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Analysis of the Opinion in Case C-524/24, ECJ, “Brenner”

This analysis examines in detail the content of the Advocate General’s Opinion and assesses its potential implications for Alpine transit, on the assumption that the ECJ will follow it.

Potentially contrary to EU law: three out of four measures

In his Opinion, the Advocate General concludes that the night-time driving ban, the sectoral driving ban and the winter driving ban are potentially contrary to EU law. He notes that the measures challenged by Italy constitute, in principle, restrictions on the free movement of goods (Articles 34 and 35 TFEU). These may be justified by objectives of general interest, such as environmental protection, the protection of public health or road safety (Article 36 TFEU), provided they are proportionate. The principle of proportionality requires that restrictions on fundamental rights, such as the right to the free movement of goods, must be appropriate, consistent, systematic and proportionate.

Night-time driving ban: appropriate, but not consistent with the objective

The aim of the night-time driving ban is to shift freight transport to daytime hours, when atmospheric conditions are more favourable, in order to reduce NOx emissions at night given the less favourable atmospheric dispersion conditions. While this measure is suitable for achieving the objective, it is not consistent with the objective owing to the exemption for local and regional traffic, as this also causes emissions at night. Overall, Austria has failed to assess the necessity of the ban, despite having complied with the air quality limit values of the EU Air Quality Directive for several years, nor considered whether less restrictive measures might have been available.

Austria can here establish a legal basis for such measures by swiftly implementing the amended EU Air Quality Directive, which halves pollutant limit values. Furthermore, it is clear from the Advocate General’s opinion that an adjustment to the improved environmental situation – for example, through temporal or seasonal differentiation – could justify a restriction on the free movement of goods.

Lack of proportionality assessment: sectoral driving ban is contrary to EU law

The sectoral driving ban, which applies 24 hours a day, covers a 65-kilometre section of the A12 motorway and, in order to comply with EU air quality targets, aims to prevent or restrict journeys



by lorries that use the Brenner motorway despite the existence of shorter alternative routes, and to promote the shift of freight transport to rail. The Advocate General considers the sectoral driving ban to be suitable for achieving these objectives and regards the measure as consistent. However, he criticises the lack of an assessment as to whether the current form of the ban is necessary despite compliance with air quality targets, and whether less restrictive measures could make a comparable contribution to environmental protection.

As already explained in relation to the night-time driving ban, the sectoral driving ban may be an appropriate measure for complying with air quality targets and may justify a restriction on the free movement of goods in order to protect the environment. However, Austria has not responded to the current factual circumstances and has not carried out an assessment of the proportionality of the sectoral driving ban. The rapid national implementation of stricter limit values, as well as any adjustments involving less severe restrictions on the free movement of goods, may justify the maintenance of a sectoral driving ban.

Winter driving ban: discriminatory and not sufficiently justified

The measure serves road safety, is intended to prevent traffic congestion and aims to ensure the free flow of traffic as well as the supply of goods to the areas most affected by congestion. The Advocate General also considers this measure to be pursuing legitimate objectives. However, the way it is structured primarily affects cross-border freight transport, as the driving ban applies to lorries bound for Italy, Germany or beyond. The cumulative effect, combined with the night-time driving ban and the weekend driving bans, leads to significant restrictions, and Austria has not sufficiently demonstrated why this driving ban is necessary as a supplementary measure, or why less restrictive measures would not have been sufficient to ensure road safety. The winter driving ban is at risk of being overturned should the ECJ rule accordingly. It seems conceivable that it could only be upheld if appropriate amendments are made and the cumulative effect with the other measures is taken into account. Alternatively, increased use of existing traffic flow management measures, time limits or situation-dependent restrictions would also be conceivable.

Traffic flow management: compatible with the free movement of goods, subject to certain conditions

The Advocate General does not consider traffic flow management for lorries (“dosing”) to be comparable to a driving ban. If the traffic flow management consists solely of a speed limit which, exceptionally, applies on certain motorway sections due to special circumstances, based on substantiated forecasts of traffic volumes, there is no breach of the free movement of goods.



Nor has Italy sufficiently demonstrated that the traffic flow management measures would lead to a significant hindrance to the movement of goods that is relevant under EU law.

The compatibility of traffic regulation with the free movement of goods is a positive sign and should prompt Germany, Austria, Italy and the Commission to work together to further develop traffic regulation.

Conclusions

At first glance, the Opinion may appear drastic; however, upon closer analysis, it can be concluded that the traffic management measures in question are suitable for protecting the environment and human health and, provided the principle of proportionality is observed, may also be compatible with the free movement of goods.

It now remains to be seen whether the ECJ will follow the Advocate General's opinion or adopt a different legal view. What is certain is that Austria needs to take action and would be well advised to transpose the new limit values of the EU Air Quality Directive into national law and thoroughly review the measures once more.

Should the ECJ rule in line with the Advocate General's opinion, the current measures will have to be repealed or, at the very least, substantially improved. Similar traffic management measures in the Alpine region could also be called into question on the basis of the ECJ's ruling.

Future measures aimed at protecting the environment and human health are permissible provided they are proportionate, consistent and suitable for achieving their objectives.

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