on increased competitiveness and flexibility for employers.⁷⁷⁷

The strength of the economic system in the hierarchy of the various function systems is therefore quite evident. Economic system values have influenced the programming of first the political and the legal systems, and onwards to the systems of collective bargaining. It is ironic, therefore, that the measures taken have not had the desired results for the economic system. Instead, unemployment and bankruptcies have risen, consumption has fallen, and public debt levels remain largely unchanged.⁷⁷⁸ Considering that changes in labour law and employee protection over time have been

⁷⁷⁴ Bruun, N. (2014) 'Legal and Judicial Avenues: The ILO', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 243-264, in p. 263.

⁷⁷⁵ As concluded by Barnard in relation to the actions taken by the EU in response to the financial crisis and their effects for labour law '*There is a threat to national labour law as we know it and that threat is driven largely by the EU.*' in Barnard, C. (2012) 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective', *Industrial Law Journal*, 41(1), pp. 98-114, at p. 114.

⁷⁷⁶ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff

⁷⁷⁷ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff and Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

⁷⁷⁸ Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at p. 94.

shown to have no significant effect on employment,⁷⁷⁹ the persistence of the neo-liberal hegemony within the programming of the policy-shaping systems is remarkable. The most likely explanation is simply that the economic function system has become the most influential in the hierarchy of function systems, steering the values of the programming of the other function systems.⁷⁸⁰ This has had and will continue to have effects for the ESD. The next section will consider the impact of the developments in relation to the ESD within the context of the financial crisis and the measures taken to address it.

9.2.4 A clash of the European Social Dialogue?

At the outset of the financial crisis there had already been developments within the legal system limiting the autonomy of the social partners and thus the autonomy of the ESD as a system of collective bargaining. These developments were highlighted in the *Viking*,⁷⁸¹ *Laval*⁷⁸² and *Rüffert*⁷⁸³ cases, and depict a legal system whose programming is based on values promoted by the economic system. The strength of the economic system in shaping the values for the programming of other function systems, including the ESD, was also seen clearly in the measures taken in response to the financial crisis.

The interventions within the collective bargaining systems, in the form of wage cutting and requirements for the decentralisation of bargaining procedures, show that the acceptance of free collective bargaining within the EU is no longer a certainty. Direct political intervention into the procedures and results of collective bargaining

⁷⁷⁹ Deakin, S., Malmberg, J. and Sarkar, P. (2014) 'How do labour laws affect unemployment and the labour share of national income? The experience of six OECD countries, 1970–2010', *International Labour Review*, 153(1), pp. 1-27.

⁷⁸⁰ In this sense the programming of the economic system can be considered to have generated results that have targeted the conditions for difference minimization within the policy-shaping function systems and thus influenced the programming of these systems. See Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 53ff for further discussion.

⁷⁸¹ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

⁷⁸² *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

⁷⁸³ *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

has become part of the game.⁷⁸⁴ The necessity of respecting the autonomy of the social partners and collective bargaining systems – respecting their freedom to choose the scope and contents of negotiations and respecting the outcomes of such negotiations – in relation to the fundamental labour rights has thus been challenged. The difficulty of retaining decision premises and membership conditions that can empower an organisation of collective bargaining to actually make decisions that will succeed as communication within the ESD as a whole is thus even greater than before.⁷⁸⁵ In other words, the improbabilities of communication have become an increasing challenge for the collective bargaining organisations of the ESD, since the conditions set up for such organisations have been increasingly limited and pushed towards the local level as an effect of the structural coupling between the EU legal system and the ESD.⁷⁸⁶

The MoUs discussed by several authors⁷⁸⁷ whose contents concern levels of pay and collective bargaining structures for pay show that the structural coupling between the policy-shaping systems of the EU and the ESD affects the possibilities for the ESD to

⁷⁸⁴ Schulten, T. and Müller, T. (2013) 'A new European interventionism? The impact of the new European economic governance on wages and collective bargaining', in Natali, D. & Vanhercke, B. (eds.) *Social developments in the European Union 2012 - Fourteenth annual report*. Brussels: ETUI, pp. 181-213, at pp. 201ff. Worth noting here is also the issue of the Commission blocking the implementation of the health and safety agreement in the hairdressing industry as commented on in chapter five. For a good discussion see Bandasz, K. (2014) 'A framework agreement in the hairdressing sector: the European social dialogue at crossroads', *Transfer*, 20(4), pp. 505-520. The reluctance of the EU institutions to address the problematic issue of neglecting fundamental social human rights in the continuous work with the crisis measures has also been highlighted in Ghailani, D. (2016) 'Violations of fundamental rights: collateral damage of the Eurozone crisis?', in Vanhercke, B., Natali, D. & Bouget, D. (eds.) *Social policy in the European Union: state of play in 2016*. Brussels: ETUI and OSE, pp. 157-188.

⁷⁸⁵ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff and Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142ff.

⁷⁸⁶ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff, Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227 and Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

⁷⁸⁷ See for example Koukiadaki, A., Távora, I. and Martiínez Lucio, M. (eds.) (2016) *Joint regulation and labour market policy in Europe during the crisis*. Brussels: ETUI; Fischer-Lescano, A. (2014) 'Competencies of the Troika: legal Limitations of the Institutions of the European Union', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81; Deakin, S., Malmberg, J. and Sarkar, P. (2014) 'How do labour laws affect unemployment and the labour share of national income? The experience of six OECD countries, 1970–2010', *International Labour Review*, 153(1), pp. 1-27; Veneziani, B. (2014) 'Austerity Measures, Democracy and Social Policy in the EU', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 109-151.

communicate and shape the programming of the system. It also affects the conditions for which decisions could be set up by potential organisations of collective bargaining within the ESD. This is not the first time that the EU legal system has made decisions that, via the structural coupling with the ESD, serve to limit the possibilities for the ESD organisations of collective bargaining to develop their internal programming, conditions of membership and decision premises in a manner that facilitates communicative success. Such decisions have been made by the legal system before⁷⁸⁸ and also then challenged the ESD. The challenges caused by the measures addressing the financial crisis are thus not new. They simply build on already-existing challenges and further undermine the possibilities for the ESD to develop into a fruitful system of industrial relations further.

The increasing challenges for the ESD are also evident in the results coming out of the system, since the increased attention and focus on employers' interests by the legal and policy-shaping systems of the EU has generated increased tensions between the social partners. The ESD has thus had greater difficulties in producing results and reach agreements. This is true not only at the cross-industry level, where an increased polarisation of interest between management and labour is clear, but also as concerns the outcomes at sectoral level, where a previously rising trend in numbers of agreements concluded has been broken.⁷⁸⁹ The situation is not improved by the fact that following the crisis within the EU there has been increasing diversification of interests among the Member States generating even further challenges to the prospects of any EU action within the field of social policy.⁷⁹⁰ This means that the shadow of law is absent and therefore this decision premise will not generate any ESD agreements to be implemented through directives. There is thus reason to assume that the increasing strength of the economic system and the increasing influence of its values on the programming of the legal and political function systems of the EU have weakened the already-fragile system of the ESD. The question is whether the ESD this time has a chance of recovery?

⁷⁸⁸ The CJEU cases discussed in chapter 4 are examples of such decisions, as is the advice from the Commission's Legal Service on the issue of pay during the negotiations on temporary agency workers, as discussed in chapter 8.

⁷⁸⁹ See for example Eurofound (2013) *Social dialogue in times of global economic crisis*, Luxembourg: European Foundation for the Improvement of Living and Working Conditions, pp. 14f and CEU (2015) *Industrial Relations in Europe 2014*. Luxembourg: Publications Office of the European Union, p. 135.

⁷⁹⁰ See for example Theodoropoulou, S. (2016) 'What solidarity in the Eurozone after the Greek crisis of 2015?', in Vanhercke, B., Natali, D. & Bouget, D. (eds.) *Social policy in the European Union: state of the play 2016*. Brussels: ETUI and OSE, pp. 33-60.

9.3 Summary of conclusions

The discussion in this chapter has made clear that the neo-liberal consensus within the economic system of the EU is strong enough to also inform the programming of the political and legal systems of the EU, via the structural couplings between these systems. The ESD in turn, with strong structural couplings to the legal and political systems, stands little chance of developing its own programming in any other manner. Neo-liberal economic values therefore also shape the programming of the ESD, and before this situation can change, a challenge to the strength of the economic system will be required. This will not be an easy task. It will require a reassessment of the economic values within the political and legal systems in a manner radical and strong enough to counterbalance the strength of the economic system. It is not unlikely that the developments in the wake of the austerity programs can generate the necessary debate,⁷⁹¹ but it is by no means certain that this will lead to a breakup of the neo-liberal hegemony of the different function systems of the EU. It is thus not only the ESD and its potential future function for the social model of the EU that stands at a crossroads, but also the EU as a whole.

This chapter has explored more thoroughly how hermeneutic values can contribute to the explanation of why the ESD is what it is and why the ESD produces the results it does. The importance that values in the hermeneutic sense have for the programming of systems and the results that different systems generate in other systems through their structural coupling has become clear. This has been the main focus of the analysis in this chapter (thus an analysis relating to questions 2b and 1b in my methodological model), as the parts of the analysis relating to the concept of values in the positivistic sense (concerning questions 2a and 1a in my methodological model, about what the ESD is and what results it produces) have been put in place in previous chapters. Having covered the ESD in a holistic manner it is time to turn to the system of collective bargaining within the global maritime sector and begin answering the questions of what the ITF FOC campaign is, what results it produces and why this is so. The next part of the thesis will thus deal with the ITF FOC campaign, placing it in relation to the ESD in order to provide a basis for understanding the similarities and differences between the ESD and the ITF FOC campaign and why they are perceived differently in terms of their capacity to produce results that improve working conditions.

⁷⁹¹ As Deakin notes, the neo-liberal policies shaping the austerity measures were one of the main reasons behind the crisis, making a reassessment of the neo-liberal consensus likely. See Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at p. 106.

10 The International Transport Workers' Federation Flag of Convenience Campaign

10.1 Introduction

The purpose of this thesis is to deepen the understanding of the ESD by exploring the differences and similarities with the ITF FOC campaign as well as seeking to answer why these two systems are perceived differently in terms of their capacity to produce results that improve working conditions. In order to answer those questions it is necessary to understand how the ITF FOC campaign works and how it can be understood as an autopoietic system. This chapter will therefore analyse the context within which the ITF FOC campaign has developed as well as the structures of this system: its binary code, communicative structures and programming. Methodologically, the analysis will focus on positivistic values to help to answer the questions of what the ITF FOC system is and what results it produces (questions 2a and 1a in my methodological model), but this is not possible to understand fully without also examining the underlying hermeneutic values to provide a picture of why the system is what it is and why it produces the results it does (questions 2b and 1b in my model).

To understand the similarities and differences between the ESD and the ITF FOC systems, it is necessary to consider that the functions of social dialogue and collective bargaining systems very much depend on their historical development. It is, however, possible to identify different elements and factors of importance for the development of systems that have a clear impact on employment and working conditions. The power balance between labour and management depends upon which mechanisms are available to them for promoting their own interests and putting pressure on the other side. In other words, what are the improbabilities of communication⁷⁹² facing the system, and what means are available for overcoming them? In most national systems

⁷⁹² Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff

with strong collective bargaining systems, the historical development of those systems follows a similar pattern: trade unions use industrial action to force employers to the bargaining table and reach agreements to improve working conditions. Such means of reaching agreements then become institutionalised in the national legal system.⁷⁹³ Following Luhmann, this can be explained as trade unions using the instrument of collective action as a means to overcome the improbabilities of communication within the system of industrial relations.⁷⁹⁴ The institutionalisation of these structures can then be understood as a formalisation of the system's binary code, programming and communicative structures.⁷⁹⁵

The preceding chapters have analysed the ESD. In order to place the often-described failure of the ESD as an international system of industrial relations into perspective, I will now move on to the global sector of maritime transport. Within this sector, global collective agreements with accompanying control and enforcement mechanisms have existed at least since 2003, when maritime employers and the ITF concluded an agreement covering wages and working conditions on FOC ships.⁷⁹⁶ This collective agreement is a sign that the strategy adopted by the ITF has generated a global system of industrial relations capable of producing results within the global economic system in terms of the regulation of wages.⁷⁹⁷ This in turn makes it interesting to juxtapose this system with the ESD in order to see lessons it might offer for the further development of the ESD.

The strategies adopted by the trade unions in the maritime sector have also gained for them and their counterparts at the bargaining table, i.e. the employers' organisations,

⁷⁹³ For analyses of this development in some of the EU national legal systems, see for Sweden: Adlercreutz, A. (2003) *Svensk arbetsrätt*. Twelfth edition edn. Stockholm: Norstedts Juridik AB; or Schmidt, F. (2002) *Facklig arbetsrätt*. Fourth edition edn. Stockholm: Norstedts Juridik AB; for France Pélissier, J., Supiot, A. and Jeammaud, A. (2006) *Droit du travail*. 23 edn. Paris: Dalloz; for Italy; Biagi, M. c. b. T., Michele) (2003) *Istituzioni di diritto del lavoro*. Second edition edn. Milano: Giuffrè Editore; or Giugni, G. (2002) *Diritto Sindacale*. Bari: CACUCCI EDITORE; and for the UK Davies, P. and Freedland, M. (1993) *Labour Legislation and Public Policy*. Clarendon Law Series Oxford, UK: Oxford University Press.

⁷⁹⁴ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227 and Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁷⁹⁵ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 203f.

⁷⁹⁶ ILO (2004) *Organizing for Social Justice - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Geneva: International Labour Office (Report I (B), p. 3. This is when global maritime social partners signed the first global collective agreement within the International Bargaining Forum. However, the system can be considered as having existed already before that through the ITF standard collective agreements.

⁷⁹⁷ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 121.

a certain level of influence in the policy-shaping systems of the EU. Both trade union and employers' organisations have a role that allows them scope for influencing and helping to set the legislative agenda for the EU institutions. Proposals from the social partners in the maritime sector are taken into consideration when new policies are implemented or existing policies are adapted and changed to better comply with industrial developments.⁷⁹⁸ The maritime sector is thus a good place to discover the factors that facilitate the development of an industrial relations system that is important on the grassroots level but also contributes through structural coupling to the policy-shaping systems.⁷⁹⁹ The aim of this chapter is to achieve a better understanding of this industrial relations system by providing a general idea of the context within which the ITF FOC campaign has developed, how the campaign has evolved and how it works in practice.

As a starting point, it is worth mentioning that the maritime sector is a highly internationalised sector, the first truly global sector in the world. The characteristics of such a global sector, where most services and trade have an international aspect, have generated a need and demand for an international system of industrial relations that so far is not present to the same extent in other sectors. As such, duplicating the function and the processes of the ITF FOC system will not be possible, nor will it provide added value. There are, however, certainly issues worth highlighting in order to find inspiration and solutions to overcome challenges within other international or EU-level systems of social dialogue or industrial relations. In preparation for the analytical section, I will give an explanation of basic maritime law principles of relevance for social dialogue and employment relations before embarking on a system analysis of the ITF FOC campaign.

⁷⁹⁸ The role of the SSDC in maritime transport will be further analysed in chapter 11. Examples of EU acts in maritime policy where the SSDC has had an impact include CEC (2004b) *Commission communication C(2004) 43 - Community guidelines on State aid to maritime transport*. Brussels: European Commission (OJ 2004 No C 13/3); *Council Decision 2005/367/EC of 14 April 2005 authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention 185)* (2005). Brussels: Council of the European Union (OJ No L 136/2005); and *Directive 2015/1794/EU of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers* (2015). Brussels: Council of the European Community (OJ No L 263/2015).

⁷⁹⁹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

10.2 Introduction to maritime law

The most important principle for maritime law, when the issue of FOC is discussed, is the principle of a genuine link between the flag a vessel flies and the beneficial ownership and control of the ship.⁸⁰⁰ This means that the owner of a ship and the one exercising the control of the ship should be residents of or companies registered in the country where the vessel is registered. Management as well as a significant part of the workers on board should also be subject to the national laws of the flag country. Traditionally this was how the bona fide national flag registers functioned.⁸⁰¹ Another founding principle for maritime law, related to the principle of a genuine link, is the principle of the law of the flag, which basically means that the national legal system of the flag a vessel flies is to apply on board the ship.⁸⁰² As such, a ship registered in France is subject to French laws and regulations. Therefore, French labour law will govern employment contracts for seafarers on board this ship. The basis for the development of this principle was that ships were to be considered part of the territory of the nation where they were registered, and the flag state was responsible for control and enforcement of the laws on board the ship.⁸⁰³

Article 91 of the UN Convention on the Law of the Sea (UNCLOS) provides guidance for the application of these two principles by stating that '*every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*' Whether the concept of a genuine link truly has a proper definition is debated,⁸⁰⁴ but the ITF has over years of campaigning established its own definition, in the absence of a clear and precise definition in international law. A reading of the ITF definition of 'flag of convenience' (FOC) offers an explanation of the concept of genuine link.

⁸⁰⁰ Article 91 of the UN Convention on the Law of the Sea (UNCLOS).

⁸⁰¹ See Tiberg, H. and Schelin, J. (2014) *On Maritime & Transport Law*. Stockholm: Axel Ax:son Johnson Institute for Maritime and other Transport Law Stockholm University, p. 45. For a discussion on the events leading up to the inclusion of the requirement of a genuine link in UN conventions preceding UNCLOS see Boczek, B. A. (1962) *Flags of Convenience - An International Legal Study*. Cambridge, Massachusetts: Harvard University Press, pp. 70ff.

⁸⁰² Tiberg, H. and Schelin, J. (2014) *On Maritime & Transport Law*. Stockholm: Axel Ax:son Johnson Institute for Maritime and other Transport Law Stockholm University. p. 14.

⁸⁰³ See Boczek, B. A. (1962) *Flags of Convenience - An International Legal Study*. Cambridge, Massachusetts: Harvard University Press, pp. 91ff or Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, p. 37.

⁸⁰⁴ According to MacGillivray the concept has never been defined. MacGillivray, P. (2003) 'Globalization's Effect on Today's Seafarers - Part I of II - ', *Harbour & Shipping*, October 2003, pp. 18-19, at p. 18.

Briefly, the concept entails that the flag of the ship shall be the same as the nationality of the person or entity that has actual control and power over the ship. If the flag of the ship is not the same as the nationality of the person or organisation that has the ultimate decision-making responsibility over the ship, then the ship is considered to sail under an FOC.⁸⁰⁵

The principles of the genuine link and the law of the flag were the original principles that governed the application of laws and regulations on board ships, and it might seem a fairly straightforward and simple system. This is no longer the case, however, as the growing use of FOCs or open registers has increasingly complicated the ways that national laws are applied on board such ships. This is the case especially for the laws governing employment conditions on board ships, where the situation has become increasingly complex due to the growth of the FOC sector. It is now often the case that seafarers are employed under contracts based on the laws and labour standards of their home countries, which means that seafarers of different nationalities on board the same ship can be subject to different systems of labour law. This can be described as the principle of applying the laws of residence.⁸⁰⁶ Basically this means that shipowners using FOC registers are likely to choose their crews based on labour costs. This has raised fears that competition amongst seafarers will cause a downward spiral of social dumping, one of the main incentives for ITF to launch and continue their campaign against FOC ships.

In this connection it is worth noting that the control of ships sailing international seas is regulated through international conventions from the International Maritime Organisation (IMO), a UN organ. Traditionally, these conventions have mainly concerned ship security, technical competence on board ships and environmental issues,⁸⁰⁷ but since 2013 a more comprehensive convention from the ILO covering working conditions for seafarers has been in force. The ILO Maritime Labour Convention (MLC)⁸⁰⁸ thus complements the conventions from the IMO. All of these conventions⁸⁰⁹ face challenges of enforcement, especially with respect to FOC ships

⁸⁰⁵ ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF, pp. 12f.

⁸⁰⁶ On the legality of the use of this principle within the EU legal system, see Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 437ff.

⁸⁰⁷ Important here are the Convention on the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from ships (MARPOL) and the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers (STCW).

⁸⁰⁸ Adopted in 2006, but in force from 2013 following the ratification of the required number of Member States.

⁸⁰⁹ Due to the recent date of the MLC it is still somewhat problematic to provide a clear assessment of the level of enforcement for this convention.

due to the failed system of flag state control. This system builds upon the requirement that a state which allows a ship to register and fly the flag of the state should also ensure that the ship abides by the requirements set down in national and international legal acts. This control is efficient in some states, whereas other states, especially those having their ship registers declared FOC, either disregard the legal requirements or lack the necessary political will and/or resources to exert such control. As a means of overcoming the problems of enforcement due to the failure of the flag state control system, port states have joined together and initiated a system based on port state control (PSC). This system was first established in international law in relation to inspection of seafarers' working conditions, in accordance with ILO Convention 147 on Minimum Standards for Merchant Shipping. The Paris Memorandum allowing for PSC now applies for several ILO and IMO instruments, but so far the number of countries that have ratified the Paris Memorandum remains small.⁸¹⁰ There are thus questions as to whether the MLC will produce efficient results for seafarers on board FOC ships.⁸¹¹

In reference to the ITF FOC campaign, it is important to understand the basic ideas underlying the system of collective bargaining developed by the ITF. The distribution of bargaining capacities amongst ITF members is conducted on the basis of the beneficial ownership of a ship, where the definition of beneficial ownership is decisive in assigning bargaining rights to a trade union. The beneficial owner of a ship is considered to be the person or company that effectively pursues the overall control of the ship. Basically, the trade union from the country where the beneficial owner of the vessel is resident, or registered in case of an enterprise, will automatically have the right to negotiate the terms and conditions of work for the seafarers on board that vessel, regardless of the nationality of the seafarers. If this union does not manage to obtain a contract, the union crewing the ship will obtain the right to negotiate a collective agreement. However, if a contract is secured by means of industrial action,

⁸¹⁰ In 2013 there were 27 parties to the Paris Memorandum, all European or North American states, see Piniella, F., Silos, J. M. and Bernal, F. (2013) 'Who will give effect to the ILO's Maritime Labour Convention, 2006?', *International Labour Review*, 152(1), pp. 59-83, at pp. 62ff.

⁸¹¹ The aim of this thesis is focused on the ESD and the ITF FOC campaign as regulatory systems. The influence of international conventions on the working conditions for seafarers is further questioned by several authors and for these reasons I have chosen not to include a comprehensive study of the MLC here. For more information on the MLC and its potential low level of repercussion on seafarers' working conditions, see for example Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 105ff or Piniella, F., Silos, J. M. and Bernal, F. (2013) 'Who will give effect to the ILO's Maritime Labour Convention, 2006?', *International Labour Review*, 152(1), pp. 59-83, at pp. 78f.

the union exercising the right to industrial action will gain the bargaining rights for one year, if they claim this right.⁸¹²

The work carried out by the ITF in its effort to combat the negative consequences of the FOC system for workers can, in other words, be characterised as an autopoietic system based on the binary code of 'negotiable/non-negotiable between collective actors'.⁸¹³ Within this system the programming of the communication and the communicative structures are clearly framed by the idea of improving working conditions for workers in a precarious situation.⁸¹⁴ The communicative structures further incorporate a clearly developed bargaining organisation with defined decision premises in the form of defined mandates for different members.⁸¹⁵ In short, the ITF FOC system seems to ensure a clear link between the global and the national levels, allowing for adaptation and implementation at the national level. The reasons for and the background behind the development of this system will now be explained briefly.

10.3 Internationalisation and increased importance of flags of convenience

Traditionally the shipping industry was nationally regulated, as a ship was considered part of the national territory for the flag that it carried. According to UNCLOS, there should be a genuine link between the real owner of a vessel and the flag the vessel

⁸¹² Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 62 and ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, points 252-253.

⁸¹³ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 119f.

⁸¹⁴ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 225ff.

⁸¹⁵ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff and Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

flies. In the case of FOC registers there is no such link.⁸¹⁶ FOC registers in general make it possible for shipowners to take advantage of cheap registration fees, pay very low or no taxes and employ cheap labour. These registers also offer less stringent control and inspection by the flag state, which for shipowners is a very convincing reason for registering their ships in an FOC register.⁸¹⁷ The increased use of these registers with less stringent regulations has to some extent also been used to explain the increasing numbers of abandoned seafarers and problems with substandard shipping.⁸¹⁸ FOCs are in practice deregulated and international production zones, and as such 'flagging out'⁸¹⁹ can be seen as the maritime form of production relocation.⁸²⁰

⁸¹⁶ In the 1970s the Rochdale criteria were drafted and have since then been used by the ITF to define FOCs. The criteria generally refer to what kind of regulations a specific flag register has and can briefly be described as: allowing non-citizens to own vessels; lacking restrictions on register entry and exit; having very low or no taxes on shipping; and lacking regulations governing the nationality of crews. There are also some criteria referring to the government of the country for the register, which are: that the country has no need of its own for shipping tonnage, but would like to render income from the tonnage fees; and that the government lacks a possibility to or interest in imposing international or national standards on ships carrying its flag. However, the ITF has reviewed these criteria, as they are no longer considered suitable to the actual situation in international shipping (ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, pp. 13f).

⁸¹⁷ Some argue that the FOC registers facilitate fraud and deceit in maritime transport due to the inefficient control and supervision mechanisms set up by the flag states concerned. For an interesting analysis of how FOC registers can contribute to or at least facilitate the actions of terrorists and how this could be dealt with legally, see Garmon, T. (2003) 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th', *Tulane Maritime Law Journal*, 2002-2003(27), pp. 257-275, especially pp. 267ff. For a further discussion on the effects of 11 September on US action on the FOC issue, see; Wing, M. J. (2004) 'Rethinking the Easy Way Out: Flags of Convenience in the Post-September 11th Era', *Tulane Maritime Law Journal*, 2003-2004(28), pp. 173-190. The fact that some of the registration offices in FOC countries are not even located in the country of the flag clearly demonstrates the lack of commitment to flag state control for some of these flag states. See Sehgal, M. (2010) 'Open Registers: A Necessity or Mere Convenience', *Maritime Affairs: Journal of the National Maritime Foundation of India*, 6(1), pp. 132-141, at p. 139.

⁸¹⁸ These issues are, however, adherent to methods of evading regulatory systems and since the focus of this thesis is on issues belonging within regulatory systems the issue will not be further examined here. For a more in-depth discussion of abandoned seafarers and substandard shipping, see ILO; Alderton, T., Bloor, M., Kahveci, E., Lane, T., Sampson, H., Thomas, M., Winchester, N., Wu, B. and Zhao, M. (2004) *The Global Seafarer - Living and working conditions in a globalized industry*. Geneva: ILO, chapter 7. For a further discussion on the use of FOCs and the consequences for vulnerable groups of workers, see Sampson, H. (2013) 'Globalisation, Labour Market Transformation and Migrant Marginalisation: the Example of Transmigrant Seafarers in Germany', *International Migration & Integration*, 2013(14), pp. 751-765.

⁸¹⁹ Flagging out generally refers to the situation wherein the registration of a ship is changed from a national register to an international FOC register in order for the shipowner to reduce costs, e.g. labour costs, by facilitating the employment of crew from low-cost labour supply countries.

⁸²⁰ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at p. 375.

In other words, FOC registers have been created and are upheld through the promotion of economic values such as cost reduction and can be considered as a result stemming from the global economic system.⁸²¹ As noted by Lillie, FOC registers are a sign of '*the subordination of state sovereignty to the needs of transnational capital.*'⁸²²

The history of FOC registers as we know them today is by now almost one hundred years old. An initiative from US multinationals in the early 1920s set up the first international open registers in Honduras, Panama and Costa Rica. The sector expanded after WWII under political protection from the US, in spite of initial resistance from Europe.⁸²³ The problem posed by the increased flagging-out of ships was recognised by trade unions as early as the 1950s.⁸²⁴ The ITF FOC campaign was actually launched already in 1948, initiated by trade unions in the Nordic countries and the US in the post-war years who saw internationally open ship registers affecting the national fleets through capital transfers or loss of employment opportunities.⁸²⁵ However, lack of consistency and coordination of trade union strategies at that time undercut attempts to develop functional transnational collective actions in the field. A major reason for the failure of a FOC counter-regime at this time was the divergent interests and the equal balance of power and available resources between the trade union movements in the capital-exporting US and the labour-supplying Europe, in

⁸²¹ The way in which economic interests are the main factors driving employers to flag out is well illustrated in Sampson, H. (2013) 'Globalisation, Labour Market Transformation and Migrant Marginalisation: the Example of Transmigrant Seafarers in Germany', *International Migration & Integration*, 2013(14), pp. 751-765.

⁸²² Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, p. 37.

⁸²³ The use of unregulated ship registers has an even longer history; but developments in the 1920s and 1930s, when US transnational companies initiated the use of flag registers in e.g. Panama, are considered the more formalised commencement of FOC registers. The term FOC was for a long time contested, not least by US transnational companies, who preferred the term 'flag of necessity' as they believed it better described the fact that in order for them to stay competitive in the international shipping market it was necessary for them to flag their ships under registers that facilitated cost reduction. For a more detailed discussion on the early stages of the development of FOC registers and the subsequent deregulation of maritime shipping, see Boczek, B. A. (1962) *Flags of Convenience - An International Legal Study*. Cambridge, Massachusetts: Harvard University Press, especially chapters 1-3.

⁸²⁴ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 51. For a more detailed analysis of the developments in the 1940s and 1950s, see Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at pp. 381ff.

⁸²⁵ ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, p. 1.

particular the UK.⁸²⁶ At the outset there were thus problems in generating results from the system, due to unsuccessful communication caused by improbabilities of communication.⁸²⁷

Following the expansion of the FOC sector, the fleets of the classic maritime countries have suffered a huge decline. The current market share of FOC shipping is approximately 47 per cent of total tonnage.⁸²⁸ As international trade has increased, the demand for international shipping has risen, and due to the cost benefits of FOC registers, the FOC shipping sector is constantly growing as well. FOC shipping has increased even faster than maritime transport as a whole. For example, the increase in world tonnage between 1986 and 1991 was 6 per cent while the increase in the FOC sector during the same period was 38 per cent.⁸²⁹ However, between 2011 and 2015 the growth of the FOC sector seems to have become more aligned with total growth, with world tonnage increasing by almost 17 per cent during this period and the FOC sectors by approximately 16 per cent.⁸³⁰

The competition from FOC has generated an establishment of international registers in traditional maritime countries; registers that have been set up as a means of maintaining a national fleet in order to protect the national maritime industry. These registers can be considered as a mix between FOC and national registers, since they allow for tax concessions and the possibility to employ a large proportion of the crew on contracts subject to the residence of the seafarer, thus evading the regulations and

⁸²⁶ For a more detailed discussion, see Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at pp. 388ff.

