

## EDITORIAL COMMENTS

### *Charting deeper and wider dimensions of (free) movement in EU law*

On 1 July 2021, the EU Digital COVID Certificate (EUDCC) Regulation entered into force,<sup>1</sup> with the aim of establishing “a common framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates” (Recital 12). The Regulation was introduced “for the purpose of facilitating the holders’ exercise of their right to free movement during the COVID-19 pandemic” and to “contribute to facilitating the gradual lifting of restrictions to free movement put in place by the Member States, in accordance with Union law, to limit the spread of SARS-CoV-2, in a coordinated manner” (Art. 1). It is premised on a “trust framework”, defined in Article 2(11) as “the rules, policies, specifications, protocols, data formats and digital infrastructure regulating and allowing for the reliable and secure issuance and verification of certificates to ensure their trustworthiness by confirming their authenticity, validity and integrity, through the use of electronic seals”.

According to Article 3(1) of the Regulation, the EUDCC framework “allow[s] for the issuance, cross-border verification and acceptance” of three forms of certificate: a *vaccination certificate* (“confirming that the holder has received a COVID-19 vaccine in the Member State issuing the certificate”, detailed in Art. 5); a *test certificate* (“confirming that the holder has received a NAAT test or rapid antigen test listed in the common and updated list of COVID-19 rapid antigen tests established on the basis of the Council

1. Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, O.J. 2021, L 211/1. Originally titled a “Digital Green Certificate” in the Commission’s proposal: Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate), COM(2021)130 final.

Recommendation of 21 January 2021<sup>2</sup> carried out by health professionals or by skilled testing personnel in the Member State issuing the certificate and indicating the type of test, the date on which it was carried out and the result of the test”, detailed in Art. 6); or a *certificate of recovery* (“confirming that, following a positive result of a NAAT test carried out by health professionals or by skilled testing personnel the holder has recovered from a SARS-CoV-2 infection”, detailed in Art. 7).

Certificates are issued “in digital or paper-based format, or both” (Art. 3(2), leaving choice of format to prospective holders), free of charge (Art. 3(4)). They contain a scannable “interoperable barcode allowing for the verification of their authenticity, validity and integrity” (Art. 3(2)). Article 11(1) then outlines the significance of possessing one of the three certificates provided for in the Regulation:

“Without prejudice to Member States’ competence to impose restrictions on grounds of public health, where Member States accept vaccination certificates, test certificates indicating a negative result or certificates of recovery, they shall refrain from imposing additional restrictions to free movement, such as additional travel-related testing for SARS-CoV-2 infection or travel-related quarantine or self-isolation, unless they are necessary and proportionate for the purpose of safeguarding public health in response to the COVID-19 pandemic, also taking into account available scientific evidence, including epidemiological data published by the ECDC on the basis of Recommendation (EU) 2020/1475.”<sup>3</sup>

Member States must inform the Commission and the other Member States when they impose any such additional restrictions, which must be in accordance with Union law (Art. 11(2)).<sup>4</sup> The Regulation will remain in force

2. Council Recommendation of 21 Jan. 2021 on a common framework for the use and validation of rapid antigen tests and the mutual recognition of COVID-19 test results in the EU, O.J. 2021, C 24/1.

3. Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, O.J. 2020, L 337/3.

4. See in particular, Art. 29(1) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77; and Council Recommendation (EU) 2020/1475, as amended. See generally, Goldner Lang “‘Laws of Fear’ in the EU: The Precautionary Principle and public health restrictions to free movement of persons in the time of COVID-19”, (2021) EJRR, 1–24. doi:10.1017/err.2020.120.

for 12 months (Art. 17), with an initial six-week phasing-in period to enable Member States to adjust to the new requirements (Art. 15). By 1 June 2021, seven Member States were already issuing EUDCCs on a voluntary basis prior to the adoption of the Regulation.<sup>5</sup>

Several objectives are evident across the provisions of the Regulation with respect to the design and functioning of the EUDCC framework, with particular emphasis on a coordinated,<sup>6</sup> evidence-based,<sup>7</sup> and sustainable<sup>8</sup> approach. There is a concern to ensure interoperability – in different understandings, with provisions referring, for example, to “the capability of verifying systems in a Member State to use data encoded by another Member State” (Art. 2(7)) as well as to “technological systems established at international level” (Art. 4(3)). There is alertness to safety and security, including the potential for and tackling of fraud;<sup>9</sup> the requirements of

5. European Commission press release, 1 June 2021, “EU Digital COVID Certificate: EU Gateway goes live with seven countries one month ahead of deadline”, <[ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2721](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2721)>.

