

## The displacement of Social Europe: a productive lens of inquiry

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In the 20<sup>th</sup> century, the social component of the EU had a clear, albeit highly distinctive, profile when contrasted with definitions of social policy at national level. It focused mainly on improving and protecting the rights of workers, both in the market integration project per se as freely-moving workers and job-seekers and in protecting workers' rights, including centrally the rights of women not to be discriminated against at work. High member state consensus (with just one outlier member state after 1979), empowered and adept supranational policy entrepreneurs in the European Commission,<sup>1</sup> and judicial dialogue via the preliminary reference procedure,<sup>2</sup> led to a worker-focused social *acquis*, a focus on the social partners and a Charter in 1989 exclusively focused on the Fundamental Social Rights of Workers. We might call this *Social Europe for Workers*. Such a focus was an essential part of underpinning the legitimacy of the EU project and EU institutional actors. Introducing a special issue of the *Common Market Law Review* in 1977 on Social Europe, Michael Shanks, Commission Director-General for Social Affairs between 1973 and 1976, made clear that the felt need to give the integration project 'a human face' translated into Social Europe for Workers law and policy outcomes.<sup>3</sup> Indeed the remaining articles of that special issue focused on free movement and social security co-ordination for Community workers, the European Social Fund, employee

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<sup>1</sup> See, for example, in relation to gender discrimination at work, C. Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) and on sexual harassment at work, K. Zippel, 'Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment', 11 *Social Politics* (2004) p. 57.

<sup>2</sup> See the contributions to S. Sciarra (ed.), *Labour Law in the Courts: National Judges and the ECJ* (Hart Publishing 2001).

<sup>3</sup> M. Shanks, 'Introductory Article: The Social Policy of the European Communities', 14 *Common Market Law Review* (1977) p. 375 at p. 378, also noting, 'As regards the non-employment aspects of Community social policy, the scope for dramatic initiatives is very limited'.

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participation legislative initiatives and the free movement of third country national workers.<sup>4</sup> That is a quite striking illustration of the Social Europe for Workers' focus.

The central claim of this special issue is that it is productive to consider changes to Social Europe by asking how this profile of Social Europe has been displaced and by evaluating such displacement.<sup>5</sup> Hence the suggestion is that the vision and content of Social Europe, anchored around creating protection for workers, has been displaced and that, in considering how and why that displacement occurred, we might shed some new light on Social Europe in the EU today and its development.

The first question to be addressed then is: why use the concept of displacement? Is this a productive way to investigate and shed light on Social Europe developments? Other ways certainly exist. Alongside impressive texts systematising and presenting the EU law and policy seen to comprise Social Europe, there are books, edited collections and journal articles exploring angles such as its future, its evolution or producing manifestos or new deals for Social Europe and calling for its resocialisation. Given its long-term anchoring in Social Europe for Workers, not surprisingly many of these legal analyses are primarily focused on labour law.<sup>6</sup> I liked the concept of displacement more than these or other contenders, not principally for its novelty, but because of the resonance of two of its central social science meanings.<sup>7</sup> A first meaning of displaced is moved elsewhere or replaced by

<sup>4</sup>J-C. Séché, 'Free Movement of Workers under Community Law', 14 *CMLRev* (1977) p. 385; W. Stabenow, 'The European Social Fund', 14 *CMLRev* (1977) p. 435; W. Däubler, 'The Employee Participation Directive: A Realistic Utopia', 14 *CMLRev* (1977) p. 457; D. Duyssens, 'Migrant Workers from Third Countries in the European Community', 14 *CMLRev* (1977) p. 501.

<sup>5</sup>This is the title of the workshop held at the EUI in December 2016 at which earlier versions of the analyses published here were presented. I am extremely grateful to those who presented analyses in the workshop but have not contributed to the special issue: Catherine Barnard, Bruno De Witte and Sylvaine Laulom, and to all those who contributed to a stimulating and enjoyable workshop through their comments and reflections.

