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Introduction
In an increasingly globalised world the employment relationship and dynamics behind the regulation of it are subject to changes. Employers are increasingly acting in an international environment and also adapting strategies relating to their businesses and personnel. Outsourcing, relocations and labour market hopping are increasingly becoming part of business strategies. These developments tend to undermine the role of national trade unions and has caused what has been coined the liquedifaction of the employment relationship. With increasing digitalization of the labour market these problems for national systems of collective bargaining are accelerated further as exemplified by Houwerzijl. National trade unions and national systems of collective bargaining have thus lost some of their capacity to protect the interests of workers and regulate the labour market, since they, in general, are limited to act within the nation state and thus have less to offer in relation to transnational relocations, multinational employment relationships and an increasingly internationalised labour market. In other words, there is a need for transnational and/or international systems of labour market regulation. In order to deal with the regulation of internationalised labour markets it would thus seem that there is a need for internationalisation of systems of collective bargaining and industrial relations as well. At the EU level the European Social Dialogue (ESD) has in periods provided promises of a potential for developing towards such an alternative. However, in the more recent period the road towards fulfilling such a promise seems far. At the global level the International Transport Workers’ Federation’s (ITF) campaign against flags of convenience (FOC) has developed into a system of collective bargaining with relatively efficient structures for control and enforcement. Therefore, there could be reasons to draw some lessons from the ITF FOC campaign in the future development of the ESD.

This paper will focus on the ESD, the challenges this system is facing and its future potential as a system of industrial relations. The analytical framework for the paper is Luhmann’s theory on autopoietic systems and the paper will be divided in four parts. Firstly, the methodological and theoretical starting points will be briefly explained. Secondly, the paper will explain the challenges that the ESD is facing in terms of its future potential as an autopoietic system. In this analysis, I will draw on examples from different sectors and themes dealt with within the ESD. Thirdly, I will present some examples on how similar challenges have been met and dealt with within the ITF

4 For further discussion of this see for example chapters 5-6 in Hartzén, A.-C. (2017). The European Social Dialogue in Perespective: Its future potential as an autopoietic system and lessons from the global maritime system of industrial relations. PhD monograph, Lund University.
FOC system. In the concluding section I will highlight possibilities for developing and dealing with the ESD challenges based on the analysis in the previous sections.

**Methodological and theoretical starting points**

The methodology for this paper is in essence a socio-legal methodology based on documents studies in the form of both legal sources and other documents of relevance for studying international systems of collective bargaining. The empirical material has thus been studied both through the use of text analysis for all included material and for the legal sources the doctrinal method has also been used. Using these forms of documents and analysing them through the Luhmanian framework makes it possible to grasp a broad range of the communication produced within the ESD and the ITF FOC in a manner that is feasible when seeking to study these systems broadly. The empirical material studied has thus been chosen on the basis that it can be considered to either consist of or reflect communication produced within the studied systems and as such make up observable elements of these systems in accordance with Luhmann’s idea that systems consist of communication.\(^5\) My ambition has been to provide a holistic perspective on the systems studied in a manner that is possible to align with Luhmann’s non-normative theory. In order to do so I have distinguished between empirical and theoretical analysis on the basis of values understood in a positivistic and a hermeneutic sense. This has been valuable since Luhmann’s theory is based on an understanding of values in the positivistic sense for the demarcation of the system from its environment through the binary code of the system, but nevertheless opening up for also studying hermeneutic values as part of the programming of the system.\(^6\)

For systems of collective bargaining at the international/global level there are certain elements of Luhmann’s theory that are especially important to highlight in the analysis. Even though the binary code of a system is what separates the system from its environment and thus forms the basis for the system I have found that the programming of the system seems to be of higher importance for my analysis. The programming of the system affects the manner through which the improbabilities of communication work within the system and through the structural coupling with other systems. The issue of symbolically generalised communication media in order for the system to overcome improbabilities of communication provides insights to the capacity of the studied systems in terms of regulating working conditions. The structural coupling and how the system of collective bargaining makes use of this in relation to other function systems such as the legal, political and economic function systems is also of high importance to understand. In addition the diverse organisations that make decisions contributing to the production of communication within the systems are also of importance, both in terms of their internal structuring with decision premises and the communicative links between these organisations.\(^7\) With this said let me now turn to the challenges that the ESD is facing as an autopoietic system of collective bargaining in terms of capacity for contributing to the improvement of working conditions.