6. “The epidemiological situation varies across the EU and within Member States, as do the measures taken to limit the spread of the virus. But one of the lessons we have learned so far is that our interdependence means that imposing restrictions in one part of the EU has implications for all. We can expect the same to be true when it comes to loosening these restrictions. This calls for a common approach to guide action across the EU” (Communication from the Commission to the European Parliament, the European Council and the Council, “A common path to safe and sustained re-opening”, COM(2021)129 final, p. 2). The delicate balance between Member State and Union competences respectively is acknowledged in e.g. Recitals 6 and 13; see also, the Commission’s Proposal (COM(2021)130 final) p. 6: “[t]he decision as to whether to introduce restrictions to free movement remains the responsibility of the Member States, which must act in compliance with EU law”.

7. “Evidence-based decision-making, based on robust epidemiological indicators will be key to opening at the right time – with the virus sufficiently under control to allow for relaxation, and to avoid restrictions lasting longer than necessary” (Communication from the Commission, COM(2021)129 final, p. 2). For example, scientific evidence is referred to in Recitals 7 (“still evolving”, “sound”, “latest available”); 10 (“sufficient”); 12 (“on the basis of”); 13 (“becomes increasingly available and more consistently conclusive”); 29 (“latest”); 33 (“latest available”); 42 (“latest available”); 43 (“latest”, “recent”); 44 (“latest available”); 45 (“available”); and 47 (“new”).

8. “In lifting restrictions, we must learn the lessons of 2020, and avoid the extra costs of stop-start restrictions. All the steps to re-opening need to be sustainable, to command the confidence of citizens and provide a solid basis for recovery” (Communication from the Commission, COM(2021)129 final, p. 1).

9. See in particular, Recitals 15–19 and 22, and Art. 4(2).

proportionality;<sup>10</sup> and compliance with fundamental rights standards,<sup>11</sup> especially for the protection of personal data.<sup>12</sup>

The logistical challenges of implementing and operating the EUDCC framework across the Union should not be underestimated. What, meanwhile, noting its “purpose of facilitating the holders’ exercise of their right to free movement during the COVID-19 pandemic” (Art. 1), does the Regulation contribute to, or reveal about, evolving dimensions of free movement in EU law?

### *The EUDCC framework and free movement restrictions*

Recital 1 of the Regulation affirms that “[e]very citizen of the Union has the fundamental right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them”.<sup>13</sup> It was inevitable that COVID-19 would require “limitations and conditions” with respect to the exercise of freedom of movement. At one level, a Regulation designed to facilitate re-animation of freedom of movement might seem inconsequential when viewed in the wider scale of loss that must be confronted because of the

10. E.g. Recital 7, which includes the statement that “[t]he free movement of persons who, according to sound scientific evidence, do not pose a significant risk to public health, for example because they are immune to and cannot transmit SARS-CoV-2, should not be restricted, as such restrictions would not be necessary to achieve the objective of safeguarding public health. Where the epidemiological situation allows, such persons should not be subject to additional restrictions to free movement linked to the COVID-19 pandemic, such as travel-related testing for SARS-CoV-2 infection or travel-related quarantine or self-isolation, unless such additional restrictions are, based on the latest available scientific evidence and in line with the precautionary principle, necessary and proportionate for the purpose of safeguarding public health, and non-discriminatory”. The text of this recital was developed significantly over the adoption process compared to the version in the Commission’s proposal.

11. Recital 62 establishes that “[t]his Regulation respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union (the ‘Charter’), including the right to respect for private and family life, the right to the protection of personal data, the right to equality before the law and non-discrimination, the freedom of movement and the right to an effective remedy. Member States are to comply with the Charter when implementing this Regulation”. On the right to move as a fundamental right on its own terms, the Commission’s Proposal also refers to Art. 45 CFR (COM(2021)130 final, pp. 5–6).

12. See in particular, Recitals 19, 48–54 and 60–62, and Art. 10.

13. The character of this right as “fundamental” was added by the European Parliament (Position of the European Parliament adopted at first reading on 9 June 2021 with a view to the adoption of Regulation (EU) 2021/... of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, 9 June 2021).

pandemic. At another level, though, it offers a mechanism of restart and recovery for vital personal and economic objectives.

Council Recommendation 2020/1475, which continues to be adapted as circumstances change, “established a coordinated approach” to restrictions of free movement in the following respects: “the application of common criteria and thresholds when deciding whether to introduce restrictions to free movement, a mapping of the risk of COVID-19 transmission, published by the European Centre for Disease Prevention and Control (ECDC), based on an agreed colour code, and a coordinated approach as to the measures, if any, which may appropriately be applied to persons moving between areas, depending on the level of risk of transmission in those areas”.<sup>14</sup> Now, the EUDCC Regulation aims to provide a mechanism that, for the Commission, “charts the way ahead for a balanced policy and common EU approach” to rolling back COVID-19 restrictions, “pointing to what we need to do to advance the time when we can recover *our European way of life*”.<sup>15</sup> With these words, invoking the not uncontroversial idea of a “European way of life”, the Commission underlines the inherent connection between the European Union and freedom of movement; which it described in its proposal for the Regulation as “one of the EU’s most cherished achievements”.<sup>16</sup> Moreover, ensuring that restrictions on freedom of movement are lifted as soon as possible – and in as coordinated a way as possible – dispels suggestions that freedom of movement might not be a defining and essential component of the EU.

