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Essential, invisible, discriminated and exchangeable: labour migrants in the EU

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ABSTRACT

This article aims to lay bare the contradictions between on the one hand the technocratic discourse of the EU praising the contribution of migrant workers to the economy of receiving countries and on the other hand the discriminatory impact of law and policy in the fields of free movement and immigration. Drawing from Luca Mavelli's concept of neoliberal citizenship, it submits that both free movement law and EU immigration law are connected to a broader transformative framework of neoliberal political economy where rationalities of value exclude, dispose or sacrifice those with low economic or emotional value for receiving countries.

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When Covid-19 hit Europe in 2020, it resulted in internal border controls and travel bans that seriously disrupted free movement, a cornerstone of the European Union (EU). Most EU countries identified specific occupational sectors as 'essential', 'crucial' or 'key', notably health care, agriculture, food processing and distribution. Workers in these sectors were applauded as essential workers. The pandemic made visible that migrant workers,¹ both EU and non-EU, were overrepresented in these sectors. Following guidelines from the European

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¹ EMN-OECD, Inform #3—*Maintaining Migration in Essential Sectors in Times of Pandemic* <https://ec.europa.eu/migrant-integration/library-document/inform-3-maintaining--migration-essential-sectors-times-pandemic-covid-19_en>. All websites accessed 12 July 2024; exemptions from health measures included exemptions from quarantines in order to ensure rapid access to the market. I use the term 'migrant worker' to designate nationals of one country who join the labour market of another, see also the definition of 'migrant worker' in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

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Commission,² EU countries introduced exceptions in their travel bans and health measures for these essential migrant workers, at times at the request of employers in the key sectors. It underscores the often-neglected value of migrant workers for the economy of receiving States.³

Just two years after the outbreak of the Covid-19 pandemic, the Commission presented Talent Partnerships as a new tool to attract labour from outside the EU necessary to fill shortages on the EU market.⁴ The Commission again highlights that 13% of key workers in the pandemic are migrant workers, who have a particularly high share in low-skill jobs. This finding probably influenced the scope of Talent Partnerships, since in contrast to the pre-existing EU legal framework on labour immigration, Talent Partnerships are open to all skill levels.⁵ They are presented as ‘a “triple win” for all the parties involved—EU Member States, partner countries and migrants themselves’.⁶

In this article, I aim to lay bare the contradictions between on the one hand the EU’s technocratic discourse applauding the contribution of EU and non-EU migrant workers to the economy of the receiving countries and on the other hand the differential impacts law and policy in the fields of free movement and immigration may have. Space constraints lead me to focus on two issues: developments in the practice of free movement law on the ground in the Netherlands (section 1) and the format of EU Talent Partnerships (section 2). They serve to illustrate how the concepts and distinctions in EU law and policy regulating free movement and immigration of workers accommodate and tolerate discrimination based on social class (depicting workers in low-skilled jobs as poverty migrants),⁷ gender (ignoring informal care work and the vulnerable position of women),⁸ race (xenoracism against eastern

² Communication from the Commission, *Guidelines Concerning the Exercise of the Free Movement of Workers During COVID-19 Outbreak* (2020 C 102 I/03), OJEU C102/12 of 30 March 2020.

³ In what follows the term sending State or home State is used to designate the state of nationality or habitual residence that the migrant worker leaves to join the labour market of another State, designated by the term receiving State or the host State.

⁴ European Commission, *Attracting Skills and Talent to the EU*, COM(2022) 657 final of 27 April 2022.

⁵ *Ibid.*, 11.

⁶ European Commission Press Release, *Talent Partnerships: Commission Launches New Initiative to Address EU Skills Shortages and Improve Migration Cooperation with Partner Countries*, 11 June 2021, <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2921>.

⁷ Charlotte O’Brien, ‘Civis Capitalist Sum: Class and the New Guiding Principle of EU Free Movement Rights’ (2016) 53 *Common Market Law Review* 937; Annette Schrauwen, ‘Pushing Out the Poor: Unstable Income and Termination of Residence’ in Tesseltje de Lange, Willem Maas and Annette Schrauwen (eds), *Money Matters in Migration. Policy, Participation and Citizenship* (Cambridge University Press, 2021) 112; A Heindlmaier, ‘Mobile Citizens and the “Unreasonable Burden”: How EU Member States Deal with Residence Rights at the Street Level’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights. Taking Supranational Citizenship Seriously* (Brill Nijhoff, 2020) 129.

⁸ Sandra Mantu, ‘Women as EU Citizens: Caught Between Work, Sufficient Resources, and the Market’ in Tesseltje de Lange, Willem Maas and Annette Schrauwen (eds), *Money Matters in Migration* (Cambridge University Press, 2021) 188; Alice Welsh, *Vanishing Safety Nets, the Citizenship Illusion, and the Worker That Isn’t: A Case Study of EU Migrant Atypical Workers’ Rights in the UK* (University of York, 2020) 157–64; ILO, *The Migrant Pay Gap: Understanding Wage Differences Between Migrants and Nationals* (2020)

European workers based on perceived cultural differences; allowing EU Member States to select which immigrants to invite and which to repel⁹ and centre-periphery (depicting workers from central and eastern Europe as benefit tourists; not taking into account the interest of sending states).¹⁰ I intend to show that both free movement law and EU immigration law are connected to a broader transformative framework of neoliberal political economy where rationalities of value exclude, dispose or sacrifice those with low economic or emotional value for receiving countries.

My focus on the Netherlands as single case study of how the implementation of free movement law and policy on the ground may have differential impact is motivated by my knowledge of the Dutch context—as a Dutch person living in the Netherlands. Furthermore, in the aftermath of the financial and economic crisis the Netherlands was among the most vocal Member States in contesting welfare rights for EU-workers from central and eastern Europe.¹¹ Also, recent studies have shown how the political economy of intra-EU labour migration turns EU-workers in low-skill jobs in the Netherlands into disposable individuals.¹² In line with the remark of Houellebecq's narrator in *Serotonin* that 'Holland isn't a country, it's a business at best',¹³ the Netherlands can be seen as exemplary for how the implementation of EU law on the ground matches a transformative framework of neoliberal political economy.

This article concerns two areas of EU law and policy that are doctrinally separated, notably EU free movement (section 1) and EU immigration (section 2). They are regulated by a different set of norms. Under free movement rules no distinction is made between types of economic activity nor levels of payment as condition to qualify as worker and *have* access to territory, welfare and residence rights. Under EU immigration law and policy, EU directives make a distinction in types of economic activity. Migration rules

www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_763803.pdf.