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\(^6\) For a more detailed discussion and an explanatory model for this methodology see chapter 2 in Hartzén, A.-C. (2017). *The European Social Dialogue in Perspective: Its future potential as an autopoietic system and lessons from the global maritime system of industrial relations*. PhD monograph, Lund University.

\(^7\) For a more detailed discussion see especially chapters 3 and 12 in ibid.
Challenges for the ESD

The history of the ESD can be considered as long as the EU itself, but in comparison to national industrial relations it is still younger and has developed under fairly different circumstances. For the ESD the means of industrial action has shone with its absence during the developments of bargaining structures at the EU level, in contrast to what has been the more common situation for national systems of collective bargaining. Instead the developments of the ESD and its communicative structures have shown a strong structural coupling to the EU policy-shaping systems. Even though this is not to say that the ESD has been developed in a top-down manner, contrary to what has been the case for national systems of industrial relations, it has generated effects for the ESD as an autopoietic system. The result is a system which is rather different from national systems of collective bargaining in terms of both its definition and structures.

Traditional systems of collective bargaining can be understood as autopoietic systems that distinguish themselves from their environment using the binary code of ‘negotiable or non-negotiable between collective actors’. For the ESD negotiations are, however, rather an exception than a rule and its binary code can also be understood as more open in the sense of ‘discussable or not discussable between collective actors’. This coding of the ESD does in other words allow for a perhaps broader set of topics and issues to be dealt with within the communicative structures of the system, but it could also result in a lower probability that the communication of the system will take the form of actual negotiations. However, the binary code as such does not exclude negotiations from the communicative structures of the system. As a matter of fact negotiations resulting in agreements do take place within the communicative structures of the ESD.


10 The term ‘EU policy-shaping systems’ refer to both the political and the legal systems of the EU. I will use this term consistently unless the discussion requires distinction between the political and the legal system.


14 Such negotiations have resulted in framework agreements between organisations representing management and labour at EU level both in the form of agreements implemented by means of directives and as autonomous agreements. See for example (1996). Council Directive 96/34/EC of 3 June 1996 on...
Nevertheless, the communications produced within the ESD are probably not taking the form of negotiations in the majority of cases and the reason for this lies not only in the binary code of the system. Instead there are other factors adherent to the communicative structures of the system and its relationship to other function systems that cause this lower degree of communications in the form of negotiations resulting in agreements.

Closely linked to the binary code of the system is its programming. For the ESD the programming has some important implications for what issues the communication of the system can deal with, not least in relation to traditional systems of collective bargaining where the regulation of pay tends to be an important issue for negotiations. Within the ESD possibilities for the system’s communication to deal with the issue of pay have been limited due to the programming of the system. The reason that the regulation of pay becomes unavailable for the communications of the ESD is that the hermeneutic values underlying the programming of the system are highly geared towards the promotion of economic interests strongly focusing on increasing the competitiveness of industry. This means that issues which can be considered as potential threats to industry profit or industry competitiveness will be less likely to be dealt with by the communication within the system or at least face a higher threshold in terms of the improbabilities of communication.

