Summary

Main proposals in brief

- The introduction of a state regulatory system including the possibility for the state to review and ultimately to impose conditions on or prohibit transfers of ownership and grants of use of identified property that is of significant interest for Sweden's total defence. This would apply to ports, airports and real property units in areas with geographical conditions of substantial importance for Sweden's military defence. The introduction of a requirement such that the transfer of ownership or grant of use of physically protected installations established to serve the needs of Sweden's civil defence may only be executed by a municipality or a county council subject to consent from the state.
- The introduction of a generally applicable and explicit legal obligation for municipalities and county councils to take total defence requirements into consideration in their activities.
- Through the county administrative boards, the state enhances its ability to safeguard Sweden's total defence interests in the spatial planning process.

What is Sweden's total defence?

According to Section 1 of *lagen (1992:1403) om totalförsvar och höjd beredskap* (the Act on total defence and heightened state of alert), total defence means activities needed to prepare Sweden for war. Under the highest state of alert, total defence is all of the public activities to be undertaken during such a period. Total defence consists of military activities (military defence) and civilian activities (civil defence). The Swedish Armed Forces are required to maintain and

develop Sweden's military defence. Civil defence is about making it possible for the society in general to manage situations during a heightened state of alert. The Riksdag (Swedish parliament), the Swedish Government, state government agencies, municipalities, county councils, the business community, volunteer organisations and private individuals are all components of Sweden's collective total defence. A comprehensive regulatory framework exists for how Swedish society is to function during war or otherwise during a heightened state of alert, and for planning and other preparations for the society in such situations. Total defence activities thus cover virtually all the functionality in our society, and concern a large number of different activities within different sectors of society. A 2015 defence policy decision determined that comprehensive planning for Sweden's total defence was to be resumed. This was due to the deterioration in the security situation in Europe.

The task

As part of strengthening Sweden's total defence, in its National Security Strategy the Swedish Government notified that it would conduct a review of what legislative changes may need to be made to better meet central government's needs to safeguard the interests of Sweden's total defence in different areas of society.[1] It was against this background that the Committee for better protection for total defence activities was appointed. The Committee reported on that part of its task that deals with *skyddslagen* (the Installations Protection Act, SFS 2010:305) and *skyddsförordningen* (the Installations Protection Ordinance, SFS 2010:523) in its interim report *Några frågor i skyddslagstiftningen* (Some questions in the installations protection legislation) SOU 2018:26.

In this its final report, the Committee is reporting on the remainder of its task. The task was to survey the existing regulatory framework aimed at protecting Sweden's total defence activities against external threats and, based on this survey, to assess whether the division of responsibilities between the state, the municipalities and private individuals is clearly and appropriately regulated. The Committee's task also included to assess whether measures need to be

[1] National Security Strategy, January 2017 p. 26.

taken to achieve a greater degree of protection for Sweden's total defence in transfers of ownership or grants of use concerning certain real property units and infrastructure of significant interest for our total defence. The Committee was tasked with submitting proposals for legislation based on the results of this assessment.

Survey

The purpose of the survey of the existing legislation for the protection of our total defence is to clarify the possibilities that the state already has today to safeguard the interests of our total defence. There is no collected regulatory framework for the protection for our total defence activities. Neither is there any single legal mechanism for providing such protection. Instead, there are many ways to provide protection for our total defence activities. A number of regulations deal with *physical protection* or *information security* in connection with total defence activities. The rules in the Swedish Environmental Code and Sweden's Planning and Building Act concerning the *management of land and waterways* are also relevant, since these rules make it possible to protect land and waterways and installations of significance for our total defence against measures which could have a significant negative impact on our total defence interests during the planning process. The state can also protect total defence activities by taking over ownership itself of some property, such as through the expropriation institute which enables greater *state ownership*. Additional protective mechanisms are rules governing the *permit application procedures for particular activities* which are significant for Sweden's total defence and the *permit application procedures for the transfer of ownership or grant of use* of certain activities or property of importance to Sweden's total defence. There are also provisions that give the state the right to impose specific *obligations on operators* to take total defence needs into consideration. Finally, there are specific rules in relation to state government agencies, municipalities and county councils. The provisions in *Säkerhetsskyddslagen* (the Protective Security Act, SFS 2018:585) concerning the protection of security-sensitive activities indirectly also

provide a broad and composite protection for total defence activities, since total defence activities are very often also security-sensitive activities.

