

Finnish and Swedish public procurement, the war in Ukraine and the countries' applications for and Finland's admission to NATO

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ABSTRACT

This was our contribution to a special edition of the University of Nottingham's Public Procurement Law Review on defense procurement in Europe in light of the war in Ukraine. The volume comprised articles by defense procurement experts from Estonia, Finland, France, Germany, Lithuania, Poland, the Netherlands, Romania, Sweden, the UK, and the United States.

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INTRODUCTION

This article was written jointly by Finnish and Swedish lawyers, since the two countries have had similar journeys after the Russian invasion of Ukraine on 24 February 2022. Both countries had before February 2022 chosen to stay neutral and not join any international military alliances. Due to the security situation in Europe, both choose to abandon their neutrality and apply for membership in NATO.

The procurement legislations of Finland and Sweden are as a rule similar. This is an effect primarily due to both countries being members of the European Union (EU), but also due to a long-time cooperation on legal matters as well as on defence and security and on procurement issues between the Nordic countries.¹ Above the EU thresholds, both Sweden and Finland have implemented EU's legislation on defence and security procurement. Below the EU thresholds, both countries have implemented national provisions..

The authors of the article discuss changes to the procurement legislation and practice in Finland and Sweden after February 2022 and if there have been any reactions from the suppliers shown in court cases on appeals against decisions made in defence and security procurements. They also look at the countries' applications for membership in NATO and the fact that Finland has joined NATO and what effects this has had on the procurement legislation and practice in each country.

DEFENCE AND SECURITY PROCUREMENT LEGISLATION IN FINLAND

In Finland procurement in the field of defence and security is regulated in through the Act on Public Procurement in the fields of Defence and Security (*Fi. Laki julkisista puolustus- ja turvallisuushankinnoista*, 1531/2011, as amended) (the Finnish Act) which entered into force on 1 January 2012. The Finnish Act implements the Directive 2009/81/EU on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (and amending Directives 2004/17/EC and 2004/18/EC) (the DSD).

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¹ The Nordic Council of Ministers and the Nordic Council are the main forums for official Nordic co-operation, which involves Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland, www.norden.org/en.

The Finnish Act also covers defence and security procurement when the value of the contract is under the EU threshold values but over a national threshold value. As regards supply and so-called A-services contracts the national threshold value is EUR 100,000 and as regards works contracts the national threshold value is EUR 500,000. These procurements are less strictly regulated as the national procedure provisions in Chapter III in the Finnish Act will be applied. Further, procurement subject to art.346(1)(b) TFEU is also covered by the Finnish Act and subject to these national procedure provisions as well as so-called B-services provided they exceed the national threshold value.² However, there is no obligation to publish a notice for the procurement if it fulfils the conditions set out in art.346(1)(b) TFEU. A contracting authority or entity may request a tender directly from one supplier if the invitation to tender cannot be organised for legitimate reasons relating to national defence, state security, or security of supply.³

In the Finnish Act the term 'defence materiel' (*Fi. puolustustarvike*) is used instead of the term 'military equipment', which is used in the DSD, as the term 'defence materiel' is an established term in Finland and used also in the Act on Export of Defence Materiel (282/2012, as amended). Based on the Government Proposal (76/2011)⁴ as regards the definition of what is considered as defence materiel, it is justified to refer primarily to the more up-to-date, wider and detailed common military list of the EU adopted by the Council on 18 February 2019. In terms of flexibility given in the DSD to the Member States for implementation it can be mentioned, as an example, that Finland has included a clause in the Finnish Act on subcontracting. The clause allows a contracting authority or entity to ask a successful tenderer to subcontract to third parties a share of the contract (the maximum percentage of the subcontracting may not exceed 30 percent of the value of the contract).

National remedies regarding procurement decisions include an appeal that may be filed to the Market Court,⁵ and a request for rectification submitted to the contracting authority or entity. Both need to be filed as a rule within 14 days after receipt of the decision in question, which must include instructions for appeal.⁶ Request for rectification as a remedy, but not an appeal to the Market Court, is available also in case the Finnish Act is not applicable based on any of the listed exceptions or if the procurement value is under the national threshold for direct procurement.