<sup>6</sup>See, for some examples of manifestos, B. Bercusson et al., 'A Manifesto for Social Europe', 3 *ELJ* (1997) p. 189 making the case for insertion of the Maastricht Protocol on Social Policy and the 1989 Workers' Charter into the Amsterdam Treaty; for a more recent example making the case for an upgrade of the legislative *acquis* as part of the 2017 European Pillar of Social Rights, see S. Garben et al., 'Towards a European Pillar of Social Rights: Upgrading the Social *Acquis*', College of Europe Policy Brief 1/2017. See N. Countouris and M. Freedland (eds.), *Resocialising Social Europe in Times of Crisis* (Cambridge University Press 2013). For evolutionary approaches, see C. Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2<sup>nd</sup> edn. (Oxford University Press 2011) p. 641 and J. Kenner, *EU Employment Law*, 2<sup>nd</sup> edn. (Hart Publishing 2017): 'traces the evolution of EU employment law over sixty years from its limited market-based origins in the Treaty of Rome through to the present-day commitment to advance the fundamental social rights of workers and establish a core "guarantee" of adequate social protection in Union policies in the Treaty of Lisbon.'

<sup>7</sup>Other meanings are related to these two central meanings: e.g. its use in psychoanalysis to describe the unconscious transfer of an intense emotion from one object to another, or its meaning

something else. A second meaning is missing, threatened or vulnerable. Of course the central contemporary social use of displacement, in identifying displaced persons seeking refuge outside their own home (internally displaced) or their own state, fuses both these meanings so that those compelled to move elsewhere for their own safety are vulnerable, both in their former and their new location. Nonetheless, and crucially, the first meaning of displacement, when applied to Social Europe, does not necessarily have a negative connotation. Movement, of a policy frame, or of an individual, can be a positive even if a disorienting and transformative experience. The second meaning, however, embodies a negative evaluation so that something that should be safeguarded and protected (e.g. the right to collectively bargain in the EU) has been removed, forced out, threatened, limited or made vulnerable. This double meaning of displacement is what makes it a productive angle for identifying and evaluating the EU's contemporary contribution to Social Europe.

#### THE FIRST MEANING OF DISPLACEMENT: MOVED ELSEWHERE OR REPLACED BY SOMETHING ELSE

As this meaning is typically less explored than the second, I spend some time setting it out. The central point is that as the EU project got much more capacious, after Maastricht and Amsterdam in particular, so too did the focus of what might be social or what, to use Shanks' phrase, might constitute the 'human face' of the EU. First, Social Europe moved beyond work. It became focused on a much wider range of welfare and social issues rather than just workers and their families. Health, education, pensions, housing and social inclusion all became resonant and substantial focuses of EU policy activity. Second, Social Europe moved elsewhere. Central components, such as status discrimination which started life as part of Social Europe for Workers<sup>8</sup> and in the Directorate-General for Social Affairs, are now typically considered as part of Justice and Fundamental Rights and have a new Commission home. The location of Social Europe activity, again closely connected to human rights, shifted to EU external relations, both in its accession to instruments such as the 2006 UN Convention on the Rights of Persons with Disabilities and the 2011 Council of Europe Istanbul Convention on gender violence, and in its trade agreements.<sup>9</sup> At the same time, much of the expanded

in physics as the occupation by a submerged body or part of a body of a volume which would otherwise be occupied by a fluid.

<sup>8</sup> Reflecting this shift from Social Europe for Workers in the area of status discrimination, with the 2000 Race Equality Directive encompassing also discrimination in education, housing, social protection and access to goods and services, see M. Bell, 'Beyond European Labour Law? Reflections on the EU Race Equality Directive', 8 *European Law Journal* (2002) p. 384.

<sup>9</sup> See, for interesting details and insights, E. Muir, 'Drawing Positive Lessons from the Presence of "the Social" outside of EU Social Policy *stricto sensu*', in this special issue.