Based on the survey, the Committee has assessed that the rules that exist today and which directly or indirectly can be said to give our total defence protection against external threats are generally adequate and justified in light of the need for protection and on the basis of the state's need to be able to safeguard our total defence interests. In some respects however, we have assessed that the division of responsibilities between central and local government ought to be clarified and that protection for our total defence ought to be strengthened. Both of these assessments are apparent in our main proposals.

Clarification that municipalities and county councils are required to take total defence requirements into consideration in their activities

Municipalities and county councils have an important role to play in Sweden's total defence. Despite this, municipalities and county councils can make decisions as part of their normal administrative activities which can have consequences for Sweden's total defence at the national level without any explicit requirement that they must take Sweden's total defence interests into consideration. This was especially apparent in the case of the grant of use of municipal port space in the Nord Stream 2 project, which triggered debate about the limits of municipal discretionary powers in matters with security policy implications and the legal mechanisms available to the state in such matters.

The Committee proposes that a general rule be introduced into *Lag (2006:544) om kommuners och landstings åtgärder inför och vid extraordinära händelser i fredstid och höjd beredskap* (the Act on municipalities' and county councils' measures before and during exceptional events in peacetime and during a heightened state of alert) to the effect that Sweden's total defence requirements must be taken into consideration in all activities within municipalities and county councils. Alternatively, the proposed provision may be introduced into the Local Government Act (*Kommunallag* SFS 2017:725). This

amendment would mean a clarification of the obligations of the municipalities and county councils in this respect.

Municipalities and county councils may need support from the state in taking Sweden's total defence requirements into consideration. The Committee therefore also proposes a rule to the effect that if necessary the municipalities and county councils are to consult with the government agency so designated by the Swedish Government in matters of significance for our total defence.

The Committee believes that these proposals can heighten awareness of the importance and needs of our total defence, and also ensure that the interests of our total defence are taken into consideration to the extent necessary in municipal decision-making. An equivalent rule already exists for state government agencies in *förordningen (2015:1053) om totalförsvar och höjd beredskap* (Regulation concerning total defence and heightened state of alert).

Through the county administrative board, the state expands its possibilities to safeguard Sweden's total defence interests in spatial planning.

The Swedish Environmental Code contains rules concerning the management of land and waterways. According to the Planning and Building Act (SFS 2010:900), these provisions are to be applied in plan preparation and in cases concerning planning permission and outline planning permission. The provisions in the Planning and Building Act ensure a state-level influence over planning, primarily through the consultative role and the possibilities for the re-examination of municipal decisions that the Act places on the county administrative boards. The rules concerning areas of national interest act as mechanisms for exercising a national influence over land and water use in the municipalities. The rules state *inter alia* that areas may be of national interest for Sweden’s total defence if they are needed for total defence installations.

Under the provisions in the Planning and Building Act, in consulting with the municipalities concerning comprehensive plans, the county administrative board is required to ensure that national interests are safeguarded. The Committee nevertheless feels that municipalities’ planned use of a land area can have a negative impact on the interests of Sweden’s total defence even if the specific land area

has not been identified as of national interest for our total defence. The Committee therefore proposes the introduction of a requirement on county administrative boards to promote the interests of our total defence over and above the specified national interests in this consultation procedure. The Committee also proposes that the county administrative boards' possibilities to intervene against municipal decisions to adopt, repeal or amend a legally binding land-use plan or special area regulations be expanded so that they also apply where it can be assumed that the decision will mean that the interests of Sweden's total defence will be substantially negatively impacted in some other way than through a specified national interest not being safeguarded.