According to the publicly available statistics from the Market Court, no appeals regarding the Act on Public Procurement in the fields of Defence and Security were handled in 2022. In July 2023 at least three appeals are pending regarding defence sector procurements. One of these appeals has been launched by a German firearm manufacturer against a framework agreement on acquisition of handguns concluded in March 2023 between the Finnish Defence Forces and a Finnish firearm manufacturer (owned by an Italian company). The Finnish Defence Forces based their reasoning for not executing a formal public procurement process on security of supply, referring to the expertise needed in repair, maintenance, and production of handguns in exceptional circumstances. According to the Finnish Defence Forces, the company the agreement was awarded to is the only industrial manufacturer of handguns in Finland with the necessary and sufficient manufacturing capacity. The appellant, in turn, considers that the key security interests of the Finnish state would not be compromised if the Finnish Defence Forces were to tender for handguns, which could involve also other firearms manufacturers than the successful company. The appellant argues that the security of

² Section 15 and Section 68 in the Finnish Act. The Annexes A and B to the Act list A-services and B-services. Further, as an exception, procurement over the national, but under the EU threshold by a contracting authority or entity defined in the Act on Public Procurement and Concession Contracts by entities operating in the water, energy, transport and postal services sectors (1398/2016, as amended) is not in the scope of the Finnish Act.

³ Sections 2 and 69 in the Finnish Act.

⁴ Government Proposal on the Act on Public Procurement in the fields of Defence and Security and other related laws (76/2011).

⁵ The Market Court is a national court that deals e.g. with procurement matters.

⁶ See Chapters 13 and 15 in the Finnish Act.

supply of handguns can be guaranteed by less restrictive measures, such as by contract terms and requirements for the handguns in question, rather than by a direct award without any competition.⁷

Based on statistics from the years 2017-2022, only one to three appeals per year were resolved.⁸ Based on information received from the Finnish Supreme Administrative Court, which exercises the supreme jurisdiction in e.g. procurement matters, only two cases under the Finnish Act have been reviewed between 2021 and the beginning of May 2023. As a conclusion, appeals have been and still are rare in respect of procurement in the fields of defence and security in Finland. The appeal grounds in the reviewed cases at the Market Court, before the most recent appeal made in June 2023, seem to relate to similar legal questions as in the appeals in the classical sector (such as arguing that request for proposal has not been sufficiently clear to serve as the basis for submitting comparable tenders or that awarded tender is not compliant with requirements of RFP). As a result of the most recent appeal, it is expected that the Market Court will take a stand on the applicability of exemption under the Finnish Act and art.346(1)(b) TFEU.

Implementation of Directive 2009/81 in Sweden

The DSD has been implemented into Swedish legislation through the Swedish Procurement Act in the fields of Defence and Security (Sw. *lagen om upphandling på försvars- och säkerhetsområdet, 2011:1029*) (the Swedish Act) which entered into force on 1 November 2011. The Swedish Act includes both provisions that follow from the DSD and from regulations outside the scope of the DSD. Procurement in the fields of defence and security below the EU threshold value, but above SEK 1, 200,000 are covered by the legislation as well as procurement of so-called B-services.⁹ As in Finland, procurements which fall outside the scope of the DSD are regulated in a less strict way and allows contracting authorities and entities to decide how to perform such procurements. The structure with national provisions regulating procurement outside the scope of the EU Directives on public procurement reflects the same model as for all Swedish Acts on procurement.¹⁰

Procurements covered by art.346(1)(b) TFEU are regulated in the Swedish Act. However, if necessary for security reasons and if the procurement is not excluded according to arts.36, 51, 52 or 62 TFEU or the Swedish regulations legislation equivalent to art.12 and art.13 (b) – (d) DSD, the Swedish Government may decide on exceptions from the Swedish Act if it is necessary for national security interests. The Swedish Defence Materiel Administration (Sw. *Försvarets Materielverk, FMV*) and the Swedish Armed Forces (Sw. *Försvarsmakten*) and The National Defence Radio Establishment (Sw. *Försvarets radioanstalt, FRA*)¹¹ may also decide on the same type of exceptions, but only below certain values, see below.¹²

In the Swedish Act, military equipment is defined without referral to the Council Decision 255/58 of 15 April 1958, which is different from the DSD.¹³ The reason is that the Swedish legislator found that the description

⁷ See the press release by the Finnish Defence Forces on 27 March 2023: https://puolustusvoimat.fi/-/suomi-ja-ruotsi-solmivat-kasiaseiden-hankintaa-koskevan-puitesopimuksen?languageld=en_US.

