

Alpina Snowmobiles S.r.l.
Vicenza, ITALY

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and

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Comments to the EU Commission concerning the TRIS-notification by the state of Finland on Government bill to Parliament amending §§ 16 and 64 of the Vehicles Act and other related acts (2018/326/FIN)

The notification of July 6, 2018 by the state of Finland **involves a matter that is currently under infringement evaluation by the EU Commission** due to a complaint of an infringement sent by the two companies providing these comments. Accordingly, the current legislation in Finland violates the free movement of goods by prohibiting the use of heavy utility snowmobiles on public snowmobile trails, prohibiting thereby the intended use of e.g. the Italian Alpina-snowmobiles that are manufactured and sold by the aforementioned companies. Such prohibition creates an infringement with the articles 34 and 36 of the Treaty of the Functioning of the European Union (TFEU) and the national legislation should therefore be declared inapplicable in relation to CE-marked snowmobiles manufactured within EU. Furthermore, the current national legislation restricting the use of other than light snowmobiles on public snowmobile trails (Tieliikenneasetus 18 §) was enacted in April 29, 1994 at a time when Finland was a member of the EFTA and the Treaty on the European Economic Area (EEA) and therefore subject to the duty to notify the EFTA of technical trade barriers. No such notification was made, and the national legislation should be set aside as inapplicable even on such grounds alone, in accordance with the case-law of the European Court of Justice (EJC), e.g. in cases *CIA International* (C-194/94), *Lemmens* (C-226/96), and *Lidl Italia* (C-303/04).

The current notification by the state of Finland involves therefore not only a modernization of the legislation as is suggested by the state of Finland but also an attempt to solve the aforementioned violation of the EU-law by regulating the use of "...snowmobiles larger than those currently permitted to be used on snowmobile routes suited to that purpose and separately indicated as such". Such reform is explained to result in a situation where it "...would then be possible under the Act on Off-Road Transport [sic] to drive a utility snowmobile on snowmobile routes suited to that purpose".

Unfortunately, such a description of the current draft legislation, as well as of the current legislation, is **highly misleading** for two reasons. First, due to the above described infringement of the EU-law, the current Finnish legislation is *de facto* inapplicable, in relation to CE-marked and EU-manufactured heavy snowmobiles. In other words, *the use of EU-manufactured heavy snowmobiles is currently not limited in a way that lawfully affects such snowmobiles*, at least as soon as the EU Commission proceeds with the infringement evaluation and forces the state of Finland to seize the current violation of the EU-law. The notified draft legislation would therefore *introduce a new and effective limitation to the use of such snowmobiles and limit the free movement of EU-goods to the Finnish market*, through introduction of **a general ban** (with a possibility for later-to-be designated exemptions) to the use of heavy snowmobiles on public snowmobile trails.

Furthermore, the suggestion by the state of Finland of a future possibility to drive heavy utility snowmobiles would be *far from as simple as the notification text implies*. In reality, materialization of such possibilities would be in the hands of hundreds of snowmobile trail operators since the draft for legislation gives such operators **not an obligation but merely a right to evaluate** whether heavy utility snowmobiles will be allowed or not, regardless of the fact that the specific trails might be suitable for such traffic. In practical terms, the legality of the use of CE-marked heavy snowmobiles manufactured in another EU-state would be decided by operators of public snowmobile trails, with little or no knowledge of the obligations to secure the free movement of goods to the highest possible degree in accordance with the TFEU. Furthermore, such operators will have little interest in actually evaluating the suitability of the trails since **such evaluation and eventual designation is to be fully and completely voluntary**, with **no legal remedies** for the interested parties to demand such evaluation nor to appeal the results of an eventual evaluation or rejection to conduct such an evaluation. In other words, the companies involved will have **no legal security** against unwillingness of the operators to conduct evaluations, nor against groundless decisions by the operators to refrain from designating trails for such purposes.

Obviously, such a regulation would be an infringement against the free movement of goods according to articles 34 and 36 of the TFEU for several reasons since the draft legislation does not fulfill any of the tests established by the case law of the ECJ in similar matters. Furthermore, the reform does not solve the inherent problems of the current Finnish legislation, which is in violation of the EU-law and therefore inapplicable.