The “European way of life” sentence ends, though, with what else freedom of movement and residence constitutes for the Union: “an important driver of its economy”. Throughout the Regulation’s preparatory documents, both the existential and functional dimensions of free movement, and often the merging of them, are represented. For example, in its March 2021 Communication, the Commission acknowledged that “[c]ontrolling the COVID-19 pandemic has required an unprecedented range of restrictions”, which “continue to come at a high and ever-increasing cost for individuals, families, communities and businesses”.<sup>17</sup> In that light, the EUDCC

14. COM(2021)130 final, p.1. See most recently, Council Recommendation (EU) 2021/961 amending Council Recommendation (EU) 2020/1475 of 13 Oct. 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, O.J. 2021, L 2131/1.

15. COM(2021)129 final, p. 1 (emphasis added).

16. COM(2021) 130 final, p. 1.

17. COM(2021) 129 final, p. 1; also noting the internal market as “inextricably linked to the economic and social life of Europeans”. In its proposal for the Regulation, the Commission recognized that “[p]articularly affected were persons living in border regions and crossing borders as part of their daily life, be it for work, education, health care, family or other reasons”

contributes to achieving the goal that “conditions must be created across the Single Market to allow for safe and coordinated re-opening, so that citizens can enjoy their rights in full and so that economic and social activity can return”.<sup>18</sup> Recital 12 thus expresses, both simply and powerfully, that “[f]acilitating freedom of movement is one of the key preconditions for starting an economic recovery”.

As might be expected, the Regulation progresses a standard “obstacle” approach to restrictions of free movement overall.<sup>19</sup> As Recital 9 recognizes, “[u]nilateral measures to limit the spread of SARS-CoV-2 have the potential to cause significant disruption to the exercise of the right to free movement and to hinder the proper functioning of the internal market”.<sup>20</sup> Further facilitating free movement, “the certificates making up the EU Digital COVID Certificate should be issued to the persons referred to in Article 3 of Directive 2004/38/EC, namely Union citizens and their family members, irrespective of their nationality, by the Member State where the vaccination was administered or the test carried out, or where the recovered person is located” (Recital 23).

### *A richer understanding of obstacles to free movement?*

Importantly, while the Regulation confers a “right” to a vaccination or test certificate (Arts. 5(1) and 6(1) respectively),<sup>21</sup> Article 3(6) underlines that “[p]ossession of the certificates referred to in paragraph 1 shall not be a

(COM(2021)130 final, p. 1). Recital 24, added by the European Parliament, emphasizes that “[i]n accordance with Recommendation (EU) 2020/1475, Member States should pay particular attention to persons living in border regions and travelling across the border on a daily or frequent basis for the purposes of work, business, education, family, medical care or caregiving”.

18. COM(2021)129 final, p1. Drawing attention to specific sectors of the Single Market, the corrosive implications of free movement restrictions for “Europe’s tourism ecosystem” (p. 7) and for “the survival of a cultural and creative economy” (p. 9) were highlighted.

19. E.g. the Commission’s proposal observes that “[a]bsence to act at EU level would likely result in Member States adopting different systems, resulting in citizens exercising their free movement rights experiencing problems in the acceptance of their documents in other Member States” (COM(2021)130 final, p. 5). See similarly, p. 2.

20. See further, Recitals 37–40 on free movement problems associated with (non-)recognition of COVID-19 test results in particular.

21. There is no similar statement of an explicit “right” to a certificate of recovery, though Art. 7(1) of the Regulation establishes that “[e]ach Member State *shall issue, upon request*, the certificates of recovery referred to in point (c) of Article 3(1)”.

precondition for exercising the right to free movement”,<sup>22</sup> reflecting the established approach in free movement law to documentation as evidence for but not constitutive of rights.<sup>23</sup> As explained in the Commission’s proposal, “[p]ersons who are not vaccinated, for example for medical reasons, because they are not part of the target group for which the vaccine is currently recommended, such as children, or because they have not yet had the opportunity or do not wish to be vaccinated, must be able to continue to exercise their fundamental right of free movement, where necessary subject to limitations such as mandatory testing and quarantine/self-isolation. In particular, this Regulation cannot be interpreted as establishing an obligation or right to be vaccinated”.<sup>24</sup> Additionally, Recital 14 underlines that “[a]ny verification of the certificates making up the EU Digital COVID Certificate should not lead to further restrictions to the freedom of movement within the Union or to restrictions on travel within the Schengen area”.