⁸ Two appeals were resolved in 2021, one in 2020, three in 2019, two in 2018 and two in 2017.

⁹ See the Swedish Act, Chapter 15 and Chapter 15a.

¹⁰ See the Swedish Act on public procurement (Sw. *lagen om offentlig upphandling, 2016:1145*), the Swedish Act on procurement of utilities (Sw. *lagen om upphandling inom försörjningssektorerna, 2016:1146*) and the Swedish Act on Procurement of Concessions (Sw. *lagen om upphandling av koncessioner, 2016:1147*).

¹¹ FRA, the National Defence Radio Establishment is the Swedish national authority for Signals Intelligence.

¹² See the Swedish Act, Chapter 1, Section 9.

¹³ See p. 10 of the recital and Art. 1.6 in the DSD.

in the DSD referring to the Council Decision also included information that the list is not exclusive and that the products covered by the wording 'military equipment' can change over time.¹⁴

The specific exceptions such as the exception for purchase for the secret service, contracts in R&D-cooperation-programs which are performed by at least two Member States in the EEA and aims to develop a new product as well as later phases in the product's life cycle, contracts that need to be given to a supplier outside EEA for operative reasons (including civil purchases) and intergovernmental affairs are implemented in the Swedish legislation. More than this, the possibility to use the negotiated procedure without publication in situations of crisis has also been implemented into the legislation. The Swedish legislator has also used the specific possibility in the DSD to implement the provisions on contractual conditions in procurements that may concern (i) subcontracting, (ii) ensure security of classified information and (iii) security of supply required by the contracting authority or entity.¹⁵ These provisions have been implemented into Swedish law in close conformity with the DSD.

In the description concerning the security of classified information in the preparatory works to the Swedish Act, it is stated that Sweden has performed an in-depth analysis of the Swedish regulations concerning the Swedish Public Access to Information and Secrecy Act (*Sw. Offentlighets- och sekretesslagen, 2009:400*), which restricts the right to access Swedish public documents, as well as of other relevant legislation. This reflects the sensitive character of classified information.¹⁶

In Sweden, legal disputes concerning contract awards are tried by an Administrative Court and may be appealed to an Administrative Court of Appeals and the Supreme Administrative Court. In 2022, nine review procedures of decisions in procurements according to the Swedish Act were assessed by an Administrative Court, whereof one ruling was overruled by an Administrative Court of Appeals. However, the cases do not concern the specifics of the Swedish Act, but concern generic questions in public procurement, primarily non-fulfilment of mandatory requirements,¹⁷ such as requirements on protective security agreements according to the Swedish Protective Security Act¹⁸.

NATIONAL DEFENCE AND SECURITY PROCUREMENT AFTER FEBRUARY 2022: Effects in Finland

No changes have been made or suggested to the public procurement legislation in Finland nor to the Finnish Act after February 2022, when Russia launched its military invasion of Ukraine, or due to Finland applying for NATO membership in May 2022, or joining NATO in April 2023.

In Finland there are no statistics publicly available on the effect of the Ukraine crisis and the NATO application on the public procurement executed in the fields of defence and security and e.g. whether more direct awards have been made, which may well be the case. Based on information in the official national public procurement notification channel maintained by the Ministry of Finance,¹⁹ there seem to be several ex ante-notifications on direct awards based on the ground that only a certain supplier can implement the procurement for technical reasons, or for reasons related to protecting an exclusive right.

¹⁴ See the Swedish preparatory works, 2010/11:150, Procurement in the Defence and Security Area (*Sw. Upphandling på försvars- och säkerhetsområdet*), p. 150 – 151.

¹⁵ See the Swedish Act, Chapter 1 Section 10, p. 2., p. 3, p. 4, p. 6, , Chapter 4, Section 4, p. 4, Chapter 14 Section 1-5 and 7-8, Chapter 7 Section 14-15, and Chapter 7 Section 16-18.