Through a review authority, the state will be given the possibility to review and ultimately to impose conditions on or prohibit the transfer of ownership, grant of use or, in some instances, the demolition of identified property of significant interest for Sweden's total defence.

The need for a regulatory system

Today, the legislation does not contain any requirement to take into consideration our total defence interests when transferring ownership or granting a right to use property of significant interest for our total defence. A negative consequence of this could be that assets important to our total defence are dissipated or destroyed. Another consequence is that by purchasing or obtaining a grant of use of a real property unit within an area that is important to our total defence, an antagonist could acquire a level of control over a geographical area that would make it possible for the antagonist to damage Sweden's defence preparations. A permanent or temporary right of disposition over infrastructure, such as a port or an airport, would also allow an antagonist to act in a way that could damage our total defence. Through selective acquisitions or grants of use of property in Sweden, a foreign power could obstruct Swedish defence activities, carry on illegal intelligence operations, or otherwise support an activity that is antagonistic to Sweden's security.

A closely related problem is that without further restrictions, municipalities and county councils can transfer ownership, grant the

right of use or demolish certain physically protected installations, for example a rock cavern that was constructed or paid for by the state for civil defence needs. This also entails a risk that property assets important to our total defence could be dissipated or destroyed.

The Committee proposes the introduction of a system whereby Sweden's total defence interests must be taken into consideration prior to the transfer of ownership or grant of use and, in some cases, the demolition of identified property of significant interest for our total defence. This would mean that the state is given the possibility to review and ultimately to prohibit such courses of action if significant total defence interests so demand. This would make it possible to take total defence interests into consideration in a uniform manner in cases of transfer of ownership, grant of use or demolition and would avoid or reduce the serious consequences described above. The Committee is also of the opinion that such a regulatory system can assist the municipalities in shouldering their share of the responsibility for Sweden's total defence.

Although it is possible for the state to expropriate property for total defence purposes by means of the expropriation mechanism, which could be utilised to prevent some other party's ownership or right of use or to take back ownership of the property after the fact, the expropriation legislation does not contain any mechanism by which the state can be made aware of intended transfers of ownership or grants of use so as to be able to act preventively. An intervention after the fact can mean that damage, such as in the form of preparatory antagonistic measures, has already been done. The Committee has also considered a right of pre-emption for the state in respect of property of importance to our total defence. The Committee nevertheless assesses that a regulatory system which would result in the state being able to block an intended agreement is an appropriate and effective complement and alternative to the existing expropriation legislation. Furthermore, the regulatory system proposed encroaches less on the rights of the individual and is less burdensome and costly for the state than if the state itself were to become the owner of the property.

Property of significant interest for our total defence

The Committee proposes that the regulatory system should cover:

- Ports and airports,
- Real property units in areas with geographical conditions of substantial importance for Sweden's military defence, and
- Protected installations that have been established to serve the needs of Sweden's civil defence.

Due to their particular design and function, and often due to their geographical location, ports and airports are of particular importance to Sweden's total defence. Who owns or who has been granted the right of use of a port may be of importance for Sweden's defence and security of supply. The right of disposition over a port or airport can thus constitute a major strategic advantage for an antagonist. The Committee takes the view that state regulation of transfers of ownership and grants of use that concern ports and airports – regulation that includes the possibility of prohibiting an agreement deemed risky from the point of view of our total defence – can play an important role. However, it is neither necessary nor reasonable that all ports and airports should be covered by this review requirement. The Committee has aimed for limitations which would mean that for example smaller airports as well as recreational boat marinas and fishing ports which are not of a size, or have a function or other qualification which can be assumed to be of total defence interest, would fall outside the scope of the regulation. A special derogation is proposed for inland ports for example.