These considerations were, in many respects, rooted in the facilitation of free movement rights in a general sense. But an important dimension in the reshaping of the EUDCC Regulation from proposal to adoption relates to how it conceives and responds to free movement restrictions that produce “discrimination”. Article 21(1) of the Charter of Fundamental Rights prohibits discrimination “on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”, yet this wider (than nationality) span of discrimination has gained surprisingly little traction in free movement law. For example, while the national court referred to Article 21 CFR in its framing of the questions referred in *Coman*, the Court focused only on respect for family life in its ruling, not reflecting at all on discrimination on grounds of sexual orientation in finding that the definition of “spouse” for the purposes of Article 3(1) of Directive 2004/38 includes spouses of the same sex.<sup>25</sup>

22. See e.g. the Commission’s March 2021 Communication: “people without such a certificate must still be able to travel and [...] being in possession of a certificate is not a prerequisite of exercising the right to free movement or other fundamental rights” (COM(2021)129 final, p. 3).

23. Case 48/75 *Royer*, EU:C:1976:57; see also, Recital 11 of Directive 2004/38: “[t]he fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures”.

24. COM(2021)130 final, p. 3.

25. Case C-673/16 *Coman*, EU:C:2018:385; cf. in particular, paras. 16–17 and 47–50. Note the brief reference to Art. 21 CFR in the Opinion of A.G. Wathelet, EU:C:2018:2, para 98. Questions referred by the national court in the pending Case C-206/21, *Préfet de Saône-et-Loire* offer the opportunity to consider discrimination on the grounds of disability in connection with “sufficient resources” under Art. 7(1) of Directive 2004/38.

Creating the EUDCC provoked reflection on potential discrimination in terms of inclusion/exclusion as well as vulnerability, both conceptually and logistically; driving, in particular, the approach of a comprehensive model based around interoperable vaccination or test or recovery certificates. Article 3(7) of the Regulation, reflecting concerns signalled in Recital 36,<sup>26</sup> establishes that “[t]he issuance of certificates pursuant to paragraph 1 of this Article shall not lead to discrimination on the basis of the possession of a specific category of certificate”. But through the Regulation’s adoption process, both the European Economic and Social Committee and European Parliament also ensured better reflection of other dimensions of inclusion. For example, the EESC Opinion emphasized that “socially marginalized and disadvantaged groups must have access to relevant information and the impact of the [COVID] Certificate on these groups must be properly assessed and monitored”.<sup>27</sup> Article 16 of the Regulation now ensures, compared to the draft Regulation first proposed, that the Commission report assessing the impact of the measure, due by 31 March 2022, will address “the facilitation of free movement, including on travel and tourism and the acceptance of the different types of vaccine, *fundamental rights and non-discrimination*, as well as on the protection of personal data during the COVID-19 pandemic”.

Similarly, Recital 21, added by the European Parliament, underlines that “[u]niversal, timely and affordable access to COVID-19 vaccines and tests for SARS-CoV-2 infection, which form the basis for the issuance of the certificates making up the EU Digital COVID Certificate, is crucial in the fight against the COVID-19 pandemic and essential to restore freedom of movement within the Union”, and encourages Member States “to ensure

26. I.e. “It is necessary to prevent direct or indirect discrimination against persons who are not vaccinated, for example because of medical reasons, because they are not part of the target group for which the COVID -19 vaccine is currently administered or allowed, such as children, or because they have not yet had the opportunity or chose not to be vaccinated. Therefore, possession of a vaccination certificate, or the possession of a vaccination certificate indicating a COVID-19 vaccine, should not be a pre-condition for the exercise of the right to free movement or for the use of cross-border passenger transport services such as airlines, trains, coaches or ferries or any other means of transport. In addition, this Regulation cannot be interpreted as establishing a right or obligation to be vaccinated”.

27. Opinion of the European Economic and Social Committee, 27 April 2021, para 1.3. See similarly, para 4.11: “every kind of immunity certification raises ethical questions concerning respect, individual rights and interests, public health responsibility and social justice. Such impact, especially on socially marginalised and disadvantaged groups, must be properly assessed and monitor”. See also, para 1.8 (discrimination in the workplace, poor working conditions); para 1.9 (that the certificate should be free of charge); para 1.12 (“in order to avoid unequal restrictions on the freedom of movement for those who have not been vaccinated, European governments should ensure easy and free of charge access to testing for all citizens”); and para. 4.10 (“a possible gap between rural and urban areas”).

affordable and widely available testing possibilities, taking into account that not the entire population would have had the opportunity to be vaccinated before the date of application of this Regulation”.<sup>28</sup> Additionally, Recital 18 explains that certificates will be available in both digital or paper-based format “[t]o ensure the interoperability of and equal access to the certificates making up the EU Digital COVID Certificate for all Union citizens, *including for vulnerable persons, such as persons with disabilities, and for persons with limited access to digital technologies*”.