¹⁶ See the Swedish preparatory works, 2010/11:150, Procurement in the Defence and Security Area (*Sw. Upphandling på försvars- och säkerhetsområdet*), p. 254-258, p. 275-291 and p. 268-274.

¹⁷ See cases no 3572-21 and no 7009-21, Administrative Court of Linköping.

¹⁸ The Protective Security Act (*Sw. Säkerhetsskyddslagen, 2018:585*).

¹⁹ This official service for notices in Finland is called Hilma and the website address is: www.hankintailmoitukset.fi.

Such procurements may relate to extension to, updating, or maintenance of goods or services procured at an earlier time.

According to the DSD, transposed in the Finnish Act, there are several exceptions to the applicability of the DSD and several grounds on which direct awards can be based. Examples are when the periods (even when shortened as allowed by the Finnish Act) laid down for the restricted procedure and negotiated procedure with publication of a contract notice are incompatible with the urgency resulting from a crisis or when the time limits cannot be observed due to extreme urgency arising from unforeseen circumstances beyond the control of the contracting authority or entity. There is one recent decision from the Market Court where extreme urgency as a ground for a direct award made by the Defence Forces was challenged. The case concerned the Act on Public Procurement and Concession Contracts (1397/2016 as amended) which includes a similar provision on direct awards. The contracting authority had referred to Russia launching a military invasion of Ukraine and at the Market Court also to the competition for and shortage of components of products on the market due to COVID-19. The Market Court ruled that these circumstances and the fact that the acquisition was based on the task given by the Ministry of Defence after the outbreak of the war in Ukraine to launch the measures resulting from the change in the security environment to maintain and develop readiness promptly, established such an extreme urgency as referred to in the Act on Public Procurement and Concession Contracts and that therefore the direct award of the contract for portable electric power machines was in line with the Act.²⁰

Generally, the Ukraine war and Finland joining NATO have increased joint international procurements. There are also replacement purchases as a result of military aid shipments to Ukraine,²¹ and the budget for defence materiel procurement in Finland has been increased²².

As regards the legal basis for joint procurements, the Finnish Act includes i.a. a provision based on which a contracting authority or entity which acquires goods, services, or works falling within the scope of the Finnish Act using a joint procurement entity shall be deemed to have complied with the Finnish Act provided that the joint contracting entity (which refers i.a. to a contracting authority) has complied with the Finnish Act.

In addition to NATO related procurements, which will be discussed below, Finland has made several joint procurements, e.g. with other Nordic countries within of the Nordic Defence Cooperation (NORDEFCO) which had been established already long before Russia's invasion of Ukraine and Finland joining NATO. Further, Finland and Sweden have publicly announced several joint procurements in 2022 and 2023, such as a framework agreement on the acquisition of handguns²³ (on which an appeal referred to above is pending for Finland at the Finnish Market Court) and of vehicle systems²⁴. As examples of other international joint procurements, Finland had already in 2019 established a multinational collaboration activity on armoured wheeled vehicles together with Latvia and Estonia. In the Autumn of 2020, the

²⁰ The Market Court Decision 102/2023 on 3 March 2023.

²¹ See the press release by the Ministry of Defence on 2 February 2023: https://www.defmin.fi/en/topical/press_releases_and_news/defence_forces_receives_additional_funding_to_replace_materiel_provided_to_support_ukraine.13387.news?11662_o=20#e8d14405.

²² The draft budget for 2023 included EUR 1.6 billion for defence material procurement, which is EUR 765 million more than in the original budget for 2022. See the press release of the Ministry of Defence on 19 September 2022: <https://valtioneuvosto.fi/-/vuoden-2023-puolustusbudjetti-siirtyy-eduskunnan-kasittelyyn>.

²³ See the press release by the Finnish Defence Forces: <https://maavoimat.fi/en/-/1948673/finland-and-sweden-concluded-a-framework-agreement-on-the-acquisition-of-handguns> and <https://www.fmv.se/aktuellt--press/aktuella-handelser/eldhandvapen-sverige-finland>.