⁸²⁷ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁸²⁸ The figure is based on data from 1 October 2015, but for 9 per cent of the world tonnage in 2015 the flag is not listed and it is thus possible that the market share for FOCs could be somewhat higher. Clarksons Research (2015) 'October 2015', *World Fleet Monitor*, 6(10), p. 3. The definition of FOC used for this calculation is based on the list of FOC countries provided by the ITF at ITF (2016b) *ITF Website - Transport Sectors - Seafarers - In Focus - Flags of convenience*. Available at: <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/> (Accessed: 8 March 2016).

⁸²⁹ Barton, J. R. (1998) 'Flags of Convenience': Geoeconomics and regulatory minimisation', *Tijdschrift voor Economische en Sociale Geografie*, 90(2), pp. 142-155, at p. 150.

⁸³⁰ Since the data does not provide a full listing of flags for the world tonnage, the FOC share might be slightly higher. See Clarksons Research (2015) 'October 2015', *World Fleet Monitor*, 6(10), p. 3. The definition of FOC countries is based on the list provided by the ITF at ITF (2016b) *ITF Website - Transport Sectors - Seafarers - In Focus - Flags of convenience*. Available at: <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/> (Accessed: 8 March 2016).

procedures adherent to the national labour law system.⁸³¹ One example of such a register is the French International Ship register (FIS).⁸³² Another is the German International Ship register (GIS). Both are declared FOC registers by the ITF.⁸³³ These registers, in other words, contribute to the global deregulation of the maritime labour market in an effort to secure national economic interests by keeping national fleets at least partially within the nation-state.⁸³⁴ This legalisation of economic cost optimising registers can in other words be considered as the application of economic difference minimising programs by the legal system.⁸³⁵

Even as the international character of the maritime sector facilitated the development and use of FOC registers, these registers have themselves contributed to the further globalisation of the sector. As FOC shipping has increased the demand for cheap labour, new markets for labour supply have developed. This can be seen in low-wage countries in Asia but also in former socialist countries, where agencies have been established that specialise in offering cheap seafarers with fewer qualifications to the shipping industry from capital-supply countries. This development, wherein the nationality of capital and labour and interests within the trade union movement are increasingly differentiated, has further facilitated the deregulation of the maritime labour market and made it more difficult for the national trade unions to take action and protect their interests.⁸³⁶ The effect of the structural coupling⁸³⁷ between the legal system and the system of industrial relations has thus been that changes in the legal framework resulted in an undermining of the national systems of industrial relations.

⁸³¹ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at p. 377.

⁸³² For an interesting legal analysis of the FIS, see Chaumette, P. (2006) 'Le marin entre le naivre et sa résidence. Le registre international français des naivres (RIF)', *Revue critique de droit international privé*, (2), pp. 275-456.

⁸³³ ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, p. 4.

⁸³⁴ For a brief comment on national strategies for combatting the loss of national fleets within the EU, see Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 280ff.

⁸³⁵ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57, at pp. 53ff.

⁸³⁶ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at pp. 375ff and Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 31ff.

⁸³⁷ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff

An imminent need arose for an internationalised system of industrial relations to tackle the effects of the internationalised legal system.⁸³⁸

The overall global situation can nonetheless be considered positive for workers, since the efforts of the ITF have proved successful,⁸³⁹ and future developments are likely to further improve working conditions for seafarers on FOC ships.⁸⁴⁰ The following section will analyse the success story of the ITF FOC campaign⁸⁴¹ as a trade union strategy that has increased ITF power and influence and improved working conditions for its members through the coverage of ITF-approved collective agreements.

10.4 The International Transport Workers' Federation's Flag of Convenience campaign

The ITF FOC campaign strategy was developed to meet the challenges of the growing FOC labour market for seafarers. Today it targets not only FOC vessels but also substandard shipping in general.⁸⁴² It is interesting in that the traditional trade union strategy of protecting jobs has developed into a strategy of improving the situation for the workers who are worst off in the maritime sector. In this respect the ITF strategy comes close to realising the aim of using collective bargaining as a means

⁸³⁸ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 87f.

⁸³⁹ Approximately 30 per cent of the 18,000 ITF-declared FOC vessels were covered by ITF collective agreements by 2004. ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 15.

⁸⁴⁰ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at pp. 51ff.

⁸⁴¹ Even though the ITF has not succeeded in the political aspect of the campaign, i.e. eliminating the FOC system, the overall effects of their FOC campaign have been to improve working conditions for seafarers in the FOC sector and increase the coverage of the ITF collective agreements, and this cannot be interpreted as anything but success.

⁸⁴² The reason being that not all cases of seafarer exploitation nor all marine accidents involve FOC ships (ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, foreword by the ITF General Secretary David Cockroft).

to combat poverty.⁸⁴³ It also shows that social values have gained a stable position in framing the programming of the communication of this system,⁸⁴⁴ and furthermore that the contents of the social values framing the programming of the system are clearly identified.

The campaign has grown steadily throughout the years, in spite of some setbacks during the 1980s and 1990s. The market share of FOCs continued to increase during the 1950s and 1960s and by the 1970s it posed a significant problem for unions. In 1970 the FOC ships composed a total of 18.1 per cent of market share, compared to 4.5 per cent in 1950.⁸⁴⁵ The ITF Congress of 1972 addressed the issue, with some national ITF affiliates demanding an intensification of the campaign against FOCs. This was the start of ITF-sanctioned inspections, and the first standard agreement was formulated by the ITF. Trade unions in Australia, Finland, Sweden and the UK backed the campaign and regularly conducted boycotts of FOC ships without ITF collective agreements. These actions led to an increase in the coverage of ITF FOC collective agreements⁸⁴⁶ and in 2003 a total of 6,500 ships were covered by ITF-approved agreements.⁸⁴⁷ Since then the number of agreements concluded has risen steadily. In 2014, more than 11,000 agreements concluded as a result of the campaign covered almost 205,000 seafarers.⁸⁴⁸

The system can be compared to the situation in the UK, where British and Polish unions joined together with the common aim of protecting vulnerable workers.⁸⁴⁹ The difference is that the ITF has established the protection of workers as the aim

⁸⁴³ However, such terminology is not used by the ITF itself, which instead states that the FOC campaign has two elements, comprising a political and an industrial aim. The political aim is to achieve an international governmental agreement on '*a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers, and so eliminate the flag of convenience system entirely.*' The industrial aim is to '*ensure that seafarers who serve on flag of convenience ships, whatever their nationality, are protected from exploitation.*' ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, p. 3.

⁸⁴⁴ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press. p. 227.

⁸⁴⁵ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at p. 377.

⁸⁴⁶ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 51.

⁸⁴⁷ See for example Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 70f.

⁸⁴⁸ ITF 2014c. Seafarers' Bulletin. ITF, p. 4.

⁸⁴⁹ See section 7.6 in this thesis for this discussion.

that frames the programming⁸⁵⁰ of a global system, rather than something that characterises a one-off trade union strategy. The use of this value to frame the programming of the ITF FOC system further serves to aid the ITF in overcoming the communicative improbability of understanding,⁸⁵¹ as the programming clarifies the intention of communication within the system. The strategy of focusing on securing collective agreements on board FOC or substandard vessels also indicates that the binary code⁸⁵² for the system can be understood as 'negotiable/non-negotiable between collective actors'.

The ITF strategy and FOC campaign have, however, been criticised by various authors who have interpreted the intentions of the ITF more cynically, as a way of protecting the interests, jobs and wage levels of seafarers from the organised sector of maritime transport by pushing the unorganised seafarers from the FOC sector into organisation, collective bargaining and standardisation of the labour market.⁸⁵³ Others have similarly claimed that the campaign is an attempt to overcome the market effect of lower costs, in order to prevent registers and employment in industrialised countries being lost to developing countries and their seafarers.⁸⁵⁴ Not surprisingly, the ITF strongly denies that the FOC campaign has a protectionist agenda.⁸⁵⁵ This idea is also rejected by other authors, who claim that trade unions from low-wage labour-supply countries see global control of the labour market as an important tool for reducing competition amongst these low-wage countries.⁸⁵⁶

The understanding of the ITF strategy and FOC campaign is further complicated when considering the complex relationship between the ITF and its national affiliates in labour-supply countries. In fact, unions from the evolving labour-supply countries

⁸⁵⁰ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 110.

⁸⁵¹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press. pp. 157ff.

⁸⁵² Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press., p. 91 and Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 119f.

⁸⁵³ On this see Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, especially p. 387 and footnote 67.

⁸⁵⁴ Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at p. 371.

⁸⁵⁵ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 49.

⁸⁵⁶ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 57.

in Asia have had other interests and have strongly disagreed with the campaign. In their view, the campaign was intended to protect the interests of the unions from the high-standard regions through unrealistic increases in minimum wages, thus eliminating the cost advantage of Asian seafarers on the international labour market. Because unions from developing countries had a low rate of representation in the ITF decision-making bodies, however, they were overruled and the FOC campaign continued.⁸⁵⁷ This created tension within the ITF that grew steadily and resulted in an internal conflict when the National Union of Seafarers of India (NUSI) took action in cooperation with employers to undermine ITF efforts to increase wage levels. As a result, NUSI was excluded from the ITF.⁸⁵⁸ If the communication produced by ITF FOC system is considered to comprise decisions from an organisation with the capacity to decide on transnational union strategies, it is clear that organisation has clearly defined membership conditions.⁸⁵⁹ These conditions include acceptance and alignment with the adopted union strategy, both to obtain and to retain membership. A member that fails to fulfil this condition faces exclusion and loss of membership.

For the internal functioning of the ITF, however, the adopted strategy was not possible to uphold, as many Asian trade unions expressed their sympathy for NUSI and threatened to join them in boycotting Western-manned ships. The ITF was thus forced to change its policy and came up with a compromise: agreements on lower wage levels for seafarers in the Asian region were concluded, and agreements on total crew cost (TCC) were introduced as an alternative to the standard ITF agreements.⁸⁶⁰ On the positive side, this compromise saved the ITF from internal breakdown. Its general effects, however, were more negative, as the diversification of agreements that could be concluded made administration more complex and allowed unions to

⁸⁵⁷ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at pp. 396f and on the representative structures of the ITF same author, pp. 393f.

⁸⁵⁸ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 52 and Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB., pp. 122f.

⁸⁵⁹ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f. The Constitution of the ITF further clarifies this in its Rule II, which requires the members of the organisation to act in the interests of the ITF and cooperate in the work decided upon by the governing bodies. Rule II further clarifies that a member acting against the interests of the ITF will face the risk of expulsion. See ITF 2014b. Constitution of the International Transport Workers' Federation (ITF) as amended by the 43rd ITF Congress, Sofia, Bulgaria, 10 August - 16 August 2014.

⁸⁶⁰ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at p. 397.

compete on costs. In other words, the compromise undermined the work of the ITF and increased the difficulty of controlling the labour market.⁸⁶¹ The change in strategy has also been interpreted as the beginning of a more cooperation-oriented attitude from the ITF towards employers.⁸⁶² Regardless, these developments clearly show that the ITF is not only competent to recognise the need to adapt its strategy, but also capable of responding to that need. This shows that the system is cognitively open and capable of adapting its communicative structures in order to secure communicative success.⁸⁶³

Here it is also worth noting the fairly high degree of influence that the dominant Filipino seafarers' union, the Associated Marine Officers and Seamen's Union of the Philippines (AMOSUP) has or at least has had within the ITF, and the somewhat contrasting interests of the AMOSUP and the ITF. This complex relationship is exemplified in the way AMOSUP has mainly focused on securing jobs for Filipino seafarers, including arguing for a lower level of remuneration than the one defined by the ITF. In addition, AMOSUP also succeeded in temporarily closing down the ITF inspection office in Manila in order to retain national control over working conditions for Filipino seafarers.⁸⁶⁴ It is therefore not surprising that the ITF deemed it necessary to minimise the possibility of wage competition between Asian unions and unions from the former Communist states. More uniform principles for wage negotiations were established for old members, and suggestions for regional wage standards from new members were effectively silenced before they were ever officially put on the agenda. The underdeveloped structures of trade union movements and

⁸⁶¹ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 52.

⁸⁶² Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB, p. 123.

⁸⁶³ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press., pp. 104 f and Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁸⁶⁴ Ruggunan, S. (2011) 'The Role of Organised Labour in Preventing a 'Race to the Bottom' for Filipino Seafarers in the Global Labour Market', *African and Asian Studies*, 10, pp. 180-208, where it is stated that the ITF withdrew the inspector in Manila. However, a search for ITF inspectors on the ITF website reveals there is now an inspector installed in Manila. See ITF (2016a) *ITF Seafarers - Home - Topics - Look Up a Ship, Inspector or Union*. Available at: http://www.itfseafarers.org/look_up_ship2.cfm (Accessed: 11 March 2016). For further discussion on the ITF Inspection Unit see section 10.5, below. When comparing the list provided by Lillie of the number of inspectors in 2000 with the list of inspectors provided by the ITF in 2014, it is clear that for some time there was no inspector present in the Philippines, but as of now there is. See Appendix B in Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge and ITF 2014c. Seafarers' Bulletin. ITF, pp. 3 and 6. In relation to this it is worth noting that AMOSUP also managed to defer an increase in the ITF benchmark wage for one year in the early 2000s; see Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, p. 48.

lack of experience amongst the trade unionists from the former Communist countries, which made them dependent on technical support from the ITF, proved to be effective obstacles to these unions' efforts to lower wage levels. The ITF realised the importance of quickly integrating the trade unions in the former Communist states in order to retain stability on the international level. The slightly chaotic situation in the former Communist states, where trade unions were split up and began to compete with one another, was an advantage for the ITF, which favoured the unions that cooperated and undermined the credibility of other unions.⁸⁶⁵

Thus, by assuring cooperation with the strategically suitable trade unions, the ITF managed to uphold communicative understanding and success within the system and further limit the problems of improbabilities of communication.⁸⁶⁶ This strategy proved efficient, as the problems caused by internal conflicts among unions from capital-supply and labour-providing countries decreased to the extent that they no longer posed a real threat of undermining the FOC campaign.⁸⁶⁷ The pessimism some authors expressed about the success of the FOC campaign⁸⁶⁸ thus proved inaccurate.

Developments in the maritime industry and global transport, whereby new countries such as Russia and China were gaining market share through increased tonnage for their national vessels, spurred the ITF to review its campaign objectives. These new arrivals on the market sometimes offered wages and working conditions far below ITF benchmarks and ILO minimum levels,⁸⁶⁹ giving them a competitive advantage over other national flags. As these countries' registers are considered bona fide national flags, the ITF had previously not considered itself responsible for enforcing conditions

⁸⁶⁵ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at pp. 54f.

⁸⁶⁶ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁸⁶⁷ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at pp. 54f.

⁸⁶⁸ See for example Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at pp. 399f.

⁸⁶⁹ Worth noting here is that the ILO minimum wage is lower than the ITF-approved benchmark. In 2007 the ILO minimum monthly wage was set at \$515 whereas the comparable ITF minimum wage in accordance with TCC agreement was \$720. See Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, p. 302. Considering the challenges of enforcing ILO standards on board FOC ships, it is therefore not a hasty conclusion that the ITF FOC system renders better results for seafarers; on such challenges, see for example Piniella, F., Silos, J. M. and Bernal, F. (2013) 'Who will give effect to the ILO's Maritime Labour Convention, 2006?', *International Labour Review*, 152(1), pp. 59-83, at pp. 78f.

on these ships, and the obligation to apply ILO minimum wages had only been enforced by ITF affiliates at the direct request of a national union.

Because these national bona fide registers enjoyed a competitive advantage over other national registers with higher standards,⁸⁷⁰ the ITF recognised these substandard flags as a problem that needed to be addressed at the international level and thus reviewed the FOC campaign objectives accordingly. This meant that substandard shipping was included in the target for the campaign.⁸⁷¹ It is thus possible to say that the programming of the system is framed by the value of improving the situation for the poor workers, and that the communicative structures of the system allow for local adaptation in order to secure these values.⁸⁷² In this sense, the ITF strategy can be considered a method of combatting social dumping. Regardless of the motivations behind the campaign, it is clear that the campaign has improved working conditions for seafarers on FOC ships, and as those seafarers often have been the ones subject to the worst conditions, it is easy to take a benevolent view of those motivations.

Another point on which the ITF FOC campaign has drawn criticism is the financial structure of the ITF, whereby the FOC campaign actually gains income from the growth of the FOC sector:⁸⁷³ that is, from the growth of the very system it seeks to eliminate. The criticism focuses on the fact that the campaign has apparently been successful not only at improving working conditions for seafarers on FOC ships, but also and even more so at improving the finances of the ITF. This is because every ship for which an ITF agreement is won will end up contributing to ITF funds for welfare and campaigning. Thus, an increase in FOC shipping market share will most likely lead to an increase in ITF income; the ITF will profit from the growth of the sector it is supposed to combat. Regardless of ITF efforts to eliminate the FOC sector,

⁸⁷⁰ This competitive advantage has generated a trend towards deregulation of other higher-standard national flags, where taxation systems and regulations governing the nationality of the crew have become much more flexible. A good example is the development of second national registers, but also the liberalisation of first registers, with the Netherlands' flag as a leading example. See ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 25.

⁸⁷¹ *Ibid.*, pp. 14ff.

⁸⁷² Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227.

⁸⁷³ In the 1970s the ITF decided to make a mandatory contribution from shipowners to the ITF Welfare Fund (then the ITF Seafarers' International Assistance, Welfare and Protection Fund) a condition of approval for ITF agreements on FOC vessels. This has secured for the ITF the financial resources needed to further develop its FOC campaign and increase its strength and power in international maritime transport. See ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 47).

however, the sector is still likely to grow due to worldwide economic factors.⁸⁷⁴ In other words, the ITF is likely to retain and even increase its power and wealth, and thus its possibilities for further improving working conditions for FOC seafarers in the future.

The paradox that its activities are financially and politically dependent on the FOC system is recognised by the ITF, which acknowledges the truth of this criticism but dismisses it as missing the point. According to the ITF, the FOC system has led to a vast decline in membership and power amongst its national affiliates, and the growth of the ITF and its unionist activities is merely the flipside of that decline. In other words, without the FOC system the national unions would be stronger and the trade unionism activities performed by the ITF would not be necessary. Instead the ITF could '*revert to its traditional role of providing back up services and research and coordinating solidarity between national unions.*'⁸⁷⁵ The likely future growth of the FOC sector, albeit not likely to be so significant as in the past,⁸⁷⁶ would thus imply that strong trade union representation on primarily the international and secondarily the national level will remain an important element of the maritime industry. The global level of the system has thus been and will continue to be the core level of the system.

Considering the ITF FOC campaign as a collective bargaining organisation making decisions that contribute to the communications produced within the autopoietic system of industrial relations, it is clear that the global members of that organisation have the mandate to decide on decision premises and membership conditions for the organisation.⁸⁷⁷ In turn, these decision premises and membership conditions equip the national members with certain decision-making capacities – the ability to call for negotiations, initiate industrial action and so on – in a clearly defined hierarchical structure for the members of the organisation. In order to better understand these structures I will next explain how the ITF FOC campaign works in practice, beginning with the important element of the ITF inspection unit.

⁸⁷⁴ Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at pp. 422f.

⁸⁷⁵ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 47.

⁸⁷⁶ Jing Haider, J. (2013) 'Towards a new era in ship registration', *The International Journal of Logistics Management*, 24(1), pp. 87-100, at p. 98.

⁸⁷⁷ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff and Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

10.5 The International Transport Workers' Inspection Unit

The global inspection unit set up by the ITF has been of utmost importance for the success of the FOC campaign. The development of the ITF inspection unit began in the early 1970s, when national affiliates of the ITF criticised the FOC campaign as unsuccessful. A solution to that critique was sought in the form of a commitment from national ITF affiliates to appoint inspectors to enforce ITF minimum wage levels on board FOC vessels. During the 1970s inspection units were mainly centred in Scandinavia, the UK and Australia. In the 1980s the ITF inspector network expanded to include Japan, the US, Eastern European countries and others. Training and cooperation within the inspector network improved and agreements were reviewed and standardised in order to ensure that the agreed-upon minimum wage could not be undercut.⁸⁷⁸

Doubts exist, however, about the extent to which employers actually followed the regulations in the collective agreements, as a system of double bookkeeping came into use in order to circumvent agreement terms and conditions. This double bookkeeping basically made it possible for shipowners to pay wages below ITF minimum levels whilst maintaining records for port control that showed wage payments in accordance with the agreement. How widespread this practice was, however, is difficult to estimate.⁸⁷⁹ The use of the double bookkeeping system can be interpreted as a rejection of system communication⁸⁸⁰ by the management side, albeit disguised in order to appear as acceptance.

In order to prevent the use of double bookkeeping, trade unions, especially in the US, began to call upon the ITF collective agreements in court. This proved a successful strategy, as court orders proved to be an efficient means of enforcing the agreements. The double bookkeeping system was used less,⁸⁸¹ as it resulted in expensive back pay

⁸⁷⁸ Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at pp. 52 f.

⁸⁷⁹ Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at p. 398 and Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 51.

⁸⁸⁰ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 158f.

⁸⁸¹ For a more detailed discussion of the double bookkeeping system and the court actions of the US trade unions, see Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at pp. 401ff.

judgments against shipowners who had profited from the system and underpaid their crew.⁸⁸² This is an example of how the ITF FOC campaign produced results with effects in the legal system, and how the structural coupling between these systems in turn produced results for the ITF FOC campaign, specifically by increasing the communicative success of the ITF FOC campaign.⁸⁸³ In other words, the ITF FOC system managed to exploit its structural coupling with the legal system to decrease the negative aspects of the improbability of communication relating to communicative success.

In the 1990s the inspection network increased considerably again in both numbers and geographic terms, as the ITF succeeded in setting up inspectorates in India, South Korea, Russia and South Africa. Inspector activity also increased, and boycotts were initiated in places where this had previously not been possible. Considering that the FOC share of world tonnage in the early 1990s was as high as 40 per cent, the necessity for this intensification was clear, something the ITF obviously realised.⁸⁸⁴ The increasingly efficient enforcement of ITF collective agreements and the steady rise in the number of ports under ITF inspection control increased pressure on employers to pay ITF wages. In other words, the communicative structures of the ITF FOC campaign developed in a manner that diminished the improbability of communication reaching the relevant addressee.⁸⁸⁵

At the turn of the millennium, the inspection network had grown to cover more labour-supply countries and more developing countries. All major trade routes were covered. There were, however, still parts of the Middle East and Africa where the ITF inspection unit had no presence.⁸⁸⁶ Since then the geographical scope has increased

⁸⁸² Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at pp. 52f.

⁸⁸³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, at pp. 157ff.

⁸⁸⁴ Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at pp. 371f. According to the ITF, the substantial increase in the FOC sector after 1986 was caused by the United Nations Convention on the Conditions for the Registration of Ships (UNCCRS), which the ITF considers to have legitimised FOCs, in spite of the fact that the convention never entered into force. See UN (2016) *UN Website - Treaty Collections - Databases* Database allowing for the search of UN Treaties with information on the legal status, ratifications etc.: UN. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&lang=en (Accessed: 26 March 2016). This is ambiguously mentioned in the ITF's review of its campaign; see ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, pp. 14 and 16.

⁸⁸⁵ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁸⁸⁶ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 71ff and Appendix B.

further and inspectors are now present in several African countries, such as Nigeria, the Ivory Coast and Senegal.⁸⁸⁷ Although the ability of the ITF inspector to act and to guarantee ITF-approved conditions on board vessels very much depends on the national setting in which they are operating,⁸⁸⁸ the increased coverage of inspections is an advancement for the ITF and the FOC campaign in large. The reason is that the ITF inspection unit forms an essential element in the communicative structures of the ITF FOC autopoietic system. I will explain this further.

The ITF inspection unit can be characterised as a global organisation that 'bypasses national union officers and places local unionists in direct and regularized contact with one another, enabling the ITF to force employers into industry level global collective bargaining using coordinated industrial action.'⁸⁸⁹ The function of ITF inspectors is basically to make sure that ITF collective agreements are respected, and where such agreements do not exist, to facilitate actions that will secure the conclusion of an agreement.⁸⁹⁰ ITF inspectors can, in other words, be considered as members of the bargaining organisation who have the mandate to make decisions about whether the decisions of the organisation are correctly recognised, understood and accepted within the global system of industrial relations.⁸⁹¹ The inspectors are thus an essential part of the communicative structures of the system, in that they play an active role in ensuring that the challenges of the improbabilities of communication can be overcome.⁸⁹²

ITF inspectors are guaranteed access to ships at port. After inspection, they issue a certificate if conditions on board are satisfactory. This certificate safeguards the ship from further inspections. If conditions are unsatisfactory, the inspector reports the ship to the port authorities and to the ITF affiliate with bargaining rights. If this does not suffice to improve conditions, industrial action will be initiated to secure an ITF-

⁸⁸⁷ ITF 2014c. Seafarers' Bulletin. ITF, pp. 3ff.

⁸⁸⁸ Lillie, N. (2005) 'Union Networks and Global Unionism in Maritime SHipping', *Relations Industrielles*, 60(1), pp. 88-111, at pp. 99f.

⁸⁸⁹ Lillie, N. (2006b) 'Globalisation and Class Analysis: Prospects for Labour Movement Influence in Global Governance', *Industriella Beziehungen*, 13(3), pp. 223-237, at p. 233.

⁸⁹⁰ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 70f. See also ITF 2010a. 42nd Congress, Mexico City, 06 August 2010, Seafarers Section Conference, Agenda item 2a: FOC Campaign Review, p. 16, which states that the function of the inspection unit concerns the application and operations of the FOC campaign, rather than the campaign and policy itself.

⁸⁹¹ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff and Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

⁸⁹² Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

approved collective agreement.⁸⁹³ This makes the ITF inspection unit the main source for providing information and facilitating collective bargaining for seafarers on FOC vessels, and thus an important part of the ITF communicative structures.⁸⁹⁴

In practice the ITF inspection units can be viewed as members of the bargaining organisations who have the capacity to decide⁸⁹⁵ whether the working conditions on a specific ship should be negotiated about or not. In this manner the inspection unit serves to overcome the improbabilities of communication, through securing that the communication reaches the right addressee, assessing whether the communication is understood or not, and facilitating actions that will secure the acceptance of the communication.⁸⁹⁶ In other words, the ITF Inspection Unit serves to secure the necessary communicative links between the global level and the national and local levels in order to ensure that the communication reaches the relevant addressee. The ITF inspection unit further assures communicative success by initiating industrial action in cases where ITF-accepted standards are not met. Since a large proportion of such industrial action depends upon the cooperation of dockworkers through secondary industrial action,⁸⁹⁷ it is also important to consider the work of the ITF on the solidarity between seafarers and dockers.

10.6 Solidarity between seafarers and dockers

The ITF FOC campaign encompasses a strong element of solidarity between seafarers and dockers, both of whom are organised by ITF affiliates. The solidarity between these two categories of worker consists in a coordination of activities to ensure collective agreements that regulate working conditions and worker pay in accordance

⁸⁹³ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 75ff.

⁸⁹⁴ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 264f.

⁸⁹⁵ Luhmann, N. (2005c) 'The Paradox of Decision Making', in Seidl, D. & Becker, K.H. (eds.) *Niklas Luhmann and Organization Studies Advances in Organization Studies*. Koege, Denmark: Liber & Copenhagen Business Scholl Press, pp. 85-106, at pp. 92ff and ,Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 142ff.

⁸⁹⁶ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁸⁹⁷ See Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 76ff. For a detailed discussion of the legality of the forms of industrial action taken by the ITF in relation to the EU legal order see Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 329ff.

with the ITF's globally approved standards. Originally, this meant in practice that when an FOC vessel arrived at a port, the ITF inspector checked the working conditions on board, and if the terms and conditions were not acceptable a collective bargaining procedure was initiated. Until the vessel was declared compliant with ITF standards, the dockers at the port would not unload the vessel. This blockade would continue until a collective agreement had been signed. Since the main interest of a shipowner is to earn income by transporting goods for clients, stopping the transportation chain in this way proved a very efficient means of industrial action. ITF industrial action tactics thus rely to a vast extent on secondary industrial action taken by the dockers, rather than primary industrial action taken by seafarers.⁸⁹⁸ This tactic has proven to be an efficient means of ensuring communicative success⁸⁹⁹ for the ITF standards. It is not unlikely that the reason for this communicative success is that the communication produces repercussions in the economic system, threatening its values of competitiveness and profitability.

However, over time shipowners have tried to circumvent this strategy in various ways, and ports have also sought to undermine its effects by employing unorganised dockers and by attempting to deregulate port activities.⁹⁰⁰ This has in turn generated a need for the ITF to ensure that their FOC campaign tactics are not undermined and that dockers also receive better protection in order to maintain their solidarity with seafarers. The ITF has created closer organisational links between the seafarer and the docker sections and has initiated a campaign focusing on securing decent working conditions and pay for dockers in ports subject to deregulation. This campaign has been coined the Port of Convenience campaign (POC). In order to maintain the cooperation between the two categories of workers as a means of ensuring that the interests of both are taken into account, the ITF now holds a joint session for seafarers and dockers at the ITF Congress, and also now requires that the Fair Practices Committee (FPC) consist of an equal number of representatives from both sections.⁹⁰¹

The ITF FOC system has, in other words, proven to be adaptive via its cognitive openness, whereby it has recognised a need for the further development of its own

⁸⁹⁸ Lillie, N. (2006b) 'Globalisation and Class Analysis: Prospects for Labour Movement Influence in Global Governance', *Industriella Beziehungen*, 13(3), pp. 223-237.

⁸⁹⁹ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁹⁰⁰ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 68ff.

⁹⁰¹ See ITF 2014a. 43rd Congress, Sofia, 13 August 2014, Joint Seafarers' and Dockers' Conference, Report. ITF, and ITF 2010b. ITF 42nd Congress, Mexico City, 5-12 August 2010. ITF, pp. 70f.

communicative structures in response to the improbabilities of communication.⁹⁰² Such improbabilities have been generated through changes in the environment of the ITF FOC system, as for example the economic system sought to adapt its own structures in response to communication from the ITF FOC system that it recognised as threatening the values it promoted. There is thus a constant interplay⁹⁰³ between the ITF FOC system and the economic system via their structural coupling.