The Commission has published a Statement agreeing that “affordable and accessible COVID-19 vaccines and tests for SARS-CoV-2 infection are crucial in the fight against the COVID-19 pandemic” and outlining how it has supported, and will continue to support, testing capacity strategies, acknowledging that “access to affordable and widely available testing possibilities is important to facilitate free movement and mobility in Europe”.<sup>29</sup> It is imperative that these actions to identify and address exclusion and vulnerability continue as the EUDCC framework is implemented, and we are far from there yet. On 16 June 2021, FRA, the EU Agency for Fundamental Rights, published its assessment of equality of access to vaccines in the EU, identifying weaknesses in respect of vulnerable groups and having fed its expertise into the European Parliament’s position on the Regulation at the latter’s invitation.<sup>30</sup> It will be important to consider the extent to which uneven experience of freedom of movement is already part of conceiving “obstacles” to free movement rights or whether, and if so, when, it crosses lines into the legal terrain of actionable discrimination. Whether positive obligations are entailed on the part of the Member States and/or the Union to foster or create conditions under which free movement can take place, for all citizens, must also be worked out. For now, what the process of adopting the EUDCC Regulation suggests is openness to and scope for better understanding of *capacity* to move as a component of *freedom* of movement. Similarly, in that light, progressing a more consciously Charter-enriched understanding of and approach to freedom of movement has resonance well beyond the Regulation itself.

28. See also, Recital 41, which includes the statement that “easy access to inexpensive rapid antigen tests meeting quality criteria can contribute to lower costs, in particular for persons who cross borders on a daily or other frequent basis for work or education, to visit close relatives, to seek medical care, or to take care of loved ones, for other travellers with an essential function or need, for economically disadvantaged persons and for students”.

29. Statement by the Commission, O.J. 2021, L 211/23.

30. FRA, *Coronavirus Pandemic in the EU – Fundamental Rights Implications: Vaccine Rollout and Equality of Access in the EU*, 16 June 2021, <[fra.europa.eu/en/publication/2021/covid19-rights-impact-june-1](https://fra.europa.eu/en/publication/2021/covid19-rights-impact-june-1)>.

*Movement and free movement: EUDCC's several "external" dimensions*

The global interconnectedness viscerally exposed by the COVID-19 pandemic finds reflection in the Regulation in different ways, again highlighting unresolved questions and tensions within free movement law and especially where free movement law confronts external borders, both geographical and legal.

At one level, the Regulation seeks to acknowledge and accommodate both the reality of the pandemic as a global challenge and the implications of mobility beyond the Union for Union citizens. On the first point, there is recognition that “[o]nly a global approach can bring a solution to this global challenge and common global solutions are the best way to ensure a sustainable recovery”.<sup>31</sup> The institutional dimension of this reality is then reflected in the aim is that “[t]he trust framework to be established for the purpose of this Regulation should seek to ensure consistency with global initiatives, in particular involving the WHO and the International Civil Aviation Organization” (Recital 28). On the second point, the Regulation recognizes that vaccination of Union citizens might take place in a third country, and it therefore seeks “to allow the persons concerned to make use of an interoperable and accepted vaccination certificate when exercising their right to free movement within the Union” (Recital 31; with the procedure to be implemented by the Commission in such circumstances then detailed in Article 8). The Regulation also addresses agreements on the free movement of persons concluded by the Union and its Member States with third countries that enable public health restrictions but do not include a mechanism for incorporating Union legal acts, so that the Commission is empowered to adopt implementing acts establishing that COVID-19 certificates adopted by such third countries “are equivalent to those issued in accordance with this Regulation” (Art. 3(10); see further, Recital 26).

However, the stratification of free movement’s *legal* borders is also reflected in the EUDCC framework and, importantly, these borders exist both *within* and *beyond* the territory of the Union itself. On “legal” borders within the Union, the Commission’s March 2021 Communication confirmed that “[t]he package will also cover third country citizens legally staying or legally residing in the EU” in order “to facilitate travel within the EU”.<sup>32</sup> Third country nationals who reside in a Member State as family members of a Union

31. COM(2021)129 final, p. 2. See similarly, p. 8: “[n]o country or region in the world will be safe from COVID-19 unless it is contained at global level, and only a global approach can bring a solution to a global crisis. For as long as the virus is circulated, the human cost will continue”. There are also references to interoperability with WHO systems (p. 4) and cooperation with the WTO regarding vaccine production (p. 10).