The programming of the ESD is not, however, constant because for any system it is possible to change the programming through the reflexive capacity inherent to the self-referential autopoiesis of the system. This occurs in the sense that the system picks up communication from its environment that it finds meaningful and will further adapt its own internal programming in order
to secure the continuation of its autopoiesis.\textsuperscript{19} This means that systems to which the ESD is structurally coupled can produce communication that will generate results for example in the form of changes to the programming of the ESD. The stronger the structural coupling between the ESD and another system is, the more likely that such situations will occur. Due to the fact that the ESD is structurally coupled to the policy-shaping systems of the EU in an unbalanced manner those systems are also more likely to generate results within the ESD in terms of what hermeneutic values frame the programming of the ESD than the opposite.\textsuperscript{20} There are several events during the developments of the ESD that illustrate this.

Firstly, the effects that the shadow of law has had in terms of kicking off negotiations within diverse bargaining organisations whose decisions form part of the communications within the ESD. The cross-industry social dialogue framework agreements relating to atypical work and parental leave all came out as a result of negotiations under the shadow of law.\textsuperscript{21} The same was the case for the various sectoral agreements extending the Working Time Directive to different transport sectors.\textsuperscript{22} In these cases the shadow of law as a decision premise for the bargaining organisations was framed in the sense that ‘if legislation is probable, then negotiations aiming to reach an agreement will take place’. During that period, the hermeneutic values framing the programming of the EU policy-shaping systems included social objectives and the programming of the ESD was framed in a manner that allowed scope for seeking a balance between the interests of workers and industry profitability.\textsuperscript{23}

The start of the cross-industry negotiations concerning temporary agency work was also a response from the ESD to the threat of legislation However, in that case negotiations failed and one of the more important factors contributing to that failure was the change of balance between social and economic interests as values influencing the programming of the ESD as well as the EU policy-shaping systems. During the negotiations, the Commission’s legal service provided advice that tilted the balance between the social objective of protecting the interests of workers and the economic objective of improving industry competitiveness in favour of the latter.\textsuperscript{24} As a result the programming for the ESD communication shifted and the decision premise for the bargaining

organisation also changed. Instead of merely including the probability of legislation as a condition for negotiations aiming to reach an agreement the decision premise became centred on whether or not there was a probability for legislation that would promote worker’s interests or could be considered as a threat to industry competitiveness. Since that was clearly not the case the bargaining organisation could no longer make a decision on an agreement and the negotiations failed.\textsuperscript{25}

The structural coupling between the ESD and the EU policy-shaping systems is thus of importance for the development of the ESD system programming. However, this structural coupling works in an unbalanced manner where communication from the ESD is not as likely to produce results within the EU policy-shaping systems as the other way round. This is clearly exemplified through the manner that the Commission at times rejects the wish of the social partners to put forward a proposal for implementing a concluded framework agreement through a Council directive. This has occurred in at least two cases, concerning the hairdressing sector and the public sector. For the hairdressing sector the concluded agreement was an autonomous agreement, whereas for the public sector the concluded agreement followed on the previous consultation procedure.\textsuperscript{26} These examples provide clear indication of the asymmetry of the structural coupling between the ESD and the EU policy-shaping systems. For structural coupling to provide results only in one direction, it does indeed seem as if the direction from the ESD to the EU policy-shaping systems is subject to a lot more difficulties than the opposite. This situation can be understood in terms of the programming of the systems, where communication from the ESD seeking to promote interests of workers will be unlikely to overcome the improbabilities of communication within the EU policy-shaping systems. The reason being that those systems are programmed in line with economic interests and therefore they do not identify such communication from the ESD as meaningful.\textsuperscript{27} This in turn is likely to have repercussions within the ESD, which will seek to adapt its programming in line with economic interests in order to assure the continuous autopoiesis of the system.

Due to the asymmetrical structural coupling between the ESD and the EU policy-shaping systems the programming of the EU policy-shaping systems will likely influence the possibilities for the ESD to generate results within these systems and here we find another challenge. This challenge

\textsuperscript{25} Hartzén, A.-C. (2017). The European Social Dialogue in Perspective: Its future potential as an autopoietic system and lessons from the global maritime system of industrial relations, PhD monograph, Lund University., pp. 218ff.