⁹ Manoj Dias-Abey, 'Determining the Impact of Migration on Labour Markets: The Mediating Role of Legal Institutions' (2021) *Industrial Law Journal* 532; Jean-Baptiste Farcy, *The Palim Project in the Belgian and European Migration Context*, (UC Louvain, EDEM, October 2020) 19. Peo Hansen and Stefan Jonsson, 'Demographic Colonialism: EU–African Migration Management and the Legacy of Eur-afrika' (2011) *Globalizations* 8, 261 at 263; Diamond Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) *Industrial Law Journal* 506.

¹⁰ Valentina Vasile, 'Labour Mobility Impact on Sending Countries. Romanian EU Workers Case Study' (2014) 8 1st International Conference 'Economic Scientific Research—Theoretical, Empirical and Practical Approaches', *ESPERA* 2013, 737; Damjan Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal* 406.

¹¹ See Section 1 below.

¹² T de Lange and others, *Migranten in de frontlinie. De effecten van COVID-19 maatregelen op arbeidsmigranten werkzaam in cruciale sectoren* (Radboud Universiteit/De Burcht Nijmegen, 2023); Aanjaagteam bescherming arbeidsmigranten, *Geen Tweederangs Burgers. Aanbevelingen om misstanden bij arbeidsmigranten in Nederland tegen te gaan*, 30 October 2020 <<https://open.overheid.nl/repository/ronl-404846f9-9f80-400f-90c3-0c9a8b0fd036/1/pdf/Geen%20tweederangsburgers-Interactief.pdf>>. See also section 3 below.

¹³ Michel Houellebecq, *Serotonin* (Heinemann, 2019).

and rights are different for different categories of non-EU workers to whom EU Member States can *grant* access on their labour market. Nevertheless, I submit that both areas are connected to a broader transformative framework of neoliberal political economy that becomes visible in the implementation of the rules.

I draw on Luca Mavelli's concept of neoliberal citizenship, based on rationalities of value that 'challenge classic dichotomies between inside/outside, inclusion/exclusion, members/strangers'.¹⁴ The rationalities of value underlying neoliberal citizenship exclude, dispose or sacrifice those without value or with low-value for the labour market, those whose work can be done at cheaper cost by others, those who need welfare provision to live a life in dignity, and also those whose presence does not contribute to the emotional welfare of a country and its population.¹⁵ In both free movement within the EU and immigration to the EU these rationalities are incorporated in the application of seemingly neutral legal and policy concepts such as 'sufficient financial resources', 'worker', 'partnership' or 'talent' that condition access to territory, welfare and residence rights.

The third section returns to the discourse of essential workers both the EU and individual EU countries used during the Covid-19 pandemic. It questions whether the discovery of the essential role of migrant workers has led to changes in either the application of free movement and immigration law and policy that mitigate discriminatory impacts, and whether it has led the rationalities of value to change and acknowledge that applauding the essential contribution of migrant workers to host countries is meaningless when they are treated as disposable assets. Final remarks are made in the fourth section.

1. EU citizens as (un)wanted migrant workers in the Netherlands: from equal treatment to undeserving poverty migration

Literature distinguishes several periods in the development of internal EU free movement rights.¹⁶ For a long time EU secondary legislation stimulated free movement of workers as much as possible by providing equal treatment for social and tax advantages, the right to bring (non-)EU family members, and educational rights. The Court's case law contributed to a broad interpretation of free movement rights, such as the inclusion of jobseekers

¹⁴ Luca Mavelli, *Neoliberal Citizenship. Sacred Markets, Sacrificial Lives* (OUP, 2022) 3.

¹⁵ *Ibid.*, 3–8.

¹⁶ Eleanor Spaventa, 'Earned Citizenship—Understanding Union Citizenship through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 204.

and part-time workers within the personal scope of these rights.¹⁷ The introduction of Union citizenship in the Maastricht Treaty led to an even broader expansion of the rights where a focus on individual circumstances might provide welfare rights to non-economic actors.¹⁸

A restrictive turn in case law followed a turn in the political climate that accompanied the economic and financial crisis starting in 2008.¹⁹ Member States such as Austria, Germany and the Netherlands planted the seeds of that turn already in 2004, with the first eastern enlargement, when the term ‘free movement’ was renamed ‘benefit tourism’.²⁰ It is illustrative of how discrimination at the intersection of class and geographic origin slipped into EU free movement discourse.²¹

In the Netherlands, the discourse turned into a cost–benefit framing in which access to social benefits played the leading role. Workers from central and eastern Europe were portrayed as ‘abusers’, ‘welfare tourists’ or ‘poverty migrants’.²² The discourse does not concern the wealthy free movers, but a ‘conflated group of mobile poor’,²³ irrespective of their status of worker under EU law. Discrimination based on class, geographic origin and xenoracism on the basis of perceived cultural differences gradually became mainstream in the Netherlands.

The Court seemed responsive to the changed political climate and focused more on limitations in free movement law. It seemingly allowed public authorities to disregard personal circumstances when rejecting social assistance to the economically inactive, jobseekers and those having worked less than a year in a host state.²⁴ Thereby, free movement does no longer provide equal treatment in social and tax advantages if one does not immediately

¹⁷ *Ibid.*, 206–7; Mark Dawson and Floris de Witte, *EU Law and Governance* (Cambridge University Press, 2022) 158–9.

¹⁸ In Case C-85/96, *Martínez Sala*, ECLI:EU:C:1998:217, Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, Case C-209/03, *Bidart*, ECLI:EU:C:2005:169; Spaventa (n 16) 207.

¹⁹ Bridget Anderson, ‘Migration Immigration Controls and the Fashioning of Precarious Workers’ 24(2) 2010 *Work, Employment and Society* 300 at 310.

²⁰ Peo Hansen, *A Modern Migration Theory: An Alternative Economic Approach to Failed EU Policy*, Comparative Political Economy (Agenda Publishing, 2021) 15; Dion Kramer, ‘Earning Social Citizenship. Free Movement, National Welfare and the European Court of Justice’ (PhD thesis, Vrije Universiteit, 2020) 237.

²¹ O’Brien (n 7); Spaventa (n 16).

²² Sandra Mantu and Paul Minderhoud, ‘Exploring the Limits of Social Solidarity: Welfare Tourism and EU-Citizenship’ (2016) 2 *UNIO-EU Law Journal* 4 at 5–6.

²³ Sandra Mantu, ‘Alternative Views on EU Citizenship’ in Carolus Grütters, Sandra Mantu and Paul Minderhoud (eds), *Migration on the Move. Essays on the Dynamics of Migration* (Brill | Nijhoff, 2017) 225–46.