social and labour EU activity was taking place outside the Social Policy Chapter of the Treaty. For instance, a significant new corpus of legislation on work and social entitlements came via EU migration and asylum law.<sup>10</sup> Moreover, over the last decade, a very broad range of policy messages on social and labour issues came through the European Semester, and social and labour constraints came via sovereign debt loan conditions managed by the EU institutions, opening a substantial new policy frame of Social Europe via the Economic and Monetary Union. Third, the 'human face' of Europe came not via or not primarily via Social Europe for Workers. This is perhaps the most important consequence of the expansion of EU activity across a much wider range of policy fields. Rather than Social Europe for Workers being a primary vehicle through which the supranational project could demonstrate its social legitimacy, the field became filled with other compelling contenders. Some of these took centre-stage, especially in legal scholarship, with perhaps the central example being the expansive use of EU citizenship by the Court of Justice to protect the mobile even when they were not economically active.<sup>11</sup> Other EU 'human face' growth areas include protecting Europeans' data.<sup>12</sup> So while the traditional *acquis* for workers did not contract, and was modestly expanded, the focus of EU scholars' attention mainly moved elsewhere, leaving this by and large as the preserve of labour lawyers. Until very recently, free movement of workers, not a central concern of labour lawyers, was benignly neglected in EU scholarship too, as the established precursor or backdrop to the new frontier of EU citizenship. Perhaps the most significant change amongst many came with the introduction of a written, and post-Lisbon binding, Charter of Fundamental Rights for the EU. This overlaid all existing legislative and judge-made rules and principles while offering opportunities for challenges or reinterpretations of other EU rules.

<sup>10</sup> For asylum seekers see the Reception Directive 2013/33/EU: this includes the right to work no later than nine months after the international protection application (Art. 15), the right to education for child applicants (Art. 14) and rights to 'material reception conditions' covering a series of guarantees for health, housing and subsistence (Arts. 17, 18 and 19). For irregular migrants see the Returns Directive 2008/115/EC, which provides that pending return such migrants should have access to emergency health care and basic education for children (Art. 14). For managed EU labour migration, see the Seasonal Workers' Directive 2014/36/EU, making admittance subject to having in place a work contract, guarantees of sickness insurance, adequate accommodation and exclusion of recourse to the host-state social assistance system. Seasonal workers are given rights to equal treatment with host state workers for a series of labour and social security rights, including working conditions and industrial action.

<sup>11</sup> Starting with the seminal case ECJ 12 May 1998, Case C-85/96, *Martinez-Sala*, ECLI:EU:C:1998:217.

<sup>12</sup> See, for example, O. Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015) at p. 9, 'EU data protection regulation embraces elements of economic regulation (which reflect its origins as an internal market instrument) as well as aspects of social regulation (which reflect its fundamental rights dimension).'

Finally, the reverse of the EU's human face is its inhuman one. The expansion of EU powers and activities also meant that the EU could now importantly be seen as creating an inhuman Europe, or one that threatened human and fundamental rights. Again, however, the focus here is not centrally or solely on Social Europe. Instead, attention is focused on the rights implications of, in particular, the creation of an Area of Freedom, Security and Justice, and within that an EU operating on the assumption of mutual trust, so that one member state is as good as another, enabling for instance criminals to be transferred under European Arrest Warrants or asylum seekers to be transferred to the EU state deemed responsible under the relevant Dublin Regulation.<sup>13</sup>

All this serves to underline, through these many examples, why the displacement of Social Europe is highly interesting and productive to reflect upon and evaluate. Social Europe is changed, partly because it itself changes but more importantly because the EU environment in which it is embedded is transformed. The central point is that this first sense of displacement does not lead (or at least not necessarily) to a negative evaluation, but rather to a better understanding and perspective on the place Social Europe has at any given time in the EU project. This important perspective is developed in particular by Muir in this special issue.<sup>14</sup> Moreover, it conveys that that place can also change so that Social Europe for Workers, or some broader understanding of Social Europe, can again become a new location of institutional focus. One reason for that occurring can be because of the second meaning of displacement: Social Europe, or parts of it, are seen not to be proceeding as they should, but are under threat, vulnerable or missing in ways that are problematic because of (or, alternatively, for) EU legal and political developments. This may then lead to Social Europe again becoming at least a part of the compass of providing a 'human face' for the EU. The current European Pillar of Social Rights, an initiative of the Juncker Commission, explored by Garben and Robin-Olivier in their contributions,<sup>15</sup> can be seen in this light. In part, it is a response to the weakening of social and labour rights required by EU institutions during the sovereign debt crisis. It is also seen as part of a response to broader populist challenges to the EU project.

<sup>13</sup> See recently on the difficulties of the Dublin III Regulation, AG Sharpston in ECJ 26 July 2017, Case C-646/16, *Jafari* ECLI:EU:C:2017:443; on mutual trust and EU criminal justice see V. Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship between Legal Pluralism and Rights-based Justice in the European Union', in D. Gerard and E. Brouwer (eds.), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (MWP 2016/13 EUI Florence) p. 23.