32. COM(2021)129 final, p. 3.

citizen within the framework of Directive 2004/38 fall within the scope of the EUDCC Regulation. However, for all other third country nationals “legally staying or residing in the EU”,<sup>33</sup> a twin Regulation was adopted, Article 1 of which simply states that “Member States shall apply the rules laid down in Regulation (EU) 2021/953 to third-country nationals who do not fall within the scope of that Regulation, but who are legally staying or residing in their territory and who are entitled to travel to other Member States in accordance with Union law”.<sup>34</sup>

Apart from one other substantive provision concerning Ireland, returned to below, that is the only text in the main part of the twin Regulation. So why adopt two measures? In a formal sense, the answer connects in a straightforward way to relevant legal basis. The EUDCC Regulation – Regulation 2021/953 – was adopted on the basis of Article 21 TFEU, which concerns *freedom of movement* for Union citizens.<sup>35</sup> Regulation 2021/954 was adopted on the basis of Article 77(2)(c) TFEU, i.e. “[f]or the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: . . . (c) the conditions under which nationals of third countries shall have the *freedom to travel* within the Union for a short period”. Importantly, then, Union citizens have a (fundamental) *right* to move to another Member State, while, for present purposes, Regulation 2021/954 concerns third country nationals who are “legally staying or residing in the EU” and “entitled to travel to other Member States in accordance with Union law”, with the legal basis of Article 79(2)(c) TFEU underlining that such travel is “for a short period”.

What is “freedom to travel” and how does it differ from “freedom to move”? Article 79(2)(b) TFEU does enable measures concerning “the definition of the rights of third-country nationals residing legally in a Member State, including the conditions *governing freedom of movement and of*

33. The FRA report on access to vaccines also highlights concerns in respect of third country nationals with *insecure* residence status (see esp. pp. 21 and 31).

34. Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic, O.J. 2021, L 211/24.

35. Art. 21(1) TFEU establishes that “[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”; Art. 21(2) provides that “[i]f action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1”.

*residence in other Member States*". If freedom of movement can be extended, by legislation, to third country nationals, has it been?

Even third country nationals who fall within the scope of the EUDCC Regulation as the family members of Union citizens do not, under Directive 2004/38, have a right to "move" to another Member State unless it is to accompany or join the Union citizen from whom they derive their rights under EU law.<sup>36</sup> In most cases, absent a specific agreement with the Union conferring a right to move and reside on third country nationals (such as the EEA Agreement, returned to below), the initial permission to move to and reside in a first Member State rests with that Member State. Limited rights to move to another Member State are provided for in some of the measures adopted under Title V TFEU, but they are indeed limited rights, carefully phrased and carefully bounded. In the Directive on Long-Term Residents, there is a right to *reside in* another Member State, not to *move* there.<sup>37</sup> At one level, the distinction seems immaterial, noting that Article 14(1) establishes that "[a] long-term resident *shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status*, for a period exceeding three months, provided that the conditions set out in this chapter are met". Article 14(2) then specifies that a long-term resident "*may reside in a second Member State*" to exercise economic activity in an employed or self-employed capacity; to pursue studies or vocational training; or for undetermined "other purposes". Over time, and in accordance with the relevant conditions of the Directive more generally, long-term resident status can be acquired in the second Member State (Art. 23).

However, the decoupling of residence from a *right* to move – and thus from freedom of movement enjoyed by Member State nationals – is underlined in several other provisions. In particular, "[f]or reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals, when provided for by [Union] legislation, as well as to third-country nationals who reside legally and receive unemployment benefits in the Member State concerned" (Art. 14(3)). According to Article 15(2), Member States may require persons who move there for any purpose – including economic activity – to provide evidence that they have stable and

36. Case C-218/14, *Singh II*, EU:C:2015:476, para 50: "the rights conferred on third-country nationals by Directive 2004/38 are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow such rights would be liable to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State".

37. See Recitals 18–23 and Art. 1(b) of Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, O.J. 2004, L 16/44.

regular resources as well as comprehensive sickness insurance. Only family members in situations where the family was “already constituted in the first Member State” may accompany or join the long-term resident in a second Member State (Art. 16).<sup>38</sup> Additionally, “[t]he long-term resident who has resided in another Member State in accordance with Chapter III shall no longer be entitled to maintain his/her long-term resident status acquired in the first Member State when such a status is granted in another Member State pursuant to Article 23” (Art. 9(4)).<sup>39</sup> Moreover, the Directive’s mobility mechanism has had little impact in practice: in 2019, the Commission observed that “the way that most Member States have implemented the intra-EU mobility provisions of the Directive has not really contributed to the attainment of the EU internal market”.<sup>40</sup>