²⁴ Most notoriously in Case C-333/13, *Dano*, EU:C:2014:2358, Case C-67/14, *Alimanovic*, EU:C:2015:597, Case C-299/14, *García-Nieto*, EU:C:2016:114; see also Michael Blauburger and others, ‘ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence’ (2018) 25 *Journal of European Public Policy* 1422; Spaventa (n 16). For a view that the *Dano* case followed a steady line in case law, but however very critical on the lack of individual proportionality assessment see Moritz Jesse and Daniel William Carter, ‘Life after the “Dano-trilogy”: Legal Certainty, Choices and Limitations in EU Citizenship Case Law’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill | Nijhoff, 2020) 135.

contribute to the purse of the receiving society. Social citizenship must be ‘earned’.²⁵ Hansen notes how the European Commission also welcomed the Court’s restrictive turn.²⁶

In 2011, the Dutch government proposed an ‘action package’ that targeted EU workers from central and eastern Europe. Its tone is that of ‘increasing numbers’, ‘problems’, ‘exploitation’ and ‘fraud’.²⁷ Actions included stricter and faster enforcement of residence conditions and the introduction of a ‘sliding scale’, linking periods of residence to a maximum number of nights in a homelessness shelter. Surpassing the maximum can result in a removal decision. Furthermore, instances of rough sleeping, eating from a bin, shop thefts or public drunkenness are noted in a file. An extensive file can result in a removal decision, also for persons who are in and out of work.

In April 2013, the Dutch Minister of the Interior, with his counterparts of Germany, the UK and Austria sent a letter to the Council presidency asking for an urgent review of EU law that provided access to benefit rights for ‘recently arrived EU citizens’, the Citizens’ Rights Directive (CRD).²⁸ The CRD regulates residence and equal treatment rights EU citizens have in other EU countries than their own. However, on the basis of bilateral contacts the Dutch Minister of Social Affairs later concluded that a review of EU law would never happen, so restrictions should be found in domestic practice.²⁹

The key change in Dutch national practice took place via policy rules and guidelines, making use of seemingly neutral concepts in the CRD to include rationalities of value in free movement law. The CRD includes a link between lawful residence and access to social assistance, correctly transposed in the Social Assistance Act.³⁰ Guidelines for the application of conditions of lawful residence provided for a strict interpretation of seemingly neutral concepts such as ‘sufficient financial resources’ those without work should have to be lawfully residing, and seemingly neutral income and working hours conditions to qualify as EU worker lawfully residing and having access to social rights.³¹ Longer career breaks or care breaks result in the loss of lawful residence if the (increased) threshold of sufficient resources is not met.³²

²⁵ Spaventa (n 16); Kramer (n 20); Anita Heindlmaier and Michael Blauburger, ‘Enter at Your Own Risk: Free Movement of EU Citizens in Practice’ (2017) 40 *West European Politics* 1198.

²⁶ Hansen (n 20) 191.

²⁷ Mark van Ostaijen, ‘Worlds between Words. The Politics of Intra-European Movement Discourses’ (PhD thesis, 2017).

²⁸ Council Document 10313/13; Directive 2004/38 on Citizens’ Movement and Residence Rights, OJEU L158/77 of 30.4.2004.

²⁹ Kramer (n 20) 238.

³⁰ *Staatsblad* 2006, 373.

³¹ Kramer (n 20) gives a detailed description at 241–57.

³² Miriam Quené, ‘Resource Conditions for Legal Residence in the EU. A Comparative Analysis of EU Migration Law and Its Implementation in Selected Member States’ (Doctoral dissertation, University of Antwerp, 2023) 622.

For persons working under increasingly flexible contracts that are on-call, zero-hours, short-term, temporary or substitute it becomes more difficult to provide evidence of being an EU worker. Especially women, ethnic minorities, and young people are more heavily affected by the restrictive interpretation of EU worker status.³³ A 2023 report on essential migrant workers in the Netherlands during COVID-19 shows how the Dutch legal system facilitates these flexible contracts.³⁴ It further lays bare how the Dutch law leads to a vulnerable position of migrant workers. Indeed, access to housing and access to health-care is linked to lawful residence for which EU worker status is essential. This is combined with the administrative invisibility of migrant workers due to a misfit between temporary migration and a good registration system, and a very poor enforcement of the rules, especially when temporary work agencies employ EU workers in the Netherlands.

While the Commission is aware of national practices such as the Dutch ones, noted as ‘strategic (non-)compliance with’ or ‘manipulation of’ free movement law,³⁵ it seemed to disregard these. In 2013 it noted that administrative practices are difficult to tackle via infringement procedures, especially if the formal rules comply with EU law.³⁶ The Commission referred to more informal problem-solving mechanisms, such as SOLVIT, that help if individual complaints are filed. It is questionable however whether those affected will file individual complaints or even know that the practice is not compliant with EU law.

One might conclude that the European Commission tolerates, and EU law concepts accommodate structural discrimination of EU workers based on gender, class and geographic origin—such as portrayed by the Dutch ‘Action Package’. Stricter policy rules and guidelines are equally tolerated, though they have distributive effects along gender, class, and race. This discrimination goes beyond the legal diversification in rights attached to economic status, as it also affects those who have worker status under EU law. It is illustrative for the gradual inclusion of neoliberal rationalities of value in the concepts of EU worker and Union citizenship that challenge classic dichotomies between members and strangers and allow to depict the economic and

³³ Anna Simola, ‘EU Citizenship as Precarious Status for Precarious Workers: Implications of National Policies Restricting EU Citizens’ Rights for Young University-Educated EU Migrants in Brussels’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights. Taking Supranational Citizenship Seriously* (Brill | Nijhoff, 2020) 190; Charlotte O’Brien, Eleanor Spaventa and Joyce De Coninck, *The Concept of Worker Under Art. 45 TFEU and Certain Non-Standard Forms of Employment* *FresCo Comparative Report 2015* for the European Commission (European Commission, 2016) 8 and 63; Welsh (n 8) 157; Quené (n 32) chapter 8; see also ILO (n 8).

³⁴ T de Lange and others (n 12).

³⁵ Kramer (n 20) 238; Anthony Valcke, ‘Expulsion from the “Heart of Europe”: The Belgian Law and Practice Relating to Termination of EU Residence Rights’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds) (n 7) 155–89; O’Brien (n 7).

³⁶ European Commission, *Impact Assessment Accompanying the Document Directive of the European Parliament and of the Council on Measures Facilitating the Exercise of Rights Conferred on Workers in the Context of Free Movement of Workers* SWD(2013) 149 final of 26 April 2013.

emotional value of certain groups of EU citizens as undeserving the rights that twenty years ago EU law would have provided to them as part of a notion of Union citizenship that binds Europeans together. For now, the European Commission seems unwilling to take appropriate countermeasures against the gradual neoliberal transformation in the practical implementation of free movement law, and thereby neglects its role as guardian of the Treaties.