<sup>14</sup> Muir, *supra* n. 9.

<sup>15</sup> S. Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?', and S. Robin-Olivier, 'Fundamental Rights as a New Frame: Displacing the social *acquis*', this special issue.

## THE SECOND MEANING OF DISPLACEMENT: MISSING, THREATENED, OR VULNERABLE

This is an important and prominent way of looking at Social Europe. Although such criticisms began early, with the shift from legislation to governance in the 2000 Lisbon strategy already being claimed as a limitation or dilution of Social Europe, the last decade has seen a sea change. The shift from autonomous social and employment Open Method of Coordination processes to a macroeconomic European Semester with strong fiscal consolidation and deregulatory messages has been seen as threatening the integrity of national social and labour protection.<sup>16</sup> The specific social and labour requirements laid down in loan conditions or European Central Bank bond purchase programmes, an experience affecting almost half of EU member states over the last decade, have been the sharpest and most widespread normative expression of the EU as an active and ongoing dismantler of national labour and social protections.<sup>17</sup> At the same time, the Court of Justice took some important steps away from adopting a progressive and protective approach towards Social Europe to a freedom of enterprise or protection-limiting interpretation of EU social rights and guarantees. These have ranged across: limiting the rights of posted workers and of collective action to protect workers' rights in cross-border situations;<sup>18</sup> limiting its earlier jurisprudence on the social rights accorded to mobile EU citizens;<sup>19</sup> and providing new non-progressive readings of some elements of the legislative labour *acquis* through a range of interpretative devices, including extensive application of the fundamental freedoms, invocation of the Charter freedom to conduct a business and reopening the purpose of the measures.<sup>20</sup> All of these varied EU developments, coming from a wide range of EU actors, have been seen as not just

<sup>16</sup> See M. Dawson, 'New Governance and the Displacement of Social Europe: the Case of the European Semester', in this special issue.

<sup>17</sup> See C. Kilpatrick, 'Abnormal Legal Sources and Institutional Actions in the EU Sovereign Debt Crisis', in M. Cremona and C. Kilpatrick (eds.), *Legal Acts in the EU: Challenges and Transformations* (Oxford University Press 2018).

<sup>18</sup> The *Laval* quartet: ECJ 11 December 2007, Case C-438/05, *International Transport Workers' Federation v Viking Line ABP* EU:C:2007:772, [2007] ECR I-10779; ECJ 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* EU:C:2007:809, [2007] ECR I-11767; ECJ 19 June 2008, Case C-319/06, *Commission v Luxembourg* ECLI:EU:C:2008:350, [2008] ECR I-4323; ECJ 3 April 2008, Case C-346/06, *Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189, [2008] ECR I-1989.

<sup>19</sup> See ECJ 11 November 2014, Case C-333/13, *Dano*, EU:C:2014:2358; ECJ 15 September 2015, Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597.

<sup>20</sup> See, for example, ECJ 18 July 2013, Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521; ECJ 21 December 2016, Case C-201/15, *AGET Iraklis v Ergasias* ECLI:EU:C:2016:972

moving but also undermining Social Europe. Significantly, if we go back to the list of issues covered in the 1977 *Common Market Law Review* special issue on Social Europe, today this is true, for the first time in the EU's history, of free movement of workers also as a by-product of the events leading to the Brexit referendum in June 2016,<sup>21</sup> but foreshadowed in EU-Swiss migration disputes from 2014.<sup>22</sup>