In another twist, beneficiaries of long-term resident status under the Directive on Long-Term Residents are excluded from the scope of the sectoral mobility rights provided for in Directive 2016/801,<sup>41</sup> which aims to facilitate intra-EU mobility for researchers and students, *inter alia* by reducing the administrative burden related to mobility in several Member States and, for that purpose, “sets up a specific intra-EU mobility scheme whereby a third-country national who holds an authorization for the purpose of research or studies issued by the first Member State *is entitled to enter, stay and carry out part of the research activity or studies in one or several second Member States* in accordance with the provisions governing mobility under this Directive” (Recital 44). The Directive establishes procedures for either short-term (up to or more than 180 days in a 360-day period per Member State, Art. 28)) or long-term (more than 180 days per Member State, Art. 29) mobility for researchers. Mobility for students extends only to those “who hold a valid authorization issued by the first Member State and who are covered by a Union or multilateral programme that comprises mobility measures or by an agreement between two or more higher education institutions” (Art. 31). This mobility framework is based on an ethos of mutual

38. Cf., for Union citizens, Case C-127/08, *Metock and Others*, EU:C:2008:449, paras. 84–90.

39. Art. 9(5) does ask that “Member States who have granted the status shall provide for a facilitated procedure for the re-acquisition of long-term resident status” with particular reference to “the cases of persons that have resided in a second Member State on grounds of pursuit of studies”; however, it also confirms that “[t]he conditions and the procedure for the re-acquisition of long-term resident status shall be determined by national law”.

40. Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2019)161 final, p. 9.

41. See Art. 2(2)(d) of Directive (EU) 2016/801 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, O.J. 2016, L 132,21.

recognition: residence authorizations granted to third country nationals by one Member State for purposes that fall within the scope of the Directive are, in effect, (required to be<sup>42</sup>) recognized by other Member States.

Similarly, Directive 2014/66 establishes a short-term (up to 90 days in any 180-day period per Member State, Art. 21) and long-term (more than 90 days per Member State, Art. 22) mobility scheme for intra-corporate transfer.<sup>43</sup> And Article 18(1) of the EU Blue Card Directive (Directive 2009/50) establishes that “[a]fter eighteen months of legal residence in the first Member State as an EU Blue Card holder, the person concerned and his family members may move to a Member State other than the first Member State for the purpose of highly qualified employment under the conditions set out in this Article”.<sup>44</sup> Crucially, and uniquely, Article 16(2) ensures that periods of residence in more than one Member State can be considered cumulatively for Blue Card permit holders with respect to entitlement under the Directive on Long-Term Residents. However, the decision to issue or refuse a second Blue Card rests with the second Member State (Art. 18(4)).

In the context of the EUDCC framework, Regulation 2021/954 was adopted to ensure “that the same framework applies to other third-country nationals who are legally staying or legally residing on the territory of an EU Member State and who are entitled to travel to another Member State in accordance with Union law”<sup>45</sup> under the patchwork of the rights outlined above, recognizing that this freedom – already fragmented and limited – has been curtailed through the adoption of measures adopted in response to COVID-19. Regulation 2021/954 also addresses entitlement to travel under Schengen: the framework that sits at the intersection of the legal *and* geographical borders of freedom of movement. According to Recital 1 of Regulation 2021/954, “[u]nder the Schengen *acquis*, third country nationals lawfully residing in the Union and third country nationals who have legally entered the territory of a Member State may move freely within the territories of all other Member States during a period of 90 days in any 180-day period”. Under the Schengen Borders Code, conditions for intended stays of up to 90

42. For permitted exceptions and sanctions, see Arts. 32 and 33.

43. Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, O.J. 2014, L 157/1.

44. Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, O.J. 2009, L 155/17.

45. Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to third-country nationals legally staying or legally residing in the territories of Member States during the COVID-19 pandemic (Digital Green Certificate), COM(2021)140 final, p. 2.

days are harmonized.<sup>46</sup> Importantly, these conditions not only concern more formal requirements around travel documents, visas and/or residence permits; it is also required that third country nationals must “justify the purpose and conditions of the intended stay, and...have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully” (Art. 6(1)(c)), contrasting with the irrelevance of motivation for or purposes of movement<sup>47</sup> as well as the absence of any requirements concerning subsistence under Article 6 of Directive 2004/38 for Member State nationals (or their family members). The Schengen Borders Code does not, therefore, constitute a “right” to move.