Furthermore, it seems to me that the inclusion of neoliberal rationalities of value is facilitated by the lack of attention to the impact of free movement on the sending Member States.³⁷ For Romania free movement of workers meant a major loss of highly skilled experienced workers and young workers and has lasting negative demographic, economic and social effects.³⁸ However, the topic of brain drain and young people leaving central and eastern Europe is hardly addressed in mainstream EU (legal) literature, and seems to be absent on the EU's agenda.³⁹ Ignoring these topics also makes it easier to disregard brain waste, which happens when persons qualified for a certain skilled job in the sending Member State are working in unskilled or low-skilled jobs in the receiving Member State.

2. Talent partnerships to attract migrant workers of 'all skill levels'

Social class is a rationality of value formally underlying the EU labour immigration legal framework. In contrast to that rationality, Talent Partnerships promise to be a legal migration pathway for all skill levels and all sectors. As will be shown below, at present that promise is not fulfilled.

Under the EU's external labour migration policy and in contrast to EU free movement law, EU countries remain competent for first admission of labour migrants coming from non-EU States.⁴⁰ Since the beginning of this century, the EU started to develop an EU labour migration policy motivated by economic and demographic concerns.⁴¹ The current legal framework for labour migration includes sectoral directives harmonising conditions of entry and residence for highly skilled, intra-corporate transferees, students

³⁷ As Kukovec (n 10) 407 noted, 'the interests and concerns of the new Eastern countries were difficult to express in the existing legal discourse'.

³⁸ Vasile (n 10).

³⁹ To illustrate the brain drain one could mention that the number of Romanian doctors in Romania would increase by 20% if the doctors who left Romania since its accession to the EU would return to Romania. See Corinne Hinlopen and Annette Schrauwen, 'Health Personnel Policy: Matching Free Movement of Labour with an Active Role for the EU' in Vytenis Pvilas Andriukaitis and Gediminas Ceriauskas (eds), *A European Health Union. A Blueprint for Generations* (FEPS and EIHS 2023) chapter 2.5.

⁴⁰ Article 79 (5) TFEU.

⁴¹ Hansen (n 20) 85–6.

and researchers, and seasonal workers.⁴² Member States decide on work and entry permits. The framework is completed by ‘horizontal’ directives on family reunification, long-term residence, and on a single permit for work and residence of people admitted under national schemes of the Member States.⁴³

The sectoral approach makes a distinction in rules and rights for different categories of workers. In contrast to the highly skilled, the seasonal workers have no EU right to unemployment benefits or family benefits nor access rights to educational and vocational training, or tax benefits.⁴⁴ They are not allowed to stay on the European labour market.⁴⁵ Despite remarks of the European Economic and Social Committee and the European Parliament that this is discriminatory towards different categories of non-EU nationals, the categorisation in the legal framework still stands.⁴⁶

Starting from 2005, the EU brings together all areas of migration policy: asylum, ‘illegal’ or irregular migration, visa policy, border security, and labour migration. The 2020 New Pact on Migration and Asylum⁴⁷ also presents a comprehensive approach that is based on partnerships between the EU and third countries and connects development of new legal pathways of migration to reduction of irregular migration.⁴⁸

Talent partnerships are such a new legal pathway for labour migration, and promise to involve all skills levels and various economic sectors.

⁴² Directive (EU) 2021/1883/EC of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 382/1, 28.10.2021; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1, 27.5.2014; Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132/21, 21.5.2016; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375, 28.3.2014.

⁴³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1, 23.12.2011, which will be repealed on 22 May 2026 by recast Directive 2024/1233 of 24 April 2024 on a single application procedure for a single permit, OJ L 2024/1233, 30.4.2024.

⁴⁴ Preamble point 46 of the Seasonal Workers Directive (n 42).

⁴⁵ For a critical and more detailed analysis of the sectoral framework see Hansen (n 20) Chapter 5.

⁴⁶ Hansen (n 20) 96; European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Green Paper on an EU Approach to Managing Economic Migration*, SOC/ 199 (European Economic and Social Committee, 2005) 4; European Parliament, ‘European Parliament Resolution on an EU Approach to Managing Economic Migration (COM(2004)0811-2005/2059(INI))’, P6 TA (2005)0408.

⁴⁷ European Commission, New Pact on Asylum, COM(2020) 609 final of 23 September 2020, at 2. After four years of negotiation, the Pact has been endorsed by the European Parliament on 10 April 2024 and by the Council on 14 May 2024.

⁴⁸ *Ibid*, point 6.6.

Talent Partnerships are ‘an enhanced commitment to support legal migration and mobility with key partners’ offering

a comprehensive EU policy framework as well as funding support for cooperation with third countries, to better match labour and skills needs in the EU, as well as being part of the EU’s toolbox for engaging partner countries strategically on migration.⁴⁹

The rationality of value underlying Talent Partnerships is similar to that underlying Mavelli’s notion of neoliberal citizenship: excluding those without value for the EU labour market and, with the engagement of partner countries, repelling those whose presence does not contribute to the emotional welfare of the EU and its population. Talent partnerships are a form of ‘control-oriented cooperation’⁵⁰ or ‘remote control’.⁵¹ At the same time, they are imbued with a colonial ideology in which the EU selects the migrants it needs for its own economic benefit.

In its April 2022 Communication on attracting skills and talent to the EU, the Commission presents Talent Partnerships as part of an approach to better match skills and needs for the EU *and* partner countries.⁵² It promises they are open to all skill levels and concern various economic sectors, and provide in long-term, temporary or circular migration. The document does signal the risk of brain drain, a concept lacking in EU free movement discourse. However, it only mentions the EU should be ‘mindful’ of brain drain.

Four steps should operationalise the partnerships.⁵³ First, the parties are consulted on their labour market needs, interest in labour mobility and talent development. It is done in the context of the overall state of relations and migration management needs.⁵⁴ Thus, next to the EU labour market, the EU’s wish to prevent irregular migration and to return unlawful migrants is served. The Partnership reflects EU-driven policy preferences stemming from donor support, where the partner should develop particular policies, buy equipment or build capacity.⁵⁵ Partner countries are indeed criticising the EU for ignoring their perspectives and needs.⁵⁶

⁴⁹ *Ibid.*

⁵⁰ Paula García Andrade, ‘EU Cooperation on Migration with Partner Countries within the New Pact: New Instruments for a New Paradigm?’ *EU Migration Law Blog*, 8 December 2020 <<https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>>.