While the two meanings of displacement are clear, the task of identifying and characterising a specific development as constituting a simple movement of, or as a threat to, Social Europe is often open to interpretative disagreement and contestation. While Giubboni argues that certain developments in the Court's interpretation of the social *acquis* correspond fully to the second meaning of displacement, as a threat to Social Europe,<sup>23</sup> Davies' analysis suggests that some Court of Justice judgments, because they involve complex disputes between groups of workers, can be read as instances of apparent rather than real negative displacement.<sup>24</sup> To take a further example, Dawson's contribution asks whether the European Semester is best seen as a new location for socialisation of the EU project (the first meaning of displacement) or as undermining and marginalising Social Europe (the second meaning) as both views exist. He suggests important paths for testing these alternate characterisations. His analysis also demonstrates that there is not always an easy or straightforward solution to recentring Social Europe, even when there is sufficient consensus that EU developments have threatened it and that such recentring is desirable.<sup>25</sup> A number of contributors also raise interesting questions about how certain decisions may, rather than only being viewed as straightforwardly regressive, be seen as retaining the social, but at the national level or outside EU methods and institutions. Hanna Eklund and Elise Muir, in their respective contributions, give distinct examples providing alternative readings of *Dano* and *Alimanovic*.<sup>26</sup>

<sup>21</sup> This led to EU agreement in February 2016 to modify commitments on free movement of workers had the UK voted to remain: A New Settlement for the UK within the European Union, OJ 2016/C 69 I/01.

<sup>22</sup> A Swiss referendum in January 2014 to restrict free movement of non-Swiss nationals meant Switzerland no longer respected its 1999 agreement with the EC and the member states on free movement of persons, with knock-on implications for all the bilateral free trade agreements between Switzerland and the EU.

<sup>23</sup> S. Giubboni, 'Freedom to Conduct a Business and EU Labour Law', in this special issue, focusing on *Viking* and *Laval*, *supra* n. 18 as well as *Alemo-Herron* and *AGET*, *supra* n. 19. And, placing this against the development of the social rights in the Charter, Robin-Olivier, *supra* n. 15.

<sup>24</sup> A.C.L. Davies, 'How has the Court of Justice changed its management and approach towards the social *acquis*?', in this special issue.

<sup>25</sup> Dawson, *supra* n. 16.

<sup>26</sup> H. Eklund, 'Enlargements, and Displacements of Social Europe: The Example of Sweden', in this special issue; Muir, *supra* n. 9.

## THE DIMENSIONS OF DISPLACEMENT OF SOCIAL EUROPE

While the different factors underpinning displacement make identifying a precise date impossible, the millennium is a useful hinge after which the displacement of Social Europe for Workers becomes increasingly apparent. If we focus solely on formal EU constitutional developments, it may seem counter-intuitive to claim that Social Europe for Workers is in retreat or being displaced. For a start, even at what I present as its 20<sup>th</sup> century golden age, it was frequently called the Cinderella or, worse still, the ‘ugly sister’ supranational policy area.<sup>27</sup> And since then, we have witnessed the flourishing of social policy competences,<sup>28</sup> the expansion of the social governance tool-kit with the Open Method of Co-ordination,<sup>29</sup> the mainstreaming of Treaty social commitments<sup>30</sup> and the consecration of a wide range of social rights as binding fundamental rights.<sup>31</sup> These all took place only from Maastricht onwards with each Treaty iteration, Amsterdam, Nice and Lisbon, building on the last. Yet rather than contradicting the story of displacement, the contrast between what the Treaties promise and the life of EU social policy in policies, membership, institutions, and governance tells instead a more interesting tale of disjunctures between Treaty promises and EU practices. In this sense at least, there is continuity in the tale of Social Europe: the Treaties have never been a reliable or a sufficient guide to its content. The continued use of internal market competences for initiatives billed as Social Europe measures, even when – unlike in the 1970s – multiple social policy competences exist, is a good demonstration of the creative but fragmented nature

<sup>27</sup> Shanks himself makes this Cinderella claim, *supra* n. 3. See claiming ‘ugly sister’ status after Maastricht, E. Szyszczak, ‘Social Policy: A Happy Ending or a Reworking of the Fairytale?’, in D. O’Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery 1994) p. 313.

<sup>28</sup> The Amsterdam Treaty witnessed introduction of a broad discrimination law competence and the integration of the Maastricht Social Policy Agreement.

<sup>29</sup> In particular, the inclusion of the Employment Policy Title in the Treaty in Amsterdam and the Open Method of Coordination on social inclusion as part of the Lisbon process in 2000.

<sup>30</sup> See, in particular after Lisbon, Art. 3 TEU, committing the EU to work for ‘a highly competitive social market economy, aiming for full employment and social progress’ and the mainstreaming social clause in Art. 9 TFEU, ‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.’