First, there has been no actual study of the *necessity* of such a general prohibition (with possibility of later-to-be designated specific exemptions), only vague assumptions have been provided concerning traffic security and environmental risks. Such a **lack of an actual and detailed risk assessment and evaluation of the necessity** of the limitations to the free movement of goods is in clear violation against the extensive case law of the ECJ in similar matters, see e.g. *Mickelson & Roos* (C-142/05), *Sandström* (C433/05). It is striking that e.g. the governments of Sweden and Norway have – as a result of the aforementioned case-law – recently commissioned detailed studies by expert organizations, in similar matters concerning the necessity of limitations to the use of personal-watercrafts (PWC's).

A detailed study and evaluation of **the alleged traffic security risks** would have provided a much different picture than the assumptions that are now being used as an argument for the draft text. For example, *the width* of the heavy utility snowmobiles is only slightly higher than that of light snowmobiles, as is clearly visible in this picture:



For *traffic safety* purposes it is the largest width of the vehicles, the distance between the outer edges of the skis, that is decisive. The difference between the widest light snowmobiles, equipped with the widest plastic skis on the market, and the heavy snowmobiles of Alpina S.r.l. is only +6,5 % or 8,5 cm in relation to the Alpina Superclass-model and +12,4 % or 14,6 cm in terms of the Alpina Sherpa model. Hardly a difference large enough to necessitate a general prohibition as the main rule, particularly as long as the width of the light snowmobiles has not been regulated.

It is also highly contradictory that utility vehicles (snowcats) that are heavier and wider than the heavy utility snowmobiles are often being used for maintenance of the very same public snowmobile trails, where the heavy snowmobiles are now alleged to create risks, without snowcats being declared as a hazard for traffic safety or as an environmental problem, let alone demanding legislation prohibiting their use for maintenance of the trails. Furthermore, the very same heavy utility snowmobiles that now are alleged to create risks, can be also be used for such maintenance of the trails, without that being a problem or prohibited due to traffic safety risks according to the current or the proposed legislation. The alleged necessity of the general prohibition (with possibility of later-to-be designated specific exemptions) is therefore outmost questionable since the only use to be prohibited or limited is the use where the heavy utility snowmobiles would compete with light snowmobiles in terms of e.g. tourist services.

The necessity to generally ban the use of heavy snowmobiles as the main rule is questionable also due to the fact that the grand majority of heavy snowmobiles are most likely going to be used by professional tourist service companies, whose services are strictly regulated by the Finnish safety regulations concerning services (Palveluturvallisuuslainsäädäntö). Snowmobile-safaris are categorized as so called 'dangerous services' in Finland and therefore the service providers are subject to extensive obligations concerning risk management, including risk evaluations concerning the safari routes, duty to design a risk management plan, risk event reporting procedures etc. Accordingly, there are **extensive and strict risk management obligations, mechanisms and procedures** that are applicable in terms of the grand majority of the most likely users of heavy snowmobile, **regardless of the snowmobile trail regulations**. The necessity of a ban to the use of heavy snowmobiles within *traffic* legislation would therefore be highly questionable, particularly when no such rules are seen to be needed for heavier utility machines used for maintenance of snowmobile trails.

However, **the most fundamental blow against the necessity of the general ban** (with possible designated-to-be exemptions) **is deliver by the Finnish government themselves since** on page 9 of the draft they explain that **the general ban was chosen in order to minimize the administrative burdens of the trail operators** due to additional burdens that the allowance of heavy snowmobiles on public snowmobile trails would cause them otherwise. The government explains that an alternative for the regulation would have been detailed risk assessment of the trails and particularly bridges etc. and use of local weight restrictions through use of traffic signs, where needed, but that such an alternative would force administrative burdens on the trail operators. **In other words, there is no necessity to have a general ban and even the Finnish government admits it.** The nation-wide general ban (as the main rule) is in other words **motivated by economic motives, not a necessity of protecting traffic security or the environment!**