The FPC, meanwhile, secures communicative structures between two groups of workers whose interests are closely aligned and whose cooperation is essential for the ITF FOC campaign to assure communicative success.⁹⁰⁴ The FPC plays an important role in relation to the development of the FOC campaign as well as in relation to the International Bargaining Forum (IBF), where global collective agreements are concluded between international management and labour organisations in the maritime industry.⁹⁰⁵ The FPC and the IBF are thus of interest for this analysis.

10.7 The Fair Practices Committee and the International Bargaining Forum

The FPC has a total of 120 members representing unions from across the world, with union representatives from Europe, Asia and the Pacific holding a majority of the chairs. Seafarers' and dockers' unions each have 60 representatives, 20 of whom (10 for each group) are ITF officials.⁹⁰⁶ The role of the FPC is broadly to direct the FOC campaign by deciding which flags should be considered FOCs and by setting the level for ITF benchmark wages. FPC operations are mostly run through its steering group,⁹⁰⁷ consisting of 40 FPC members: four representatives from African unions, ten representatives from Asian and Pacific unions, 14 representatives from European

⁹⁰² Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 120ff and 264ff.

⁹⁰³ ,Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 110ff.

⁹⁰⁴ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

⁹⁰⁵ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 4, 15 and 39f.

⁹⁰⁶ ITF 2014a. 43rd Congress, Sofia, 13 August 2014, Joint Seafarers' and Dockers' Conference, Report. ITF, pp. 4ff. In 2010 there were a total of 118 representatives to the FPC, 18 of whom were ITF officials. See ITF 2010b. ITF 42nd Congress, Mexico City, 5-12 August 2010. ITF, pp. 70f.

⁹⁰⁷ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, p. 15.

unions, five representatives from Latin American and Caribbean unions and seven representatives from North American unions.⁹⁰⁸

Since the late 1980s and early 1990s, the FPC has managed to gain consensus on increases to the ITF benchmark wage, even though this consensus at times has been fragile and deferrals have been agreed on in order to retain it. As a result of the ITF FOC campaign strategy whereby globally determined wage levels are secured through locally adapted strategies for communicative success, the wage level for seafarers has been more or less determined unilaterally by the ITF. Employers' organisations have perceived a need to coordinate the bargaining procedure and shift their strategy from seeking to regionally undermine ITF global wage levels to seeking influence through participation in global bargaining structures. Responding to the increased influence and success of the ITF FOC campaign following the growth of the ITF inspection unit, several maritime employers joined together to form the International Maritime Employers' Committee (IMEC) in 1993 in order to better coordinate collective negotiations, especially in India and the Philippines. The employers tried to take advantage of earlier internal tensions in the ITF by supporting the interests of trade unions from India and the Philippines, but the strategy was unsuccessful. Instead these unions now realised the importance of ITF controls, mainly due to growing numbers of Russian and Eastern European seafarers on the market, and in 1994 the Indians and Filipinos negotiated agreements setting wage levels at exactly the ITF TCC rate.⁹⁰⁹

The traditional conflict of diverging interests between management and labour in a system of industrial relations has, in other words, been if not solved then at least constructively handled through the development of structures that aid in overcoming some of the improbabilities of communication.⁹¹⁰ This has also generated a higher level of integration of the management side into the communicative structures of the system: an international organisation for employers in the maritime industry is now continuously involved in collective negotiations with the ITF. It is thus possible to conclude that within the ITF FOC system, a proper collective bargaining organisation has developed with the capacity to make decisions regulating working

⁹⁰⁸ITF 2014a. 43rd Congress, Sofia, 13 August 2014, Joint Seafarers' and Dockers' Conference, Report. ITF, pp. 5ff.

⁹⁰⁹Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at pp. 53f. In this connection it is perhaps interesting to note that 35 per cent of the FOC seafarers were covered by either an ITF TCC Agreement or an ITF Standard Agreement in 1996. See ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 34.

⁹¹⁰Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

conditions within the industry.⁹¹¹ In this sense the system can be considered fairly similar in its function to that of a developed national system of industrial relations. In the words of Rogowski, this would be a system that fills the function of managing conflict between collective actors.⁹¹²

In 2002 the ITF initiated the establishment of an IBF, and in 2003 the IMEC and the International Mariners Management Association of Japan (IMMAJ) agreed to cooperate in such a negotiating structure. The IBF was formally created in May 2003,⁹¹³ representing 2200 of the 6000 ships covered by ITF agreements.⁹¹⁴ In order to allow for broader employer participation in the negotiations, the ITF agreed to defer an increase to the benchmark monthly wage, and by doing so they managed to secure an IBF TCC agreement, in force from 1 January 2004, that secured several key improvements: extended leave periods, increased sickness and compensation payments, improved access to medical attention, increased access to communications, the creation of a joint fund to benefit seafarers welfare, and an annual wage increase of \$3,421 for an able-bodied seafarer (AB). The agreement also allows more flexibility for ITF affiliates to negotiate conditions that match local conditions.⁹¹⁵

A certain type of certificate, called the Green Certificate, is issued to ships covered by IBF agreements. It safeguards ships from ITF inspections in the same manner as the Blue Certificate issued by ITF inspectors. This constellation of bargaining capacities has also enabled the ITF to focus the attention of its inspection units towards less cooperative employers, potentially offering more support to the seafarers with the

⁹¹¹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 143ff.

⁹¹² Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1). pp. 97-126, at pp. 115f.

⁹¹³ The establishment of the IBF followed a situation in which several factors more or less pushed both the ITF and the IMEC into negotiations. The most important factor was the ITF declaration in 1997 that the benchmark wage rate would increase by 17 per cent, raising strong objections from shipowners and the real possibility that they would refuse to pay, as well as a fear amongst unions from labour-supply countries that they would lose jobs to non-unionised seafarers. The ITF and IMEC were thus pushed together, and during negotiations the ITF agreed to lower wage increases on the condition that a bargaining forum be set up. See 'New era for global pay talks', (2003) *Lloyd's List*. Available at: www.lloydslist.com/art/1034683088832. It is not unlikely that AMOSUP in some way influenced the ITF to agree to some concessions, due to its strength within the ITF and its wish to secure jobs for its members, as suggested by Ruggunan, S. (2011) 'The Role of Organised Labour in Preventing a 'Race to the Bottom' for Filipino Seafarers in the Global Labour Market', *African and Asian Studies*, 10, pp. 180-208.

⁹¹⁴ 'Hopes rise after bargaining forum drama', (2003) *Lloyd's List*. Available at: www.lloydslist.com/art/1034683592639.

⁹¹⁵ An AB or so-called 'able-bodied seafarer' is a seafarer rating and the skill/competence level for which ITF benchmark wages are negotiated. ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, pp. 11 and 16.

worst working conditions.⁹¹⁶ The IBF can thus be understood as a bargaining organisation making decisions that contribute to the production of communication within the ITF FOC system as a whole.⁹¹⁷ The decisions made by the IBF on collective agreements are recognised as communication by the ITF FOC system, which allows the other parts of the communicative structures of the system to pick up and direct communication towards other issues of relevance. In this sense the IBF has made the system more efficient by ensuring that the communication reaches the right addressee, thus decreasing the challenges posed by that improbability of communication.⁹¹⁸

The conclusion of this global collective agreement between the ITF and employers in the FOC sector is a strong indication of the future importance and power of the ITF and its campaign for better working conditions for seafarers on FOC and substandard ships.⁹¹⁹ However, it remains to be seen whether the ambition of the ITF FOC campaign – ‘*building and mobilising solidarity amongst workers on the basis of international minimum standards ... [in] an all-encompassing Campaign that unites the interests of all seafarers and dockers*’⁹²⁰ – will be feasible given the still-present tension between unions in capital- and labour-supply countries. In addition, the environment of the ITF FOC system is becoming ever more complex, and the question is thus whether the system will manage to adapt and provide useful solutions for overcoming challenges posed by the improbabilities of communication in the future. The next section will therefore discuss these increased environmental complexities and how the ITF FOC system has dealt with them so far.

⁹¹⁶ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 46ff.

⁹¹⁷ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 149ff.

⁹¹⁸ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157f.

⁹¹⁹ Concerning the bona fide national flags that are considered substandard flags, ITF has become more active and even managed to improve conditions considerably in e.g. Romania through exerting political pressure with the cooperation of national affiliates. The ITF has furthermore realised the need to intensify its campaign towards substandard bona fide national flags, even though ships registered under these flags previously have been outside ITF jurisdiction. This is thoroughly dealt with in the ITF’s campaign review. ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers’ Federation. Available at: www.itf.org.uk, especially pp. 21ff. On the effects for the maritime industry of the privatisation of the former Communist states’ fleets, see also ILO:, Alderton, T., Bloor, M., Kahveci, E., Lane, T., Sampson, H., Thomas, M., Winchester, N., Wu, B. and Zhao, M. (2004) *The Global Seafarer - Living and working conditions in a globalized industry*. Geneva: ILO, pp. 12f.

⁹²⁰ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers’ Federation. Available at: www.itf.org.uk, pp. 18f.

10.8 Challenges posed by increased complexity in the system environment

Over the years, various internal difficulties, such as the improbabilities of communication, have challenged the system of the ITF FOC campaign, and the system has found various ways of dealing with these issues. This is not to say that all the challenges have been overcome and no difficulties lie ahead. In fact, the ITF and its FOC campaign have recently begun to face even more complex challenges than in the past. The maritime industry has been the most internationalised industrial sector since the FOC campaign began, but it is affected by globalisation in several ways. Whereas its main international characteristics were previously found in the operational parts of the industry, ownership and vessel control are now also subject to increased internationalisation and complexity. For example, a vessel might be owned by a multinational company and registered under the flag of a country where the multinational has only a small branch office with little or no permanent staff, while the management of the vessel might be controlled by a third party through a ship management company.⁹²¹ In addition, some countries offering FOC registers allow corporate entities to register with no other information than the name of the company and the date of its formation: so called shell corporations set up to ensure anonymity for their owners and conceal illicit activity.⁹²² Thus the flag might have one nationality, the beneficial ownership another, and the management of the vessel might hold a third; and apart from the flag, these nationalities might even be difficult to discover, thus increasing the complexity in determining the national jurisdiction for the vessel.

This means that the FOC campaign policies on beneficial ownership and allocation of negotiating rights are becoming outdated: their applicability no longer takes into account the full context of the seafarers' situation. The continuing globalisation of the maritime industry has therefore been one major reason why the ITF has performed

⁹²¹See for example ILO.; Alderton, T., Bloor, M., Kahveci, E., Lane, T., Sampson, H., Thomas, M., Winchester, N., Wu, B. and Zhao, M. (2004) *The Global Seafarer - Living and working conditions in a globalized industry*. Geneva: ILO, pp. 19ff or Sehgal, M. (2010) 'Open Registers: A Necessity or Mere Convenience', *Maritime Affairs: Journal of the National Maritime Foundation of India*, 6(1), pp. 132-141, at p. 139.

⁹²²Sharife, K. (2010) 'Flying a Questionable Flag', *World Policy Journal*, 27(4), pp. 111-118. On the lack of will or resources for FOC states to secure efficient flag state control, see also Piniella, F., Silos, J. M. and Bernal, F. (2013) 'Who will give effect to the ILO's Maritime Labour Convention, 2006?', *International Labour Review*, 152(1), pp. 59-83, at pp. 78f.

two extensive reviews⁹²³ of their campaign objectives and policies, with the aim of adapting and finding more flexible solutions to retain their influence and power in the future. One of these changes has consisted in the development of a new public campaign strategy to complement the other two aspects – political and industrial – of the FOC campaign. The main objective of the public campaign strategy is to generate public support for the ITF FOC campaign as a whole and thus to strengthen its political and industrial aspects.⁹²⁴ After these reviews, the target for the ITF FOC campaign is no longer limited to FOC ships. Now the campaign targets substandard shipping irrespective of flag, emphasising that minimum standards should be met on board all ships. Another point of emphasis is that negotiating rights are to be distributed in accordance with the best interests of the crew, which in some instances means allocation according to the nationality of the beneficial ownership, but could also mean allocation according to the nationality of the party that has effective control over the ship.⁹²⁵ The focus on the poorest workers, in other words the values that frame the programming of the system, are preserved, while the communicative structures securing these values are made more flexible. The system is adapting its communicative structures to help itself overcome the improbabilities of communication. This is a clear indication of system reflexivity; that is, an expression of the self-referential nature of the system and its autopoietic character.⁹²⁶

This means that the ITF will have to consider a more complex set of factors in deciding when and where to take action, something that will require more resources, both financial and in terms of human capital. This is because greater variance among agreements and negotiating parties is likely to evolve, generating a need for more administration. The work of the ITF is therefore not getting easier; rather, external challenges to the future of its campaign against FOCs and substandard shipping are mounting. It is worth noting, however, that the creation of the IBF and globally negotiated agreements for ships covered by the IBF have eased the administrative burden to some extent. The IBF can thus be considered as a means for the ITF FOC system to retain internal efficiency and cope with increased environmental

⁹²³ The ITF published a document describing the reasons for and results of its first review on 8 March 2005; see ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk. The second review was adopted as the Mexico City Policy during the ITF 42nd Congress in Mexico City 2010; see ITF 2010b. ITF 42nd Congress, Mexico City, 5-12 August 2010. ITF. For a thorough description of the Mexico City Policy, see ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF.

⁹²⁴ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, pp. 49f.

⁹²⁵ ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF.

⁹²⁶ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 32ff.

complexities. The ITF FOC campaign has thus led to the creation of an international collective bargaining system that matters and its work and strategies ought to be a source of inspiration for trade unions in other sectors. The ITF has received some criticism for being overly aggressive in its campaign against FOC,⁹²⁷ but that aggressive approach is likely one of the major reasons for its success.⁹²⁸

When analysing how the function of collective bargaining has developed in the maritime sector, it is possible to identify three different stages. The first stage was what is commonly seen as the main function of collective bargaining, i.e. improving working conditions. Due to the high level of internationalisation and the liberalisation of regulations for ship registers, that approach shifted and national trade unions focused on protecting the jobs of their members, an approach that proved not very successful as the FOC registers continued to grow and gain importance. This led to a second shift in trade union strategy, where the function of collective bargaining was once again to improve working conditions, but now with an international instead of a national focus. The workers worst off internationally are the ones collective bargaining aims to help. In this sense, and taking into account the international aspect, the maritime collective bargaining system highlights the same issues that were at stake at the beginning of collective bargaining: solidarity among workers who compete for the same jobs but realise that they need to act together to force employers to improve working conditions. Through worker solidarity, the trade unions have managed to find ways of overcoming the improbability of having communication accepted.

10.9 Summary of conclusions

The ITF FOC campaign can be understood as an autopoietic system of industrial relations that has the binary code 'negotiable/non-negotiable between collective actors' and is programmed following the value of improving conditions for the

⁹²⁷ See for example Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, who, in spite of acknowledging the ITF's success in setting up a fairly strong global collective bargaining system, portrays the ITF FOC campaign as a protectionist campaign lacking internal democracy.

⁹²⁸ As Barton points out: '*The essence of the geoeconomic system [international maritime transport] ... is competition, adaptation and flexibility, all of which lead to the capture of market share and profit maximisation. Geoeconomic actors and agencies are aggressive, regulations and regulators must follow suit in order to achieve their objectives.*' Barton, J. R. (1998) 'Flags of Convenience': Geoeconomics and regulatory minimisation', *Tijdschrift voor Economische en Sociale Geografie*, 90(2), pp. 142-155, at p. 152.

lowest-paid workers. The binary code for this system thus accords with traditional analyses of systems of industrial relations. The ITF system has further developed in such a way that its communicative structures can exploit links between the local, national and global levels to solve the improbabilities of communication. This has been achieved through the establishment of different organisations that make different forms of decisions that contribute to the production of communication within the system. In other words, these organisations have the capacity to make decisions that are relevant for system communication. This decision-making capacity for the organisations is upheld through clear conditions of membership, hierarchical structures between members and clearly defined decision premises. These organisations form a basis for the communicative structures of the system, ensuring that the communication of the system reaches the right addressee.

The clear programming of the system ensures that the organisations within the system make decisions that are well aligned and this in turn ensures that the communication of the system is understood. Finally, the ITF FOC system also has integrated within its communicative structures means to ensure that the communication of the system can generate repercussions for the economic system and thus threaten the values promoted by the economic system, which has proven an efficient means for overcoming the improbability of having communication accepted.

Methodologically, the analysis in this chapter has devoted a great deal of attention to values in a positivistic sense, explaining what the ITF FOC campaign is and what results it produces (questions 2a and 1a in my methodological model), in order to create a basis for describing differences and similarities between the ESD and the ITF FOC campaign. However, the analysis has not been limited to the understanding of values in the positivistic sense. I have also identified hermeneutically perceived values, such as economic values, social objectives and solidarity, which are important for understanding why the ITF FOC campaign is what it is and why it produces the results it does (question 2b and 1b in my model).

Having developed this understanding of the ITF FOC campaign as an autopoietic system, it is now possible to take the next step towards answering my research questions and hold up the ITF FOC system as a mirror for the ESD. To do so, an overview of that part of the ESD that relates to the maritime sector will be helpful in establishing whether the SSDC in maritime transport should be considered part of the ESD or the ITF FOC system, and how challenges for this sector at the EU level might affect the developments of both systems. Therefore, the next chapter will deal with developments in the sectoral social dialogue in maritime transport at the EU level.

11 The effects of the EU policy-shaping systems on the ITF FOC Campaign

11.1 Introduction

The main aim of my thesis is to provide a deeper understanding of the ESD by exploring the differences and similarities with the ITF FOC campaign as well as seeking to answer why these two systems are perceived differently in terms of their capacity to produce results that improve working conditions. Since the ITF FOC campaign is a global system, it has repercussions also at the EU level, making it interesting to analyse the ITF FOC campaign within the EU context. The aim of this chapter is thus to position the industrial relations in maritime transport in relation to the EU policy-shaping systems, in order to see the effects of the EU policy-shaping systems on these industrial relations within the Community. I will do this by examining the work carried out by the European management and labour organisations in maritime transport at EU the level. I will consider the work of the SSDC for maritime transport as well as actions more likely to be considered part of the ITF FOC system. By doing so I hope to be able to explain some of the ways the ITF FOC campaign and the ESD differ in terms of what they are, what results they produce and why. Methodologically, this chapter brings together the four parts of my methodological model to provide a foundation for the concluding analysis in the next chapter. I will begin relating the EU maritime sector to the ITF FOC system by examining the development of EU policy on maritime affairs, and then continue with a discussion of the development of the ESD within the maritime transport sector, including the positions of the relevant actors.

11.2 EU policy on maritime affairs

At the outset of the Community, maritime affairs were not of interest for policy makers. In fact, between 1957 and 1977 there was no community action in the field of maritime affairs. It was considered outside the scope of community competence, and the Member States at that time had no specific interest in the matter.⁹²⁹ When Denmark, Great Britain and Ireland joined the EU, things changed, as 90 per cent of transports within the EU were now conducted by sea. During the years 1977–1985 measures were taken on harmonising working conditions and social security for seafarers and the right to establish shipping companies in other Member States. The issue of competition, especially internal competition within the Community, also took on a larger role.⁹³⁰

FOCs were briefly mentioned for the first time in 1985 in the Commission communication ‘Progress Towards a Common Maritime Policy: Maritime Transport’,⁹³¹ which stated that social and labour law issues were closely linked with international conditions in the field and that a dialogue between the relevant actors was needed to secure more agreement on the problems in general for the European seafaring sector.⁹³² At this state the Commission was not concerned about FOC vessels competing with European flagged vessels; this competition was regarded as positive in the long run, especially for consumers. The measures taken were aimed at securing the right to provide maritime services and preventing protectionism.⁹³³

This position was strongly criticised by the ITF and the Economic and Social Committee for not fully appreciating the seriousness of the FOC situation. This criticism had no significant impact, however, and the so-called ‘Brussels Package’ contained no measures to prevent the flagging-out of European vessels. The Brussels

⁹²⁹ The opinion of the EPP-ED Group in the European Parliament, however, is that the failure to develop a common transport policy in the years before the mid-1980s was not owing to a lack of proposals, but rather the incapacity of the Council to reach compromises. See Hatzidakis, K. and Jarzembowski, G., Group, E.-E. (2004) *European Transport Policy - Present situation and future prospects*: The European Parliament, p. 12.

⁹³⁰ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB., pp. 171ff. Concerning Community action relating to competition in maritime transport see Dinger, F. (2002) ‘What shall we do with the drunken sailor? EC Competition Law and Maritime Transport’, *BASLERSCHRIFTEN zur europäischen Integration*, (61), especially pp. 8ff for the historical developments.

⁹³¹ CEC (1985a) *COM(85) 90 final - Progress Towards a Common Maritime Policy: Maritime Transport*. Brussels: European Commission (COM(85) 90 final).

⁹³² *Ibid.*, p. 44.

⁹³³ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB, p. 177.

Package comprised Regulation 4055/86,⁹³⁴ applying the principle of the freedom to provide services to maritime transport among Member States and between Member States and third countries; Regulation 4056/86,⁹³⁵ laying down detailed rules for the application of Articles 85 and 86 of the EC Treaty (now articles 101 and 102 TFEU) to maritime transport; Regulation 4057/86⁹³⁶ on unfair pricing practices in maritime transport; and Regulation 4058/86⁹³⁷ concerning coordinated action to safeguard free access to cargoes in ocean trades.

These regulations were mainly intended to open up the maritime transport market in the EU and assure that maritime transport would become part of the European single market. There was no specific concern for working conditions or other social values. The main aim of the regulations as trade policy instruments is reflected not at least in Regulation 4057/86, Article 5(1), which can be read to exclude trade unions from putting forward complaints or taking counter-action against non-European shipowners profiting from so-called non-commercial advantages. The right to complain adheres only to physical and legal persons and organisations, or associations without the status of legal persons, who act in the interest of the Community shipping industry, and it is debatable whether trade unions such as the ITF or the ETF meet this definition.⁹³⁸ As regards the ITF FOC campaign, Regulation 4057/86 was the most important, since it offered a means for EU Member States to establish practises that would improve the competitiveness of their own fleets.

⁹³⁴ *Council Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries* (1986). Brussels: Council of the European Community (OJ No L 378/1986).

⁹³⁵ *Council Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (Liner shipping conferences)* (1986). Brussels: Council of the European Community (OJ No L 378/1986). Some authors have considered this regulation the most important of the maritime regulations as concerns competition law; see for example Dinger, F. (2002) 'What shall we do with the drunken sailor? EC Competition Law and Maritime Transport', *BASLERSCHRIFTEN zur europäischen Integration*, (61), p. 11. However, the regulation was repealed in 2006; see *Council Regulation 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services* (2006). Brussels: Council of the European Community (OJ No L 269/2006).

⁹³⁶ *Council Regulation 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport* (1986). Brussels: Council of the European Community (OJ No L 378/1986).

⁹³⁷ *Council Regulation 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades* (1986). Brussels: Council of the European Community (OJ No L 378/1986).

⁹³⁸ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB, pp. 178f. However, no case has so far been put forward to the CJEU on the basis of Article 5(1), Regulation 4057/86, and therefore the exact meaning of a legal subject acting in the interest of the Community shipping industry is still unclear.

The Brussels Package was a first step towards a Community maritime policy, but it had no real effect on flagging-out, and the European fleet continued to decline after its adoption. In 1970 the EC Member State flags' market share of world tonnage amounted to 32 per cent, falling to 14 per cent by 1995.⁹³⁹ This decline led to a more serious discussion on positive measures to strengthen the Community shipping industry, a discussion in which both the ITF and the European Community Ship-owners' Association (ECSA) were very active in pushing for measures that would support the European part of this sector. The discussion led to a proposal from the Commission to establish a European international ship register (EUROS) to combat the potential loss of European job opportunities, imbalances in competition on the internal market due to differing measures among the Member States for promoting the maritime industry, and the risk of losing political power in this sector to the rest of the world.⁹⁴⁰ The register was intended to work in conjunction with the national registers of the Member States, conferring certain obligations concerning the employment of EU nationals in the crew on board ships registered therein, and in return the shipowners would receive state aid.⁹⁴¹

The EUROS proposal, however, was roundly criticised by both the social partners and the Member States. The ITF criticised it for not sufficiently restricting possibilities to employ non-European seafarers on board European registered ships. ECSA thought it was too restrictive on this matter, and also did not grant enough tax reductions to the industry. Opinions among the Member States differed; some thought it would negatively affect the national fleets as well as possibly provoke countermeasures from other parts of the world that would make it difficult for the European maritime industry to stay competitive in the global arena. This led to a review of the proposal. A new proposal was put forward under which the additional costs for employing mainly European staff on board vessels would be reduced by tax subsidies, a measure common in the northern European Member States. This proposal, however, was also rejected by the Member States, who saw it as a threat to both their sovereignty and their own national fleets.⁹⁴²

⁹³⁹ *Community guidelines on State aid to maritime transport* (1997) (OJ 1997 No C 205/1997), p. 6.

⁹⁴⁰ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Lustus Förlag AB, pp. 179ff.

⁹⁴¹ *Community guidelines on State aid to maritime transport* (1997) (OJ 1997 No C 205/1997), p. 6.

⁹⁴² Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Lustus Förlag AB, pp. 184ff. The proposal was CEC (1989) *SEC (89) 921 final - Guidelines for aid to shipping companies*. Brussels: European Commission (SEC (89) 921 final), which was never published in the Official Journal. Nonetheless these guidelines seem to have been awarded some relevance, as the EFTA Surveillance Authority reports considering them relevant in relation to the EEA (*EFTA Surveillance Authority Decision No 187/97/COL of 16 July 1997 on the 11th amendment of the Procedural and Substantive Rules in the Field of State Aid* (1997) (OJ 1997 No L 316/0023-0036).).

The Commission withdrew the proposal⁹⁴³ and focus shifted to guidelines for national support to the industry, mainly based on the differences in wages and social costs between different flags and a further development of the port state control in order to eliminate the existence of substandard vessels within EU maritime transport. In other words, from the EU there have been no successful actions of major importance for national maritime policies, and due to differences of opinion among the Member States and the voting rules in this field it has been considered unlikely that any major political results will be achieved on the EU level.⁹⁴⁴ What was, however, implemented in this period was a regulation that established the principle of freedom to provide services also in relation to cabotage trade:⁹⁴⁵ Regulation 3577/92.⁹⁴⁶

The freedom to provide services was hereby declared to apply in cases where transport is conducted by sea between two Member States, between a Member State and a third country or between different ports in the same Member State. The right to provide such services adheres to any shipowner established within the Community, regardless of the flag of the ship, as well as to ships registered within the Community when the control of the ship lies with a service provider outside the Community.⁹⁴⁷ This means that the establishment of the freedom to provide services in maritime transport has been ensured in a way that opens the door to the unlimited use of FOC registers. The focus has been on ensuring the principle of the freedom to provide services, but potential consequences for employment conditions are left unconsidered. Instead this may have contributed to deregulation, since shipowners established in the EU are free to choose the flag of their ships without consequence for their right to provide

⁹⁴³ The European Parliament, however, still favours establishing an EU Register, but most other parties are reluctant or reject the idea. See Hatzidakis, K. and Jarzembowski, G., Group, E.-E. (2004) *European Transport Policy - Present situation and future prospects*: The European Parliament, p 12 and 'Owners back EU policy with some reservations', (2007) *Lloyd's List*. Available at: www.lloydslist.com/art/1177526519714.

⁹⁴⁴ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB, pp. 190f.

⁹⁴⁵ Cabotage refers to agreements that reserve a certain part of the maritime transport trade between two countries, or within a region, for vessels registered within those countries. Third-country registered vessels must compete amongst each other for the unreserved part of the trade. An example is the so-called 40:40:20 rule in the UNCTAD Code; see Dinger, F. (2002) 'What shall we do with the drunken sailor? EC Competition Law and Maritime Transport', *BASLERSCHRIFTEN zur europäischen Integration*, (61), p. 9, for further explanation.

⁹⁴⁶ *Council Regulation 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)* (1992). Brussels: Council of the European Community (OJ No L 364/1992).

⁹⁴⁷ Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 286f.

services within the EU. In other words, the legal acts adopted clearly promoted economic values and favoured those over social values.

Still no regulations or other hard-law measures that properly addressed the FOC problem had been implemented. In 1997, however, the Community Guidelines on state aid to maritime transport were adopted, whose aim was to '*ensure freedom of access to shipping markets across the world for safe and environmental friendly ships, preferably registered in EC Member States with Community nationals employed on board.*'⁹⁴⁸ These guidelines were considered a review of the 1989 guidelines, and their objective was to improve employment, skills and safety in the maritime sector.⁹⁴⁹ Furthermore, these guidelines were amended to the EFTA rules on state aid and thus extended outside the EU.⁹⁵⁰ The result was an increase in the EU fleet.⁹⁵¹ The number of EU seafarers, however, is declining, while the proportion of third-country nationals from low-wage labour-supply countries employed on board EU fleet ships is increasing; an issue that is of great concern to the ETF. The proportion of third-country nationals employed on board EU fleet ships is likely to increase further, as the proportion of vessels owned by EU nationals but flagged in a third country and thus likely registered under an FOC has also been increasing in relation to EU-flagged vessels.⁹⁵²

Legal acts were also adopted on working conditions and other requirements for seafarers. These acts cover working time for seafarers; minimum levels of training; standards for training, certification and watchkeeping; mutual recognition of seafarers' certificates; control of port state authorities; and procedures governing the recognition of third-country-issued competence certificates.⁹⁵³ Nevertheless, seafarers were still excluded from the largest part of Community social legislation, including legislation on European Works Councils (EWCs), worker protection in case of employer insolvency, posting of workers, the right to information and consultation

⁹⁴⁸ *Community guidelines on State aid to maritime transport* (1997) (OJ 1997 No C 205/1997), p. 5.

⁹⁴⁹ *Ibid.*, pp. 10f.

⁹⁵⁰ *EFTA Surveillance Authority Decision No 187/97/COL of 16 July 1997 on the 11th amendment of the Procedural and Substantive Rules in the Field of State Aid* (1997) (OJ 1997 No L 316/0023-0036)..