<sup>31</sup> See, in particular, the Solidarity Chapter of the EU Charter of Fundamental Rights (Arts. 27-33). These mainly cover labour rights and some social (social security and assistance, health-care) rights, as well as rights to consumer and environmental protection. Discrimination and gender equality are in a separate Equality Chapter.



of Social Europe.<sup>32</sup> Social Europe developed without all the Treaty support it needed (eg in the 1970s) and was placed under greatest pressure in the presence of its most significant support in the Treaties after Lisbon. The trajectory of social rights in the interpretation of the EU Charter of Fundamental Rights, explored by Robin-Olivier, provides a compelling example of the latter.<sup>33</sup>

This displacement manifests itself across a range of dimensions. At least four key dimensions are worth identifying: policy displacement, membership and displacement, institutional displacement and governance displacement. By *policy displacement* is meant firstly, as discussed above, that as EU areas of activity have expanded far beyond the internal market, more ‘competitor’ policy areas have become prominent within EU law and policy, such as data protection, protecting asylum-seekers, Roma rights or criminal justice. Just as importantly, the new overarching frame of fundamental rights has effects throughout all areas of EU law.<sup>34</sup> These provide competing areas and frames for EU law legitimacy from the Social Europe focus. Alongside competing policy areas or frames, making Social Europe one of many in a more crowded field, the belief that Social Europe initiatives are a way of delivering desired policy and legitimacy objectives which command widespread acceptance, has weakened considerably. This can be because of conflicts, real or perceived, between groups of workers, such as younger and older workers, as explored by Anne Davies in her contribution. It can also be because it is believed that protection for labour market ‘insiders’ limits access to employment for ‘outsiders’. These can make Social Europe a less appealing option in a field with many more alternatives. At the same time, policy displacement can also mean fewer initiatives to build Social Europe while other policy frames, centrally Economic and Monetary Union and the internal market, drive policies with significant socio-economic impacts. Accordingly Garben’s analysis highlights the exceptionally limited use of the Social Policy Title in the EU Treaties over the last decade, as an important indicator of policy displacement, alongside the rise of Economic and Monetary Union and internal market as frames, and considers whether the European Pillar of Social Rights may address this.<sup>35</sup>

Changing EU Membership (enlargement and proposed withdrawals) is a further highly significant lens through which to track, understand and

<sup>32</sup> See especially the agreement in Council of 23 October 2017 to amend the Posted Workers’ Directive on the basis of the Commission proposal of March 2016: COM (2016) 128 final. The legal basis is Arts. 53(1) and 62 TFEU, the free movement of services’ legal bases.

<sup>33</sup> Robin-Olivier, *supra* n. 15.

<sup>34</sup> Robin-Olivier, *supra* n. 15. This is also an important strand of Muir’s analysis, with an important focus on anti-discrimination law.

<sup>35</sup> S. Garben, ‘The European Pillar of Social Rights: Effectively Addressing Displacement?’, in this special issue.

evaluate displacement.<sup>36</sup> Enlargement, and the new kinds and quantities of free movement of EU nationals it produced, has had the political and legal effect of placing free movement in conflict or in tension with national systems of social protection and industrial relations (rather than free movement operating towards progressive opening of equal access to those systems to certain categories of cross-border movers, as had previously been the case). This tension between free movement and national social and labour systems has been evident in accession treaties,<sup>37</sup> in case law<sup>38</sup> and in the politics of the EU. Its sharpest manifestation was in the pre-referendum renegotiation of UK membership of the EU during which the social costs of free movement of persons, for the first time, replaced the labour law *acquis* in Conservative government priorities as the most pressing social issue requiring resolution.<sup>39</sup> However, reflecting upon membership opens up other less obvious but productive lines of inquiry. We might imagine, for instance, assume that member states renowned for their social and industrial relations model, will straightforwardly upload that to EU level politics and institutions and vice versa.

<sup>36</sup> See in particular the contributions to this special issue by Hanna Eklund on Swedish membership and by Zane Rasnača on membership and posting, 'Identifying the displacement of "new" Member State social interests in the posting of workers: The case of Latvia'.