⁵¹ Arne Niemann and Natascha Zaun, ‘Introduction: EU External Migration Policy and EU Migration Governance: Introduction’ (2023) *Journal of Ethnic and Migration Studies* 1.

⁵² European Commission (n 4) 10, author’s italics.

⁵³ *Ibid.*, 13.

⁵⁴ *Ibid.*

⁵⁵ Ilke Adam and others, ‘West African Interests in (EU) Migration Policy. Balancing Domestic Priorities with External Incentives’ (2020) 46 *Journal of Ethnic and Migration Studies* 3101 at 3102.

⁵⁶ Briefing Paper, EMN-JRC-DG Home Rountable, ‘EU Labour Migration Policy: Time to Move from a Skill-Based to a Sector-Based Framework?’ November 2020, 6; Helen Dempster and Michael Clemens, ‘The

As a second step the Commission analyses the relevant data of the partner country and shares it with interested EU countries.⁵⁷ In the third step, the Commission together with the External Action Service and EU delegations steer discussions with the relevant partner countries after which a technical roundtable of ‘all relevant stakeholders of the EU’ and the partner country will discuss and agree on designing a partnership. The fourth step consists in financing the partnership from a combination of funds from the EU,⁵⁸ Member States and private sector (especially those companies ‘which will benefit from workers as part of the Talent Partnerships’). It is unclear what percentage of the EU financial instruments is reserved to develop Talent Partnerships.⁵⁹

The first Talent Partnerships would be with Egypt, Morocco, Tunisia, Senegal, Nigeria, Pakistan, Bangladesh and build on upon successful pilot

EU Should Build Skills in Africa, Not Just Promote Mobility’ *Blog Post Center for Global Development* <www.cgdev.org/blog/eu-migration-pact-putting-talent-partnerships-practice>.

⁵⁷ See eg, the EU funded report on how EU’s Talent Partnerships can address youth employment and mobility in Algeria, Morocco, Libya and Tunisia, ICMPD, *Youth and Mobility in the Maghreb: An Assessment of Youth Aspirations in Algeria, Libya, Morocco and Tunisia*, 2021 <www.icmpd.org/news/euomed-migration-v-releases-new-study-on-youth-and-mobility-in-the-maghreb>.

⁵⁸ Notably the Neighbourhood, Development and International Cooperation Instrument—Global Europe, and the Asylum, Migration and Integration Fund.

⁵⁹ The Commission Implementing Decision of 23 November 2022 on the financing of components of the Thematic Facility under the Asylum, Migration and Integration Fund and adoption of the Work Programme for 2023, 2024 and 2025, C(2022)8340 final, shows that Talent Partnerships are financed via ‘indirect management’ (contributions to entities selected and assessed in accordance with article 154 of the Financial Regulation 2018/1046). For financing Talent Partnership, synergies are maximized with 3 other Funds (the Neighbourhood, Development and International Cooperation Instrument, the Instrument for Pre-Accession Assistance III and EU humanitarian aid regarding actions in or in relation to third countries). That said, the AMIF work programme reserves 329,900,000 euro for activities under ‘indirect management’. Point 4 of the Annex clarifies that this amount is reserved for a variety of activities without further specification of the amount connected to each activity. Only 1 of the 8 activities mentioned is aiming at legal migration:

- contribution to the Migration Partnership Facility which among other activities, also co-finances Talent Partnerships.
- support of third countries hosting refugees.
- contribution to the Return and Reintegration Facility.
- contributions to facilitate voluntary transfers of asylum seekers or refugees.
- contribution to emergency assistance.
- contribution to a comparative publication on national integration policies in EU and OECD countries.
- contribution to a Readmission Capacity Building Facility.
- support for reception, asylum and return systems under pressure.

Annex 4 of the Commission implementing decision also clarifies that the Migration Partnership Facility is implemented by the ICMPD and that projects supported through the Migration Partnership Facility will be implemented preferably via call(s) for proposals, open to public bodies of EU Member States, EU Member States-based organisations, and in some cases international organisations as lead applicants. Public authorities of priority partner countries, public bodies of the same or other EU Member States, international organisations or non-governmental organisations working on a non-profit basis established in the EU or in the priority partner countries will be able to apply as co-applicants (future co-beneficiaries). Recital 51 of the preamble of Regulation 2021/947 establishing the Neighbourhood, Development and International Cooperation Instrument—Global Europe, OJEU L209/1 of 9 June 2021 refers to 10% of the financial envelope being dedicated to management of migration and forced displacements, including support for the ‘development benefits’ of regular migration.

projects with these countries.⁶⁰ The Commission indicates seven pilots as successful.⁶¹ Six of these are contracted by the International Centre for Migration Policy Development (ICMPD), an international organisation with 19 Member States founded in 1993 upon initiative by Austria and Switzerland. At the time of writing (October 2023) 15 out of 48 projects displayed at the ICMPD website, including the 6 successful pilots, are on legal migration and mobility.⁶² Only 1 out of the 6 successful pilots includes a possibility of long-term migration (PALIM), the other projects aim at circular migration, defined by the Commission as ‘a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries’.⁶³ Only 1 out of the 6 projects addresses seasonal workers in agriculture (WAFIRA), whereas the others have graduates or students as target group. The total number of persons selected by the 6 pilots is quite small: their aggregate aim was 604 candidates. The seventh ‘successful pilot’ (THAMM) is funded by the EU Emergency Trust Fund for Africa and addresses governance frameworks, skills recognition and qualification, and statistical data. It targets ‘young people’ from Morocco, Tunisia, and Egypt via pilot mobility schemes. All the other projects also work on capacity building of public employment agencies and other government institutions to manage labour migration in partner countries—and one cannot help thinking that the capacities are mainly built around EU preferences.⁶⁴ Though this capacity building is presented as building trust and long-term cooperation, the projects often have a small scale and a short timeframe.⁶⁵

⁶⁰ European Commission (n 4) 14. See also the call for proposals 2022 under ‘Lot 2’ of the MPF—Support to the implementation of projects aligned to the new Talent Partnerships. Note that one of the criteria for funding is partner country cooperation with the EU, including cooperation on return and readmission, see MPF Guidelines for Call of Proposals, April 2023 Update 6 <www.migrationpartnershipfacility.eu/calls-for-proposals/documents?topicid=14>. The guidelines indicate that approximately 14,000,000 euro from AMIF is available for projects under strand D. It would be 4% of the money reserved for the ‘indirect management activities’.