⁹⁵¹ CEC (2006f) *Maritime Transport Policy: Improving the competitiveness, safety and security of European shipping*. Brussels: European Commission, p. 2.

⁹⁵² Mitroussi, K. (2008) 'Employment of seafarers in the EU context: Challenges and opportunities', *Marine Policy*, 32, pp. 1043-1049.

⁹⁵³ CEC (2006f) *Maritime Transport Policy: Improving the competitiveness, safety and security of European shipping*. Brussels: European Commission, p. 11.

etc.⁹⁵⁴ This was a situation that would hardly be considered acceptable for any other group of workers in the EU. This has also continuously been pointed out by the ETF, which has several times voiced its opinion on the necessity of including seafarers in this legislative system, whilst also stressing the problems associated with the increasing use of FOCs in EU maritime transport.⁹⁵⁵

In 2004 the Regulation 789/2004 on the transfer of cargo and passenger ships between registers within the Community was adopted, a regulation that facilitates re-flagging of ships under the condition that they meet international safety and environmental standards.⁹⁵⁶ This means that the regulation facilitates the use of FOCs within the EU, i.e. Cyprus, FIS, GIS and Gibraltar, and as such more nearly promotes the FOC phenomenon than restricts it. In principle European shipowners are free to register their vessels in any EU member state, in accordance with the principle of free movement of capital.⁹⁵⁷ This policy opens the door to widespread use

⁹⁵⁴ *Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer* (2008). Brussels: European Council (OJ No L 283/2008); *Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees* (2009). Brussels: European Parliament and European Council (OJ No L122/2009); *Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation* (2002). Brussels: European Parliament and European Council (OJ No L 80/2002); *Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies* (1998). Brussels: European Council (OJ No L 225/1998); *Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses* (2001). Brussels: European Council (OJ No L 82/2001); *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services* (1997): European Parliament and Council of the European Union (OJ No L 18/1997).

⁹⁵⁵ See for example ETF 2008. Reassessing the regulatory social framework for more and better seafaring jobs in the EU - ETF response to the first phase consultation of the Social Partners at Community level. Brussels: European Transport Workers' Federation.

⁹⁵⁶ See Article 4 *Regulation 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation (EEC) No 613/91* (2004). Brussels: European Parliament and Council of the European Community (OJ No L 138/2004). For a further discussion see Davies, A. C. L. (2006) 'The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences', *Industrial Law Journal*, 35(1), pp. 75-86, at p. 79.

⁹⁵⁷ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, pp. 26f. This freedom of registry has been seen as one of the outcomes of the *Factortame I* case; see *Case C-213/89 The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1990] 1990 ECLI:EU:C:1990:257 I-2433. For a discussion see de Schutter, O. 2005. La protection juridictionnelle provisoire dans le droit de l'Union européenne et les droits fondamentaux. In: Louvain, U.c.d. (ed.) *CRIDHO Working Paper*. Louvain, pp. 16f.

of the EU FOCs, which means that the use of these flags within the EU is likely to increase even more. This indicates the influence that values promoted by the economic system, such as competitiveness, have within the EU policy-shaping systems.

In June 2006 the Commission's 'Green Paper on a Future Maritime Policy for the Union'⁹⁵⁸ was put out for consultation. The paper showed that the intention of the Commission was to find a common approach on important issues of maritime affairs, with the aim of developing a proper Community policy in this field. This was also pointed out in the Commission review of the 2001 Transport White Paper.⁹⁵⁹ This review covered all sectors of transport, but in terms of social impact the objectives remained, as before, in line with the Lisbon agenda: to promote '*employment quality improvement and better qualifications for European transport workers*'.⁹⁶⁰ The Commission stressed the importance of the maritime transport sector for European trade and the economy and pointed out the high levels of market share owned by maritime transport within the EU and in the external trade, as well as the size of the European fleet.⁹⁶¹

Further on, the Commission called the maritime transport sector a valuable alternative to land transport and a sector with future growth potential, which would thus require attention to needed social and economic regulations.⁹⁶² However, the Commission saw the international characteristics of the maritime sector as somewhat problematic, since international regulations to some extent limited the options for optimising the EU regulatory framework to simplify internal trade. Regardless, the

⁹⁵⁸ CEC (2006a) *COM(2006) 275 final Volume II - ANNEX - GREEN PAPER Towards a future Maritime Policy for the Union: A European vision for the oceans and seas*. Brussels: European Commission (COM(2006) 275 final Volume II - ANNEX).

⁹⁵⁹ CEC (2001) *COM(2001) 370 final - WHITE PAPER European transport policy for 2010: time to decide*. Brussels: European Commission (COM(2001) 370 final).

⁹⁶⁰ CEC (2006d) *COM(2006) 314 final - Communication from the Commission to the Council and the European Parliament: Keep Europe moving - Sustainable mobility for our continent, Mid-term review of the European Commission's 2001 Transport White Paper*. Brussels: European Commission (COM(2006) 314 final), p. 3.

⁹⁶¹ At this time maritime transport held 39 per cent of the internal transport market and accounted for 90 per cent of the external trade transport volumes. In addition, 40 per cent of the world fleet was European-owned, whereas a quarter of the world fleet was registered in the EU; *ibid.*, p. 7. However, whether the European fleet tends to be registered in bona fide national registers or in European FOC registers, such as Cyprus, GIS etc., or national second registers is not mentioned. This ignores a major issue for the maritime labour market, as European FOC registers or national second registers allow shipowners to choose their crews more or less entirely based on labour costs.

⁹⁶² Even though land transport has been and to some extent might still be the primary focus of the EU common transport policy, the future potential for maritime transport could shift focus towards this sector; on the former point, see Hatzidakis, K. and Jarzembowski, G., Group, E.-E. (2004) *European Transport Policy - Present situation and future prospects*: The European Parliament, p. 13.

ambition was to develop a common European maritime space⁹⁶³ through the debate set in motion by the 2006 Green Paper.⁹⁶⁴ Concerning employment in maritime transport more specifically, the Commission pointed out the lack of European candidates⁹⁶⁵ as a worrying issue for the future, as this had contributed to the increase in foreign labour in addition to jeopardising know-how and skills within the European maritime transport workforce. It was further stressed that the social partners in the sector should be encouraged to engage in dialogue and negotiate an agreement for implementing the ILO MLC in order to address the problem of varying labour cost levels within the EU. The Commission also committed itself to promoting both the social dialogue in this sector and transport professions and training on a continuing basis.⁹⁶⁶

In 2007 the conclusions from the consultations of the 2006 Green Paper were presented in conjunction with the new Integrated Maritime Policy for the EU. The consultation of the Green Paper received more than 490 responses and in the conclusion the two issues of environmental sustainability and industry competitiveness are specifically pointed out as essential to an integrated maritime policy. Although the Commission mentions that EU maritime industry should compete on quality rather than cost, the issue of working conditions for seafarers is barely mentioned otherwise, except for the need to assure quality in training.⁹⁶⁷ The

⁹⁶³ See CEC (2006d) *COM(2006) 314 final - Communication from the Commission to the Council and the European Parliament: Keep Europe moving - Sustainable mobility for our continent, Mid-term review of the European Commission's 2001 Transport White Paper*. Brussels: European Commission (COM(2006) 314 final), Annex 1, p. 24.

⁹⁶⁴ *Ibid.*, p. 11. The Green Paper was referred to above; the full title is CEC (2006a) *COM(2006) 275 final Volume II - ANNEX - GREEN PAPER Towards a future Maritime Policy for the Union: A European vision for the oceans and seas*. Brussels: European Commission (COM(2006) 275 final Volume II - ANNEX).

⁹⁶⁵ Previously, the definition of an EU seafarer seems merely to have been based on the flag of the ship and not related to the nationality of the seafarer, something which the ETF pointed out would undermine any effort to improving the conditions and quality of maritime work within the EU. See ETF 2005c. ETF response to the UK Presidency non-paper on maritime employment. European Transport Workers' Federation, p. 4. This definition seems now to have been changed, as reference is made both to European seafarers and third-country nationals. See CEC (2006a) *COM(2006) 275 final Volume II - ANNEX - GREEN PAPER Towards a future Maritime Policy for the Union: A European vision for the oceans and seas*. Brussels: European Commission (COM(2006) 275 final Volume II - ANNEX), p. 17ff.

⁹⁶⁶ CEC (2006d) *COM(2006) 314 final - Communication from the Commission to the Council and the European Parliament: Keep Europe moving - Sustainable mobility for our continent, Mid-term review of the European Commission's 2001 Transport White Paper*. Brussels: European Commission (COM(2006) 314 final), pp. 11-12 and Annex 1, p. 24.

⁹⁶⁷ CEC (2007a) *COM(2007) 574 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Conclusions from the Consultation on a European Maritime Policy*. Brussels: European Commission (COM(2007) 574 final).

issue of working conditions for seafarers also received relatively little attention in the Integrated Maritime Policy, which simply notes the need to improve working conditions for seafarers in order to attract more Europeans to take up such jobs. According to the Commission, this should be done by involving the social sectoral partners in the integration of the ILO MLC as well as in the reassessment of the exclusion of maritime transport from EU labour law.⁹⁶⁸

As far as further developments in EU maritime policy, ensuring the implementation of the ILO MLC has remained the main achievement with respect to employment and working conditions of seafarers. However, the overall concern within the policy-shaping systems of the EU seems to be retaining a competitive EU maritime industry in spite of the threats posed by FOC. Social issues are highlighted to a vast extent in relation to the need to ensure a competitive industry.⁹⁶⁹ In other words, the attention paid to social values has been increasing, but the issue of improving conditions for workers is mainly framed as necessary because it could help stave off negative economic effects, not as a value that is important to safeguard per se.

The latest developments in the implementation of the SSDC agreement concerning the ILO MLC⁹⁷⁰ and the amendment of several directives concerning different forms of protection of workers⁹⁷¹ show that the political will exists to improve working

⁹⁶⁸ CEC (2007b) *COM(2007) 575 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions - An Integrated Maritime Policy for the European Union*. Brussels: European Commission (COM(2007) 575 final).

⁹⁶⁹ See for example CEC (2009) *COM(2009) 8 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strategic goals and recommendations for the EU's maritime transport policy until 2018*. Brussels: European Commission (COM(2009) 8 final), where the FOC issue is mainly referred to as a problem to be solved at the international/global level and the implementation of the ILO MLC is highlighted but framed as a way to ensure the competitiveness of the EU maritime industry. In a follow-up report the Commission concluded that maritime sectors have contributed to the economic and social development of the EU through actions that have served to 'lower costs, improve resource efficiency, reduce risk, support innovation and make better use of public money.' CEU (2012) *COM(2012) 491 final - Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Progress of the EU's Integrated Maritime Policy* (2012). Brussels: European Commission (COM(2012) 491 final), p. 10. The Commission here emphasizes economic values and places social values in the position of a potential contributor to economic goals.

⁹⁷⁰ *Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009).

⁹⁷¹ *Directive 2015/1794/EU of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers* (2015). Brussels: Council of the European Community (OJ No L 263/2015).

conditions for seafarers. However, I doubt this indicates that social values are gaining priority within the programming of the EU policy-shaping systems. I think the more likely explanation is that there is an ambition within the EU policy-shaping systems to minimise potential problems generated by conflicts between EU *acquis communautaire* and international law.⁹⁷² As for the inclusion of seafarers within the scope of the Directives concerning different forms of protection of workers, this can be seen as a mere consequence of the implementation of the ILO MLC, since several of those Directives lay down rules aimed at the efficient recognition of workers' rights to collective bargaining under Article III (a) of the ILO MLC. The question is thus whether these developments indicate a shift in the programming of the EU policy-shaping systems or whether they should be considered results in the EU policy-shaping systems, effected by communication from the international legal system via the structural coupling between these systems:⁹⁷³

Finally, it is worth noting that even though the Commission has recognised the problem of diverse levels of labour costs, both within the EU and internationally, it seems to some extent to neglect the fact that those differences are actually part of what has caused the increase in foreign labour in European maritime transport. This is because a large part of the European fleet has been affected by regulations facilitating the employment of seafarers under working conditions based on their residence and not the flag of the vessel. This has permitted shipowners to employ cheap foreign labour and shrunk the maritime transport labour market for European seafarers,⁹⁷⁴ discouraging young Europeans from pursuing a career in this sector. The problematic situation has hardly been eased by the case law from the CJEU, which has been rather consistent in considering trade union actions to protect or improve working

⁹⁷² CEC (2006c) *COM(2006) 288 final - Proposal for a Council Decision on authorising Member States to ratify, in the interests of the European Community, the 2006 Consolidated Maritime Labour Convention of the International Labour Organisation*. Brussels: European Commission (COM(2006) 288 final), pp. 2f. See also Adascalitei, O. (2014) 'The Maritime Labour Convention 2006 - a Long-Awaited Change in the Maritime Sector', *Precedia - Socia and Behavioral Sciences*, 149, pp. 8-13, at p. 10 where the contribution of the EU to drafting the ILO MLC in order to assure compliance between EU law and the ILO MLC is mentioned.

⁹⁷³ Both these legislative interventions are connected to developments within the SSDC for maritime transport. A more thorough discussion of the developments leading up to the adoption of the Directives is in the next section, on ESD developments within maritime transport. On structural coupling between systems, see Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

⁹⁷⁴ This has also been pointed out by the ETF; see ETF 2005c. ETF response to the UK Presidency non-paper on maritime employment. European Transport Workers' Federation, p. 2.

conditions as infringements on the freedom to provide services.⁹⁷⁵ The environment within which the SSDC for maritime transport exists is thus to a large extent framed by the importance of safeguarding employers' options for keeping their businesses competitive. It would be natural to assume that the developments within the ESD concerning maritime transport and the improvement of working conditions for seafarers have been rather limited. However, the achievements of the ITF FOC system at the global level have also had some implications for the EU level. I will now proceed to a discussion of the developments of the ESD in maritime transport.

11.3 EU maritime social dialogue developments

The SSCD for maritime transport was established in 1999.⁹⁷⁶ However, activities were taking place within the framework of a joint committee on maritime transport already in the late 1980s and early 1990s,⁹⁷⁷ although those activities seem to have been limited to three joint statements, where one addresses the consultation of the social partners and the other two are comments preceding and following up after a conference on employment and training possibilities for EU seafarers.⁹⁷⁸ The material substance of these documents is directed towards the EU institutions, requesting that different studies be carried out to investigate measures that could serve to improve the quality of the EU maritime industry, and as such can be seen as a proof of dialogue

⁹⁷⁵ Of specific relevance to the seafaring industry are *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779; *Case C-83/13, Fonnship A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v. Fonnship A/S* [2014] Court Reports - General ECLI:EU:C:2014:2053 2053. Both these cases will be discussed more in section 11.4. Similar reasoning can be found in e.g. *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

⁹⁷⁶ CEC (2005b) *Recent developments in the European Sectoral Social Dialogue*. Brussels: Office for Official Publications of the European Communities, p. 71.

⁹⁷⁷ In fact, the Joint Committee on Maritime Transport had already been established in 1987 by CEC (1987) *Commission Decision 87/467/EEC of 31 July 1987 setting up a Joint Committee on Maritime Transport*. Brussels: European Commission (OJ No L 253/1987).

⁹⁷⁸ See the documents ECSA and CSTCE 1994. Joint Statement on the Consultation of the Social Partners in the Context of the Social Protocol., ECSA and FST 1996b. Training: a Statement by the Joint Committee on Maritime Transport and ECSA and FST 1996a. Joint Statement by ECSA and FST - Is the EU Seafarer an Endangered Species? (Dublin Conference, December 17-18 1996), Dublin Follow-up Group.

between the partners, but not necessarily an effort to establish proper EU sectoral bargaining.⁹⁷⁹

In 1999 the SSDC for maritime transport adopted its internal rules. They state that the task of the committee is to assist the Commission in the formulation and implementation of Community policy aimed at

‘improving and harmonising living and working conditions in maritime transport within the context of the Treaty;

improving the economic and competitive position of the Community’s maritime transport;

promoting Community seafarers’ employment opportunities.’⁹⁸⁰

The wording of the internal rules seem to establish the committee merely as an assistant responding to calls from the Commission, but in the context of the Treaty provisions on the social dialogue, it is more likely that the committee is also free to formulate proposals to be put forward to the Commission. In fact, by ensuring a qualitative dialogue between the parties aimed at identifying and addressing important issues, this SSDC could definitely be of assistance to the Commission. Therefore it is of the utmost importance for the Commission to encourage independent work by the committee and not merely focus on responses to Commission calls. The internal rules also state that *‘the Committee encourages and develops the social dialogue in the maritime transport sector’*⁹⁸¹ and it is further supposed to organise work on jointly identified topics: a clear indication that the committee sets up and organises its own work independently of the Commission.

The internal rules of this SSDC, with their focus on responding to calls from the Commission, implies that the binary code for this SSDC is unlikely to focus on negotiations. It is more likely that the binary code is formulated as ‘discussable/non-discussable between collective actors’, in line with the system of the ESD as a whole.⁹⁸² Therefore, this SSDC should probably be interpreted as an organisation that can make decisions that contribute to the production of communication within the

⁹⁷⁹ See for example ECSA and FST 1996a. Joint Statement by ECSA and FST - Is the EU Seafarer an Endangered Species? (Dublin Conference, December 17-18 1996), Dublin Follow-up Group.

⁹⁸⁰ ECSA and FST 1999. Social Dialogue Committee, Maritime Transport Sector, Internal Rules.

⁹⁸¹ Ibid.

⁹⁸² Compare with Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at pp. 119f.

system of the ESD.⁹⁸³ Nevertheless, the tasks of the SSDC as described above incorporate social values to perhaps a somewhat greater extent than the ESD in general, and it is thus possible that this SSDC has framed its decision premises with slightly more focus on social values than the system as a whole. If so, it is likely that there is a structural coupling between the ESD and the ITF FOC campaign that has allowed the ITF FOC system to produce results that have had an effect within the ESD, generating an adaptation of the decision premises for the SSDC maritime transport organisation.⁹⁸⁴

Worth noting is that prior to the establishment of the SSDC for maritime transport, in late September 1998, the ESCA and the FST (now the ETF) had reached an agreement on the organisation of working time of seafarers⁹⁸⁵ that was later implemented in Directive 1999/63/EC. As seafarers were excluded from the general Working Time Directive,⁹⁸⁶ this agreement was an important step in building up a framework for good working conditions within the EU maritime sector, and a first step towards establishing a dialogue between the maritime social partners. The structural coupling⁹⁸⁷ between the EU legal system and the SSDC in maritime transport is evident here, as in all situations where the shadow of law⁹⁸⁸ exerts significant influence on the negotiating will of the social partners. The maritime transport sector is thus no exception to this rule of structural coupling,

In 2000 the ETF and ECSA produced a joint statement on seafarer training and recruitment in Europe in response to the Commission's wish to discuss the subject.⁹⁸⁹

⁹⁸³ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 149ff.

⁹⁸⁴ See Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 227 and Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, p. 110.

⁹⁸⁵ ECSA and FST 1998. European Agreement on the Organisation of Working Time of Seafarers.

⁹⁸⁶ Article 1.3 of the Working Time Directive excludes seafarers from the application of the Directive (see *Council Directive 93/104/EC of 23 November 1993 concerning Certain Aspects of the Organisation of Working Time* (1993): Council of the European Union (OJ No L 307/1993). Repealed and replaced with *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time* (2003). Brussels: Council of the European Community (OJ No L 299/2003).).

⁹⁸⁷ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press.

⁹⁸⁸ The shadow of law describes a situation in which social partners engage in negotiations in order to retain control over the contents of regulations when there is a high probability that the issue in question would otherwise regulated by legislation. For more on this concept see section 1.3 or section 6.5 of this thesis.

⁹⁸⁹ ECSA and ETF 2000. Seafarer Training and Recruitment in Europe - An ETF/ECSA Contribution. Brussels.

The statement contains suggestions for initiatives to allow the Community and the Member States to tackle the decline in EU seafarers' competence and skills and the shortage of EU officers. The initiatives suggested were considered by the social partners to fall under the scope of the Commission's 1997 State Aid Guidelines, which they considered the key instrument at that time. They did, however, ask for a Council resolution to clearly indicate to the Member States that the guidelines preferably could be used to reduce shipowners' costs for on board training and repatriation of seafarers.⁹⁹⁰

The social partners also proposed several possible initiatives to be taken by industry and/or the EU. These mainly focused on research into possible career paths at sea and on shore, how to motivate people to take up a career in the maritime sector, and ways for seafarers to keep in touch with friends and family. Retraining lower rank seafarers, distance learning and financial relief for cadet on board training were also suggested as actions that could help address the shortage of qualified EU seafarers. Finally, the social partners suggested starting an EU-sponsored campaign to attract more candidates to take up a career in the maritime transport sector.⁹⁹¹ Several of these proposals were implemented in the revised Community guidelines for State aid.⁹⁹² For example, the guidelines now include a section specifically devoted to training which clarifies that state aid may be awarded for on board training when the trainee is not an active member of the crew; officers' skill development throughout their career; the retraining of high sea fishermen willing to work as seafarers; and further research efforts that aim to increase the quality, productivity and safety of the EU maritime industry.⁹⁹³

These events show that the SSDC has proven capable of making decisions that have been recognised by the EU policy-shaping systems and generated results there. There is thus a clear structural coupling between the ESD and the EU policy-shaping systems.⁹⁹⁴ As regards both the joint statement and the revised guidelines discussed above, it is worth noting that all the social objectives essentially focus on ensuring

⁹⁹⁰ ECSA and ETF 2000. *Seafarer Training and Recruitment in Europe - An ETF/ECSA Contribution*. Brussels, paragraphs 3-4.

⁹⁹¹ *Ibid.*, paragraphs 6-10.

⁹⁹² CEC (2004b) *Commission communication C(2004) 43 - Community guidelines on State aid to maritime transport*. Brussels: European Commission (OJ 2004 No C 13/3).

⁹⁹³ *Ibid.*, section 7. Compare with ECSA and ETF 2000. *Seafarer Training and Recruitment in Europe - An ETF/ECSA Contribution*. Brussels.

⁹⁹⁴ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

competitiveness for the EU maritime industry, highlighting the importance of economic objectives.⁹⁹⁵

In 2002 the social partners produced a joint opinion on the subject of piracy and armed robbery in the maritime sector in order to bring the Commission's attention to this matter. The proposal strongly urged the Commission to consider possible actions to increase maritime safety, especially given the tragic events of 11 September. The social partners further stressed the importance for the EU and its Member States of giving priority and support to UN and IMO work on security for seafarers, and that appropriate international agreements should be discussed to solve problems related to survivors of distress at sea or people rescued at sea, to allow them to be treated in accordance with international agreements and humanitarian maritime traditions. In particular, they mentioned the necessity of allowing ships that retrieve persons in distress at sea to deliver these persons to the nearest place of safety.⁹⁹⁶

In 2003 the ECSA and ETF sent a joint statement in cooperation with the ITF and ISF to the Commission and the Council regarding the implementation of the ILO convention on seafarers' identity documents⁹⁹⁷ and the problem of implementing this convention in the EU Member States, due to the visa rules established therein.⁹⁹⁸ The social partners pointed out that a majority of Member States had already ratified the convention without expressing any reservations about the visa regulations or interference with the Member States' exclusive competence⁹⁹⁹ in this field.¹⁰⁰⁰ In apparent response to this request, the Commission put forward a proposal for a Council Decision authorising Member States to ratify the convention,¹⁰⁰¹ a proposal

⁹⁹⁵ See ECSA and ETF 2000. Seafarer Training and Recruitment in Europe - An ETF/ECSA Contribution. Brussels and CEC (2004b) *Commission communication C(2004) 43 - Community guidelines on State aid to maritime transport*. Brussels: European Commission (OJ 2004 No C 13/3).

⁹⁹⁶ ECSA and ETF 2002. Piracy and Armed Robbery. Brussels.

⁹⁹⁷ ILO Convention 185 on seafarers' identity documents.

⁹⁹⁸ Article 6.6 ILO Convention 185 states that seafarers on shore leave should not be required to hold a visa, nor should seafarers be required to hold a visa when they need to enter a state for transit, transfer or repatriation.

⁹⁹⁹ This is how the problem was described in the social partners' document, but some confusion seems to have occurred, as the visa rules are under the Community competence for Member States within Schengen. This is also clarified in the Commission proposal (see below).

¹⁰⁰⁰ ECSA, E., ISF, ITF 2003. ILO Seafarers' Identity Documents Convention (Revised). Brussels.

¹⁰⁰¹ CEC (2004a) *COM(2004) 530 final - Proposal for a Council Decision authorising Member States to ratify in the interests of the Community the Seafarers' Identity Documents Convention of the International Labour Organization (Convention 185)*. Brussels: European Commission (COM(2004) 530 final).

later implemented by Council Decision 2005/367/EC.¹⁰⁰² This is a clear example of how the ESD, with the maritime transport SSDC as an organisation making decisions that contribute to the production of system communication, can be understood as an autopoietic system¹⁰⁰³ that achieves results which in turn have an impact within the EU legal and/or policy-shaping systems. The SSDC for maritime transport is part of the ESD system, as an organisation that makes decisions which form part of the communication in that system.¹⁰⁰⁴ However, it seems as if the maritime transport SSDC produces communication that places more weight on the improvement of working conditions than the communication of the ESD in general. This could thus be explained by a structural coupling between the ESD and the ITF FOC systems,¹⁰⁰⁵ a coupling that has generated an adaptation of the communicative structures specifically for the maritime transport SSDC.

In 2004 the ETF and ECSA carried out a project to assist shipping companies in eliminating harassment and bullying on board ships and implement effective company policies on equal opportunities throughout the EU Member States. The project was an extension of an initiative by the British social partners, which resulted in the publication of guidelines for shipping companies and a training programme for use by shipboard and shore-side management.¹⁰⁰⁶ This SSDC thus possesses the capacity to build upon national initiatives, indicating possibilities for exploiting the national-international cooperation that has proven to be a strength of the ITF FOC campaign globally. The materials related to this training programme are now available in 15 different languages and highly promoted by both the ECSA and the ETF.¹⁰⁰⁷ This project shows that the implementation of soft law is utterly dependent on the interest of the actors and can be successful only when such interest exists. It is also one

¹⁰⁰² Council Decision 2005/367/EC of 14 April 2005 authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention 185) (2005). Brussels: Council of the European Union (OJ No L 136/2005).

¹⁰⁰³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 34ff.

¹⁰⁰⁴ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 38f.

¹⁰⁰⁵ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 110ff.

¹⁰⁰⁶ See the English version ECSA and ETF 2004. Equality of Opportunity & Diversity in the European Shipping Industry - Eliminating Workplace Harassment & Bullying - Guidelines to Shipping Companies.

¹⁰⁰⁷ See ECSA (2016b) *ECSA Website - Projects - Workplace Bullying & Harassment*: ECSA. Available at: <http://www.ecsa.eu/projects/workplace-bullying-harassment> (Accessed: 25 March 2016), ETF (2016) *ETF Website - Maritime transport - Projects - Disseminating training materials for a harassment and bullying-free work place in shipping*: ETF. Available at: <http://www.etf-europe.org/BullyingAndHarassment.cfm> (Accessed: 25 March 2016).

more indication that the social partners within the EU maritime transport sector produce communication that is framed by social values to a somewhat greater extent than the ESD in general, although the SSDC for maritime transport follows the same binary code.¹⁰⁰⁸ The SSDC must therefore be understood as an organisation making decisions that contribute to the production of communication within the ESD. Furthermore, this organisation has developed communicative structures, in terms of its decision premises, which allow for more socially framed communication than the system at large.

Apart from these topics of direct relevance to maritime working conditions, the social partners also gave a joint statement on duty-free sales on board ships within the EU, as the gains from such sales were considered to be of high importance for the shipowners and therefore to indirectly affect working conditions.¹⁰⁰⁹ A future topic for possible social dialogue action was the establishment of minimum labour standards and the extension of *'port state control to labour standards applied on board all ships calling at European ports regardless of the flag and the nationality of the seafarers.'*¹⁰¹⁰ Such measures would be part of addressing the implementation of the ILO MLC, and the Commission clearly states that the involvement of the social partners in this matter is desirable, as it indicates an agreement between them as a possible solution.¹⁰¹¹ The fact that the Commission sees such an agreement as feasible in this sector is indicative of the credibility of this SSDC and faith from the Commission that future results are possible. This is most likely because this SSDC achieves results and activities with a proper commitment from both management and labour. If that is the case, it is also an indication that this SSDC has managed to set up membership conditions and decision premises that help it to overcome the improbabilities of communication and thus achieve results that have an impact within other structurally coupled systems.¹⁰¹²

The establishment of EU minimum standards, of which the implementation of the ILO MLC can be considered one, is most likely welcomed by the ETF, as their affiliates have sought to enforce equal treatment of seafarers regardless of nationality.

¹⁰⁰⁸ Luhmann, N. (2003) 'Organization', in Bakken, T. & Hernes, T. (eds.) *Autopoietic Organization Theory*. Oslo: Abstrakt & Liber & Copenhagen Business School Press, pp. 31-52, at pp. 45ff.

¹⁰⁰⁹ ECSA and ETF 1997. Duty Free Sales - Resolution of the Joint Committee on Maritime Transport.

¹⁰¹⁰ CEC (2006a) *COM(2006) 275 final Volume II - ANNEX - GREEN PAPER Towards a future Maritime Policy for the Union: A European vision for the oceans and seas*. Brussels: European Commission (COM(2006) 275 final Volume II - ANNEX), p. 19.

¹⁰¹¹ *Ibid.*, p. 19ff.

¹⁰¹² Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff. On the issue of systems of industrial relations generating results that have an effect in other systems, see also Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 121.

The Dutch Seafarers' Federation (FWZ) has tried to enforce equal treatment of non-domiciled seafarers by court order, however without success.¹⁰¹³ With regards to the Community *acquis* on equal treatment this outcome might be considered surprising, since the applied wage schemes ought to have been considered discrimination on grounds of nationality, and thus in breach of the equal treatment principle. It is less surprising, however, in light of the legislation concerning the freedom to provide services in sea transport, where the competence of regulating employment conditions for seafarers is clearly defined as adhering to the flag state.¹⁰¹⁴ This means that if the flag state allows employment of seafarers with contracts based on the nationality of the seafarer rather than the nationality of the flag, such legislation could possibly be challenged based on the principle of equal treatment in the Treaties, if the flag state is a Member State of the EU. However, for the majority of FOC registers established in countries outside of the EU, there is no possibility to challenge the manning regulations, as these registers fall outside the scope of EU law.