It should be obvious that such a rule is blatantly against the articles 34 and 36 of the TFEU and the extensive case law of the ECJ, where administrative costs have never been accepted as a justification for a violation against the fundamental principle of free movement of goods. Furthermore, the case law has established that even if such a general ban were to be justifiable at the outset, **evaluation of the necessity of such a ban can only be made contextually**, and not in terms of a whole nation. In *Mickelson & Roos* para 38, the ECJ specifically stated that a prohibition in areas where no protection is needed "...constitutes a measure going beyond what is necessary to achieve the aim of protection..." In *Sandstöm* (C-433/05) para 38 this is developed further by the ECJ through the statement that "...any prohibition... in such an area, resulting from its not being designated [as an exemption]... is a measure going beyond what is necessary to achieve the

objective of protection...” In other words, a general ban can only relate to specific areas where the risks against the environment or traffic security necessitate limitations to the free movement of goods. A general ban outside such areas is to be considered inapplicable, regardless of whether or not such areas have been designated as exemptions. In practical terms, even if such an indefensible general ban were to be passed, **a judicial review of the necessity of it, in accordance with the case law of the ECJ, would not be limited by eventual designations of exemptions from such a general ban. Instead, it would have to be based on a contextual risk assessment of the local necessity of protection.** Such contextual judicial review would make the nation-wide ban completely unnecessary.

In the Finnish context this means that **a general nation-wide ban (with possible later-to-be designated exemptions) against the use of heavy snowmobiles is completely and utterly indefensible.** The Finnish government has effectively admitted that there is no nation-wide necessity for protection along the entirety of the thousands of kilometers of public snowmobile trails. In reality, it is all about saving administrative costs. Consequently, it should be obvious that such an unjustifiable general ban would be impossible to defend in a court of law due to the obvious violation of fundamental EU-law. Since the Finnish draft legislation fails the first test, it is strictly speaking unnecessary to go any further, but for the sake of clarity, we will present in detail even additional arguments against the draft regulation.

Second, no actual considerations of the **effectiveness** of the proposed legislation in protecting traffic security or the environment have been provided since no actual study has been done of the alleged environmental or traffic issues. Therefore, no expert evaluation of the effectiveness of the proposed limitations has been possible and therefore the proposed legislation violates the criteria established in extensive ECJ case law, among others in the *Mickelson & Roos* (C-142/05). A general prohibition as the main rule is hardly justifiable as long as heavier and wider utility vehicles (snowcats) are allowed to be used for the maintenance of the public snowmobiles trails, without any restrictions in traffic legislation.

Third, the proposed legislation is clearly **disproportionate** since there would be several alternatives that would pose less restrictions on the free movement of heavy utility snowmobiles to the Finnish market, e.g.:

- a) lower speed-limits for heavy snowmobiles, as is the case according to the current legislation.
- b) stricter demands for the competence of the drivers through use of stricter driving license criteria for heavy snowmobiles, as has been done in Sweden and is in fact being used by the current Finnish legislation applicable to heavy snowmobiles.
- c) use of local restrictions in terms of weight, height and/or width on bridges etc. where traffic security risks have been documented and can not be managed otherwise.
- d) use of warning signals such as orange flashing lights on heavy snowmobiles in areas with less than optimal visibility.

When such alternatives are available, and in fact even partly identified within the draft by the Finnish government as alternatives, it should be obvious that a general ban to the use of heavy snowmobiles on public trails is disproportional, even if there later *possibly* could be specifically designated exemptions in some areas. Without an access to the network of public snowmobile trails, the intended use of heavy snowmobiles is limited to the extent that they become marginally interesting for the market. Consequently, access to the network of public snowmobile trails is crucial for the willingness of most potential customers to invest in heavy snowmobiles and a general ban is the most effective trade barrier for heavy snowmobiles.

Accordingly, the suggested general ban (as the main rule) is clearly in violation against the *proportionality* test established by the extensive case law of the ECJ in similar matters. For example, in *Mickelson & Roos* (C-142/05), para 37-38, the ECJ stated that a general ban (for use of personal watercrafts) *outside* the public traffic routes (general navigable waterways), would be indefensible and unnecessary as admitted by the national regulation since exemptions were to be made for areas where there was no necessity of protection

through a general ban. In the Finnish context, the disproportionality is far worse since the proposed general ban (with *possibly* later-to-be exemptions) for use of heavy snowmobiles, *specifically involves* such public traffic routes, and not some areas outside such routes as was the case in *Mickelson & Roos*.