In cases of ownership or grants of use of real property units in geographical areas meriting protection, the Committee is also of the view that state regulation of transfers of ownership and grants of use can be an important mechanism for safeguarding our total defence interests. These areas are of interest for example because they are adjacent to an important waterway, navigation channel or port entrance. Due to their geographical location, they may also hold installations of substantial importance for our military defence. The right of disposition over real property units in such areas could ultimately result in strategic advantages for an antagonist and make it more difficult for the Swedish Armed Forces to fulfil their task of defending

Sweden. The Committee proposes that it should be the responsibility of the Swedish Government to specify in an ordinance the geographic extent of such areas by attaching maps on which these areas are marked out to such an ordinance. The Committee proposes that the areas corresponding to the former military restricted areas (*militära skyddsområden*) should be identified as geographical areas meriting protection. These areas still have relevance for Sweden's military defence due to their geographical locations. By marking out and identifying these areas on a map, it will be easy for private property owners to check whether their real property units are covered by the proposed legislation.

A regulatory system can lead to a curtailment of the private owner's right of control and enjoyment of their property. Compliance with the freedom of establishment and the free movement of capital, regulated in international trade law and in EU law, is also necessary. Furthermore, in practice a regulatory system can result in some restriction on municipal self-government, since the proposal could ultimately limit the municipality's right to choose how it wants to carry on its own activities. In order for the Committee to justify these restrictions, it has been crucial that the property to be covered by the review requirement can be identified in a clear and legally transparent way. It has also been crucial that the property is of substantial enough importance to our total defence, and has a sufficient need for protection, that regulating who owns it and who may be granted the right of use of the property is justified. Based on these conditions, the Committee has assessed that there are currently no possibilities for identifying property other than the types mentioned above, i.e., ports and airports, real property units in geographical areas meriting protection, and protected installations established to serve the needs of Sweden's civil defence.

Since the point of departure for the work of the Committee was expanding the possibilities for the state to protect our total defence activities, state-owned property is not covered by the legislation, whether owned by a state government agency or a company in which the state has a controlling influence.

Transfers of ownership and grants of use covered by the review requirement

In the proposed legislation, transfer of ownership means primarily the transfer of title through the sale, exchange or gifting of property. It is proposed that the review requirement will cover transfers of ownership of the whole or part of or a share in, real estate that is part of a port or airport or a geographical area meriting protection, or holds protected installations established to serve the needs of Sweden's civil defence. Transfers of ownership of buildings and installations erected on the real estate by a party other than the real property owner are also covered. The regulatory system also applies to the transfer of ownership of shares or participations in companies that own property that has been identified in the legislation, but not shares in public limited liability companies.

As a rule, grants of use of property that have been identified in the legislation are to be subject to review. In view of the great variety of phenomena that the term 'grant of use' can cover, there is also a need for some limitations and derogations for various types of property. Concerning ports and airports, the Committee proposes that the review requirement is limited to grants of use which, with regard to the grantee's identity or the nature, scope or duration of the grant of use, or the frequency of grants of use, are not typical for the activities of the port or airport. What is meant here is that grants of use that are part of day-to-day commercial operations and which cannot be expected to have any impact on total defence interests are to fall outside the consultation obligation. It is not the intention that the daily operation of a port or airport should be hampered by the regulatory system.

In the case of real property units in geographical areas meriting protection, it is proposed that the review requirement be limited to grants of use for buildings or land, or parts of buildings, for more than three months. It is the total period of grants of use to the same person that determines whether or not the notification obligation arises. For example, through this limitation in time, short-term summer cottage rentals and renting of sleeping accommodation at hotels and youth hostels will fall outside the legislation's scope of application. Furthermore, in relation to private owners, certain transfers of ownership and grants of use between related parties or affiliates are also exempt.

Review authority

The Committee proposes that the county administrative boards of Skåne, Stockholm, Västra Götaland and Norrbotten counties are to be the review authorities under the proposal and be given the power to approve, impose conditions on, and prohibit the procedures under the legislation.