The formal opening of the consultation process on the ILO MLC, in accordance with the treaty provisions governing social dialogue, was put forward through a Commission communication in 2006 on the strengthening of maritime labour standards.¹⁰¹⁵ In this communication the Commission stressed the need to make the EU maritime industry more competitive, and by making the seafaring profession more attractive to retain European expertise in the maritime industry. The Commission also pointed out that the ILO MLC could be a good tool with which to level the global playing field and limit the risk of social dumping within the sector.¹⁰¹⁶ As the social partners were negotiating the implementation of the ILO MLC, the Commission launched the social partner consultation process on the maritime exclusion from labour law, as improvements to working conditions and social protections for workers in the maritime industry were considered necessary in order to attract more people to these jobs.¹⁰¹⁷

¹⁰¹³ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 22.

¹⁰¹⁴ See for example Article 3 in *Council Regulation 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)* (1992). Brussels: Council of the European Community (OJ No L 364/1992), where it is clearly stated that regulations governing the manning of the ship are the responsibility of the flag state.

¹⁰¹⁵ CEC (2006b) *COM(2006) 287 final - Communication from the Commission under Article 138(2) of the EC Treaty on the strengthening of maritime labour standards*. Brussels: European Commission (COM(2006) 287 final).

¹⁰¹⁶ *Ibid.*

¹⁰¹⁷ CEC (2007c) *COM(2007) 591 final - Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Reassessing the regulatory social framework for more and better seafaring jobs in the EU (first phase consultation of the social partners at Community level provided for in Article 138(2) of the Treaty)*, Brussels: European Commission (COM(2007) 591 final).

The ECSA and the ETF did respond to the call and informed the Commission of their intent to enter into negotiations in September 2006.¹⁰¹⁸ However, by this time there was already a proposal for a Council Decision¹⁰¹⁹ on authorisation for Member States to ratify the ILO MLC. This proposal, in addition to the high level of involvement of EU institutions in the drafting of the ILO MLC,¹⁰²⁰ indicated a high probability that EU legislation would be put forward to implement the ILO MLC. The shadow of law thus worked to trigger negotiations through the structural coupling¹⁰²¹ between the EU policy-shaping systems and the ESD. The final agreement was concluded in May 2008,¹⁰²² after the adoption of the Council Decision.¹⁰²³ It is likely that the social partners, especially the ECSA, sought to retain some influence over the contents of the implementation, as EU legislation on issues related to the ILO MLC is likely to have a somewhat stronger impact due to the more efficient mechanisms for enforcement within the EU legal system in comparison to the ILO legal system. The outcome of the consultation process on the ILO MLC is found in Directive 2009/13/EC¹⁰²⁴ implementing the framework agreement on the ILO MLC, including amendments to the agreement on the organisation of working time for seafarers, concluded by the ETF and the ECSA. Worth noting in relation to the FOC issue is that the standards and regulations in this framework agreement, as well as the ILO MLC at the global level, enshrine the obligation for Member States to

¹⁰¹⁸ See the preamble, point (4) *Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009).

¹⁰¹⁹ CEC (2006c) *COM(2006) 288 final - Proposal for a Council Decision on authorising Member States to ratify, in the interests of the European Community, the 2006 Consolidated Maritime Labour Convention of the International Labour Organisation*. Brussels: European Commission (COM(2006) 288 final).

¹⁰²⁰ Adascalitei, O. (2014) 'The Maritime Labour Convention 2006 - a Long-Awaited Change in the Maritime Sector', *Procedia - Socia and Behavioral Sciences*, 149, pp. 8-13, at p. 10.

¹⁰²¹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff

¹⁰²² CEC (2008c) *COM(2008) 422 final - Proposal for a Council Directive implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006 and amending Directive 1999/63/EC* (2008). Brussels: European Commission (COM(2008) 422 final), p. 2.

¹⁰²³ The Council Decision was adopted on 7 June 2007. *Council Decision of 7 June 2007 authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation (2007/431/EC)* (2007). Brussels: Council of the European Community (OJ No L 161/2007).

¹⁰²⁴ *Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009).

assure compliance on board ships flying the flag of the respective Member State.¹⁰²⁵ The implemented measures will therefore have little effect on non-EU FOC-registered ships enjoying the right to free movement within the EU, due to the owners' nationality, and thus the FOC issue remains largely unsolved.¹⁰²⁶

The FOC issue is also not addressed in the final developments following the consultation processes on seafarers' working conditions and the amendments of the Directives on the information and consultation of workers.¹⁰²⁷ The Commission had already in 2006 noted the problematic situation that seafarers were excluded from a broad swathe of EU labour law.¹⁰²⁸ In response to the first consultation on this matter, initiated by the Commission in 2007,¹⁰²⁹ the social partners exhibited differing opinions. The ECSA considered the exemptions necessary for industry, while the ETF wanted seafarers to be included in the EU labour law framework.¹⁰³⁰ The ESCA persisted in refusing to negotiate on the possible inclusion of seafarers in the Directives relating to different forms of worker protection including the

¹⁰²⁵ See for example Standard A2.1 and Regulation 2.4 *Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009), where specific reference is made to the obligation of Member States to implement measures applying to ships flying the flag of the Member State in question.

¹⁰²⁶ Even though the implementation of the ILO MLC in EU law likely will generate effects with respect to FOC ships controlled by EU Member States (for example Malta or the French and German international registers), these registers are still proportionately small compared to the fleets registered in Liberia, the Marshall Islands or Panama, which are the top three registers in terms of gross tonnage (see ITF 2014c. Seafarers' Bulletin. ITF, p. 5).

¹⁰²⁷ The Directives concerned are the Employer Insolvency Directive, the European Works Councils Directive, the Framework Directive on information and consultation, the Collective redundancies Directive and the Transfer of Undertakings Directive, see *Directive 2015/1794/EU of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers* (2015). Brussels: Council of the European Community (OJ No L 263/2015). In force as of 8 October 2015, but to be implemented by the Member States at the latest by 10 October 2017; see Articles 8–9 of the Directive.

¹⁰²⁸ CEC (2006a) *COM(2006) 275 final Volume II - ANNEX - GREEN PAPER Towards a future Maritime Policy for the Union: A European vision for the oceans and seas*. Brussels: European Commission (COM(2006) 275 final Volume II - ANNEX), pp. 17ff.

¹⁰²⁹ CEC (2007c) *COM(2007) 591 final - Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Reassessing the regulatory social framework for more and better seafaring jobs in the EU (first phase consultation of the social partners at Community level provided for in Article 138(2) of the Treaty)*, Brussels: European Commission (COM(2007) 591 final).

¹⁰³⁰ CEU (2013) *COM(2013) 798 final - Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC* (2013). Brussels: European Commission (COM(2013) 798 final), p. 5.

information and consultation of workers,¹⁰³¹ but when the Commission presented its proposal for an amending Directive in 2013¹⁰³² the situation changed. Through the communication within the EU policy-shaping systems about the proposed Directive, it became evident that the Commission would succeed in getting the proposal accepted.¹⁰³³ This is probably what shifted the ECSA stance. The ECSA agreed to participate in negotiations on a non-binding compromise agreement concerning the proposed Directive.¹⁰³⁴ In November 2014 a compromise between ETF and ECSA was concluded and several of their proposed changes were included in the Directive adopted in October 2015.¹⁰³⁵ The structural coupling¹⁰³⁶ between the EU policy-shaping systems and the ESD had two effects here. Firstly, the shadow of law spurred

¹⁰³¹ The fact that not a single joint document was produced within the SSDC on the issue of extending EU labour law to seafarers from the 2008 adoption of the framework agreement on the ILO MLC until the compromise agreement was concluded in 2014 would seem to confirm that the social partners were too far apart on their views of the issue. For a full list of the joint documents produced within the SSDC for maritime transport, see CEU (2016) *Website of the European Commission - Employment, Social Affairs & Inclusion - Policies and Activities - Agencies and Partners - Social Dialogue Texts Database*. Brussels: European Commission. Available at: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en&day=&month=&year=§orCode=SECT22&themeCode=&typeCode=&recipientCode=&keyword=&mode=searchSubmit> (Accessed: 2 July 2017).

¹⁰³² CEU (2013) *COM(2013) 798 final - Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC* (2013). Brussels: European Commission (COM(2013) 798 final).

¹⁰³³ The Opinion of the EESC on the 2013 proposal made reference both to the already adopted ILO MLC and to the resolution of the European Parliament, indicating that the adoption of the Directive was highly probable. See *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC'* (2014). Brussels: European economic and Social Committee (OJ No C 226/2014), especially points 4.4–4.5, 5.7 and 5.9.

¹⁰³⁴ One reason mentioned for the negotiations to take place was that the social partners thought that the Commission proposal did not solve some of their main concerns. See ETF and ECSA 2014. Press Release, Social Partners Break Labour Law Deadlock. Brussels: ETF, ECSA.

¹⁰³⁵ When comparing the Commission Proposal from 2013 with the Compromise Agreements between ECSA and ETF as well as with the final Directive, it is evident that the social partners wielded a certain amount of influence over the final Directive, as most of their suggested changes to the 2013 Proposal were included in the final Directive. See *Directive 2015/1794/EU of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers* (2015). Brussels: Council of the European Community (OJ No L 263/2015); CEU (2013) *COM(2013) 798 final - Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC* (2013). Brussels: European Commission (COM(2013) 798 final); ECSA and ETF 2014. Commission Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC - ECSA/ETF Compromise Agreement. Brussels: European Commission.

¹⁰³⁶ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 110ff.

communication and decisions within the ESD bargaining organisation relating to maritime transport. Secondly, the decision of this organisation was recognised as communication by the EU policy-shaping systems and thereafter included in the communication of those systems.

In spite of the inclusion of seafarers within EU labour law relating to different forms of worker protection including information and consultation, and the implementation of the ILO MLC in EU law, setting up a framework of minimum requirements that could affect ships flagged in EU Member States,¹⁰³⁷ the issue of discriminatory working conditions for seafarers on board FOC ships with the right to provide services in the EU remains mostly unresolved. The reason is the inconsistency in EU law on maritime transport, where the freedom to provide services is granted in a flexible manner depending on either the flag of the ship or the nationality of the shipowner or service provider, allowing EU-based companies to register their ships in an FOC register outside of the EU without jeopardising their freedom to provide services within the EU. The regulation of working conditions, meanwhile, is more strictly limited to the principle of the flag state,¹⁰³⁸ which means that EU legislation will only impact ships flagged within the EU.¹⁰³⁹ Any efforts by the ETF to secure further regulation of working conditions for seafarers via its structural coupling with the EU policy-shaping systems are therefore likely to still struggle with the issue of non-EU FOC ships being excluded from such regulations. For seafarers on board non-EU FOC ships who are subject to substandard working conditions, hope thus lies in the ability of the ITF FOC campaign to secure ITF-approved collective agreements on board these ships. The scope for the ITF FOC system to succeed in such communication has to some extent been challenged by the CJEU, primarily in

¹⁰³⁷ See for example Standard A2.1 and Regulation 2.4 *Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009), where specific reference is made to the obligation of Member States to implement measures applying to ships flying the flag of the Member State in question.

¹⁰³⁸ On the flag state principle as a basis for the regulation of employment conditions within maritime transport, see Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 431ff.

¹⁰³⁹ Article 3 of Regulation 3577/92/EEC allows for some exceptions from the flag state principle in favour of the host state principle concerning the manning of ships up to a certain weight involved in specific forms of cabotage. However, this exception is very limited, both in scope and as concerns the possibility for the host state to enforce host state working conditions. The host state may in such circumstances require a certain proportion of EU nationals in the crew, require that the crew be covered by EU social insurance and impose minimum wage rules in force in the country, but apart from that the host state is left to the international minimum standards for working conditions in the sector, such as the STCW and SOLAS Conventions. See CEU (2014) *COM(2014) 232 final - Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)* (2014). Brussels: European Commission (COM(2014) 232 final), p. 9.

the *Viking* case,¹⁰⁴⁰ a challenge that will be discussed below. In order to better understand the work of the SSDC and its potential future development as an organisation within the autopoeitic system of the ESD, I will now move on to focus on the members of this organisation, beginning with the employers' side.

11.3.1 The position of the European Community Shipowners' Association

The ECSA has mainly a political function, working as a lobby organisation towards the EU institutions. In general the ECSA has promoted a liberal free trade approach in maritime affairs, due to the fear that protectionist measures within the EU could lead to counter-actions, mainly from the US. To some extent the ECSA has tried to push for positive measures within the EU, but difficulties within the organisation in formulating a common position have made it difficult for the ECSA to have much impact on EU maritime policy. The main internal disagreement is caused by the Union of Greek Shipowners (UGS), which is highly opposed to the harmonisation of regulations governing maritime affairs. The importance of the Greek fleet within the EU makes it unlikely that the ECSA will find support for its demands in Brussels.¹⁰⁴¹

Nevertheless, the ECSA is fairly active in EU policy-making processes, giving its opinion and promoting key issues of concern. Its input, however, tends to be more focused on business and industry and highlighting the need for a more competitive European fleet than employment conditions, an issue on which it generally remains silent.¹⁰⁴² It is possible to detect a slightly more positive approach toward cooperation with labour than is generally the case for employers' organisations, however, in the higher number of joint statements and projects produced within the SSDC for maritime affairs. The strength of the ITF and the impact that the ITF FOC campaign system has at the global level is well known to the ECSA and is probably an incentive for it to engage in social dialogue. As the ambition of the ECSA is to assure a

¹⁰⁴⁰ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779. The interpretation of freedom of establishment and freedom to provide services as allowing for flexibility in relation to the nationality requirement is further strengthened by the *Fonnskip* case (*Case C-83/13, Fonnskip A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v. Fonnskip A/S* [2014] Court Reports - General ECLI:EU:C:2014:2053 2053.), which will also be discussed in section 11.4 below.

¹⁰⁴¹ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Lustus Förlag AB, pp. 108ff.

¹⁰⁴² The position papers from the ECSA generally confirm this. For example, it is worth noting that the position papers relating to social affairs published on the ECSA website are all joint productions of the ECSA and ETF, whereas the ECSA has published a great number of position papers independently of the ETF on the industry in large. See ECSA (2016a) *ECSA website - Policy and publications - Position papers - Social Affairs*: ECSA. Available at: <http://www.ecsa.eu/policy-and-publications/position-papers/social-affairs> (Accessed: 18 March 2016).

competitive maritime industry at the EU level, it is likely that they also strive to reduce the risk of industrial conflicts involving the EU fleet. The ITF FOC campaign structures that assure communicative success¹⁰⁴³ have thus generated results at the EU level by increasing the commitment to social dialogue from the management side of EU maritime transport. The structural coupling with the ITF FOC system will be further clarified in regards to the position of the ETF. The next section takes up this issue.

11.3.2 The European Transport Workers' Federation's position

The ETF works under the ITF, both politically and as a trade union, more or less as a European branch of the ITF and therefore its position can be described as coherent with the position of the ITF. The main work of the ITF might seem to be the prohibition on FOC registers,¹⁰⁴⁴ but it has also tried to get the EU to implement measures that support the European fleet.¹⁰⁴⁵ This is where the ETF makes its main contribution, as its competence is restricted to issues of importance within Europe and it is therefore not as focused as the ITF on the FOC issue. The ETF has been active in the development of the Community maritime policy, what little there is of it. It has repeatedly contributed to the revision of the Community Guidelines on State aid to maritime transport, proposing different solutions on a wide range of issues within the framework of the guidelines.¹⁰⁴⁶ One important objective for the ETF is the inclusion of seafarers in EU social legislation, as it considers this exclusion to be part of what facilitates the FOC system, and more precisely the employment of

¹⁰⁴³ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

¹⁰⁴⁴ For a further discussion see section 10.4 above.

¹⁰⁴⁵ Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB, pp. 110ff.

¹⁰⁴⁶ For a sample of such contributions, see the following documents: ETF 2002. Position in the Revision of the Community State Aid Guidelines. Brussels: European Transport Workers' Federation; ETF 2003. Comments on the proposed Amendments to the Community State Aid Guidelines (1997). Brussels: European Transport Workers' Federation; ETF 2004. Maritime safety package 2004, Commission's new proposals for safer shipping and cleaner oceans - ETF comments to the preliminary set out in the consultation paper for the industry. Brussels: European Transport Workers' Federation; ETF 2005b. ETF Priorities for Maritime Transport (Meeting with Mr Jacques Barrot, Vice President of the Commission, Commissioner for Transport, Brussels, 5 April 2005). Brussels: European Transport Workers' Federation; ETF 2005a. ETF first contributions on the Future EU Maritime Policy. Brussels: European Transport Workers' Federation; and ETF 2005c. ETF response to the UK Presidency non-paper on maritime employment. European Transport Workers' Federation.

foreign crews, which endangers the continuous development of know-how and competence amongst European seafarers in the shore-based maritime sector.¹⁰⁴⁷

Although the ETF fulfils both a political and a trade unionist function, it tends to have a strong emphasis on trade union issues, not at least due to a history of EU social legislation excluding seafarers. The ETF seems to be disappointed with the general failure to implement EU, IMO and ILO legal instruments and a lack of attention to promoting decent working conditions on board ships. However, national affiliates take action in the light of the ITF European Ferries Policy, also referred to as the Athens Policy, in the effort to achieve common terms of employment, a campaign specifically noticeable in the Baltic region.¹⁰⁴⁸ The Athens Policy was the first attempt by the ITF to develop a strategy for dealing with unfair competition within a specific region. The policy applies where no intergovernmental agreement on cabotage trade exists, and employment opportunities for seafarers within the region are threatened by unfair competition. The strategy can thus be considered as trade union cabotage, as it aims to secure a certain proportion of the positions on board ships trading within a region for seafarers resident in the region.¹⁰⁴⁹ Alongside work on this policy, the European Seafarers' Regional Committee (ESRC) has also addressed the issue of European minimum standards, and has managed to achieve consensus amongst the ITF/ETF affiliates on minimum standards for ferry services, resulted in the European Ferry Framework Agreement (EFFA).¹⁰⁵⁰ In spite of the ETF being engaged in, for example, coordinating activities relating to operative parts of this policy, it is evident that the Athens Policy, as also described by the ITF,¹⁰⁵¹ is a result that stems from the ITF FOC system rather than the ESD for maritime transport. The ETF position on actions to secure ITF-approved collective agreements for vessels sailing EU waters should thus not be mistaken for communication stemming from the SSDC for maritime transport.

Establishing a set of EU minimum standards is undoubtedly a high priority for the ETF, which considers wage differences for seafarers resident in different countries but

¹⁰⁴⁷ ETF 2005c. ETF response to the UK Presidency non-paper on maritime employment. European Transport Workers' Federation, p. 2.

¹⁰⁴⁸ See Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 57ff, who concludes that the Athens Policy is part of what has maintained a relatively high proportion of nationally flagged ships in the Baltic region. See also Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 306f.

¹⁰⁴⁹ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 30.

¹⁰⁵⁰ *Ibid.*, p. 31.

¹⁰⁵¹ The Athens Policy is described in the Annex to ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF.

employed on the same vessel to be contrary to what used to be Article 39 ECT (now Article 45 TFEU).¹⁰⁵² The importance it awards the issue of equal treatment for seafarers in the EU is further stressed in the ETF priorities for maritime transport of 5 April 2005, in which it refers to Commission statements in line with the ETF opinion on this matter.¹⁰⁵³ This objective is also closely linked to the ETF position on the concept of an EU seafarer, in the Community guidelines on state aid to maritime transport. The ETF considers it of utmost importance to identify the EU seafarer as someone resident for tax purposes in a Member State and subject to the labour laws of a Member State. In the opinion of the ETF, a less strict definition would undermine the objective of increasing the employment of EU seafarers in the EU fleet, as state aid can otherwise flow to shipowners employing third-country nationals, who thus can exploit a 'double' cost advantage.¹⁰⁵⁴ To some extent the ETF has been rewarded for its efforts on this issue, as the new Community Guidelines for State aid at least define the concept of a Community seafarer; the guidelines from 1989¹⁰⁵⁵ and 1997¹⁰⁵⁶ contained no such definition. The definition in the new guidelines does not fully meet the requirements of the ETF,¹⁰⁵⁷ but it is a step in that direction, as it now ought to be clear that a Community seafarer is a seafarer resident in a Member State.¹⁰⁵⁸

¹⁰⁵² ETF 2005c. ETF response to the UK Presidency non-paper on maritime employment. European Transport Workers' Federation, p. 3.

¹⁰⁵³ ETF 2005b. ETF Priorities for Maritime Transport (Meeting with Mr Jacques Barrot, Vice President of the Commission, Commissioner for Transport, Brussels, 5 April 2005). Brussels: European Transport Workers' Federation.

¹⁰⁵⁴ See ETF 2002. Position in the Revision of the Community State Aid Guidelines. Brussels: European Transport Workers' Federation, p. 3 and ETF 2003. Comments on the proposed Amendments to the Community State Aid Guidelines (1997). Brussels: European Transport Workers' Federation, pp. 2f.

¹⁰⁵⁵ The proposal was CEC (1989) *SEC (89) 921 final - Guidelines for aid to shipping companies*. Brussels: European Commission (SEC (89) 921 final), which was never published in the Official Journal. Still there seems to have been some relevance awarded to these guidelines, as the EFTA Surveillance Authority reports considering them relevant in relation to the EEA (*EFTA Surveillance Authority Decision No 187/97/COL of 16 July 1997 on the 11th amendment of the Procedural and Substantive Rules in the Field of State Aid* (1997) (OJ 1997 No L 316/0023-0036).).

¹⁰⁵⁶ *Community guidelines on State aid to maritime transport* (1997) (OJ 1997 No C 205/1997).

¹⁰⁵⁷ The ETF said the definition was too broad and disregarded the objective of safeguarding EU maritime know-how and skills. See ETF 2005b. ETF Priorities for Maritime Transport (Meeting with Mr Jacques Barrot, Vice President of the Commission, Commissioner for Transport, Brussels, 5 April 2005). Brussels: European Transport Workers' Federation, pp. 3f.

¹⁰⁵⁸ CEC (2004b) *Commission communication C(2004) 43 - Community guidelines on State aid to maritime transport*. Brussels: European Commission (OJ 2004 No C 13/3), section 3.2, where the definition is 'all seafarers liable to taxation and/or social security contributions in a Member State', and seafarers working on board vessels engaged in scheduled passenger services are also required to be a Community/EEA citizen in order to fall under the definition of a Community seafarer.

The ETF has in other words managed to establish a role as a political actor in the development of EU maritime industry policy. This in combination with the ETF/ITF trade unionist approach of using industrial action makes it likely that they will manage to exert some influence over the future development of employment conditions for seafarers in the EU. The structural coupling¹⁰⁵⁹ between the EU legal system and the ESD has thus been strengthened for the maritime transport sector. Due to the strong link between the ITF FOC campaign and the SSDC for maritime transport, the structural coupling between the global system of industrial relations for maritime transport and the EU legal system has also been strengthened. The structural coupling between the EU legal system and the ITF FOC campaign makes it necessary for the ITF to consider legal developments at the EU level when developing its strategies. It is therefore important to consider the case law from the CJEU in relation to the ITF FOC campaign, as this case law affects not only EU-level industrial relations in maritime transport, but also the global system. In this respect the *Viking*¹⁰⁶⁰ and *Fonnskip*¹⁰⁶¹ cases are important ones, as both concern questions related to the ITF/ETF strategies for assuring decent working conditions for seafarers. They are discussed further in the next section on challenges for the EU maritime sector.

11.4 Challenges in the EU

The European maritime sector faces a number of problems and challenges. The lack of a comprehensive EU regulatory framework relating to employment conditions in

¹⁰⁵⁹ Luhmann, N. (2013b) *Theory of Society Volume 2*. Translated by: Barrett, R. Stanford, California: Stanford University Press, pp. 109ff.

¹⁰⁶⁰ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

¹⁰⁶¹ *Case C-83/13, Fonnskip A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v. Fonnskip A/S* [2014] Court Reports - General ECLI:EU:C:2014:2053 2053.

this sector has been an issue of concern.¹⁰⁶² In spite of improvements regarding the inclusion of seafarers in EU labour law, problems remain due to the inconsistency between the application of labour law and free movement provisions. The flag state principle governs working conditions, while free movement rights for shipowners is based on a flexible framework that permits the use of FOCs by EU shipowners. This regulatory framework has hardly contributed to improving working conditions for seafarers on board ships sailing EU waters, although it has allowed the EU fleet to stay cost-competitive internationally.¹⁰⁶³ The challenge of competition from developing countries and from FOC shipping internationally thus still looms over the EU maritime sector, as does the problem of competition and differing labour standards among Member States.

The *Viking* case¹⁰⁶⁴ provides a very good example of the problems these different labour standards can cause and is of interest not least as regards the possibility for the ITF to uphold the Athens Policy as part of the ITF FOC overall campaign. As a regional policy, the Athens Policy provides possibilities of establishing regional standards that can be used in future negotiations, but owing to the varying standards within the EU this will not be an easy task. In fact, the ESRC dedicated a great deal of time to trying to find an average of conditions acceptable to all affiliates in their efforts to establish the conditions set down in the EFFA agreement.¹⁰⁶⁵ In addition, the *Viking* case created a need to adopt the ITF FOC policy and limited possibilities for transnational coordinated collective action. In order to better understand how this

¹⁰⁶² Due to the recent date of the Directives concerning the implementation of the framework agreement on the ILO MLC (*Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009).) and the amendment of seafarers to legislation relating to information and consultation of workers (*Directive 2015/1794/EU of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers* (2015). Brussels: Council of the European Community (OJ No L 263/2015).), it remains to be seen how much these changes will affect working conditions for seafarers on board ships sailing EU waters. The changes will, however, only apply to ships registered in EU Member States and therefore will do not address the issue of seafarers on non-EU FOC-registered ships providing transport services within the EU.

¹⁰⁶³ The reason for ensuring the right to free movement in relation to maritime transport service to a broad range of legal subjects is undoubtedly an effort to promote the competitiveness of the EU maritime transport sector internationally. This is further confirmed by the CJEU in *Case C-83/13, Fonnship A/S v. Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v. Fonnship A/S* [2014] Court Reports - General ECLI:EU:C:2014:2053 2053, paragraph 33.

¹⁰⁶⁴ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

¹⁰⁶⁵ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk, p. 31.

has come about and its potential implications for the ITF FOC system and the work of the maritime transport SSDC, I think it is relevant to provide a brief discussion of the case:

The situation in the case concerns the ship *Rosella* that was owned by the Finnish company Viking Line and registered under the Finnish flag. *Rosella* operated the route between Tallinn and Helsinki and due to competition from Estonian flagged vessels Viking wished to establish an Estonian branch and reflag *Rosella* to the Estonian register. Since the Finnish Seamen's Union (FSU) considered this in breach of the ITF FOC policy because the genuine link between the beneficial ownership and the flag would be lost, Viking being an essential Finnish company in spite of the establishment of a branch office in Estonia, the FSU contacted the ITF in order to seek support for the bargaining rights of the FSU. As a response the ITF issued a circular recommending the ITF affiliates to respect the ITF FOC policy and the bargaining rights of the FSU in this case. Since the collective agreement between FSU and Viking covering *Rosella* expired the FSU were no longer bound by the Finnish legal obligations of industrial peace. In order to secure the working conditions on board *Rosella* the FSU therefore gave notice on industrial action in case Viking would not agree to renew the agreement or agree to apply Finnish labour standards on board *Rosella*. This led Viking to take court action as they saw the actions taken by FSU and ITF as an infringement of their freedom of establishment and freedom to provide services under EU law.¹⁰⁶⁶

The case thus brought to the fore the question of how to strike a balance between the economic rights of freedom of establishment and freedom to provide services on the one hand, and the social objective of protecting workers through the exercise of the fundamental rights of collective bargaining and industrial action on the other. In this balancing act, the Court took the view that the social objective of protecting workers can constitute an overriding public interest that, in principle, could legitimise restricting the free movement provisions of the Treaty. However, although the Court recognised the right to take industrial action as a fundamental right, it viewed this fundamental right basically as a means to the end of protecting workers. It was not the exercise of the fundamental right per se that the Court thought could justify the restriction of free movement.¹⁰⁶⁷ From this perspective, the place of the industrial action within the proportionality test was not as the aim to be achieved, but rather the means of achieving the aim of protecting workers. Therefore it is perhaps not

¹⁰⁶⁶ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraph 6-23.

¹⁰⁶⁷ *Ibid.* See also Björkholm, M. (2010) *Fri rörlighet i Europa ur ett sjöarbetsrättsligt perspektiv - en analys av sjömannens och redarens grundläggande friheter*. Oslo: Gyldendal Akademisk, pp. 454f or Novitz, T. (2008) 'Resistance to Re-Flagging: a Restricted Right to Strike', *Lloyd's Maritime and Commercial Law Quarterly*, 2008, pp. 266-273, at p. 271.

surprising that the Court also laid down restrictions on the exercise of the right to industrial action, as such restrictions are part of the proportionality requirement.¹⁰⁶⁸ However, the Court also declared that in order to justify the aim of protecting workers, it would be necessary to establish that the jobs or working conditions were under serious threat¹⁰⁶⁹ and with this limited the scope for trade union action aimed at protecting workers more generally. Although the Court clarified that industrial action to prevent social dumping could be justified under Community law,¹⁰⁷⁰ it remains questionable whether the restrictions on the right to industrial action set out by the Court are consistent with ILO law.¹⁰⁷¹ After recent developments in case law from the ECtHR, the *Viking* judgment can be questioned on this point, as restrictions on a fundamental right cannot legitimately be given such proportions as to empty the fundamental right of its contents.¹⁰⁷²

There are two points about the Court's reasoning on this issue that I find especially relevant for the ITF FOC campaign, and the scope for transnationally coordinated industrial action in general. The first point relates to how the Court conducts its assessment of the ITF FOC policy, and the fact that it seems to question whether this policy can actually be considered as constituting a legitimate objective of protecting workers. This assessment is based on the wording of the ITF FOC policy at that time, a wording that could be interpreted as a policy aimed at preventing re-flagging, regardless of whether the new flag state would make working conditions worse or better.¹⁰⁷³ By conducting its assessment of the policy in this way, the Court not only disregarded the facts of maritime industry, where re-flagging is a means of lowering labour costs¹⁰⁷⁴ (the other way around, re-flagging as a means of raising labour costs would hardly be anything but a fictive and theoretical example). The Court also carried out its assessment of the ITF FOC policy based strictly on the wording of said policy, instead of assessing the policy based on its purpose. For a court whose

¹⁰⁶⁸ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraph 87.