⁶¹ These are the pilot projects THAMM between Germany, Belgium and France with Morocco, Tunisia, Egypt; PALIM between Belgium and Morocco; HOMERe between France, Morocco, Egypt and Tunisia; YGCA between Spain and Morocco; MENTOR 2 between Italy, Morocco and Tunisia; MOVE_GREEN between Spain and Morocco and WAFIRA between Spain and Morocco.

⁶² <www.migrationpartnershipfacility.eu/mpf-projects>.

⁶³ Communication from the Commission on circular migration and mobility partnerships between the European Union and Third Countries, COM(2007)248 final, point III under B. The Commission explains that circular migration could create an opportunity for persons residing in a third country to come to the EU temporarily for work, study, training or a combination of these, on the condition that, at the end of the period for which they were granted entry, they must re-establish their main residence and their main activity in their country of origin. Circularity can be enhanced by giving migrants the possibility, once they have returned, to retain some form of privileged mobility to and from the Member States where they were formerly residing, for example in the form of simplified admission/re-entry procedures.

⁶⁴ For a similar observation related to mobility partnerships see Paul James Cardwell and Rachel Dickson, ‘“Formal Informality” in EU External Migration Governance: The Case of Mobility Partnerships’ (2023) *Journal of Ethnic and Migration Studies* 1, at 7.

⁶⁵ Kate Hooper, *How Can Europe Deliver on the Potential of Talent Partnerships*, MPI Policy Brief, December 2021, 10.

It would be unfair to blame the failure to keep the promise of legal migration for all skill levels entirely on the Commission as individual EU countries need to support Talent Partnerships. The Dutch government for instance has made clear it is not interested, as it considers labour mobility from outside the EU a means of ‘last resort’ to address shortages on the labour market.⁶⁶ The Dutch view reflects a policy of disposable workers, earlier visible in the government’s position during the transposition of the Seasonal Workers Directive in the Netherlands: the ‘need’ for seasonal workers from outside the EU only arises when seasonal workers from eastern Europe are no longer available for the Dutch labour market.⁶⁷

The preference for projects addressing highly educated migrants mirrors the existing EU legal framework for labour migration. The preference for circular migration indicates reluctance to provide legal pathways for long-term labour migration. The idea that circular migration is better suited to match international supply of and demand for labour is not new.⁶⁸ It ignores the desires and rights of participating migrants,⁶⁹ and implies a narrative of ‘the consenting foreign worker to legitimate the use of subjugated deportable foreign labour’.⁷⁰ Circular migration is by definition temporary, which expands the power of employers and increases vulnerability of migrant workers to exploitative working conditions.⁷¹ There is evidence that some employers prefer migrant workers for low-wage jobs, because they expect these workers to accept lower wages and less favourable working conditions. Anderson and Ruhs describe how employers justify their preference for migrant workers to the outside world by reference to a ‘high standard of work ethic’.⁷²

Interestingly, one of the successful pilots included academic action research on the implementation of the project. A first report was quite positive on the pilot. But it also noted:

A selective logic prevails: The Belgian and Flemish authorities still aim to support the local economy by resorting to targeted immigration of certain migrant workers. As in the post-war period, foreign workers (guestworkers)

⁶⁶ Tweede Kamer, Vergaderjaar 2021–2022, 22 112, nr. 3442, Fiche: Mededeling— aantrekken van vaardigheden en talent naar de EU, at 5.

⁶⁷ Tweede Kamer, Vergaderjaar 2016–2017, 34 590, no. 3, 1–2.

⁶⁸ European Commission 2007 (n 63) 8.

⁶⁹ Rainer Bauböck and Martin Ruhs, ‘The Elusive Triple Win: Addressing Temporary Labour Migration Dilemmas through Fair Representation’ (2022) 10 *Migration Studies* 528. They maintain that sending states, receiving states and migrants should be fairly represented and that some rights of migrants can be the outcome of negotiations whereas other rights need to be fixed beforehand under a democratic principle of equal protection of all under the law.

⁷⁰ Vasanthi Venkatesh, ‘Confronting Myths: Agricultural Citizenship and Temporary Foreign Worker Programs’ (2019) 5 *International Journal of Migration and Border Studies* 82 at 93.

⁷¹ Bauböck and Ruhs (n 69) 535; Venkatesh (n 70).

⁷² Bridget Anderson and Martin Ruhs, ‘Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy’ in Martin Ruhs and Bridget Anderson (eds), *Who Needs Migrant Workers?: Labour Shortages, Immigration and Public Policy* (Oxford University Press, 2010) 15–52, notably at 29, 40 and the further literature they refer to.

are invited because their profiles meet the demands of employers. In the past, low-skilled workers, today, more skilled people, but the logic is similar: Only certain categories of migrant workers are allowed to enter the market in Belgium.⁷³

It fits the ‘currency of colonial ideology’ in the EU–Africa relations pointed out by Hansen and Jonsson: measures introduced as mutually beneficial soon transformed ‘into a geopolitical relationship where the European “partner” has selected which migrants to invite, and which to repel’.⁷⁴ The term partnership does not fit such a relation.

The rationality of value also underlies the Talent Partnerships and is similar to that in free movement of workers signalled above: residence rights and citizenship rights are for those who have high economic value for the receiving labour market or who have emotional value for the receiving society. Those with low economic or emotional value are not allowed to stay permanently and are seen as disposable.

3. Essential workers in times of pandemic

Under reference to a joint statement of the European Council,⁷⁵ the 2020 Commission guidelines on movement of essential workers during the pandemic acknowledged their value for the host states.⁷⁶ The notion ‘essential worker’ includes workers at all skill levels and breaks through the divisions existing in both EU free movement law and EU labour migration law.⁷⁷ The guidelines focus on continuance of essential work, while protection of the workers remained underexposed. This changed when large coronavirus outbreaks occurred in distribution centres and slaughterhouses. Thus, an outbreak in a German slaughterhouse spread to more than 1500 employees, the vast majority of whom were EU migrants, which triggered a local lockdown.⁷⁸ The outbreaks exposed (once again) the vulnerability of migrant workers in agriculture, distribution, (long-term) care and food processing industry.

In the Netherlands essential workers in agriculture, horticulture, distribution and food industry are mainly from Poland, Romania and Bulgaria.⁷⁹ In 2020 the total number of essential workers was estimated to be about

⁷³ Jean-Baptiste Farcy (n 9).

⁷⁴ Hansen and Jonsson (n 9) 263.

⁷⁵ <www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf>. See point 3 in which the European Council recognizes the ‘essential activities’ of seasonal workers (but not their crucial role for the host State).

⁷⁶ European Commission (n 2).

