

‘Reciprocity’ and ‘proportionality’: EU code for a vaccine grab

The EU Commission has tightened its Covid vaccine export control mechanism, adding criteria on ‘reciprocity’ and ‘proportionality’. Dr Anna Bailey writes that this reasonable-sounding terminology is merely an attempt to disguise a naked vaccine grab as procedure-based and ethical. The EU’s actions fundamentally undermine the rule of law.

As usual, the EU seems to get a free pass in the media when it comes to the legal and moral acceptability of its actions. By imposing export bans and threatening to seize production and override intellectual property rights, it is riding roughshod over contract law – which, as Matt Hancock has noted, is, ‘the basis of international trade’. As I wrote for Briefings for Britain last week, this represents a serious violation of the rule of law.

The EU is now performing all kinds of linguistic gymnastics to try and justify its actions. Ursula von der Leyen and her Commission are trying to spin the issue as one of ‘fairness’, introducing reasonable-sounding criteria of ‘reciprocity’ and ‘proportionality’ to the EU’s so-called ‘authorisation mechanism’ for the export of Covid vaccines. In fact, these two criteria have nothing to do with fairness, and everything to do with the EU trying to disguise a naked vaccine grab as procedure-based and ethical.

‘Reciprocity’

‘Reciprocity’ in the EU’s interpretation of the term refers to

a balanced exchange: if we're exporting vaccines to you, are you exporting any to us in return? Justifying the introduction of this new criterion, Ursula von der Leyen – who has previously complained about the lack of vaccine exports from the UK to the EU – commented,

'the EU is the only major OECD producer that continues to export vaccines at large scale to dozens of countries. But open roads should run in both directions.'

But this is a spurious argument, because neither the EU nor the UK government produce vaccines – pharmaceutical companies do. And pharmaceutical companies are multinational organisations with global supply chains. The vaccines are the property of those pharmaceutical companies until purchased by a third party, such as the UK government or the EU, via a contract with the company. Who the vaccines 'belong to' is thus determined by contract law: the geographical location of production sites is completely irrelevant. Credit must go to Irish PM Micheál Martin in this regard, who is one of the few sane voices in the EU speaking out against the crude vaccine nationalism argument:

'They're not EU vaccines. These are vaccines paid for by other countries that are manufactured in Europe.'

We should not get sidetracked by debates over who has exported what to where. Neither export flows nor location of production bear any relevance to the issue of ownership. Von der Leyen's comment cited above effectively amounts to saying, 'whatever is produced on our territory is ours' – a particularly crude form of nationalism normally only observed in totalitarian regimes. It is remarkable that this line of argument by the EU has barely been challenged by the media.

‘Proportionality’

The Commission’s new ‘proportionality’ criterion for vaccine exports requires consideration of whether, ‘the conditions prevailing in the destination country [are] better or worse than the EU’s, in particular its epidemiological situation, its vaccination rate and its access to vaccines.’

Needless to say, these factors bear no relation to who is legally entitled to the given vaccines. It is a convenient get-out clause for the EU to compensate for its own failings. The EU spent seven times less per head upfront than the UK and the US on vaccine development, procurement and production. The EU was three months behind the UK in establishing its domestic supply chain with AstraZeneca. But now any non-EU country that has performed better than the EU and its member states on vaccines, be it on procurement or roll-out, can be penalised for its success.

That said, there may be an ethical case (not a legal one) for countries whose populations will gain less marginal utility from vaccines to divert them to where they will save more lives. But that should be a matter of mutual agreement between the states concerned, not a unilateral power play motivated by a dispute with an individual company.

It should be remembered that there is not actually a shortage of vaccines in the EU. Of the 14.8 million AstraZeneca vaccines that have so far been received by the EU, less than half – 7.3 million – have been used.

Moreover, large numbers of Europeans are now reporting that they would refuse to take the AstraZeneca vaccine and wait to be offered an alternative. The proportion who would refuse an AstraZeneca vaccine is consistently at a quarter to one-fifth across EU member states, including 27 percent in Germany, 23 percent in Italy, and 22 percent in France. This is in no small part due to the unscientific, politicised scaremongering put about against the AstraZeneca jab by their national

leaders.

The rule of law

So, what about those contractual obligations? Commission spokesman Eric Mamer stated last week:

'This is not about banning vaccine exports. This is about making sure that companies deliver on their commitments to the member states and the EU that are inscribed in contracts that they have with us.'

This is an extraordinary statement, the significance of which seems to have gone largely unremarked upon. Under the rule of law, it is the courts who act as neutral arbiters of contracts. One party to a contract may believe that the contract has been breached. But that does not give them the right to 'correct' the situation by force. One party to a contract using physical force to get their way – especially where that party is the state – is a clear violation of the rule of law.

The EU-AstraZeneca contract was concluded under Belgian law, meaning that the Belgian courts are the competent authority who should resolve any disputes between the two parties. The fact that the EU has not tried to bring a legal case against AstraZeneca speaks volumes about the strength (or otherwise) of any potential case it may have.

AstraZeneca is indeed underperforming on its contract with the EU. It was supposed to deliver 30-40 million doses in the final quarter of 2020, and a total of 110-140 million by the end of the second quarter of 2021 (i.e. by the end of June). To date, it has only delivered 30-35 million. But the contract only commits AstraZeneca to 'best reasonable efforts' to deliver on these numbers, allowing for the unpredictability of the sensitive processes in vaccine production.

Moreover, as Newsnight's Mark Urban points out, this under-delivery is not so very different to AstraZeneca's performance *vis-à-vis* the UK:

'AZ originally said it would deliver 30m doses to UK by end of 2020 but came up with 4m. It's now up to about 20m out of a total 100m it originally talked about delivering to UK by end of June. It's a bit better than performance with EU but is it really so different?'

Urban further notes that we should not forget about Sanofi and CureVac (French and German companies respectively), which were contracted last summer by the EU to deliver 525 million doses. To date, they have provided zero. According to Urban, 'MEPs who've seen the CureVac contract say it's on the same "best reasonable efforts" basis as AstraZeneca's. Likely all six of the firms contracted last summer by the EU are.'

'But', he notes, 'only one of them is the focus of so much negative attention.'

It is no exaggeration to suggest that the EU Commission, fuelled by paranoia from its dispute with AstraZeneca, is abusing state power in ways one would normally only expect from autocratic regimes. We have already witnessed a raid by Italian military police on a factory processing AstraZeneca vaccines, which took place on the Commission's orders. Portugal's former Europe minister Bruno Maçães called it possibly 'the most embarrassing day in EU history.'

Now the Commission is inventing arbitrary rules as a result of a grievance against an individual private company, and an individual country. Ultimately, it is the rule of law that will suffer.