²⁴ See "FMV signs an agreement with Finland on the procurement of vehicle systems" (11 May 2023), <https://www.fmv.se/aktuellt--press/aktuella-handelser/fmv-tecknar-avtal-med-finland-om-upphandling-av-fordonssystem/>.

program proceeded with Latvia to the research and product development phase called Common Armoured Vehicle System (CAVS). In August 2021, Finland, Latvia, and the supplier signed a framework agreement that enables national procurement acquisitions in the CAVS program and Sweden and Germany joined the program in 2022.²⁵ Further, in March 2023, eighteen states, including Finland and Sweden, signed the European Defence Agency (EDA) project arrangement for the collaborative procurement of ammunition to aid Ukraine and replenish Member States' national stockpiles.²⁶ The recently published updated Materiel Policy Strategy for the Finnish Defence Administration,²⁷ which provides guidelines and determines key objectives for the Defence Administration's Materials Policy, mentions research and development within the EU, EDA and NATO, but also bilateral and other forms of cooperation in such activities. Further, according to the strategy, Nordic materiel cooperation takes place both bilaterally and within the framework of NORDEFCO. Possible areas of cooperation include joint procurement, military security of supply, R&D and joint development projects.

Effects in Sweden

No emergency defence procurement legislation has been passed in Sweden due to Russia's invasion of Ukraine. However, the Swedish legislation concerning the national application of art.346(1)(b) TFEU was changed 1 June 2023. As was mentioned above, the Swedish Government may decide on exceptions from the Swedish Act in accordance with art.346(1)(b) TFEU.²⁸ The Swedish Defence Materiel Administration (Sw. *Försvarets Materielverk, FMV*) and the Swedish Armed Forces (Sw. *Försvarmakten*) may also decide on exceptions from the Swedish Act, but only in the following situations;

1. when the government previously decided on exceptions with the support of the first paragraph,
2. when the procurement refers to goods, services or construction contracts within the framework of an international agreement concluded by Sweden on intergovernmental cooperation in the matter of supply of goods, services or construction contracts, or
3. when a procurement has a value less than SEK 200,000,000.

The National Defence Radio Establishment (Sw. *Försvarets radioanstalt, FRA*) may decide on exceptions when the value of a procurement is less than SEK 5,000,000.

The possibility of deciding on exceptions was implemented already in 2011, but the maximum value for deciding on exceptions was then SEK 25,000,000 for the Swedish Defence Materiel Administration and SEK 5,000,000 for the Swedish Armed Forces. These values were increased significantly on 1 June 2023, to SEK 200,000,000, as stated above. The value for deciding on exceptions for the National Defence Radio Establishment remained at SEK 5,000,000. Exceptions of procurements of a higher value can only be decided by the Swedish Government.

Several factors were presented when the new and higher threshold was introduced. It was argued that the previous thresholds were introduced in times when Sweden was in a very different situation in terms of need for purchase of materiel. More than this, it was argued that the Swedish military defence needed to be strengthened because of the deteriorating international situation. NATO guidelines stipulate that at

²⁵ See the press release by the Ministry of Defence: https://valtioneuvosto.fi/-/puolustusvoimille-panssaroituja-6x6-miehistonkuljetusajoneuvoja?languageld=en_US.

²⁶ See the press release by the European Defence Agency: <https://eda.europa.eu/news-and-events/news/2023/03/20/eda-brings-together-18-countries-for-common-procurement-of-ammunition>.

²⁷ See the Materiel Policy Strategy for the Defence Administration published in May 2023: <https://julkaisut.valtioneuvosto.fi/handle/10024/164922>.

²⁸ The Swedish Act, Chapter 1, Section 9.

least 20 per cent of the defence budget should be attributed to materiel investments.²⁹ In light of those factors, the Swedish Government considered that the earlier values were neither appropriate nor effective.

The new and higher threshold is expected to lead to more effective and less administratively burdensome purchasing procedures, however still giving the Swedish Government continued decisive powers in strategically important exceptions.³⁰

As is the case for Finland, there are no publicly available statistics on the effect of the Ukraine crisis and NATO application on the public procurement executed in the fields of defence and security and e.g. whether more direct awards have been made in Sweden, which may be the case. Based on information from TED, Tenders Electronic Daily, several negotiated procedures without prior publication (18 in total under the DSD during the period 24 February 2022 until 22 June 2023) and direct awards without prior publications (49 in total under the DSD during the period 24 February 2022 until 22 June 2023) were conducted.³¹

As has been the case for Finland as described above, Sweden has also continued to cooperate with other countries on procurement within previously established organisations and structures, such as NORDEFECO and the EU (see as described under section 3.1 regarding the European Defence Agency's (EDA) program for procurement of ammunition).