\textsuperscript{27} EUPAE and TUNED (2015). General framework for informing and consulting civil servants and employees of central government administrations - Agreement. Brussels, CEU.
lies in the fact that the EU policy-shaping systems are clearly programmed in favour of economic interests over the promotion of the ESD. This conclusion can be drawn after having studied how the EU policy-shaping systems have dealt with issues relating to the promotion of social dialogue and the protection of fundamental labour rights in various manners. Worth noting is that the CJEU has favoured centralised collective bargaining at the national level in spite of local level collective bargaining being the relevant for promoting workers interests, whereas the EU policy-shaping systems have favoured localised collective bargaining at the cost of worker interests and national systems of collective bargaining in relation to action taken for crisis countries such as Greece and Ireland. The level of collective bargaining favoured in all these situations correspond to the level that best serves economic interests, which undermines the possibilities for the ESD to change its system programming from the current state.

The term bargaining organisation has been mentioned a couple of times and it is worth noting some differences that exist between the ESD and national systems of collective bargaining in relation to the forms of organisations that produce decisions which contribute to the production of communication within the system. National systems of industrial relations can show complexities in terms of diverse forms of organisations and diverse constellations of bargaining organisations where the members of a bargaining organisation also are members of a trade union or employers’ organisation. However, when considering this in relation to the ESD the situation becomes of even greater complexity. For the ESD the communicative structures allowing for diverse organisations to make decisions and contribute to the production of communication within the system are both a lot more complex than at the national level and also less developed when compared to the national systems of collective bargaining that we tend to consider as such systems, for example the German or the Nordic systems. For the ESD the bargaining organisations have members representing both management and labour and these members need to respect the hierarchy and decision premises of the bargaining organisation as well as the hierarchy and decision premises of the organisation they represent. At first glance, this comes off as no different than what would be the case for a national bargaining organisation. However, when considering the organisations that the members of the bargaining organisation represent, we will see that these organisations that best serve economic interests, which undermines the possibilities for the ESD to change its system programming from the current state.


organisations also build upon representative membership where the member thus have a dual respect for hierarchy and decision premises to deal with since they are representing national organisations within the European organisations. The chain of communicative links, for assuring efficient production of decisions and system communication also in the form of efficient implementation, control and follow up, is thus subject to an increased complexity in comparison with national systems. This also means that it is a lot more sensitive to weaknesses since a chain is never stronger than its weakest link. For the ESD there are thus a lot of obstacles in terms of weak communicative links between the European organisations and their national affiliates as well as between divers national affiliates.

Even though there are some events showing that the ESD might have potential to improve the strength of some of the weaknesses in the communicative links, there are doubts as to whether the system is actually capable of developing the communicative structures required for assuring efficient implementation, control and enforcement. Examples worth mentioning here are that Polish and British trade unions joined together and managed to increase the level of organisation amongst Polish workers in the British construction sector as well as the multi-sectoral agreements concerning the handling of crystalline silica where processes for implementation, control and follow up also have been established. However, these examples are rather unique and the question remains as to whether the ESD is capable of further developing such communicative structures in the necessary manner for allowing the system to increase its capacity for producing results. With these challenges for the ESD in mind it is now time to turn to the ITF FOC campaign in order to see what lessons can be drawn from that system.

Lessons from the ITF FOC system
As mentioned briefly before the ITF FOC campaign has evolved as a global system of collective bargaining, where global collective agreements regulate working conditions and procedures for implementation and enforcement have been developed in a manner that contributes to improving the working conditions for seafarers at the global scale. Even though the ITF FOC campaign show some differences from the ESD in terms of it being sector specific and entailing different communicative structures, there are still similarities that make this system useful to draw lessons from in the future development of the ESD. Even though the binary code for the ITF FOC system most likely is framed in terms of negotiable or not negotiable between collective actors, this is not the most important difference from the ESD. Instead, the programming, which is changeable, and the communicative structures of the system are factors that will affect the regulatory capacity of the collective bargaining system. It is in relation to these factors that we find important differences between the ITF FOC system and the ESD.