<sup>37</sup> The transitional restrictions on free movement of workers that were operated by a large number of old member states in the 2004, 2009 and 2011 enlargements; the additional restrictions on posting of workers to Austria and Germany that were also included in all these accession agreements, 'In order to address serious disturbances or the threat thereof in specific sensitive service sectors in the labour markets of Germany and Austria, [which could arise from posting] Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Art 56 TFEU with a view to limiting in the context of the provision of services by companies established in [Accession states], the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures.'

<sup>38</sup> This case law is so well known that a reference to the *Laval* quartet is almost redundant. However, analysing these cases as a well-intentioned though problematic response by the Court of Justice to changing EU membership, or justice between workers, seems a productive and not yet fully explored avenue: see further Davies, Eklund and Rasnača in this special issue for a range of insights. More interesting and less analysed is the subsequent readjustment of the *Laval* case law by the Court of Justice in the *Finnish Electricians Union* case: ECJ 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* ECLI:EU:C:2015:86. Also well worth further analysis, in light of tensions surrounding limits on free movement of workers and posted workers, is the Court's interpretation of the accession restrictions on free movement: see in particular ECJ 10 February 2011, Cases C-307/09 to 309/09, *Vicoplus* ECLI:EU:C:2011:64; ECJ 18 June 2015, Case C-586/13, *Martin Meat* ECLI:EU:C:2015:405.

<sup>39</sup> In 2013 Cameron's first speech at Bloomberg on UK renegotiation of membership did not include free movement of workers but focused instead on labour *acquis* issues such as excessive regulation and the working hours of doctors. However, this changed in late 2014 and his letter to Donald Tusk on 10 November 2015 demanded 'that people coming to Britain from the EU must live here and contribute for four years before they qualify for in-work benefits or social housing' and 'that we should end the practice of sending child benefit overseas'.

Eklund questions any such straightforward relationship by exploring Sweden's EU membership from the perspective of its contribution to building Social Europe within EU law and institutions.<sup>40</sup>

A third issue concerns EU *institutional displacement*. When Michael Shanks wrote his analysis in 1977, Gabrielle Defrenne had just won her renowned victory at the European Court of Justice,<sup>41</sup> and the Social Affairs Directorate-General of the Commission was filled with empowered actors including femocrats.<sup>42</sup> Lack of specific competences in the Treaty did not prevent a raft of Community legislation on gender discrimination and workplace rights being proposed by the Commission and adopted by the legislature. In the Delors years (1985-1994), social partner promotion was accompanied by Court and Commission supporting extensive use of the social competences introduced by the Single European Act and Maastricht. Bold and progressive interpretation of the social *acquis* was a highlight of the Court's activities and a prominent focus of constitutional EU scholarship.<sup>43</sup> Institutional displacement asks us to consider what has changed institutionally and why? Examples worth investigating include the Commission locations and relocations of Social Europe issues, the contrast between the Barroso (2004-2014) and the Juncker (2014-2019) Commissions, the different Council configurations with a say on Social Europe matters,<sup>44</sup> and the place accorded the social *acquis* in contemporary decision-making by the Court of Justice.<sup>45</sup>

A final area worth investigating and reflecting upon is *governance displacement*. From a high point of hybrid new EU employment governance in the early years of the Lisbon strategy in which the European Social Fund, the European Employment Strategy and the EU *acquis* were partially integrated to achieve social objectives,<sup>46</sup> much has changed. Disintegration of this hybrid regime has been accompanied by social objectives and governance being subsumed into the European Semester from 2011 onwards.<sup>47</sup> At the same time, the social *acquis* has been a central focus in the recent intensification of the EU Better Regulation agenda, especially in the REFIT (Regulatory Fitness and Performance)

<sup>40</sup> H. Eklund, in this special issue.

<sup>41</sup> ECJ 8 April 1976, Case 43/75, *Defrenne v Sabena (No 2)*, ECLI:EU:C:1976:56.

<sup>42</sup> *Supra* n. 1.

<sup>43</sup> Alongside *Defrenne* we can think of cases such as ECJ 26 February 1986, Case 152/84, *Marshall*, ECLI:EU:C:1986:84 (gender equality at work) and ECJ 19 November 1991, Joined Cases 6/90 and 9/90, *Francovich*, ECLI:EU:C:1991:428 (guarantees for employees in employer insolvency).

<sup>44</sup> See in particular Dawson, *supra* n. 16.