⁷⁷ The new pact on migration and asylum already mentioned the role of non-EU workers in sectors ‘key to the COVID-19 response’ (n 47) 25. A footnote (60) indicates that non-EU immigrants represented in 2018 around 6% of health professionals in the EU, 14% of personal care workers, 10% of refuse workers, 16% of agricultural workers (without counting in seasonal workers), 25% of cleaners and helpers and 27% of food preparation assistants.

⁷⁸ OECD, *What is the Impact of COVID-19 Pandemic on Immigrants and Their Children?* (2020) 4.

⁷⁹ Estimated numbers for 2022 are 92,310 Polish nationals, 35,340 Romanian nationals, and 22,120 Bulgarian nationals out of 205,180 EU nationals residing less than 5 years in the Netherlands and working

400,000.⁸⁰ They work mainly via temporary work agencies, and are not always properly registered. When the German-Polish border was closed, the agricultural sector and temporary work agencies feared a lack of seasonal workers and workers for distribution centres and food processing industry.⁸¹ The vulnerability of migrant workers in these sectors figured in parliamentary discussions and research reports before,⁸² but had hardly led to any measures addressing their situation. Vulnerability is caused by poor registration, a low knowledge level of the Dutch language, culture and labour law, dependency on temporary work agencies for insurance and housing, and at times avoidance of labour laws by employers. The pandemic increased their vulnerability: their work cannot be performed remotely, physical distance rules are difficult to keep at the workplace, and very often workers live with multiple persons in a room or small unit. Germany took specific health measures for incoming seasonal workers.⁸³ The Dutch authorities presumed the generic measures (wearing protective masks, keeping distance) were upheld, while the media reported about factories, abattoirs and warehouses as transmission hotspots—in the Netherlands as well as in other Member States.⁸⁴ Apparently, there is little willingness of industry and corporations to remedy migrant workers' vulnerability.⁸⁵

EU rules on health and safety at work oblige employers to ensure the safety and health of workers, inform workers about protective and preventive measures, and provide protective equipment.⁸⁶ Member States are responsible for implementing and enforcing the EU rules but they neglect enforcement. Again, domestic practices do not comply with the law and accommodate discrimination based on social class and geographic origin, leading to exploitation.

Commission guidelines of July 2020 on EU and non-EU seasonal workers invited Member States to strengthen field inspections, to raise awareness on the requirements for employers, and signalled the poor working, living, and

in low-paid jobs, Ministerie van Sociale Zaken en Werkgelegenheid, *Drie jaar na Roemer: Jaarrapportage arbeidsmigranten 2023*, December 2023, 10.

⁸⁰ *Eerste aanbevelingen van het Aanjaagteam bescherming arbeidsmigranten o.l.v. Emile Roemer*, 11 juni 2020, 2, TK 2019-2020, 29861, nr. 51.

⁸¹ Anita Böcker and Tesseltje de Lange, 'Arbeidsmigranten (on)beschermd door de COVID-19-crisismaatregelen' (2021) Juli/augustus *Ars Aequi* 724.

⁸² *Ibid.*

⁸³ Quarantine and work in small groups, live and work separately and stay on work premises during the first two weeks upon arrival, Böcker and De Lange (n 81) 727, fn.18.

⁸⁴ Konstantinos Alexandris Polomarkakis, 'Health and Safety at Work in the Time of COVID-19: A Social Europe Reckoning?' (2020) 11 *European Journal of Risk Regulation* 864.

⁸⁵ Conny Rijken, 'Balancing Public Health and Economic Interests Whilst Creating New Opportunities for Labour Migrants', in E Aarts and others (eds), *The New Common: How the Covid-19 Pandemic Is Transforming Society* (Springer, 2021) 197–202.

⁸⁶ Framework 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, OJ L183/1 of 12.6.1989, notably Articles 5(1), 6(1), 9 and 10.

occupational safety and health conditions.⁸⁷ Member States should also ensure employers keep to the accommodation and transport standards in force. Finally, the Commission reminds the Member States of the EU rules on applicable social security rules and on the duty to inform employees of applicable norms and rights.⁸⁸

In the Netherlands new outbreaks led to attention for housing, transport and working conditions, because of the risks of an outbreak for the Dutch population and not because of the well-being of the workers.⁸⁹ The General Association of Temporary Work Agencies called on employers to facilitate quarantine by not charging rent for housing during quarantine and offering a grocery service.⁹⁰ Of course, employers also have an (economic) interest in prevention of new outbreaks. Still, enforcement remained limited. The fines for infringements were low enough as to have no deterring effect, and inspectors operated via the phone due to the COVID-19 restrictions on physical inspections.⁹¹ Furthermore, a general scheme for income support to employers was set up, so as not to terminate employment contracts.⁹² The scheme did not include seasonal workers despite a promise by the Dutch prime minister to the migrant workers that ‘we will not let you down’.⁹³

The Dutch treatment of Eastern European migrant workers during the pandemic reveals the existence of a two-tier EU citizenship. It reflects an internal hierarchy within the European Union, in which the original six Member States form the core juxtaposed against the post-dictatorship Southern and the post-communist Eastern countries.⁹⁴ Host states from the core did not only neglect living and working conditions of migrant workers for years but also during the pandemic put them at risk when

⁸⁷ Communication from the Commission, *Guidelines on Seasonal Workers in the EU in the Context of the Covid-19 Outbreak* C(2020) 4813 final of 16.7.2020.

⁸⁸ Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJEU L166/1 of 30.4.2004; Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees on the conditions applicable to the contract or employment relationship OJEC L 288/32 of 18.10.1991 (since August 2022 replaced by Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, OJEU L186/105 of 11.7.2019).

⁸⁹ Rijken (n 85) 199.

⁹⁰ Böcker and de Lange (n 81) 728.

⁹¹ ETUC, ‘National Measures Targeting Seasonal Workers to Address Shortages (Particularly in the Agricultural Sector)’, European Trade Union Confederation Briefing Note, 2020 <www.etuc.org/sites/default/files/publication/file/2020-05/Covid-19%20Briefing%20Seasonal%20Workers%20Final_updated%2029%20May%202020.pdf>.

⁹² EMN-OECD, Inform #1—*EU and OECD Member States Responses to Managing Residence Permits and Migrant Unemployment During the Covid-19 Pandemic*, point 4.4.

⁹³ M Bos-Karczewska, ‘Europe’s Seasonal Workers Are Being Forgotten in the Corona Crisis’ (*Dutch-News.nl*, 2020) <www.dutchnews.nl/news/2020/03/europes-seasonal-workers-are-being-forgotten-in-the-corona-crisis/>.