Furthermore, even if a general ban (with possibility of later-to-be designated specific exemptions) were to be considered acceptable, such regulation would have to fulfill additional criteria established in *Mickelson & Roos* (C-142/05), where the ECJ specifically stated that an otherwise acceptable prohibition with exemptions for specifically designated areas for use, could be acceptable if and only if:

- a) the local national authorities **are obligated to designate** such areas, and
- b) **designations are actually made** and
- c) such **designations are made in accordance with criteria established by the legislation**, and
- d) the designations **are conducted within a reasonable time after the enactment** of the legislation.

Even further, in *Mickelsson & Roos*, the ECJ clearly also presupposed that there would be **access to judicial review**, in other words, an opportunity for legal remedies since the ECJ specifically stated that the aforementioned criteria would have to be evaluated by the national court. Access to court in such matters concerning the rights of private parties is an inherent part of the western rule-of-law and also demanded by the human rights law applicable in all EU-states, also in Finland.

None of these supplementary tests have been observed by the Finnish government which clearly shows that no serious evaluation of the proposed legislation against the EU-law has been made, despite the Ministries being informed of the complaint to the EU Commission on this matter by the aforementioned companies in December 2017.

Nevertheless, **none of these supplementary tests are passed** by the proposed legislation since:

- a) according to the Finnish legislation, the operators of public snowmobile trails consist not only of local or national authorities as presupposed by the ECJ, but also of non-governmental organizations and entrepreneurs! In other words, the proposed legislation **would delegate the evaluation** of the limitations to the free movement of goods, **not only to local national authorities but also to private parties**, resulting in an impossible situation where there would obviously be **no guarantees that such evaluations would be made impartially and without undue influence** from e.g. competitors to companies that would use heavy utility snowmobiles for commercial purposes. Even worse, since even private entrepreneurs can be trail operators, there is a real possibility of a conflict of interest, in case the trail operator has competing commercial interests, or is part of a business network that has competing commercial interest, in relation to the manufacturers, distributors, reseller or users of heavy snowmobiles.
- b) the proposed legislation **creates no obligation to designate trails** where heavy utility snowmobiles would be allowed to be used, only a right to designate such trails based on voluntary discretion. With no obligations, the trail operators will have less incentives to actually conduct an evaluation and even worse, in case the trail operator has competing commercial interests e.g. tourist services relying on the use of light snowmobiles, they would have very strong counter-incentives to designate trails for competing use of heavy snowmobiles.
- c) the proposed text of the legislation **gives no guidelines for the use of such a voluntary discretion**. Although such guidelines most likely will be given in the later government bill for the regulation, it is questionable whether trail operators with little knowledge of Finnish legal methodology would actually rely on such parliamentary texts along with the actual text of the legislation. Such uncertainty creates **legal uncertainty** for the manufacturers, distributors, resellers and the potential buyers and

users of heavy snowmobiles. Such legal uncertainty will create a very effective trade barrier since under such level of uncertainty it will be difficult to find buyers willing to take the economical risks.

- d) the proposed legislation opens **no legal remedies** since the discretion is to be voluntary. Such a lack of legal remedies is rather unacceptable violation of human rights law which involves even the rights of legal persons. The economic rights of the manufacturers, distributors, reseller and the owners and users of heavy snowmobiles would be completely unprotected if the draft legislation were to be enacted.
- e) the proposed legislation sets **no time limits** for such designation since the discretion is voluntary
- f) the proposed legislation creates **an uneven playground** for the manufacturers, distributors and resellers of heavy utility snowmobiles since their access to the market would necessitate communication with hundreds of snowmobiles trail operators concerning complicated networks of thousands of kilometers of snowmobile trails, with no certainty of a positive outcome. This would create **uneven and extraordinary administrative burdens and transactions costs** for such companies in comparison with their competitors dealing with light utility snowmobile products such as the ones manufactured in Finland. Even the potential users of heavy snowmobiles would be faced with uneven playground since their competitors using light snowmobiles would not be subject to **voluntary discretion of trail operators that could even withdraw their designations of trails for the use of heavy snowmobiles, creating commercially unacceptable risks**. Such uneven playground **creates a very effective trade barrier** to the free movement and access to the Finnish market.
- g) the proposed legislation would also create unwanted waste of natural resources since all such trails that were to be designated for heavy snowmobiles would have to be marked with traffic signs signaling such designation. Such an obligation would also create additional administrative burdens for the trail operators, diminishing their willingness to use their voluntary discretion to designate such areas. Therefore, the opposite solution of free use as the main rule and limitations as exemptions would create less waste of natural resource since signs would be needed only on such specific trails or bridges etc. where the use of heavy snowmobiles would have to be prohibited.