33 Ibid., pp.320ff.
Initiating this discussion, it is of importance to note that the communication produced within the ITF FOC system to a vast extent consist of decisions taken by diverse organisations, in a similar manner as for the ESD. The complexity of organisations at global level comprising member representing organisations at the national level in various manners is thus similar between these two systems. However, for the ITF FOC system it is possible to identify some important aspects that enable these organisations to make decisions that will contribute to the communication of the system in a meaningful manner as concerns the regulation of working conditions. Firstly, the organisations representing workers within the system and its diverse negotiating structures have clear and efficient membership conditions both in relation to what is required to become a member and in relation to what is required to remain a member. A member not fulfilling the membership conditions will thus face the risk of expulsion from the organisation. These membership conditions further build upon a clearly defined and expressed global strategy of improving the conditions for the most vulnerable workers arguing that the long-term effects of that will also gain workers that are better off. The membership conditions also clarify the decision-making hierarchy between members in different situations, for example by establishing rules for bargaining rights between different national trade unions in relation to ownership and flag of a ship. These premises for decisions are to a vast extent lacking within the ESD where it is difficult to define a common European strategy or any precise conditions for membership. Secondly, the communicative structures within the ITF FOC are set up in a manner that allows for not only concluding collective agreements, both globally and locally for specific ships, but also contribute in assuring efficient implementation and enforcement of those agreements.

Within the ITF FOC system the ITF inspection unit serves as an organisation that both ensures control of working conditions on board ships and ensures that communication is produced in a meaningful manner for the enforcement structures within the system. The enforcement organisations within the system can thus make decisions on sanctions or the use of symbolically generalised communication media, in the form of industrial action if necessary or by taking suitable court action, in order to assure observance of the collective agreements. The communicative links between the bargaining organisation, the control organisation and the enforcement organisation that all contribute to the communication of the ITF FOC system are well developed allowing for local decisions based on a global strategy. These structures in combination with a programming of the system focusing on protection of the most vulnerable workers and the use of forceful symbolically generalised communication media are likely the reasons that this system has also shown capacity to improve the working conditions at a global level. Even though the results are less likely to have had impact for workers from richer countries, the global results of this system are to be considered relevant, especially when considering the increasing effects of globalization discussed before.

34 Ibid., pp. 326ff.
Concluding remarks

From the analysis above it is clear that the ESD is facing some important challenges in order to be able to develop the capacity needed for improving employment and working conditions and contribute to the strengthening of the social character of the EU. The most important challenges are those of the ESD system being programmed in a manner that favours economic interests over social interests, which in combination with the unbalanced structural coupling with the EU policy-shaping systems undermines the capacity for the ESD to improve working and employment conditions across the member states. Even though a change of this could occur should the political winds shift, this is not a suitable idea to hold as the first potential for change. Instead the changes need to come from within the ESD itself. In my opinion the European organisations representing workers could learn from the ITF FOC system as concerns how the organisations that contribute to the production of system communication are structured and have set up their internal membership and decision premises. It would thus serve the European trade union organisations to define further and stronger commitments to European ambitions and strategies amongst their national affiliates as well as demanding increased loyalty as concerns these issues in order for the national affiliates to remain members of the European organisations. In addition the communicative links between these organisations need strengthening, not least through a more clear definition of not only rights, but also duties between trade union organisations at different levels across Europe. The European trade union organisations could further find inspiration in the manner that the ITF FOC system has made use of the structural coupling between the own system and other system such as the legal system in order to challenge the asymmetry of this structural coupling. It could for example be worthwhile to legally challenge the Commission’s refusal to forward proposals for implementing ESD agreements through Council directives. If such a legal procedure would turn out positive for the trade union side they might also have found an alternative symbolically generalised communication media that could serve the promotion of workers interests across the EU.