The EUDCC package, and especially the preamble to Regulation 2021/954, highlights the awkward fit of Schengen in the EU system. First, while the Regulations aim to facilitate the right to move and reside, they cannot determine the lifting and/or (re-)introduction of) border controls *vis-a-vis* Schengen.<sup>48</sup> Second, the sheer range of special arrangements detailed across these recitals is illuminating: for the Benelux Economic Union (Recital 3); for Denmark – not taking part in the adoption of the Regulation noting Protocol No 22 annexed to the TEU and TFEU, but “[g]iven that this Regulation builds upon the Schengen acquis, Denmark shall, in accordance with Article 4 of the said Protocol, decide within a period of six months after the Council has decided on this Regulation whether it will implement it” (Recital 14); for Ireland – not in Schengen (Recital 15), but in a post-Proposal development, effectively part of the framework put in place by Regulation 2021/954,<sup>49</sup> for

46. Art. 6 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. 2016, L 77/1.

47. E.g. Case C-46/12 *LN*, EU:C:2013:97, para 47: “the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration”.

48. On external borders, see Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restrictions, O.J. 2020, L 208I/1 (as amended most recently, at the time of writing, on 16 June 2021; see Council of the EU, press release, 18 June 2021, “Council updates the list of countries, special administrative regions and other entities and territorial authorities for which travel restrictions should be lifted”). On the conditions and procedures for temporary reintroduction of border control at internal borders, see Arts. 23–31 Schengen Borders Code.

49. Art. 2 of the Regulation establishes “[p]rovided that Ireland has notified the Council and the Commission that it accepts the certificates referred to in Article 3(1) of Regulation (EU) 2021/953 issued by Member States to persons covered by this Regulation, Member States shall accept, under the conditions of Regulation (EU) 2021/953, COVID-19 certificates issued by Ireland in the format that complies with the requirements of the EU Digital COVID Certificate trust framework established by Regulation (EU) 2021/953 to third-country nationals who are entitled to travel freely within the territory of the Member States”.

Bulgaria, Cyprus and Romania (Recital 16); for Iceland and Norway (Recital 15); for Switzerland (Recital 16); and for Liechtenstein (Recital 17).<sup>50</sup> This complex set of necessary arrangements reflects the fact that there are EU Member States not in Schengen and non-Member States in Schengen, and also that there are multiple differences within and not just across that basic distinction.

The picture of things communicated by the detailed preamble to Regulation 2021/954 – and indeed through the decision to adopt two Regulations in the first place – does not reflect the binary neatness presumed by Article 3(2) TEU.<sup>51</sup> The “special relationship” between the Union and Iceland, for example, which “goes beyond economic and commercial cooperation” and concerns Iceland being a party to the EEA Agreement, its application of the Schengen *acquis*, its participation in the common European asylum system, and the conclusion of the Agreement on surrender with the Union, makes the position of an Icelandic national “objectively comparable with that of an EU citizen” when receiving services in an EU Member State.<sup>52</sup> Yet a third country national who falls within the scope of the Directive on Long-Term Residents has no claim to a similarly special relationship with the Union – or to the same degree of rights conferred by Union law.<sup>53</sup>

As our specific attention is focused for now on reviving freedom of movement and/or freedom to travel across the EU Member States, we are reminded that Union citizens can become third country nationals too. The choice not to make the EU-UK Withdrawal Agreement constitutive of the rights that it confers not only on British nationals residing in EU Member States but also on Union citizens residing in the UK<sup>54</sup> faces stark reckoning as

50. See also Recital 25 on nationals or residents of Andorra, Monaco, San Marino and the Vatican or Holy See.

51. Art. 3(2) TEU provides that “[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

52. Case C-897/19 PPU, *I.N.*, EU:C:2020:262, paras. 44 and 58. See further, Fredriksen and Hillion, “The ‘special relationship’ between the EU and the EEA EFTA States – Free movement of EEA citizens in an extended area of freedom, security and justice: *Ruska Federacija v. I.N.*”, 58 CML Rev. (2021), 851–876.

53. A point long criticized; see e.g. Wiesbrock, “Free movement of third-country nationals in the European Union: The illusion of inclusion”, 35 EL Rev. (2010), 455.

54. As the Commission notes, “In a departure from the fundamental principles of Union free movement rules, Article 18 [of the Withdrawal Agreement] obliges the host State to make a choice – either to operate a constitutive residence scheme (Article 18(1)), or a declaratory residence scheme (Article 18(4))”, European Commission, *Guidance Note relating to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Part two – Citizens’ rights*, C(2020)2939 final, p. 14.

deadlines for securing statuses based on national law run out. Anyone who might not be overly concerned about the distinction between rights conferred by Union law and by national law respectively might take a moment to reflect on the detention of Union citizens in UK immigration removal centres,<sup>55</sup> underlining once again that freedom of movement is as much about legal borders as geographical ones. It is also about political, even psychological, borders.

We often debate whether freedom of movement is a right or a privilege. We should not forget that it is undeniably a privilege in part *because* it is a right.

55. "EU citizens arriving in UK being locked up and expelled", *The Guardian*, 13 May 2021; "UK like an 'enemy state' to EU nationals detained by Border Force", *The Guardian*, 21 May 2021.