Based on the arguments presented above, it should be obvious that the proposed legislation is in violation of the EU-law for a large number of reasons.

It is important to realize that heavy utility snowmobiles are the only vehicles in Finland whose intended use on public traffic routes is to be generally prohibited as the main rule (with possibility of later-to-be designated specific exemptions), due to their weight. All other heavy utility vehicles intended for use on public traffic routes, e.g. busses, trailers, etc. are allowed to traffic on public routes as the main rule and their use is restricted only on specific routes or on specific road constructions (e.g. bridges, tunnels etc.) with help of weight, height and/or width limitations. In comparison, the state of Finland has recently enacted new road legislation that allows trafficking of so heavy trailers on Finnish highways that a number of bridges will most likely have to be re-engineered to tolerate such weights in long-term, while the number of vehicles allowed simultaneously on some of such bridges is being used as a short-term solution. Against such background, the uneven and discriminating treatment of EU-manufactured and CE-marked heavy snowmobiles due to assumptions based on their weight and the alleged need to economize the administrative burdens of trail operators is therefore very troubling and should not be tolerated by the EU Commission.

As a conclusion, the EU Commission *should demand that the state of Finland immediately revises the current draft text for the law reform and ends the violation against the free movement of goods by removing the*

general ban to the use of heavy snowmobiles. Consequently, **Finland should adopt the same mechanism for regulation that is widely being used for other heavy vehicles** in Finland, and which in fact is already discussed as an alternative solution in the government draft text for the new legislation. Accordingly, the regulation should adopt a solution where:

- a) **free use is the main rule,**
- b) **local restrictions using weight, height and/or width restrictions are used for specific areas,** such as bridges etc., where safe operation of heavy vehicles creates proven and documented risks that can not be managed otherwise. Such restrictions shall be as limited as possible in accordance with the proportionality test.

In addition, the regulation should rely on:

- c) **a stricter driver competence criteria,** through the use of license class B, **as is already demanded by the current legislation** involving heavy snowmobiles in Finland and also e.g. in Sweden. It is fully contradictory to propose general restrictions to the use of heavy snowmobiles while at the same time lowering the demands to driver competence and to minimum age, as the Finnish government now proposes. The opposite solution must be used if additional restrictions are needed since such a solution would pass the proportionality test concerning limitations to free movement of goods to the Finnish market, whereas the proposal by the Finnish government does not.
- d) **a mechanism for judicial review** of restrictions to the free use of the heavy snowmobiles is provided, enabling access to justice in case disputes arise in terms of restrictions.

In addition, the state of Finland should simultaneously also reform the article 24 of the Off-road Traffic Act (Maastoliikennelaki) which currently allows the use of snowmobiles on forest roads that have been closed for other traffic. The current text of the legislation uses the term 'snowmobiles' which according to the current interpretation by the Finnish government officials, excludes the use of *heavy* snowmobiles. Such an interpretation creates a trade barrier and thereby violates against articles 34 and 36 of the TFEU. This infringement would become even clearer if the notified law reform is accepted since the proposed law text would specify that the term 'snowmobiles' refers to light snowmobiles. It would be very easy to correct such infringements against the EU-law by simply adding the expression 'light and heavy' in front of the word 'snowmobiles' in the text of the article 24 of the Off-road Traffic Act, since that statute is being reformed anyhow.

The companies also ask the EU Commission to put pressure on the state of Finland to ensure that the government officials **immediately end the application of the current national legislation** in violation with the TFEU articles 34 and 36 in the way that has been described above, and in detail in the complaint sent to the EU Commission in December 2017. The Finnish government officials have continued to violate their obligations according to the TFEU and recently the National Police Board (Poliisihallitus) effectively even denied any obligation to apply the TFEU, as if it was not part of the Finnish legal system. Such an amazing disregard of the most fundamental and overriding EU-law in 2018 should be alarming for the EU Commission.

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