⁹⁴ Magdalena Ulceluse and Felix Bender, ‘Two-Tier EU Citizenship: Disposable Eastern European Workers during the COVID-19 Pandemic’ (2022) 3 *Organization* 449.

they pressured Eastern European governments to send migrant workers to the West. The Commission went along with that pressure.⁹⁵

Following the initial focus on the risk of spread of Covid-19 for the Dutch population and the economic considerations underlying the need for ‘essential’ workers, the government installed a committee to investigate the vulnerability of migrant workers and to suggest measures for improvement. It resulted in two reports with recommendations related to enforcement of housing and working conditions, certification of temporary work agencies, improved registration of migrant workers, and improved access to social security and health care facilities. It seems ironic that the title of the first report is ‘No second-class citizens’.⁹⁶ Some recommendations have led to amendments in the law.⁹⁷ They present a small first step of the Dutch authorities towards taking responsibility for the wellbeing of (temporary) migrant workers in the Netherlands.

In contrast to its pre-pandemic disregard of non-compliance with free movement law, during the pandemic the Commission did remind host States of their duty to enforce the rights (non-)EU workers have under EU law. Mantu remarks reminding is all the Commission did and she sees this as a ‘structural weakness in EU’s mobility framework since reliance on national authorities’ cooperation, preparedness and willingness to enforce existing rules has not always been sufficient to ensure the protection of the rights of mobile EU citizens, workers or otherwise’.⁹⁸ In the current framework, the Commission apparently has difficulties to make Member States enforce EU free movement law.

The essential role of non-EU workers found its way into the Commission’s presentation of the Talent Partnerships. The Commission’s focus is first on long-term care, and it acknowledges that migrant female workers form a significant part of the workforce.⁹⁹ It does not mention the vulnerability of migrant women to discrimination, abuse, violence and harassment.¹⁰⁰ The 2022 European Care Strategy reaffirms legal migration as ‘key driver’ to remedy EU labour shortages and suggests to develop EU-level schemes for non-EU long-term care workers on a ‘demand-driven

⁹⁵ European Commission (n 2).

⁹⁶ Aanjaagteam bescherming arbeidsmigranten (n 12).

⁹⁷ Notably an adjustment of the Act on Registration of Personal Data to include up to date contact details of migrant workers in the Netherlands who do not reside in the Netherlands or do not intend to stay longer than 4 months. See also all parliamentary documents related to file number 29861. A law prescribing certification of temporary work agencies is in the making and expected to be implemented in 2026.

⁹⁸ Sandra Mantu, ‘EU Citizenship, Free Movement, and Covid-19 in Romania’, (2020) 2 *Frontiers in Human Dynamics* 5.

⁹⁹ European Commission (n 4) 18.

¹⁰⁰ The European Economic and Social Committee did explicitly mention the vulnerability of women and the need to more strongly mainstream the protection of migrant women’s rights in its critical advisory opinion of 26 October 2022 addressing also the Communication attracting skills and talent to the EU, OJEU C 75/236 of 28.2.2023 point 1.11 and 3.10.

basis'.¹⁰¹ It warns against a possible negative impact on working conditions and salaries of EU long-term care workers.¹⁰² The risk that new legal pathways for labour migration will indeed result in precarious and rightless positions for domestic, EU and non-EU workers alike has been signalled before.¹⁰³ It is inherent in a rationality of value that creates disposable workers.

The first call for proposals of Talent Partnerships projects focuses on the EU's priorities.¹⁰⁴ It confirms Talent Partnerships present a double selection mechanism instead of a partnership: unwanted irregular migrants are removed from the territory of the EU in exchange for (temporary) admission of wanted migrants. Cooperation of the partner country with the EU on return and readmission is a key funding condition for Talent Partnerships.¹⁰⁵ Projects should include measures to avoid wage dumping and to mitigate brain drain in case of long-term and permanent migration, implicitly excluding migrants for low-skilled jobs from permanent residence. Projects on circular and temporary migration are only for seasonal peaks of work and should 'particularly well-consider' the rights of migrants.¹⁰⁶

The rationality of value underlying Partnerships connects to neoliberal citizenship in excluding those with low economic or emotional value, either by denying them certain rights or by removing them. The contrast with the applause the same persons got as essential workers is huge.

4. Final remarks

Labour migration is just one of the many policy options to mitigate labour shortages—others include raising wages, improving working conditions and offering trainings—and should not be used to address labour market distortions.¹⁰⁷ COVID-19 exposed the invisible essential role of migrants to the extent that their vulnerable situation could no longer be ignored. Commission guidelines addressed their underpayment, housing, transport and working conditions, but did not sufficiently address the discriminatory impact of administrative practices and lack of enforcement.

The visibility of the essential role of EU and non-EU migrant workers for the economy of the Netherlands as host State resulted in some small steps to facilitate enforcement of labour law rules protecting migrant workers. At EU

¹⁰¹ European Commission, *The European Care Strategy*, COM(2022) 440 Final of 7 September 2022, 14.

¹⁰² *Ibid.*, 15.

¹⁰³ Hansen and Jonsson (n 9) 267; Bauböck and Ruhs (n 69) 535; See also the EESC Opinion (n 100), point 2.9.

¹⁰⁴ Migration Partnership Facility, *Guidelines for Call for Proposals*, August 2023 update, 5 <www.migrationpartnershipfacility.eu/calls-for-proposals/documents?topicid=14>.

¹⁰⁵ *Ibid.*, 5.

¹⁰⁶ *Ibid.*, 10, 11.

¹⁰⁷ Briefing Paper, EMN-JRC-DG Home Roundtable (n 56) 5.

level, the call for Talent Partnerships proposals does force projects to concretely address brain drain and the vulnerable position of migrant workers.

These first small steps are welcome, but do not take away the hypocrisy of the technocratic discourse applauding migrant workers. How they work out in practice remains to be seen. As noted above, enforcement of migrant workers' labour law rights is problematic. Furthermore, the discriminatory impact along social class, gender, race, centre/periphery and colonial lines of the existing law and policy framework is not addressed. Nothing changed to the rationality of value underlying the view that migrant workers are disposable and a low-cost temporary quick fix for labour market shortages. The applause would only be less hypocritical when authorities ensure and enforce decent labour and living conditions for essential migrant workers and thereby treat them as persons, not as disposable assets.¹⁰⁸

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¹⁰⁸ For a more forward looking view prioritizing systemic resilience see Bridget Anderson, Friedrich Poeschel, and Martin Ruhs, 'Covid-19 and Systemic Resilience: Rethinking the Impacts of Migrant Workers and Labour Migration Policies', *EUI Working Papers* (Florence: Robert Schuman Centre for Advanced Studies. Migration Policy Centre, September 2020); for a critical analysis of 'sound finance' as guiding principle that inspires a cost-benefit view on migration, see Hansen (n 20).