¹⁰⁶⁹ *Ibid.*, paragraph 81.

¹⁰⁷⁰ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767, paragraph 103.

¹⁰⁷¹ Novitz, T. (2008) 'Resistance to Re-Flagging: a Restricted Right to Strike', *Lloyd's Maritime and Commercial Law Quarterly*, 2008, pp. 266-273, at pp. 271f.

¹⁰⁷² For a further discussion on this see section 4.4 with subsections and cases of interest from the ECtHR are *Demir and Baykara v. Turkey* (Application no. 34503/97) [2008] and *Enerji Yapı-Yol Sen v. Turkey* (Application no. 68959/01) [2009].

¹⁰⁷³ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

¹⁰⁷⁴ See also Novitz, T. (2008) 'Resistance to Re-Flagging: a Restricted Right to Strike', *Lloyd's Maritime and Commercial Law Quarterly*, 2008, pp. 266-273, p. 272.

doctrinal reasoning is largely based on teleological interpretation, this is rather surprising.

The second point I find of interest relates to the manner in which the Court questioned the proportionality of the coordinated action taken by the ITF and FSU in accordance with the ITF FOC policy. Although the Court does not explicitly state that coordination of actions goes beyond what could be considered necessary, it does stress the fact that jobs or working conditions would have to be under serious threat, and trade unions would have to exhaust other means with fewer repercussions for free movement before initiating industrial action.¹⁰⁷⁵ The reasoning of the Court seems to me to imply that coordinated trade union action such as that at stake in the *Viking* case cannot be considered legitimate if the trade unions involved are somehow obliged to act in a specific manner. Instead, the unions need to have a measure of leeway and the possibility within the national organisation to decide what action to take and whether or not to follow the recommendation that is the base for coordination. If this is the case, I find such reasoning questionable, since it would encroach upon the autonomy of the ITF and its affiliates and their freedom to agree upon and abide by the conditions of membership set out in the ITF Constitution.¹⁰⁷⁶ For the Court to intervene in such issues would be truly acting outside of its mandate. Even though it is possible to legally question trade union decisions that, for example, would exclude or reject members on discriminatory grounds, there are limits on the extent to which it is legally justifiable to intervene in the internal rules of a trade union organisation. Such restrictions on internal rules based on decisions taken within an organisation could hardly be justified, unless the decisions are taken in a manner that contradicts democratic principles and discriminates against certain categories of members.¹⁰⁷⁷

The result of the *Viking* case is therefore that the ETF or ITF and their affiliates have more limited possibilities to coordinate industrial action to protect seafarers on board ships where reflagging in order to lower costs threatens working conditions for the seafarers. The limitations consist partly in that the jobs or working conditions must

¹⁰⁷⁵ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779, paragraphs 81, 84 and 87.

¹⁰⁷⁶ Rule II concerns membership and the obligation for members to act in the interests of the ITF, i.e. follow the recommendations from the ITF. Rule III clarifies that a member acting against the interests of the ITF can be expelled. See ITF 2014b. Constitution of the International Transport Workers' Federation (ITF) as amended by the 43rd ITF Congress, Sofia, Bulgaria, 10 August - 16 August 2014.

¹⁰⁷⁷ In spite of the fact that international law and practise on this issue relate to situations where individuals have brought claims, I find it unlikely that the reasoning would be different in a situation concerning national trade unions as members of an international trade union organisation. For an interesting discussion on this issue, relating to individual members and national trade unions, see Herzfeld Olsson, P. (2003) *Facklig föreningsfrihet som mänsklig rättighet (The workers' freedom of association as a human right)*. Uppsala: Iustus, pp. 514ff.

be under serious threat; partly in that the coordination of actions apparently must be of a more voluntary character; and finally in that industrial actions must be a last resort and used only after exhausting all other avenues. As regards employers' scope for exploiting their freedom of establishment and freedom to provide services, it seems that economic interests are once more favoured over social objectives. In this sense, the means for overcoming the improbability of having communication accepted¹⁰⁷⁸ potentially available to trade union members of bargaining organisations whose decisions make part of the communication within the ESD, and within the ITF FOC system, have been limited.

The international character of the maritime sector inherently presents some challenges for solving problems within the EU with measures taken purely at EU level, as has been pointed out above. As long as this continues to be used as an argument in favour of deregulation and enabling a flexible use of economic rights, problems of poor working conditions are unlikely to find a satisfactory solution. There is a need to find ways to make sure social objectives come higher on the agenda. Whether such a task is achievable for the ESD is, however, questionable, in spite of the structural coupling with the ITF FOC system that has generated a somewhat stronger emphasis on social values within the SSDC for maritime transport than the ESD at large.

Nevertheless, the ESD can learn from the ITF FOC system. The international character of the maritime sector and the strong actions taken by the ITF in the FOC campaign have created a strong sense of solidarity at the international level, expressed through actions at the local level. This solidarity seems to be reinforced by the good results achieved in the process. As competition between regions becomes more and more intense, the dialogue that has been built up between the European social partners faces challenges – challenges that can be met by acting together and using the dialogue and cooperation between management and labour to strengthen the overall interests of the EU maritime sector at the international level. The future of this sectoral social dialogue is, in other words, of importance not only for employment conditions, but also for uniting the EU maritime sector by forging a common strategy at the international level that could more powerfully influence international legislation and strengthening Europe's position vis-à-vis other regions. This might be a lesson that the EU policy-shaping systems have already picked up and thus what has generated the EU activities in the drafting of the ILO MLC. If that is so, the potential for the future development of the ESD might improve due to the structural coupling between the systems. This has been one of the important issues in this chapter. The next section will summarise my conclusions for the chapter as a whole.

¹⁰⁷⁸ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 157ff.

11.5 Summary of conclusions

As concerns maritime transport within the EU and the relationship between the ITF FOC system, the ESD system and the EU policy-shaping systems, this chapter has made several points. First of all, the challenges that the ESD is facing concerning maritime transport are similar to the ones that the ITF FOC system is facing at the global level: an increase in the FOC share, and the consequences of increased deregulation and its promotion of economic interests over working conditions for seafarers. However, the structural coupling that exists between the legal and/or policy-shaping systems and the ESD and the ITF FOC system has somewhat differing effects. This is because the international legal system is not as strong, in terms of both enforcement and in producing results that can limit the means available for the trade union members of the bargaining organisation whose decisions form part of the communication within the industrial relations system to tackle the improbability of having communication accepted.

At the global level, the trade union members have used industrial action to threaten economic interests and thereby secure communicative success for communication that promotes social interests. At the EU level, the prospects for doing so successfully have been limited by the EU policy-shaping systems in at least two ways. The limitations stem firstly from the inconsistency of regulations covering maritime transport, such that access to economic rights is flexible while access to workers' rights is more strictly governed by the flag state principle. Secondly, the CJEU decision in the *Viking* case directly limits the possibilities for coordinated transnational industrial action. This means that the possibility for the ITF FOC system to secure communicative success and thus uphold working conditions according to a social principle of favouring worker interests is somewhat limited within the EU. This could have consequences for the ESD, at least as concerns the SSDC in maritime transport. In short, the ITF FOC system has been freer than the ESD to develop its communicative structures and means to overcome the improbabilities of communication, because of the structural coupling with legal systems that differ in strength.

As have been shown, the SSDC for maritime transport is part of the ESD and should not be confused with the ITF FOC system, in spite of the fact that the ETF has adopted and participated in ITF-coordinated actions. It is clear that the SSDC for maritime transport has the same binary code as the ESD – 'discussable/non-discussable between collective actors' – and as such, negotiations have been conducted mainly under the shadow of law, as an effect of the structural coupling between the ESD and the EU policy-shaping systems. However, it seems as if the SSDC for maritime transport allows for communication that places somewhat stronger emphasis on social interests, compared to the ESD at large. The probable reason is that the ITF FOC system and the ESD are structurally coupled, and that the SSDC

as a bargaining organisation has therefore recognised communication from the ITF FOC and adapted some of its decision premises as a result. In words less influenced by Luhmann I would explain this as the ECSA simply having understood that they face the risk of having their economic interests threatened by the ITF FOC campaign. As a result, the ECSA tries to avoid this risk at the EU level by taking a more active part in the SSDC and adopting a somewhat more positive attitude towards discussing working conditions than employer organisations within the ESD in general.

Methodologically, the analysis in this chapter has used positivistic values to identify and point out some similarities and differences between the ESD and the ITF FOC systems regarding what they are and what results they produce (thus an analysis based on questions 2a and 1a in my methodological model). In addition, an examination based on hermeneutically understood values (questions 2b and 1b in my methodological model) has also been carried out in order to further explain why these two systems have differences and similarities. This part of the analysis has shown that while the hermeneutic values that frame the programming of different function systems are of importance, so too is the strength of various function systems, and the strength of the structural coupling between function systems also plays a significant role for the collective bargaining systems in their adaptation and framing of system programming.

It is thus clear that internal factors are not the only important ones that determine the capacity of a system of industrial relations to produce results that have an impact for individual workers. It is also of the utmost importance to understand the environment of the system, its structural coupling with other function systems and the strength of these systems, in order to be able to say anything about the future potential for a system of industrial relations. In the next chapter I will try to put together all the pieces from this and the preceding chapters, in order to finalise my analysis and answer my research questions.

12 Concluding analysis

12.1 Introduction

The overall ambition of this project has been to develop a deeper understanding of how the ESD functions in relation to the development of EU legislation and policy, with the aim of trying to find a model for a holistic analysis of regulatory systems for the labour market. To achieve this, I have used Luhmann's theory on autopoietic systems to analyse the ESD and 'mirror' it with the ITF FOC campaign to see what lessons could be learned. I have made use of a methodological model¹⁰⁷⁹ to help structure my analysis in two layers. First, I analysed my material based on a positivistic understanding of the concept of values, in order to answer the questions of what the ESD is and what results it produces as an autopoietic system. I then performed a second-layer analysis based on the hermeneutic values I was able to identify in my material, allowing me to explain why the ESD is what it is and why it produces the results it does. This methodological approach has guided me in finding answers to my research questions, which consist of the following questions:

How can the significant differences and similarities between the ESD and the global ITF FOC campaign be understood?

Why is the ESD generally regarded as lacking the capacity needed for producing results that improve working conditions, while the ITF FOC is considered to have such capacity?

In this chapter I will seek to answer my research questions clearly and in detail, based on the theoretical framework and methodological model I have applied in my analysis. I have found that it is fully possible to analyse both the ESD and the ITF FOC systems as autopoietic systems. For any autopoietic system to function, it is important that the system manages to reduce the complexities it needs to deal with. To do so, it applies a binary code, and the binary code can thus be considered the

¹⁰⁷⁹ For a further explanation of this model see section 2.2.3 in this thesis. I will also return to the model below in section 12.8.

foundation of any autopoietic system. I would therefore like to begin my concluding analysis by examining the binary codes for the ESD and the ITF FOC systems.

12.2 Coding of systems of industrial relations

As explained by Rogowski, the binary code for systems of industrial relations may be understood as 'negotiable or non-negotiable between collective actors'.¹⁰⁸⁰ This coding works well for the ITF FOC campaign, where negotiations in the form of both global collective agreements¹⁰⁸¹ and negotiations for specific vessels¹⁰⁸² make up a significant part of the system. In relation to the ESD this binary code is problematic, since negotiations only occur in exceptional cases. Even though several agreements have

¹⁰⁸⁰ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 119.

¹⁰⁸¹ 'Hopes rise after bargaining forum drama', (2003) *Lloyd's List*. Available at: www.lloydslist.com/art/1034683592639, 'New era for global pay talks', (2003) *Lloyd's List*. Available at: www.lloydslist.com/art/1034683088832.

¹⁰⁸² Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 51; Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 71f and ITF 2014c. Seafarers' Bulletin. ITF, p. 4.

been reached,¹⁰⁸³ in the great majority of cases the negotiations for these agreements were entered into only under the threat of the shadow of law,¹⁰⁸⁴ or as a consequence of the Commission requirement to establish SSDCs,¹⁰⁸⁵ or, in the case of voluntary

¹⁰⁸³ See for example ECF-IUF and HOTREC, 1997, Agreement between ECF-IUF and HOTREC, EuroCommerce and Euro-FIET, 1998, Agreement between EuroCommerce and Euro-FIET on the Establishment of a Sectoral Social Dialogue Committee in Commerce; ECF-IUF and CEFS, 1997, Agreement between the CEFS and the ECF-IUF; CoESS and Euro-FIET, 1998, Agreement between the CoESS and Euro-FIET with a view to setting up Sectoral Social Dialogue Committee for the private security sector; APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe and UEPG Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it; *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* (1996): Council of the European Communities (OJ No L 145/1996); *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work* (1998): Council of the European Communities (OJ No L 14/1998); *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999); *Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC* (2009). Brussels: Council of the European Community (OJ No L 124/2009); CEC (1999) *COM(99) 203 final - Proposal for a Council Directive concerning the Framework Agreement on Fixed-term Work concluded by UNICE, CEEP and ETUC (presented by the Commission)*. Brussels: European Commission (COM(99) 203 final). For an overview of the texts produced within the sectoral social dialogue up to and including 2004, see Pochet, P. (2005) 'Sectoral social dialogue? A quantitative analysis', *Transfer*, 11(3), pp. 313-332. A full list of texts produced within the ESD is available on the website of the European Commission.

¹⁰⁸⁴ For more on the shadow of law, see Bercusson, B. (2009b) 'Maastricht: A fundamental change in European labour law', in Bruun, N., Jacobs, A.T.J.M., Veneziani, B., Blanke, T., Vigneau, C., Kollonay-Lehoczky, C., Lörcher, K., Dorssemont, F., Deakin, S. & Passchier, C. (eds.) *Labour Law and Social Europe - Selected writings of Brian Bercusson*. Brussels: ETUI, pp. 89-114, at pp. 107ff. For discussions on some of the cross-industry social dialogue agreements as a result of institutional interdependence, see Falkner, G. (2003) 'The Interprofessional Social Dialogue at European Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate, pp. 11-29; Keller, B. 'Social Dialogues at Sectoral Level', in Keller, B. & Platzer, H.-W. (eds.) *Industrial Relations and European Integration*. London: Ashgate; Ashiagbor, D. (2001) 'EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy'', *European Law Journal*, 7(3), pp. 311-330; Barnard, C. (2002) 'The Social Partners and the Governance Agenda', *European Law Journal*, 8(1), pp. 80-101.

¹⁰⁸⁵ The joint document on the rules of procedure for each SSDC can be considered a form of agreement between the social partners. These types of documents also make up a significant proportion of the texts produced within the sectoral social dialogue. For further discussion of the documents produced within the sectoral social dialogue, see Pochet, P. (2006a) 'A Quantitative Analysis', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 83-109; Degryse, C. and Clauwaert, S. (2012) 'Taking stock of European social dialogue: will it fade away or be reformed?', in Natali, D. & Vanhercke, B. (eds.) *Social developments in the European Union 2011*. Brussels: ETUI and OSE, pp. 131-157.

agreements, under the condition that the text would not be binding.¹⁰⁸⁶ This suggests that the binary code for the ESD is more sensibly defined in terms of ‘discussable or non-discussable between collective actors’.¹⁰⁸⁷ Welz has suggested that the binary code for the ESD should be interpreted as ‘agreeable or not agreeable with regard to the topics listed in Article 153 TFEU’,¹⁰⁸⁸ but I find this unsuitable. The binary code defined by Welz is founded in an external view of the ESD and takes its starting point in how the EU legal system would consider the ESD, rather than how the ESD would identify itself from a system-internal perspective. A further problem with this code is the fact that ESD achievements that fall outside of the scope of the topics listed in Article 153 TFEU would not be considered as part of the ESD system communication, which I find highly odd. An example of such communication is the agreement on health and safety in the hairdressing sector, where the original agreement included self-employed workers who are excluded from the competence of the EU.¹⁰⁸⁹ This is not to say that Article 153 TFEU has no relevance for the ESD and I will discuss this later on, but it should not be considered as integrated in the binary code of the system. The binary code of a system needs to be defined in a manner that includes all of the relevant communication produced by the system. This is not the case with Welz’s proposed code, which has limitations I find unsuitable. A binary code for the ESD of ‘agreeable or not agreeable’ linked to the EU competencies in the field of employment issues would be better replaced by the more open code of ‘discussable or non-discussable between collective actors’.

The first major difference between the ESD and the ITF FOC thus lies in the binary codes of these systems. The divergence between the codes makes it clear that negotiations are a central aspect of the ITF FOC system, whereas in the ESD they are an exception. Although a binary code of ‘discussable or non-discussable’ might be less

¹⁰⁸⁶ Examples of voluntary agreements from the cross-industry social dialogue relate to issues of telework, work-related stress and harassment and violence at work. For more on these agreements, see Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, section 5.1.2. The main exceptions, i.e. agreements produced within the ESD without institutional pressure, are probably APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe and UEPG Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it, and the agreement on health and safety in the hairdressing sector. The latter, however, has been withdrawn from the legislative agenda on an initiative from the Commission, as discussed in Bandasz, K. (2014) 'A framework agreement in the hairdressing sector: the European social dialogue at crossroads', *Transfer*, 20(4), pp. 505-520.

¹⁰⁸⁷ On this definition of the binary code for the ESD, see for example sections 6.5 and 5.3.2 this thesis.

¹⁰⁸⁸ Welz, C. (2008) *The European Social Dialogue under Articles 138 and 139 of the EC Treaty - Actors, Processes, Outcomes. Studies in Employment and Social Policy* The Hague: Kluwer Law International, p. 541.

¹⁰⁸⁹ See further Bandasz, K. (2014) 'A framework agreement in the hairdressing sector: the European social dialogue at crossroads', *Transfer*, 20(4), pp. 505-520.

restrictive in one sense, the effect of this coding is that system communications are less likely to produce agreements based on negotiations, meaning the ESD will be considered less productive than the ITF FOC campaign. The binary code for every system is static and unchangeable. Its function is to make a distinction between what falls within and what falls without the boundaries of the system.¹⁰⁹⁰ Regarding whether a particular piece of communication belongs to the system, the only answers it is set to give are a positivistic 'yes' or 'no'. The code will therefore not provide any answers about why an issue is considered part of the system or not. In order to fill that distinction with understandable content and also explain variances within a system over time, the binary code does not suffice as an explanatory factor. Instead such variability is explained by the programming of the system.¹⁰⁹¹ Therefore, to further explain the differences between the ESD and the ITF FOC campaign I will explore the programming of these two systems.

12.3 Programming for systems of industrial relations

Programs, as already explained, are system-specific structures that can integrate hermeneutic values into the operations of the system and affect what decisions can be made and what results can be achieved. I have found important differences in the programming of the ESD and the ITF FOC campaign systems, which are well illustrated by the way the two systems deal with the issue of pay. The issue of pay is unquestionably part of the ITF FOC system communication, since pay is regulated in the global standard collective agreements, either in relation to an able-bodied seaman (AB) or in the form of Total Crew Cost (TCC) regulations.¹⁰⁹² In contrast, pay, or at least the detailed regulation of pay, seems to a great extent to fall outside of the scope of ESD communications. Nevertheless, the issue of pay is dealt with at least somewhat in the communication of the ESD system, in the form of regulations that

¹⁰⁹⁰ Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 444f.

¹⁰⁹¹ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 226f.

¹⁰⁹² See Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at p. 397 and ITF (2004) *Campaign against flags of convenience and substandard shipping - Annual report 2004*, London: ITF. Available at: www.itfglobal.org, pp. 11 and 16.

aim to prevent pay discrimination for certain categories of workers.¹⁰⁹³ Therefore, it is not the binary code that has excluded this issue from the ESD system communications. Instead it is the way the programming of the system is framed that makes the issue unavailable for the system's communications. I will explain why this is so shortly, but first I would like to point out what consequences this difference has for how the two systems are perceived.

Wage regulation is generally considered a highly important aspect of systems of industrial relations, and therefore a system of industrial relations incapable of regulating pay issues will necessarily be considered less successful than a system capable of doing so. However, wage regulation should not be mistaken for the function of systems of industrial relations. Instead it is a result generated in the economic system, through communications that the economic system picks up from the industrial relations system.¹⁰⁹⁴ The ITF FOC campaign is thus clearly capable of producing communication that will generate effects in the economic system, whereas the ESD seems less likely to do so. The reason is that the systems have quite different programming.

The ESD and the ITF FOC campaign systems have different programming because their programming is framed by different underlying values (hermeneutically understood). For the ESD, those underlying values are geared towards the promotion of economic interests, with a strong focus on increasing the competitiveness of industry. Many examples show how the environment of the ESD has emphasised economic values, generating a need for the ESD to consider those values in order to ensure the success of its communication. One example is the influence of neo-liberal values in the post-Communist states that joined the EU in 2004, which created challenges for the social dialogue.¹⁰⁹⁵ Another is how the commitment to securing competitiveness for industry raised difficulties on the issue of pay during the TAW

¹⁰⁹³ The events surrounding the issue of equal pay during the TAW negotiations are one such example (see section 8.3 in this thesis). Other examples are the fact that the fixed-term and part-time work agreements relate to the issue of pay; see further *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work* (1998): Council of the European Communities (OJ No L 14/1998); *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP* (1999): Council of the European Communities (OJ No L 175/1999).

¹⁰⁹⁴ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 121.

¹⁰⁹⁵ See for example Keune, M. 2008. EU enlargement and social standards: exporting the European Social Model? Brussels: ETUI-REHS, pp. 206f.

negotiations, ultimately causing those negotiations to break down.¹⁰⁹⁶ Further examples can be found in the EU response to the financial crisis, where clauses in MoUs with crisis countries included several forms of infringement of the autonomy of social partners on the issue of pay. In combination with the outcomes of the *Laval*, *Viking* and *Rüffert* cases, this will probably limit possibilities for the ESD to frame its communication in any other way than as a promotion of economic values.¹⁰⁹⁷ Since wage regulation poses a potential threat to industry profits, this makes it an issue that is more or less unavailable for the ESD system to deal with. The same programming makes it difficult for the ESD to promote social objectives, since social objectives generally are perceived to conflict with economic objectives. For example, wages are generally perceived to be an important factor that affects potential profit. Lowering wages is thus a means to increase profit, and vice versa.¹⁰⁹⁸ The inclusion in an MoU of a condition to lower the national minimum wage in Ireland is one clear example of how pay is essentially considered only in terms of its effects on costs and profits for an organisation.¹⁰⁹⁹

The EU competence in social and labour law as defined in Article 153 TFEU is also of relevance in relation to the programming of the ESD. This Article is probably best understood, as a difference minimising program for the ESD applied in order for the system to better be able to assure that its communication will be successful. Since any ESD agreement that the parties to the agreement wish to have implemented in the

¹⁰⁹⁶ This was discussed in section 8.3 and its subsections. For more information on the negotiations see Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262.

¹⁰⁹⁷ For further discussion see sections 9.3.2–9.3.4 and e.g. Koukiadaki, A., Távora, I. and Martínez Lucio, M. (eds.) (2016) *Joint regulation and labour market policy in Europe during the crisis*. Brussels: ETUI; Fischer-Lescano, A. (2014) 'Competencies of the Troika: legal Limitations of the Institutions of the European Union', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81; Veneziani, B. 'Austerity Measures, Democracy and Social Policy in the EU': in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 109-151.

¹⁰⁹⁸ As discussed in chapter 9 on the effects of the financial crisis, the level of remuneration has been seen important for meeting financial objectives. See sections 9.2.1-9.2.3 and for further discussion Fischer-Lescano, A. 'Competencies of the Troika: legal Limitations of the Institutions of the European Union': in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81. The focus on pay as a threat to potential economic profit is also well illustrated in Sampson, H. (2013) 'Globalisation, Labour Market Transformation and Migrant Marginalisation: the Example of Transmigrant Seafarers in Germany', *International Migration & Integration*, 2013(14), pp. 751-765.

¹⁰⁹⁹ CEU, ECB, IMF and Ireland (2010b) *Memorandum of Understanding on Specific Economic Policy Conditionality (Ireland)*, 3 December, 2010. Brussels: European Commission.

form of a directive will need to fall within the scope of Article 153 TFEU in order for the EU policy-shaping systems to be able to adopt the requested legal act, then the ESD will need to shape its communication in a manner that minimises differences in relation to that Article. In other words, if the ESD considered implementation of an agreement through the means of a directive the best method for assuring the desired results, then the agreement will also be framed in line with Article 153 TFEU.¹¹⁰⁰ If such an agreement were to fall outside the scope of Article 153 TFEU, then the ESD is left at its own communicative structures in order to assure efficient implementation and enforcement of the agreement, which will be subject to several difficulties, as I will explain further on.

The programming of the ITF FOC campaign system is quite different. The hermeneutic values framing the programming of this system are geared at promoting social values through focusing on the protection of the most vulnerable workers. This is clearly evident in the various ITF reviews of its own campaign, which ensure that the campaign will target substandard shipping in order to secure minimum standards on all ships.¹¹⁰¹ It is not surprising that a system whose programming is framed by social values should succeed in producing results that are perceived as useful steps towards achieving social objectives, while a system whose programming is framed by economic values is less successful in this respect. The programming of a system also affects the framing of decision premises and membership conditions for organisations within the system.¹¹⁰² I will therefore go on to discuss the organisations that make decisions which contribute to the production of communication within the ESD and the ITF FOC campaign.

12.4 Organisations within systems of industrial relations

I have identified the existence of diverse kinds of organisations that make decisions forming part of the communication within both the ESD and the ITF FOC campaign systems. As an introductory remark, it is worth noting that the complexity

¹¹⁰⁰ Compare with the reasoning in Paterson, J. (2006) 'Reflecting on Reflexive Law', in King, M. & Thornhill, C. (eds.) *Luhmann on Law and Politics: Critical Appraisals and Applications*. London: Hart Publishing, pp. 13-36, at pp. 29f.

¹¹⁰¹ ITF (2005) *A comprehensive review of the ITF FOC Campaign - Oslo to Delhi*, London: International Transport Workers' Federation. Available at: www.itf.org.uk; ITF 2010b. ITF 42nd Congress, Mexico City, 5-12 August 2010. ITF; ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF. For further discussion see sections 9.4 and 9.8 in this thesis.

¹¹⁰² For further discussion see Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348.

created by the various organisations that contribute to the production of communication within these two systems differs to some extent. Whereas the ESD includes a complex and broad spectrum of organisations with diverging decision-making capacities, but whose programming overall is influenced by economic values such as competitiveness and profit, the organisations making decisions as part of the communication within the ITF FOC system are more coherent, with clearly framed decision premises whose programming supports the improvement of working conditions for the worst-off workers. I will now explain this in further detail.

For the ESD it is possible to identify a broad spectrum of organisations that I have called bargaining organisations. Perhaps this term is somewhat misleading, since bargaining may not be the most frequent form of communication within these organisations. They are all organisations, however, which under the right circumstances could produce decisions through bargaining, so I believe bargaining organisations is a reasonable name for them. They include a cross-industry bargaining organisation that has existed at least since the conclusion of the ASP, annexed to the Maastricht Treaty.¹¹⁰³ There is also reason to consider each SSDC established by formal requirement of the Commission¹¹⁰⁴ as a bargaining organisation making decisions that contribute to the production of communication within the ESD; some of these had already existed for a long time in the form of joint committees or informal working parties.¹¹⁰⁵ In addition, the ESD communication encompasses decisions taken by ad hoc multisectoral bargaining organisations, of which the constellation negotiating the framework agreement on the use and handling of crystalline silica is the most obvious example.¹¹⁰⁶ Whether or not such multisectoral bargaining organisations will be established as persistent organisations remains

¹¹⁰³ See Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 158ff and also section 6.5 above.

¹¹⁰⁴ CEC (1998) *Commission Decision of 20 May 1998 on the Establishment of Sectoral Social Dialogue Committees Promoting the Dialogue between the Social Partners at European level*. Brussels: European Commission (OJ No L 225/1998). As of now there are more than 40 established SSDCs and the full list can be found on the webpage of the Commission. See CEU (2016) *Website of the European Commission - Employment, Social Affairs & Inclusion - Policies and Activities - Agencies and Partners - Social Dialogue Texts Database*. Brussels: European Commission. Available at: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en&day=&month=&year=§orCode=SECT22&themeCode=&typeCode=&recipientCode=&keyword=&mode=searchSubmit> (Accessed: 2 July 2017).

¹¹⁰⁵ For more on this see section 5.2.2 in this thesis.

¹¹⁰⁶ APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe and UEPG Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it. See also section 5.3.2 above.

uncertain.¹¹⁰⁷ As has been shown, the potential also exists for more bargaining organisations of different kinds to develop. The collaboration of Polish and British trade unions to organise and bargain for poor workers in the UK construction sector is an indication that under the right conditions, transnational bargaining organisations can develop.¹¹⁰⁸

The members of all the organisations that make decisions forming part of the communication within the ESD are representatives from management and labour organisations, and in this sense management and labour organisations can also be considered. In addition, any member of a European organisation representing management or labour will also have membership in a national organisation representing the same side, implying that the national organisations also may be considered organisations making decisions that form part of the communication within the ESD. This highlights the complexity of the ESD as an autopoietic system: not only does it include a broad spectrum of different organisations, but the members of those organisations have multiple memberships to respect when participating in the production of communication. This situation appears clearly in the difficulties of establishing cross-industry organisations representing management and labour, as well as the problem of identifying mandates for negotiations during the TAW negotiations.¹¹⁰⁹ In order for a bargaining organisation to be capable of making decisions and contribute to the production of communication within the ESD, it requires the kind of clarity about membership conditions and decision premises that could help reduce environmental complexity and stabilise expectations within the organisations.¹¹¹⁰ However, as will be discussed below,¹¹¹¹ such clarity does not exist.

The situation for the ITF FOC campaign is both similar and different. The communication produced by ITF FOC campaign encompasses decisions made by

¹¹⁰⁷ Through their capacity to make decisions about themselves, organisations are also capable of changing themselves and the way they make decisions. See Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 296.