The review process is initiated through consultation or subsequent to notification

What the Committee's proposal means for the municipalities and county councils is that a proposed transfer of ownership, grant of use or demolition covered by the legislation must be preceded by a compulsory consultation procedure with the review authority. The purpose of the consultation procedure is to assess the appropriateness of a proposed transfer of ownership or grant of use from the point of view of Sweden's total defence. Companies that are wholly or partly owned by a municipality or county council are equated with municipalities or county councils.

For natural and legal persons, it is proposed that the regulation should differ depending on the type of object. In the case of the transfer of ownership or grant of use of a port or airport, it is proposed that the consultation procedure rules shall apply. In the case of real property units in geographical areas meriting protection, it is proposed that intended transfers of ownership and grants of use covered by the legislation are to be preceded by a compulsory notification procedure, after which the review authority is to conduct an initial review in which it assesses the intended transaction's appropriateness from a total defence point of view. The reason for not prescribing consultation in these cases is that, in the opinion of the Committee, private real property unit owners cannot be expected to assess the total defence implications of an intended transaction, nor can they reasonably be required to conduct a dialogue on these matters with the review authority.

Decisions within the framework of the consultation procedure or after initial review

The Committee assesses that most cases can be closed within the framework of the consultation procedure or at initial review subsequent to notification.

In *consultation cases,* we propose that it should be possible to close a case without further action if the review authority is of the opinion that it is obvious that the intended transfer of ownership, grant of use or demolition can be executed without being contrary to significant total defence interests. The same is to apply if the review authority assesses that the transaction *cannot* be executed without being contrary to significant total defence interests and the consulting party shares the assessment of the review authority. The Committee assumes that the consulting owner, in most cases a municipality or a county council, will have such an interest and liability in the case, that in these cases more coercive measures from the review authority ought not to be needed.

In *notification cases,* we propose that it should be possible to close a case without further action only if the review authority is of the opinion that it is obvious that the intended transfer of ownership or grant of use can be executed without being contrary to significant total defence interests.

The obviousness requirement clarifies that relatively simple and straightforward cases are those where the intention is that they can be decided within the framework of the consultation procedure and an initial review. The Committee is of the opinion that many cases, in particular in the case of property owned by private individuals, will fall into this category.

If the conditions are not met to close the case without action, the review authority is to decide instead to launch an in-depth investigation. However, a derogation is proposed for protected installations established to serve the needs of Sweden's civil defence. What this refers to here is a unique type of property which as a rule ought to be retained as an important asset for Sweden’s total defence and where no especially complicated assessments are foreseen. An in-depth investigation will therefore not be proposed where the municipality and the review authority are not in agreement within the consultation procedure. Instead, we propose that the review authority

should be able to make a final decision in the case that a proposed transfer of ownership, grant of use or demolition may only occur under certain conditions, or not at all.

In-depth investigation if the case cannot be closed without further action

The intention of an in-depth investigation is that it will be used in potentially problematic cases that have not been possible to resolve within a consultation procedure or closed without further action after an initial review. During an in-depth investigation, the review authority is to take any additional review actions that are necessary to assess the total defence interests at stake in the individual case as well as what vulnerabilities the reviewed transfer of ownership or grant of use could mean for these interests. For this assessment, in-depth information about how a port or airport is being used or the intended purchaser's underlying ownership structure may be needed, but also intelligence information, an analysis of the international situation and current threat landscape, etc. An important element of this proposal is therefore that the review authority is to consult with government agencies that are relevant to the case to the extent necessary. For all in-depth investigations, the review authority must always seek opinions from the Swedish Armed Forces and the Swedish Security Service.

After an in-depth investigation, the review authority may decide that a transfer of ownership or grant of use may not be executed or may only be executed under certain specified conditions.

If it is clear to the review authority that the transfer of ownership of a port or an airport owned by a municipality or county council can be executed without being contrary to our total defence interests, the review authority is to decide that the case can be closed without any further action. The same applies to grants of use of ports and airports, transfers of ownership of ports and airports owned by private individuals, and transfers of ownership and grants of use of real property units within geographical areas meriting protection where

there is no reason to believe that the transaction is contrary to our total defence interests.