<sup>45</sup> See in particular Davies and Giubboni, in this special issue.

<sup>46</sup> See C. Kilpatrick, 'New EU Employment Governance and Constitutionalism', in G. de Búrca and J. Scott (eds.), *New Governance and Constitutionalism in Europe and the US* (Hart 2006) p. 121.

<sup>47</sup> See Dawson, *supra* n. 16.

programme launched at the end of 2012. To give just one of many possible examples, amongst the 'Top 10' burdensome EU Regulations identified by Small and Medium sized Enterprises in a Commission consultation as requiring EU action in 2013 no less than four are social *acquis* directives: the Posted Workers' Directive, the Framework Health and Safety Directive, the Temporary Agency Workers' Directive and the Working-Time Directive.<sup>48</sup>

Discussing the factors which have given rise to displacement clarifies the mechanisms and pathways by which Social Europe may find new spaces and prominence in the ongoing construction of the EU. As argued above, one of the advantages of displacement's dual meaning is that it provides an explanation of why it is not straightforwardly the case that all these developments are to be negatively, or indeed positively, evaluated. A blanket positive evaluation would see the turn away from Social Europe for Workers as the EU rightly deepening its focus on workers other than EU workers, expanding its focus on social issues beyond work, such as health or poverty, and adjusting worker protection to ensure other EU priorities such as inclusive and growing labour markets, adaptation to membership challenges and changes, or the need to make the single currency function. A blanket negative evaluation would see all these developments as simply a turn away from worker protection, a thinner, meaner Social Europe *tout court* and a triumph for neo-liberal agendas within the EU.<sup>49</sup> One of the key aims of analyses focusing on displacement is to test the persuasiveness of different *explanations* and *evaluations* of Social Europe developments. In so doing, it is also

<sup>48</sup> See Commission follow-up to the Top10 Consultation of SMEs on EU Regulation in COM (2013) 446 final and SWD (2013) 401 final. The labour *acquis* was a substantial focus of REFIT over the last five years with all the following being evaluated: the large group of health and safety at work directives, the written statement directive (Directive 91/533/EEC) and three directives containing national information and consultation obligations (the collective redundancies directive (Directive 98/59/EC), the transfer of undertakings directive (Directive 2001/23/EC) and the 2002 information and consultation directive (Directive 2002/14/EC). REFIT evaluation of the part-time and fixed-term work directives (Directive 97/81/EC and Directive 99/70/EC) was announced in October 2016 and of the European Works Council Directive (Directive 2009/38/EC) in 2017. For details and analysis of many of these REFIT exercises see S. Laulom, 'Better Regulation and the Social Acquis: is the REFIT Fit for Purpose?' (draft paper, on file with author).

<sup>49</sup> It is worth reflecting on a further displacement of the social *acquis*: in critical theoretical analyses of 'the social question' or the social deficit in the contemporary EU. In these analyses, the social *acquis* is either given a neo-liberal reading or ignored in considering issues of EU redistribution and legitimacy. See e.g. A. Somek, *Engineering Equality* (Oxford University Press 2010); C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the Social Deficit of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15 *ELJ* (2009) p. 1; F. de Witte, 'EU law, politics and the social question', 14(5) *German Law Journal* (2013) p. 581. Critically engaging with this scholarly displacement along the other dimensions explored here could produce productive insights on the significance of the social *acquis* in the construction of Social Europe.

to ask about the conditions under which Social Europe might find new ways to flourish in the contemporary EU.

This analysis, introducing the special issue, has sought to argue that displacement is a productive lens of inquiry for investigating Social Europe for two reasons. First, it opens a productive space for identifying and analysing the many new locations of Social Europe. By asking where else is it now, it points away from staying in the track of assuming it is primarily (still or only) defined by Social Europe for Workers and opens interesting further questions about its new locations and dimensions. Second, it does not point to a straightforward evaluation of all recent Social Europe developments as regressive or progressive. Uniting both these reasons is the productive capacity of displacement to destabilise, to acknowledge that Social Europe is in some important senses provisional work-in-progress and can benefit from shifts of perspective and knowledge of the wide range of avenues those advocating for a more Social EU can address.<sup>50</sup>



<sup>50</sup> See further Muir, *supra* n. 9.