¹¹⁰⁸ Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120.

¹¹⁰⁹ On the establishment of organisations representing management and labour, see Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 49ff as well as 141f and for further discussion also sections 6.3.1-6.3.2 above. On the TAW negotiations see Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 197 and section 8.3 above.

¹¹¹⁰ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

¹¹¹¹ See section 12.4.1.

organisations at both the global and national levels, since the members of the international organisations are also members of national organisations. In this sense it is similar to the ESD, but the ITF FOC campaign is less complicated. The reason is that the ITF FOC is sector-specific. All the organisations that make decisions forming part of the communication within the ITF FOC campaign have close links to the maritime transport sector. The communication produced by ESD, in contrast, covers a broad range of sectors in addition to including decisions made by both cross-industry and multisectoral organisations. Environmental complexity is thus less of a problem for the ITF FOC than for the ESD. This is quite possibly one factor that has contributed to the ITF FOC campaign's success in establishing clearly defined organisations for different kinds of decisions.¹¹¹² The different kinds of decisions produced by organisations contributing to the communication within the ITF FOC campaign include decisions on rules, in the form of collective agreements;¹¹¹³ decisions on enforcement, i.e. whether the rules are applied correctly or not according to the inspection unit;¹¹¹⁴ and decisions on sanctions, mainly in the form of industrial action,¹¹¹⁵ for breaking the rules. These decisions, in other words, stem from three kinds of organisations: one for bargaining, one for control and one for enforcement. These organisations thus work as a system internal support aiding the efficient implementation of the regulatory framework produced through the communication of the system. Since the ESD lack such systemic structures it is to a vast extent left at

¹¹¹² That the industry-specific character of the ITF FOC campaign helped contribute to its success has also been pointed out by Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, p. 122.

¹¹¹³ Before the globally negotiated collective agreement was concluded (see 'Hopes rise after bargaining forum drama', (2003) *Lloyd's List*. Available at: www.lloydslist.com/art/1034683592639 and section 10.7 above), the ITF FOC campaign worked with standard agreements that over time allowed for regional deviations, but were negotiated basically at plant level (see section 10.4 for the historical developments and further discussion in Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 50f and Koch-Baumgarten, S. (1998) 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational trade Union Regulation of Flag-of-Convenience Shipping', *International Review of Social History*, (43), pp. 369-402, at pp. 397f) – that is, for individual vessels. – and as such the local level makes up part of the bargaining organisation within the ITF FOC campaign.

¹¹¹⁴ On the work of the inspection unit, see section 10.5 above and Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 75ff.

¹¹¹⁵ Besides industrial action, the ITF FOC system has also used national court rulings to enforce concluded collective agreements; see Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at pp. 401ff. Whether court action or industrial action, however, the decision to take action is made at the national level, albeit with support from the ITF FOC system in accordance with the negotiating rights defined in the ITF FOC policy. See ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF.

the hands of the structural coupling with the EU policy-shaping systems as a means to secure efficient implementation of the results that the ESD produces. This situation actualises the need for the ESD to adopt the necessary difference minimising programs based on the competences defined in Article 153 TFEU and as such limits the possibilities for the ESD to achieve results going beyond the contents of that Article.

Apart from these differences between the ESD and the ITF FOC systems in terms of organisations there are also similarities between the two systems. For both systems there are organisations representing management and labour at both the global and the national levels, generating complexities of membership. However, the ESD and the ITF FOC deal with these membership complexities in different ways. I would therefore like to discuss further how membership conditions and decision premises for organisations are handled within each system.

12.4.1 Membership and premises for decisions

Members of organisations contributing to the communication produced in the ESD and the ITF FOC systems belong to not one but multiple organisations. This means that members and organisations are faced with a difficult task. Members must consider membership conditions for more than one organisation, and communicate in accordance with both the organisation they are currently operating in and whatever other organisations they may represent in these communications. This situation has implications for both the systems themselves and the organisations making decisions forming part of the system communication, but the ESD and the ITF FOC campaign have not displayed the same capacity to deal with the potential problems it raises.

The situation of multiple memberships creates more difficulties for the ESD than for the ITF FOC campaign. There are several reasons for this. Firstly, the ESD operates according to programs influenced by economic values such as competitiveness and profit. This has consequences for the organisations whose decisions form part of the communication within the ESD. The programming of the whole system influences their decision premises, including their membership conditions. Some organisations may demonstrate the capacity and strength to distinguish their decision premises from the programming of the system, but so far it is questionable whether ESD organisations in general are capable of doing so. What has been found is that European management and labour organisations making decisions that form part of the communication within the ESD tend to have vaguely formulated membership conditions. For example, when the ETUC was established, the apparent main

condition for membership was mere geographical location.¹¹¹⁶ Such vague membership conditions have consequences, especially for organisations representing labour, because they make it difficult to establish decision premises that would allow for a strong and coherent European strategy.¹¹¹⁷ As opposed to conditions that require members to act in accordance with the objectives and goals of the European organisation, vague conditions produce a situation in which the European organisation seeks to encompass the interests of every member. The wish list formulated as the mandate for the TAW negotiations is just one example of this principle.¹¹¹⁸ The result is an inability to set clear and precise strategies for member participation in bargaining organisations.

The goal-oriented decision premises that can be traced for both management and labour organisations at the European level simply do not provide members with enough clarity about what is required of them to remain members of their organisations.¹¹¹⁹ Organisations representing labour generally have a goal-oriented decision premise of protecting workers. Historically, trade unions have formed in order to collectively represent and protect the interests of workers. This intention is clearly expressed as the aim of the ETUC.¹¹²⁰ However, this common aim of unions clearly contrasts with the overall programming of the ESD, creating specific problems for these organisations. Employers' organisations using a goal-oriented decision premise of securing/increasing the competitiveness of industry are operating more in line with the programming of the ESD and run into fewer problems.¹¹²¹ This is

¹¹¹⁶ This has been discussed further in section 6.3.1. For more information see Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, especially chapters 3 and 7.

¹¹¹⁷ On membership conditions, decision premises and decision making capacity, see Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at p. 345. As concerns the importance of a developed EU level strategy it is worth noting that in sectors where such a strategy is more present, there is also a tendency for the SSDC to be more productive. See Pochet, P., Degryse, C. and Dufresne, A. (2006) 'A Typology', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 109-130.

¹¹¹⁸ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at p. 197.

¹¹¹⁹ For more on membership conditions and decision premises see Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348.

¹¹²⁰ ETUC (2016) *ETUC web site - About us - Aims and priorities*. Available at: <https://www.etuc.org/aims-and-priorities> (Accessed: 25 February 2016).

¹¹²¹ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 205.

because the overall programming of the ESD is based on the promotion of economic values, which has tended to steer the ESD bargaining organisations toward goal-oriented decision premises also focused on the promotion of economic values. This means that decisions promoting social interests will be difficult to achieve, as it is highly improbable that the bargaining organisations will accept such communication.

In certain instances, the structural coupling with EU policy-shaping systems, such that the threat of the shadow of law can function as a condition-based decision premise, has allowed ESD bargaining organisations to make decisions more directed towards social values. This has proven true for several framework agreements, where the bargaining organisations have managed to make decisions based on the following simple condition: 'if the shadow of law is present, then the organisation will make a decision on negotiating binding agreements'. The agreements on working time in the transport sectors are good examples.¹¹²² However, as the policy-shaping systems of the EU have adapted their programming to be more in line with the values of the economic system,¹¹²³ the 'shadow of law' decision premise within the bargaining organisations has also changed.¹¹²⁴ The mere existence of the shadow of law is no longer the only condition; the decision premise now also incorporates the condition that the looming law must favour social values: 'if the shadow of a law favouring social issues is present then the organisation will make a decision to negotiate binding agreements'.¹¹²⁵ If this new condition is not obviously present then there is no point for the negotiating organisation in making a decision that will form part of the communication of the ESD, since the policy-shaping system will produce communication that reflects the same hermeneutic economic values that also frame the programming of the ESD. Considering the apparent lack of the shadow of law following the enlargement in 2004 and the financial crisis it seems as if this decision

¹¹²² See section 5.2.3 above and Dufresne, A. (2006) 'The Evolution of Sectoral Industrial Relations Structures in Europe', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 49-82, at pp. 65f. The agreements relating to fixed-term and part-time work are examples of the same thing, even though they have not been discussed in detail in this thesis. For an in-depth study of the fixed-term work agreement see Vigneau, C., Ahlberg, K., Bercusson, B. and Bruun, N. (eds.) (1999) *Fixed-term work in the EU - A European agreement against discrimination and abuse*. Stockholm: The National Institute for Working Life, Arbetslivsinstitutet.

¹¹²³ As discussed in chapter 9 above, the effects of the financial crisis provide a clear example of how this has occurred. For more on the neo-liberal hegemony of the EU see also Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106.

¹¹²⁴ The reason for this is the structural coupling between systems, an issue that I will discuss further in section 12.6 below.

¹¹²⁵ Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at p. 345.

premise has become more of an obstacle than facilitator. Since the decision premise still exists within the ESD the lacking shadow of law will mean that decisions to negotiate will be highly unlikely for the bargaining organisations.

In other words, the organisations making decisions that form part of the communication within the ESD form decision premises in reference to the environmental facts of the system. The reason is that a system seeks to reduce complexities in order to function efficiently, and this requires it to adopt a programming that enables it to be efficient in relation to its environment. If the environment promotes economic values, the system will need to adapt and incorporate those values as well. Otherwise it will not manage to reduce complexities sufficiently. The system thus applies different forms of difference minimising programs in order to assure the continuation of its recursive communication.¹¹²⁶ This implies that the ESD will only be likely to start producing decisions if the policy-shaping systems of the EU adapt their programming to promote social values. This will be the case as long as no other decision premises exist that would allow the trade union members of the ESD negotiating organisations to make decisions that are guaranteed communicative success. In my opinion, this would probably require a capacity for either coordinated industrial action at the EU level or other forms of symbolically generalised communication media.¹¹²⁷ The scope for coordinated industrial action at the EU level has been limited, however, by case law from the CJEU, not least in the *Viking case*, where the programming of the legal system to accord with hermeneutic economic values is evident.¹¹²⁸ Therefore the possibilities of using coordinated industrial action as a symbolically generalised communication medium are slim, and other such media will probably need to be developed.

Whereas the ESD and the organisations making decisions that contribute to the production of communication within this system are characterised by unclear and vague membership conditions and decision premises, within the ITF FOC campaign system the situation is different. The ITF as an organisation that produce decisions forming part of the communication within the ITF FOC system has managed to develop and uphold membership conditions based on loyalty towards its global strategy and objectives. The story of the NUSI's exclusion from the ITF for acting in

¹¹²⁶ Luhmann, N. (1997b) 'Limits of Steering', *Theory, Culture & Society*, 14(1), pp. 41-57.

¹¹²⁷ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 190ff.

¹¹²⁸ As discussed in section 4.4.3, this is the result of a series of CJEU cases, e.g: *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779; *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767.

opposition to that global strategy is a good example.¹¹²⁹ The clarity of membership conditions within the ITF and the fact that the establishment of the system was driven by the value of worker protection have established social values as the basis for the system programming. This in turn has made the hermeneutic values of promoting social interests the basis of goal premises for organisations making decisions on bargaining, control and enforcement within the ITF FOC system, decisions that are also generally geared towards protecting poorer workers. Although the organisations representing management follow a goal premise of promoting industry competitiveness, the effects of this goal premise for the organisations and their decision capacities have been reduced by the development of an overarching condition-based decision premise, namely: 'if worker interests are respected, then conflicts are limited and industry remains more competitive'. This decision premise holds a clear motive for the members of the bargaining organisations and as such manages to stabilise expectations.¹¹³⁰ This condition-based decision premise has developed and persisted over time thanks to the ability of the ITF FOC system to use symbolically generalised communication media in the form of industrial action as a means of challenging economic values and preventing them from gaining influence over the programming of the system.

Furthermore, membership conditions for the organisations representing labour that contribute to the production of communication within the ITF FOC system precisely and clearly specify what they are obliged to accept as members of the international trade union organisation, as well as the conditions for retaining their membership.¹¹³¹ Members who do not abide by these conditions face an imminent risk of losing their membership; so the ITF has succeeded in developing clear and precise decision premises and mandates, allowing for the establishment of an internationally apt strategy to which its national members adhere.¹¹³² These decision premises and

¹¹²⁹ See section 10.4 above, and for further details on the twists and turns in the relationship between the ITF and the NUSI see Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67, at p. 52 or Schelin, J. (1997) *Bekvämlighetsflagg och anställningsförhållanden - En studie av rättsbildningen på sjöarbetsmarknaden*. Uppsala: Iustus Förlag AB, pp. 122f.

¹¹³⁰ See Luhmann, N. (1996) 'Membership and Motives in Social Systems', *Systems Research*, 13(3), pp. 341-348, at pp. 344f.

¹¹³¹ See Rule II in ITF 2014b. Constitution of the International Transport Workers' Federation (ITF) as amended by the 43rd ITF Congress, Sofia, Bulgaria, 10 August - 16 August 2014. For a further discussion see section 10.4 above.

¹¹³² As previously stated, this is illustrated by the exclusion of the NUSI from the ITF. See section 10.4 above.

mandates also establish communicative structures and effective means for linking the global and national levels within the ITF FOC system.¹¹³³

To sum up, the plurality of memberships for the members in the diverse organisations making decisions that in turn form part of the communication within the ESD and the ITF FOC systems does create some problems. However, the example of the ITF FOC system shows that it also creates opportunities, specifically the prospect of linking the global/European and national levels within these organisations. In the next section I will continue by examining this issue for both systems.

12.4.2 Communicative structures linking the international and the national levels

It seems that for an international system of industrial relations to produce useful results at the national level, it is important for the international level to ensure strong communicative structures between the international and national levels. The ESD and ITF FOC systems are dissimilar in this respect, as the membership conditions and decision premises of their organisations differ greatly. The vague and uncertain membership conditions and decision premises that characterise organisations making decisions that contribute to the communication within the ESD have made it difficult to establish anything more than weak communicative structures between its European and national levels. In contrast, conditions specific to the organisations accountable for different forms of decisions that form part of the communication within the ITF FOC system have generated strong links of this kind. I will explain this further.

In the ESD, the links between the European and the national levels seem vague and are mainly based on the fact that members of the EU-level bargaining organisations are also members of national organisations. The weakness of the linkage between the EU and national levels increased after the EU enlargement in 2004, partly due to weak national systems of industrial relations and partly due to a continuous decline in trade union density across the EU.¹¹³⁴ The communicative structures that would allow for a stronger link between the levels are also less developed than in the ITF

¹¹³³ This point will be further developed in the next section, but briefly it relates to the communicative structures within the ITF FOC system whereby globally agreed policies and rules are applied, controlled and enforced at the local level through cooperation between the ITF inspection unit and national trade unions. See sections 10.5–10.7 above for details.

¹¹³⁴ See for example Keune, M. and Pochet, P. (2010) 'Conclusions: trade union structures, the virtual absence of social pacts in the new Member States and the relationship between sheltered and exposed sectors', in Pochet, P., Keune, M. & Natali, D. (eds.) *After the euro and enlargement: social pacts in the EU*. Brussels: ETUI, pp. 395–415; Keune, M. 2008. *EU enlargement and social standards: exporting the European Social Model?* Brussels: ETUI-REHS. For further discussion see section 7.3 of this thesis.

FOC system. It might be possible for the ESD to improve in this regard; examples exist of transnational cooperation between national unions based on the commonly defined interest of protecting vulnerable workers. The collaboration of British and Polish trade unions to organise Polish workers in the UK is one such example.¹¹³⁵ However, the trade union organisations at the European level have not done particularly well in picking up on this in order to establish such communicative structures further.

For the ITF FOC system, on the other hand, a clear organisational structure has also ensured strong and efficient communicative structures between the international and national levels. One important element is the 'control' organisation – the ITF inspection unit – that guarantees local control and a flow of information to both the national and international levels on the implementation of rules.¹¹³⁶ Furthermore, the membership conditions established within the international organisations secure the loyalty of the national organisations towards the internationally agreed-upon strategies. Appointed globally and working locally, the ITF inspectors are an essential link between the different levels of the system.¹¹³⁷ In addition, the decision premises and mandates within the 'enforcement' organisation involve national action based on the internationally agreed-upon policy. The ITF FOC policy on distribution of bargaining rights contributes to this.¹¹³⁸ This further increases the efficiency of the communicative structures linking the international and national levels. Communicative structures and the linkage between European and national levels in the ESD might thus be characterised as underdeveloped, compared to the ITF FOC campaign. It is questionable to what extent the ESD and the organisations contributing to the communication of the ESD will manage to overcome these difficulties.

As pointed out by Lillie, the ITF FOC campaign owes some of its success to the fact that the system has managed to build up fruitful cooperation between trade unions

¹¹³⁵ This has been discussed in section 7.6 above. For more on the inefficient communication between EU and national organisations, see also Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120.

¹¹³⁶ See for example Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at pp. 371f or Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, pp. 71ff. For a further discussion see section 10.5 above.

¹¹³⁷ The exclusion of the Indian union NUSI from the ITF clearly illustrates this. See section 10.4 above.

¹¹³⁸ See ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF. For a further discussion see section 10.2 above.

transnationally within one industry.¹¹³⁹ The ITF FOC campaign has responded to and exploited market mechanisms in that industry, and it is not unlikely such transnational developments could occur in various sectors. This would imply that the sectoral bargaining organisations making decisions that contribute to the communication within the ESD stand a better chance of eventually achieving results that have an impact for workers. It might simply be easier for industry-specific organisations to identify common interests between their management and labour members.¹¹⁴⁰ It seems that by limiting the communication of the system or organisation to one specific sector, environmental complexities can be further reduced.

Further development of the communicative structures within the ESD presupposes that the organisations at the national level are also strong and capable of making decisions. As has been shown, the ESD faces many challenges in this respect. These challenges are not only caused by the weak structures for collective bargaining found in most of the Member States acceding to the EU in 2004, but are also the result of generally declining membership and collective bargaining coverage all across the EU.¹¹⁴¹ Even though I have found that legislative developments, via the structural coupling between the ESD and the EU legal system, could help strengthen collective bargaining at the national level and as such possibly strengthen the national organisations, it is questionable both whether such legal developments are probable and whether they would have an effect in all the Member States. Here I am thinking of the effects of the premature implementation of the TAW Directive in Germany. The implemented legislation allowed for exemptions through collective bargaining, which had the effect of increasing the number of collective agreements concluded and strengthening of collective bargaining structures.¹¹⁴² If this were to be an overarching effect across the EU, then the prospect of EU-level framework agreements allowing for exemptions through collective agreements at the national level could provide a path for further development of the ESD.

¹¹³⁹ Lillie, N. (2006a) *A Global Union for Global Workers - Collective Bargaining and Regulatory Politics in Maritime Shipping*. New York: Routledge, p. 122.

¹¹⁴⁰ For a useful and interesting analysis of diverse factors driving the establishment of SSDCs, including comments on common interests, see Pochet, P., Degryse, C. and Dufresne, A. (2006) 'A Typology', in Dufresne, A., Degryse, C. & Pochet, P. (eds.) *The European Sectoral Social Dialogue: Actors, Developments and Challenges*. Brussels: P.I.E. Peter Lang, pp. 109-130, at pp. 116ff.

¹¹⁴¹ See section 7.3 above.

¹¹⁴² See section 8.6 above, and for further discussion on the German legislation see Ahlberg, K. (2008a) 'Germany: "Premature Implementation" of the Draft Directive in Spite of Resistance in the Council', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 119-138.

Any such development, however, would require ESD bargaining organisations to change their decision premise relating to the shadow of law promoting social objectives. Another basic prerequisite remains that the national organisations must have the capacity to negotiate agreements that have practical coverage, which is not the case in all Member States.¹¹⁴³ Other means for developing the ESD communicative structures will thus be needed. More efficiently formulated decision premises could be one of them. To make this a reality, however, the organisations must actually make decisions on those premises, and one obstacle to them doing so is the difficulties caused by improbabilities of communication. The consequences of the improbabilities of communication and the means that the ESD and the ITF FOC systems have adopted (or not) for overcoming these obstacles will therefore be discussed in the next section.

12.5 Overcoming improbabilities of communication

There are three improbabilities of communication: the improbability of communication reaching the right addressee, the improbability of communication being understood and the improbability of communicative success.¹¹⁴⁴ These improbabilities generate different effects within the ESD and the ITF FOC system, owing to the differing communicative structures of these systems. As concerns the need to ensure that the communication reaches the right addressee, I have found that the ITF FOC system builds upon the global level as the core and has developed relevant communicative structures through control and enforcement organisations that link the global and the local levels. The ITF FOC policy, the structures of the ITF inspection unit, and the distribution of bargaining rights for national trade unions, including the use of industrial action, illustrate this well.¹¹⁴⁵ These structures assure that relevant communication reaches the local level, where the results of the communication also become concrete, and in this manner the improbability is efficiently waived by the system. By contrast, for the ESD I have found that the European level is not the core of the system. It has been added on top of the national level, seeking to produce communication that would satisfy all members of

¹¹⁴³ Challenges to the national collective bargaining organisations are discussed in sections 7.3 and 9.2.1-9.2.3.

¹¹⁴⁴ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 113ff.

¹¹⁴⁵ See ITF 2011. Mexico City Policy - ITF policy on minimum conditions on merchant ships. London: ITF. See also sections 10.4-10.5 above, and for a useful contribution on how the ITF FOC works in practice see Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67.

organisations at the national level. This is clear, for example, from the fact that the mandates for the TAW negotiations were framed as a wish list in order to satisfy all the national member organisations.¹¹⁴⁶ In addition, the structures for disseminating European-level communications to the national level seem underdeveloped. There is a persistent problem of who is the sender of information and who is the receiver, making the improbability of communication reaching the right addressee a significant obstacle.

The systems also differ with regard to the improbability of communication being understood. For the ESD, the vague formulation of its European-level strategy and the unclear conditions of membership within the organisations, with no condition of loyalty towards a European strategy, are fundamental problems. The only proper condition for membership seems to be geographical in nature.¹¹⁴⁷ This problem is particularly pertinent for the trade union side, since the management side is likely to have their interests promoted anyway by the EU policy-shaping systems, whose programming promotes economic values. This again highlights how important it is for the system to adapt internally to its environment in order to assure its autopoiesis.

For the ITF FOC system the situation is different. Through its communicative structures and clearly defined organisations, the ITF FOC system has guaranteed that locally established actors with the required understanding of its global strategy will give system communication a concrete effect. Globally appointed ITF inspectors working locally, and membership conditions that require local loyalty to the global strategy, in combination with the distribution of bargaining rights from the global level to the local level, all contribute to this guarantee.¹¹⁴⁸ As in the ESD, the implications are most important for the trade union side, where the selective attitude of the ITF in deciding which national unions are allowed to become and remain members has ensured that communication in the system will not only be understood

¹¹⁴⁶ See section 8.3 above, and for further information on the mandates for negotiations see Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262; Ahlberg, K. (1999) 'The Negotiations on Fixed-term Work', in Vigneau, C., Ahlberg, K., Bercusson, B. & Bruun, N. (eds.) *Fixed-term work in the EU - A European agreement against discrimination and abuse SALTSA - Joint Programme for Working Life Research in Europe*. Stockholm: National Institute for Working Life, Arbetslivsinstitutet, pp. 13-38.

¹¹⁴⁷ This is discussed in section 6.3.1. For further information on the history and establishment of European organisations representing management and labour see Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, chapters 7 and 3.

¹¹⁴⁸ As explained in e.g. Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67. See sections 10.3–10.5 above for further details.

but also accepted. This leads me to the third improbability of communication, that of communicative success.

In order for a system to make sure its communication is successful, the probability of acceptance of the communication needs to be higher than that of rejection.¹¹⁴⁹ The trade union organisations within the ESD face severe difficulties in this regard, caused by the fact that the overall programming of the system is framed in accordance with economic values, which is due to the need for the ESD to respond to environmental developments in order to reduce complexities. Since economic values have been protected both by the EU legal system, e.g. in the *Viking* case,¹¹⁵⁰ and by the EU policy-shaping system, e.g. in the MoUs with crisis countries,¹¹⁵¹ the ESD has had to adapt its own programming accordingly. Communication from the trade union members in ESD organisations will thus always be resisted, since that communication is framed by social values, which conflict with the values that frame the programming of the system. In contrast, the ITF, and thus the trade union members of the bargaining organisation within the ITF FOC system, have managed to make use of powerful symbolically generalised communication media,¹¹⁵² through which the acceptance of their communication by members representing employers has been assured. The primary example of this symbolically generalised communication media is the use of industrial action involving the cooperation between seafarers and port workers, which offers such a serious threat to the economic interests of employers that their only alternative is to accept the communication of the trade union organisations.¹¹⁵³ Symbolically generalised communication media thus serve to ensure the acceptance of hermeneutic values that otherwise would meet with objections due to the programming of the system or a clash with the values promoted by the system's environment.

The hermeneutic values framing the programming of systems and their environments thus have important effects on the improbabilities of communication for a system and how these improbabilities can be overcome. Protecting workers is a social objective

¹¹⁴⁹ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 113ff.

¹¹⁵⁰ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

¹¹⁵¹ CEU, ECB, IMF and Greece (2010a) *Memorandum of Understanding on Specific Economic Policy Conditionality (Greece), August 6, 2010*. Brussels; IMF, CEU, ECB, IMF and Ireland (2010b) *Memorandum of Understanding on Specific Economic Policy Conditionality (Ireland), 3 December, 2010*. Brussels: European Commission.

¹¹⁵² Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 190ff.

¹¹⁵³ Lillie, N. (2006b) 'Globalisation and Class Analysis: Prospects for Labour Movement Influence in Global Governance', *Industriella Beziebungen*, 13(3), pp. 223-237. See also section 10.6 above.

that is also considered to produce effects in the economic system, in the form of higher costs. Communication about this objective will face resistance and quite likely also rejection from systems whose programming is framed by economic values. The way to overcome such rejection is to frame the communication in a way that makes the promotion of social objectives attractive, even when economic values are prioritized. In other words, the way to overcome the improbabilities of communication is to make use of symbolically generalised communication media.¹¹⁵⁴ This can basically be done in two different ways. The first way is when the industrial relations system is capable of producing alternative communication that poses an even stronger threat to economic values. Industrial actions is one such form of communication, in which the costs and consequences of industrial action increase the possibility that management members of a bargaining organisation will agree to participate in negotiations and accept the conclusion of agreements aiming to protect workers.

However, industrial action is not the only form of symbolically generalised communication media that can allow trade unions to get communication promoting social objectives accepted in bargaining organisations of systems of industrial relations. What is essential for labour organisations and for members representing labour in bargaining organisations is to find ways of formulating communication that make the interests of labour attractive to management. One way is to frame the social objective of improved working conditions as an economic opportunity for industry: for example, as a necessity for retaining qualified employees, thus ensuring competitiveness; or as a means for attracting the right competence for productivity and profit growth. A notable example is the temporary improvements for workers in the former CEE countries that resulted from a labour shortage caused by migration flows.¹¹⁵⁵ There are probably several ways of doing this, but the main point is that

¹¹⁵⁴ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 190ff.

¹¹⁵⁵ See section 7.5 above, and for further information Meardi, G. (2012) 'Union Immobility? Trade Unions and the Freedoms of Movement in the Enlarged EU', *British Journal of Industrial Relations*, 50(1), pp. 99-120. An interesting suggestion, albeit different from what I intend, can be found in Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at pp. 105ff, where transnational wage schemes linked to productivity are suggested as a way to reduce the risk of crises such as the one in 2008. The need to link collective wage bargaining to productivity is also pointed out in Theodoropoulou, S. (2016) 'What solidarity in the Eurozone after the Greek crisis of 2015?', in Vanhercke, B., Natali, D. & Bouget, D. (eds.) *Social policy in the European Union: state of the play 2016*. Brussels: ETUI and OSE, pp. 33-60. In relation to the ESD, I think this might pose opportunities for positive developments if such wage schemes involve mechanisms that will promote collective bargaining as the method for implementing and making those schemes concrete. My point here, however, is to flip the coin completely and seek to produce communication that will make the improvement of working conditions a necessity to retain productivity and ensure future profit.

members representing unions in ESD organisations need to formulate their communication in a way that presupposes the values promoted by the economic system. In other words, they need to use communication that clearly shows the promotion of social values as a necessity in attaining economic objectives such as increased competitiveness and profits.

A point of comparison is how the issue of gender equality found its way onto the agenda of the legislator and the collective bargaining system in Sweden. The promotion of industry growth generated an increased need for labour, bringing women into the workforce in increasing numbers. It then became impossible for both the legal system and the system of industrial relations to reject the promotion of equal treatment, since the costs of doing so were likely to be higher than the costs of promoting equal treatment.¹¹⁵⁶ Equally, in relation to climate change, the previously more socially framed objectives of environmental protection have recently been transposed and reframed in economic terms as business opportunities, with the potential to generate profits instead of costs. This shift in the climate change discourse has been seen as a prerequisite for the conclusion of the Paris Agreement.¹¹⁵⁷

By using this form of symbolically generalised communication media, the trade union members of bargaining organisations can circumvent the problematic situation of having their justification of social values rejected and instead communicate in a manner that eliminates objections to these values. It might even be possible to conclude that socially framed objectives cannot actually be considered values in the ESD, or maybe even in any function system operating under the neo-liberal hegemony. Perhaps only economic values can be considered as values, since those are the values that the communication of the function systems of the EU accepts without objection.¹¹⁵⁸ To reduce complexities, it is important that systems can limit the values dealt with in their communication to the values accepted in their environment. The importance of which values are considered to exist within different function systems – how these can aid or hinder an international system of industrial relations in producing results that improve working conditions – is thus closely intertwined with the concept of structural coupling, which is the topic of the next section.

¹¹⁵⁶ For a discussion of the developments concerning the regulation of equal treatment in Sweden, albeit from a gender perspective, see Schömer, E. (1999) *Konstruktion av genus i rätten och i samhället*. Uppsala: Iustus Förlag, pp. 68ff.

¹¹⁵⁷ This is briefly commented upon in Bodle, R., Donat, L. and Duwe, M. (2016) 'The Paris Agreement: Analysis, Assessment and Outlook', *Carbon & Climate Law Review*, 2016(1), pp. 5-22, at pp. 11f.