In other cases, the review authority must decide that the transfer of ownership or grant of use may not be executed or, where adequate, decide that the transaction may be executed under certain specified conditions. A decision to prohibit or impose conditions on a transaction may not be more radical or extensive than is necessary to safeguard the need for protection and may only be made if the need for protection outweighs the damage to, or other drawbacks for, public or private interests that the decision would give rise to. Such decisions must therefore be preceded by a proportionality determination in each individual case.

Review authority is given the possibility to intervene after the fact

The regulatory system is primarily intended to operate in advance. However, in addition the review authority ought to be able to prohibit a transfer of ownership or grant of use after the fact if, because of the absence of consultation or the absence of notification, the review authority only becomes aware of a transfer of ownership or grant of use after the fact. Nevertheless, it is proposed that the review authority's right to intervene after the fact be limited to a period of one year from the date that the transfer of ownership or grant of use was completed.

Compulsory purchase

The proposed regulatory system is designed to protect significant total defence interests – a vital public interest. At the same time, the system can mean restrictions on the private owner's right to control and enjoyment of their property. The Committee proposes that a prohibited sale of a real property unit located within a geographical area meriting protection should give a private owner the right to compulsory purchase of the real property unit by the state. This means that the state has an obligation, at the request of the owner, to purchase the real property unit on the terms and conditions agreed between the intended or earlier parties. On the other hand, no right to compensation is proposed in relation other owners and

procedures affected by the legislation. This limitation is justified by the identified private owner's needs for protection having been deemed to weigh particularly heavily, and that in relation to these needs, prohibiting the sale of the real property unit therefore constitutes a particularly serious encroachment on ownership.

A request for compulsory purchase must be directed to the review authority, which will then determine if the purchase price and other conditions can be deemed reasonable. If the review authority is opposed to the compulsory purchase, it must be possible to initiate an action for compulsory purchase with the Land and Environmental Court.

Appeal

The Committee proposes that decisions by the review authority to impose conditions on or to prohibit a demolition, grant of use or transfer of ownership may be appealed. In addition, it is proposed that the Swedish Armed Forces and the Swedish Security Service should be able to appeal the review authority's decision in instances where a case has been closed without further action or the decision entails an order imposing conditions. In all instances, the appeal body is to be the Swedish Government. Private individuals can request a review of the Government's decision under the Act on Judicial Review of Certain Government Decisions (2006:304).

Relationship to säkerhetsskyddslagen (2018:585) (Sweden's Protective Security Act)

A new Protective Security Act came into force on 1 April 2019. The report *SOU 2018:82 Kompletteringar till den nya säkerhetsskyddslagen* (Additions to the new Protective Security Act) presents proposals for further changes in Sweden's protective security legislation. These changes mean *inter alia* the introduction of a system to regulate the transfer of ownership and grant of use of security-sensitive activities and certain related property. To the extent that the identified property in the Committee's proposals constitutes or is part of a security-sensitive activity, there is thus a risk that the property could be covered by overlapping regulatory systems. This might well be the case,

particularly when it comes to the transfer of ownership or grant of use of a port or airport. If the aforementioned additions to the Protective Security Act are introduced, the Committee suggests that the possibility of review under our proposed statute should be subsidiary to the proposed regulatory system under the Protective Security Act. This means that if the transferor or grantor is obliged to consult on the transfer of ownership or grant of use of an object under the provisions of the Protective Security Act, no notification or consultation in respect of the transaction shall be required under the Committee’s proposed legislation. However, the Committee's proposals do not depend on nor are they intended to be a complement to the proposed legislation under the Protective Security Act. In the event that a detailed regulatory system under the Protective Security Act does not eventuate, the Committee’s proposals will not be impacted in any way other than that the need for the regulatory system proposed by the Committee may become greater.