¹¹⁵⁸ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, p. 205.

12.6 Structural coupling between systems

Following Rogowski, I think it is important to consider the economic function system as structurally coupled with industrial relations,¹¹⁵⁹ since economic developments in society tend to have repercussions on which issues industrial relations need to address. In addition, the results produced within systems of industrial relations can generate effects within the economic system. However, the economic system is not the only system for which structural coupling with systems of industrial relations exist; also the political and legal systems are structurally coupled in various ways with systems of industrial relations. This highlights the need for a contextual approach when studying the ESD as a function system, since important exchanges with other systems would otherwise be neglected. It is impossible to understand a system without understanding the environment within which it exists. The ambition of this study has been to provide such an approach, in order to shed further light on the differences and similarities between the environments within which the ESD and the ITF FOC systems operate. I will now try to elaborate on how structural couplings affect the ESD and the ITF FOC systems.

The general picture for the ESD is one of a strong structural coupling with the EU policy-shaping systems. The importance of the shadow of law is one clear example,¹¹⁶⁰ not least when considering how this has had increased effect after the introduction of qualified majority voting in order to become more and more weakened as decision premise in line with decreased potential for legislation due to changes in the political landscape following enlargements and the financial crisis. Another example of the strong structural coupling is the advice from the Commission Legal Services on the issue of pay and its consequences for the TAW negotiations.¹¹⁶¹ The political and legal systems of the EU are strong and productive, at least in comparison with the global political and legal systems structurally coupled to the ITF FOC system.¹¹⁶² Therefore, the structural couplings with these systems also generate more prominent

¹¹⁵⁹ Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p 121.

¹¹⁶⁰ Dølvik, J. E. (1999) *An Emerging Island? - ETUC, Social Dialogue and the Europeanisation of the Trade Unions in the 1990s*. Brussels: ETUI, pp. 165ff. For further discussion see section 6.5 above.

¹¹⁶¹ Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, at pp. 209f. For further discussion see section 8.3.3.

¹¹⁶² The basic reason is that the global legal system leaves concrete regulations up to the national legal systems: international maritime law more or less provides a framework, and control occurs at the national level. See section 10.2.

effects for the ESD, which to a great extent picks up their communications as programming factors, with Article 153 TFEU working as a difference minimising program for the ESD and the shadow of law as a condition based decision premise for bargaining organisations that make decisions contributing to the communication of the ESD. This situation limits the possibilities for the production of meaningful communication within the ESD. Thus instead of making use of the structural coupling with the policy-shaping systems, especially the legal system, the ESD perceives communication from these systems as hindrances. Although the economic system is also structurally coupled with the ESD, this coupling is less evident, because the policy-shaping systems of the EU are largely programmed in accordance with the values promoted by the economic system. Again, I think it is relevant to highlight the examples of the *Laval*, *Viking* and *Rüffert* cases,¹¹⁶³ which favour centralised collective bargaining as generating lower costs for employers, whereas the MoUs for some of the crisis countries favour decentralised collective bargaining as a means to lower costs.¹¹⁶⁴ Therefore most of the effects for the ESD caused by structural coupling with other function systems seem to be produced by the policy-shaping systems of the EU.

With respect to the ITF FOC system, the global policy-shaping systems are weaker than the EU systems. The EU legal system, for instance, is highly developed in terms of economic and fiscal regulations compared to the global level, where such legislation comes with no enforcement mechanisms. This has generated a situation in which the structural couplings between the ITF FOC system and the global policy-shaping systems are less influential than is the case for the ESD. Instead, the ITF FOC system has developed structures that make use of national legal systems in its efforts to secure communicative success. The methods of industrial action and seeking acceptance for its communication through court actions are clear examples of how the ITF FOC system uses its structural coupling with national legal systems. This is seen clearly in use of court actions to challenge employers' efforts to circumvent ITF collective agreements through the use of double bookkeeping.¹¹⁶⁵

¹¹⁶³ *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767; *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779; *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989.

¹¹⁶⁴ CEU, ECB, IMF and Greece (2010a) *Memorandum of Understanding on Specific Economic Policy Conditionality (Greece)*, August 6, 2010. Brussels; IMF, CEU, ECB, IMF and Ireland (2010b) *Memorandum of Understanding on Specific Economic Policy Conditionality (Ireland)*, 3 December, 2010. Brussels: European Commission. See sections 9.2.1-9.2.3 above for further discussion.

¹¹⁶⁵ For a more detailed discussion of the double bookkeeping system and the court actions brought by the US unions, see Northrup, H. R. and Scrase, P. B. (1995) 'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995', *Transportation Law Journal*, 1995-1996(23), pp. 369-423, at pp. 401ff.

The system most strongly coupled with the ITF FOC system is the economic system, which generates plenty of communication with results in the ITF FOC system. Historical developments, whereby a constant increase in the use of FOCs has generated responses within the ITF FOC system, show this clearly.¹¹⁶⁶ Because the ITF FOC system is capable of challenging economic values and producing its own communication that generates results in the economic system, the structural coupling between these systems is more balanced than the coupling between the ESD and the EU policy-shaping systems. Briefly, the main difference between the ESD and the ITF FOC system in this connection is that the structural coupling between the industrial relations system and systems in the environment is stronger for the ESD, but more efficiently exploited by the ITF FOC system.

The ITF FOC system has furthermore been able to deploy industrial action as an efficient symbolically generalised communication medium¹¹⁶⁷ to exploit its structural coupling with the economic system and ensure acceptance for communication promoting workers' interests. Within the EU, the legal system, through the case law developed on coordinated transnational industrial action,¹¹⁶⁸ has undermined the possibilities for trade union members of ESD bargaining organisations to make use of this form of communication. Even though this case law also produces effects for the ITF FOC system, these effects are more limited due to its global scope. The difference between the two systems of industrial relations points up how important it is for such systems to have access to symbolically generalised communication media, capable of either challenging the values promoted by the economic system or ensuring that the protection of workers will be perceived as a means for promoting those values. The possibilities to use efficient symbolically generalised communication media are undermined when not only the economic system but also the policy-shaping systems place economic interests over workers' interests.

The effects of favouring economic over social interests may be viewed as a consequence of globalisation, which has produced a kind of 'liquedification' of legal systems and employment relations. The privileging of economic interests changes

¹¹⁶⁶ For a useful overview of the history, see Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67. For further discussion see section 10.3 above, and for a useful illustration it is also worth reading Sampson, H. (2013) 'Globalisation, Labour Market Transformation and Migrant Marginalisation: the Example of Transmigrant Seafarers in Germany', *International Migration & Integration*, 2013(14), pp. 751-765.

¹¹⁶⁷ Luhmann, N. (2013a) *Theory of Society Volume 1*. Translated by: Barrett, R. Stanford: Stanford University Press, pp. 190ff.

¹¹⁶⁸ *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779; *Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] 2007 ECLI:EU:C:2007:809 I-11767; *Case C-346/06 Dirk Rüffert v. Land Niedersachsen* [2008] 2008 ECLI:EU:C:2008:189 I-1989. For further discussion see section 4.4.3 above.

labour laws so as to shift the power balance between employers and workers further in favour of employers.¹¹⁶⁹ This makes the structural coupling between systems of industrial relations and legal systems even more important. Where the legal system is strong and favours economic interests, the structural coupling will to a higher degree activate the inherent conflict between management and labour in the industrial relations system by further undermining the possibilities for the labour members of the bargaining organisations to influence the communications produced by the system. In such a case – i.e. the case of the EU and the ESD – it is not unlikely that effects generated in the industrial relations system through the structural coupling with the legal system will cause the industrial relations system to transform into a conflict system with few possibilities for resolution.¹¹⁷⁰ The conflict between what is in the best interest of a competitive industry and what is in the best interest of workers will be heightened. Since the best interest of industry is generally perceived to be deregulation and this is the interest favoured by the legal system, there are few chances for the conflict system to achieve any communication that promotes workers' interests.¹¹⁷¹ If we compare this to the global level, where the legal system is weak, or at least less developed with weak enforcement mechanisms, the 'liquedification' of the legal system will produce less effect for the global system of industrial relations via their structural coupling. It thus becomes less challenging for the global system of industrial relations to stay focused on poorer workers, since the legal system is not twisting the system towards the interests of employers in the same manner as the stronger EU legal system.

As has been discussed above, the values framing the programming of function systems can be of differing character. However, it seems that economic values are prominent in such programming, which leads me to the idea that differences might exist not only in the strength of structural coupling between systems, but in the overall strength of different function systems. Further factors relating to the environment of systems thus need to be taken into account. I will elaborate in the next section.

¹¹⁶⁹ Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer, briefly discussed on pp. 15ff and further on pp. 271ff.

¹¹⁷⁰ Luhmann refers to conflicts as social systems where communication is met with non-acceptance or in other words rejection; see Luhmann, N. (1995) *Social Systems*. Translated by: Bednarz, J.J.w.B., Dirk. Stanford, California: Stanford University Press, pp. 388ff.

¹¹⁷¹ Any chance of joint decision-making will be eroded, and the system will instead simply maintain a conflictual communication. This is a development that is the complete opposite of the possibility suggested by Rogowski in viewing systems of industrial relations as conflict systems: Rogowski, R. (2000) 'Industrial Relations as a Social System', *Industrielle Beziehungen*, 7(1), pp. 97-126, at p. 111.

12.7 The hierarchy between function systems

These findings seem to imply that function systems differ in their strength and capacity to produce results with effects in other systems. In the EU context, it seems as if the economic system has achieved a role in which the values it promotes also influence the programming of the political, legal and industrial relations systems. For example, the measures taken in response to the 2008 financial crisis clearly indicate that the EU political system is programmed in accordance with economic values. The contents of the resulting MoUs with Greece and Ireland further support that notion.¹¹⁷² Likewise, the reasoning of the CJEU in the *Viking* case, where the social objectives of the ITF FOC policy were neglected in favour of a literal interpretation of this policy, creating a situation in which economic values are favoured over social values, is clear evidence that the legal system is also programmed in accordance with economic values.¹¹⁷³

In examining the effects of the structural coupling between systems, I have found that the EU political system can be strong enough to steer its system programming towards other values than those promoted by the economic system. One example is the events leading up to the inclusion of the ASP in the Maastricht Treaty, which to a large extent could be achieved due to political pressure for further integration within the field of social policy.¹¹⁷⁴ The legal system seems less apt to do the same, and is also sensitive to the results of the political system. The ESD is a less developed system and as such weaker in terms of its ability to discard results from the other systems. This means that the ESD is even more inclined to adapt its systemic programming to accord with the values included in the programming of the legal, political and economic systems. The programming of the different systems in accordance with economic values generates a situation where the selections of the system will be made in a manner that secures protection for the economic system. Even in situations when

¹¹⁷² For further discussions, see for example Fischer-Lescano, A. (2014) 'Competencies of the Troika: legal Limitations of the Institutions of the European Union', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 55-81, at pp. 72ff. For a discussion on the problems this has generated, see Deakin, S. 'Social Policy, Economic Governance and EMU: Alternatives to Austerity': Hart Publishing Ltd., in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at pp. 93ff. See also sections 9.2.1-9.2.3 above.

¹¹⁷³ See section 11.4 above and *Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [2007] 2007 ECLI:EU:C:2007:772 I-10779.

¹¹⁷⁴ See sections 6.4-6.5 above and also Didry, C. and Mias, A. (2005) *Le Moment Delors - Les Syndicats au cœur de l'Europe Social*. Brussels: P.I.E. Peter Lang, pp. 93ff and 253ff as well as Keller, B. and Sörries, B. (1999) 'The new European social dialogue: old wine in new bottles?', *Journal of European Social Policy*, 9(2), pp. 111-125, at p. 113.

the economic system is on the verge of collapsing the other systems will make selections that protect it from doing so, which was exactly what happened during the financial crisis when the political system took actions that generated results in the economic system saving it from crashing.¹¹⁷⁵ In other words even when the economic system seem to be in a weak position it is still the system whose values are protected by the other function systems. Thus I consider there to be a sort of system hierarchy, with the economic system at the top, followed by the political system, then the legal system, and finally the ESD at the bottom. The environment of the ITF FOC system is somewhat different, with a less clear hierarchy between systems. Here, the economic system, the legal and political systems and the ITF FOC seem to be balanced in strength, with structural couplings that make results from the various systems generate effects in the others more equally. I will try to explain this a bit further.

What emerges from the material overall is that within the EU there is a limit on the extent to which social values can be protected and/or promoted. This limit is set to protect economic interests. When social and economic values clash, the economic values will prevail and be protected from infringement.¹¹⁷⁶ The question is how this has been made possible. The answer is that there is nothing surprising about it. In spite of the social objectives of the Community that were stated in the original Treaties, the Community has always been about economic liberalisation and trade. These were considered the means that would tie the Member States closer together and facilitate both economic growth and peace. At the outset the Community was viewed as a peace project, but the main aim of the project was to ensure that countries that had suffered financially during World War II would be aided in their post-war economic recovery.¹¹⁷⁷ This was motivated as a means to keep the peace, but the main aim and means for achieving it focused on economic values.

This can be compared to other objectives of the Community in the social field: objectives that have been framed as social, but in fact are strongly grounded in economic values. Consider the principle of equal pay for women and men, a principle that was included in the treaties from the outset and painted as a social objective of the Community to promote gender equality. However, the reason this principle was included in the Treaty was that France feared unfair competition from low-cost

¹¹⁷⁵ The bailing out of banks and the following financial reforms initiated by the EU are examples of this. For a brief comment see Barnard, C. (2012) 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective', *Industrial Law Journal*, 41(1), pp. 98-114, at p. 99.

¹¹⁷⁶ As has been discussed several times, inconsistency as to what level of collective bargaining should be favoured, where CJEU case law favours centralised collective bargaining and the EU policy-shaping system favours decentralisation to promote employer interests through lowering costs, highlight the privileging of economic values over social ones.

¹¹⁷⁷ See for example Bercusson, B. (2009a) *European Labour Law*. second edn. Cambridge: Cambridge University Press, pp. 103ff.

female workers in other Member States.¹¹⁷⁸ The objective was initially of an economic, not a social character. This is not to say that the social objectives of the Community have been a mask used to legitimise economic liberalisation. That would be a highly conspiratorial claim. However, the assumption that the EU is a project with social objectives is debatable. Promoting social objectives becomes increasingly more difficult as the EU grows, because the differences in welfare systems are increasing among the various Member States and deregulation alone cannot achieve social policy results. To achieve changes in social policy and work for social objectives requires financial contributions. In comparison with economic interests and trade, where deregulation will suffice, it is thus much more complicated to seek changes in social policy.

The fact that social objectives have become even less visible in the Treaties is therefore no surprise. The free market project of the Community developed within the realm of neo-liberal ideology and will remain a neo-liberal project in which economic and/or financial rationality are the normative values that will guide future development.¹¹⁷⁹ Political shifts may temporarily generate a larger scope for social values in the programming of the political system,¹¹⁸⁰ but it seems as if economic values are likely to remain the prevailing ones. The focus on economic interests and trade has further generated a situation in which the economic system of the EU has become the increasingly dominant system, and influences the other function systems of the EU in the sense that the programming of these systems is based on economic system values. The legal system of the EU may have the binary code of 'legal or non-legal', but its programming drives communication from this system to focus on how best to protect economic interests. The same goes for the ESD, which has the binary code 'discussable or non-discussable between collective actors', but is programmed to ensure industry remains competitive. The structural coupling between the economic system and the other function systems of the EU thus has the consequence that the economic system produces irritations for other systems, guiding them towards economic values, while irritations to the economic system produced by other systems only feed/strengthen it further. A hierarchy of the function systems exists within the EU, with the economic system at the top.

¹¹⁷⁸ The economic motivation for including the article on equal pay is mentioned in several introductory texts on EU law. See for example Bernitz, U. and Kjellgren, A. (2014) *Europarättens grunder*. Stockholm: Norstedts Juridik, p. 279.

¹¹⁷⁹ Again I would like to point out the measures taken in response to the financial crisis as an example illustrating this clearly. See section 9.2.1-9.2.3 and also Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106.

¹¹⁸⁰ The most notable examples discussed in this study are the political shifts during the Delors era and the post-Thatcher period as discussed in sections 6.4-6.5 above.

Throughout the history of the ESD, some major steps towards a stronger system with the potential capacity to add value for individual workers can be detected in periods where the EU political system has been less influenced by the values of the economic system and more geared towards social issues.¹¹⁸¹ It thus seems that it is chiefly the political system of the EU that may manage to resist the influence of the economic system, and it is therefore from the political system that a change will have to come. This is because the legal system and the ESD are both programmed in accordance with the economic system, and they will only be able to strengthen the social objectives of the EU if the economic system is challenged by the political system for top position. In order for the social objectives of the EU not to fall into oblivion, the policy shapers of the EU need to start directing attention towards social rather than economic issues. If they do not, the EU stands only a slim chance of realising social objectives in any deep way.

The strength of the global economic system vis-à-vis the ITF FOC system is evident as well, but the latter system has access to other tools to ensure its communicative success and provide a counterbalance. One important factor is that the ITF FOC system is able to use industrial action to push for the acceptance of its communication.¹¹⁸² Since industrial action produces costs within the economic system, the economic system is also more inclined to recognise the communication of the ITF FOC system as meaningful communication and accept it instead of rejecting it. This means that instead of the ITF FOC system becoming programmed in accordance with the values of the economic system, it manages to uphold a programming more focused on the protection of vulnerable workers through the use of symbolically generalised communication media. The collective bargaining organisation making decisions that form part of the communication within the economic system¹¹⁸³ can thus make decisions on the premise 'if costs are to be minimised then workers' rights need to be respected', and the ITF FOC can continue working in accordance with its program of 'protecting workers' interests'.

The strength of the ITF FOC system in terms of producing irritations for the economic system can be compared to the situation of the ESD during the TAW negotiations, where the answer given by the Commission Legal Service to the question posed by the social partners included the statement that the social partners

¹¹⁸¹ This was the case during the Delors era and the post-Thatcher period. See sections 6.4-6.5 above.

¹¹⁸² As has been shown, the use of industrial action has been an important tool for the ITF in conducting the FOC campaign, see section 10.4 above. For a brief and useful discussion on the development of the ITF FOC campaign, see Lillie, N. (2004) 'Global Collective Bargaining on Flag of Convenience Shipping', *British Journal of Industrial Relations*, 42(1), pp. 47-67.

¹¹⁸³ Organisations can 'exist within' several function systems at the same time in the sense that an organisation produces various forms of decisions that contribute to the production of communication within differing function systems.

could not mention pay in their agreement – in spite of the social partners never having asked this.¹¹⁸⁴ This is a clear indication of how the legal system is programmed in accordance with the values of the economic system, and thus produces irritations for the ESD, which minimise the chance that the ESD could produce any sort of irritations with perceived negative effects for the economic system. Meanwhile, the ITF FOC campaign successfully combines activities across sectors in order to achieve communicative success and recognition of its decisions. Here I am thinking of the cooperation between port workers and seafarers, where port workers support and effectuate the blockading of ships for the benefit of seafarers.¹¹⁸⁵ The ESD could use this kind of strategy, perhaps by involving transport workers in blockading transport to and from different facilities across the EU, but this seems not to be on the agenda. Since this could be a way to counterbalance the economic values framing the programming of the ESD and the political system, the question is whether such a strategy might make it onto the agenda for European trade unions? This project is not designed to answer this question, but it could be an interesting question for future research.

For the ESD to become a system of collective bargaining with the capacity to produce results that can improve working conditions, it will be necessary for the programming of the different function systems of the EU, including the ESD itself, to develop and shift their programming towards social rather than economic values. It is unlikely, however, that the economic system would open the door to this, at least as long as no challenge comes from the political system, and it is therefore unlikely that the ESD will ever develop into anything more than what it is today: a crutch for the economic system and no more. The ESD stands a slim chance, if any, of ever becoming anything but a façade of a system of industrial relations within the illusion that is the European social model.

The fact that the legal and political systems at EU level are stronger than the global political and legal systems raises further issues. One effect is that the global political and legal systems are not as capable of protecting the interests of the economic system as their EU-level counterparts. This also make it more feasible for a global system of industrial relations to produce communication that can generate results within the economic system, since the legal and political constraints for communicative structures within the industrial relations system are not as stringent as they are at the

¹¹⁸⁴ See section 8.3 above and also Ahlberg, K. (2008c) 'A Story of Failure - But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive', in Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vigneau, C. & Zappalà, L. (eds.) *Transnational Labour Regulation - A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang S.A., pp. 191-262, p. 209.

¹¹⁸⁵ For further discussion see section 10.6 above and also Lillie, N. (2006b) 'Globalisation and Class Analysis: Prospects for Labour Movement Influence in Global Governance', *Industriella Beziehungen*, 13(3), pp. 223-237.

EU level. With stronger political and legal systems programmed to protect the values promoted by the economic system, the ESD stands less chance of producing communication that will have effects within the economic system. Since such communications seem to be the most efficient way of strengthening the promotion of social values within the system of industrial relations, the ESD is thus to some extent in the hands of at least the political system, as this system seems to be the only system strong enough to counterbalance the values promoted by the economic system. The other option would be for the trade union members of the bargaining organisations within the ESD to find other means than industrial action to use as symbolically generalised communication media that would allow them to promote social values within a system where economic values are the accepted ones.

The importance of hermeneutic values as a factor for explaining why these systems are what they are, and why they produce or fail to produce the results they do, ought by now to be evident for the reader. I would therefore like to move on to a brief discussion of my methodological model, where different conceptions of values play an important part.

12.8 The usefulness of the methodological model I have applied

Throughout my analysis I have applied the idea of a holistic approach, seeking to answer not only what the ESD is and what results it produces, but also why this is so. The model developed to underpin this holistic approach has four parts and combines empirical and theoretical analysis based on the positivistic and hermeneutic values detected in the sources and materials used for this study, as pictured below.

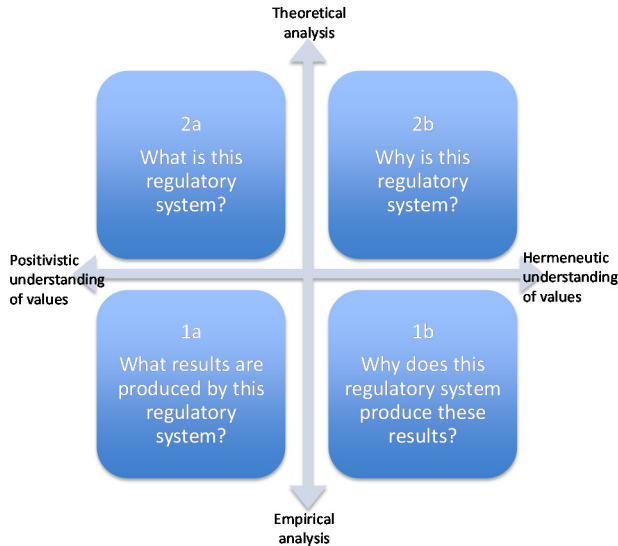


Figure 1. How the understanding of values can affect research questions (the same figure is also provided in chapter 2).

On the one hand, this model allows for the separation of different forms of analysis, based on whether the analysis is conducted empirically or theoretically, and on whether the values detected and used in either kind of analysis are positivistic or hermeneutic. On the other hand, the model also shows that its four fields need to be sufficiently connected in order to provide useful answers. If the connection is too weak, the four parts will drift apart and the holistic approach will be lost. This dual understanding of the model is also how I have sought to apply it in my study, although the analyses in different chapters may exhibit stronger or weaker links to various parts of the model. In the second part of my thesis (chapters 5–9), devoted to the ESD, there is an initial focus on empirical and theoretical analysis based on positivistic values, which shifts towards analysis based on hermeneutic values in the last chapter. In the third part of my thesis (chapters 10–11), devoted to the ITF FOC campaign, the four fields of the model are integrated into both chapters in a more coherent manner. The use of this model has allowed me to identify and discuss differences and similarities between the two systems under study and their environments. In this sense, I believe I have managed to achieve the holistic analysis I aimed for.

However, I would also find it interesting to test this model on other forms of empirical material than my sources in this study. How would the model work, for example, using interviews and surveys as sources? This is a question that I cannot

answer yet. I therefore do not consider the model fully developed; it needs further work and testing before the question of its usefulness can be answered fully.

12.9 Final remarks

To briefly sum up the main differences between the ESD and the ITF FOC I would like to point out that the ITF FOC has developed systemic structures that not only provides the system capacity to produce results that improve working conditions, but also enables the system to assure efficient implementation and application of such results. The ESD on the other hand has shown capacity to produce results that improve working conditions, but when it comes to the issue of assuring efficient implementation and application of such results the ESD has limited means at its hands. The multisectoral agreement on crystalline silica shows that there could be potential for developing such structures within the ESD.¹¹⁸⁶ If the ESD were to develop more comprehensive systemic structures for control and enforcement there could also be possibilities for further enhancing the autonomy of the system and limit the dependence of the structural coupling with the EU policy-shaping systems. Such developments would decrease the limits on contents of ESD collective agreements, by lifting the difference minimising program of Article 153 TFEU, whilst at the same time increasing the system capacity for ensuring enforcement of the agreements at national level.¹¹⁸⁷ For such structures to be fully efficient there is still a long way to go due to the weak structures of industrial relations at the national level, not least in the countries where workers most likely would gain from potential outcomes at the EU level. Another question is whether such developments are feasible at all considering the overall weaknesses of the ESD.

As for now the main means for the ESD to assure efficient implementation and application of the results it produces is therefore to make use of the structural coupling with the EU policy-shaping systems through seeking to have agreements implemented by means of directives. In that process the capacity of the ESD also becomes somewhat limited as the implementation of an ESD agreement by means of a directive requires the ESD to adopt the difference minimising program of Article 153 TFEU, thus limiting the potential contents of such an agreement. Even after

¹¹⁸⁶ For further discussion see section 5.3.2 above.

¹¹⁸⁷ Compare with the suggestion of greater coordination of labour inspectors at EU level in Barnard, C. (2014a) 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67, pp. 199-237, at p. 232. However, a labour inspectorate set up by the EU institutions would quite likely limit the scope of such inspections to the legally enforceable agreements of the ESD, i.e. those implemented through directives, thus not solving the issue of weak enforcement of the autonomous agreements.

such adaptation of the ESD communication there is still no guarantee that the EU policy-shaping systems will recognise the communication from the ESD and adopt a directive, which was seen in the case of the hairdressing agreement.¹¹⁸⁸ In this sense there is thus no surprise that the ESD is conceived of as having less capacity for producing results that improve working conditions than the ITF FOC is. The ESD is simply a less dominant system for whom the effects of its results are left to be decided by the communicative structures of the EU policy-shaping systems, which in turn are heavily influenced by the values promoted by the economic system. These more recent developments also indicate that the shadow of law as a strong and influential decision premise most likely will shine with its absence also in the near future.

The power of the economic system to influence the values that frame the programming of the other function systems of the EU does not just show that systems can exist in a hierarchy. It also shows that the values underlying the system at the top can become the overriding values of multiple other systems. It would thus seem suitable to adopt a theoretical concept that can explain these values and their importance. For this discussion, I would like to borrow the term 'common ethico-political values' from Chantal Mouffe.¹¹⁸⁹ I can state that the common ethico-political values of the EU are based on the idea that society's job is to generate economic profits and secure the competitiveness of industry, since these have overridingly been the factors shaping the development of the EU, especially since the financial crisis. Currently it seems that only the political system might have the strength to efficiently challenge these economic system values. We are therefore now in a situation in which the political system needs to reconsider the common ethico-political values in order for the EU to stand a chance of developing into anything but a project to liberalise an internal market. Because the existing common ethico-political values are strongly embedded within the neo-liberal hegemony of the political discourse, we will need to arrive at a questioning of this neo-liberal hegemony before we can see change. Some prominent authors think this will be only a matter of time,¹¹⁹⁰ but I have less confidence that such change is likely to occur. I certainly think that the ESD will not be a force in that change, unless the trade union organisations within the ESD either

¹¹⁸⁸ For a thorough discussion of this see Bandasz, K. (2014) 'A framework agreement in the hairdressing sector: the European social dialogue at crossroads', *Transfer*, 20(4), pp. 505-520. This issue is also discussed in section 5.3.2 above.

¹¹⁸⁹ For a further explanation of this concept see Mouffe, C. (1999) 'Deliberative Democracy or Agonistic Pluralism?', *Social Research*, 66(3), pp. 745-758; Mouffe, C. (2009) 'Democracy in a Multipolar World', *Journal of International Studies*, 37(3), pp. 549-561; Mouffe, C. (2005) *The Political - Thinking in Action*. Abingdon: Routledge.

¹¹⁹⁰ Deakin, S. (2014) 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', in Bruun, N., Lörcher, K. & Schömann, I. (eds.) *The Economic and Financial Crisis and Collective Labour Law in Europe*. Oxford, UK: Hart Publishing Ltd., pp. 83-106, at p. 106 and compare with Banakar, R. (2015) *Normativity in Legal Sociology - Methodological reflections on Law and Regulation in Late Modernity*. Heidelberg: Springer, p. 284.

gain the courage to challenge the limits set by the legal system on coordinated trade union action, or manage to identify other efficient forms of symbolically generalised communication media. Such challenges could cause disturbances in the economic system of such a character that the political system will see a need to make decisions that would produce changes in the legal system and offer methods for trade unions to overcome the improbabilities of communication. However, the conclusions of this study offer little cheer for those hoping that the ESD may yet develop into a system of industrial relations with strong and independent capacity for improving working conditions for employees across the EU.

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This book considers the role of systems of industrial relations in the shaping of an equal society. Historically, it is possible to see that the societies considered to be amongst the more equal and also having stable economic developments have well developed and relatively strong systems of collective bargaining and industrial relations. Following the effects of globalisation, national regulations and systems of industrial relations seem to have lost capacity for dealing with the consequences efficiently. There seems to be a need for international systems of industrial relations to deal with the effects of globalisation.

This book explores the European Social Dialogue and its potential to secure future developments where working conditions are part of the factors that are improved as economic development moves on. As a source of inspiration the International Transport Workers' Flag of Convenience campaign is used as an example to learn from. Summing up there might be potential for developments within the European Social Dialogue, but most likely such developments require a change of the political winds across the EU.



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