As described above, Finland and Sweden have participated in several joint procurements, both between the two countries and in cooperation with other countries, already before February 2022. An example of Nordic cooperation within NORDEFECO is an joint agreement of the Swedish, Finnish, Norwegian, and Danish defence forces of 2021 to procure a common combat uniform system.³² The procurement resulted in a contract where a supplier was awarded a contract for the supply of uniforms to all four countries.³³

Sweden has not entered into specific defence procurement treaties with Ukraine or any other country due to Russia's invasion of Ukraine. However, the Swedish Defence Materiel Administration has been given the mandate to negotiate and enter into treaties regarding, i.a., procurement of defence materiel.³⁴ The Swedish Defence Materiel Administration has also announced that joint procurements for military purposes may be performed in the coming years.³⁵

²⁹ See NATO guidelines https://www.nato.int/cps/en/natohq/topics_67655.htm, retrieved on 2023-04-17.

³⁰ See the Swedish preparatory works, 2022/23:93, Expanded opportunities to decide on exceptions from the law on procurement in the field of defence and security with regard to Sweden's essential security interests (Sw. *Utökade möjligheter att besluta om undantag från lagen om upphandling på försvars- och säkerhetsområdet med hänsyn till Sveriges väsentliga säkerhetsintressen*), p. 1 – 10.

³¹ Search carried out on 22 June 2023 on the web page <https://ted.europa.eu/TED/search/search.do>. Comparisons with statistics from the period before that is hard to make due to the amount of such procedures carried out regarding need for medical equipment and similar goods due to the Covid 19-pandemic.

³² Nordefeco stands for 'Nordic Defence Cooperation' and is a collaboration between all the Nordic countries in the field of defence. The aim is to strengthen the countries' own defence, find synergy effects and promote effective solutions, see <https://www.nordefco.org/>.

³³ See <https://www.forsvarsmakten.se/sv/aktuellt/2022/02/klart-med-leverantorer-av-ny-uniform/> and <https://logistiikkalaitos.fi/en/-/1948673/supplier-of-the-nordic-combat-uniform-has-been-chosen>. The only difference between the systems is the camouflage pattern of the outer garments.

³⁴ See the Swedish Governments web page on military support provided to Ukraine: <https://www.regeringen.se/regeringens-politik/rysslands-invasion-av-ukraina/militart-stod-till-ukraina/> and <https://www.fmv.se/aktuellt--press/aktuella-handelser/fmv-far-bemyndigande-att-forhandla-och-inga-avtal-med-ukraina/>.

³⁵ The Swedish Defence Materiel Administration's budget figures for 2024-2026 (Sw. FMV:s budgetunderlag för 2024-2026), no 22FMC634-4, p. 9, see https://www.fmv.se/globalassets/dokument/om-fmv/fmv-bu-2024-2026_230301.pdf.

Sweden, as well as Finland, participates in the International Fund for Ukraine (IFU) which is administrated by the United Kingdom and the NATO Ukraine Comprehensive Package Trust Fund and has provided economic support for Ukrainian defence procurement through both the IFU and the NATO fund.³⁶ Sweden also trains Ukrainian soldiers in Sweden³⁷ and in the past year, war-wounded Ukrainian soldiers have been received at hospitals and rehabilitation clinics in Stockholm³⁸.

THE NATO APPLICATION OF SWEDEN AND FINLAND AND FINLAND JOINING NATO

Finland has cooperated with NATO since signing the Framework Document for NATO's Partnership for Peace on 9 May 1994. Cooperation has included, i.a., participation in exercises and crisis management tasks. After Russia's invasion of Ukraine, Finland reassessed its security situation and decided to apply for NATO membership.³⁹ It applied for NATO membership on 17 May 2022 and NATO countries signed Finland's Accession Protocol on 5 July 2022, thereby making Finland an invitee of the Alliance. After all the Member States had ratified Finland's Accession Protocol and Finland had accepted its accession to NATO nationally, Finland became a member of NATO on 4 April 2023.

Sweden also joined NATO's Partnership for Peace on 9 May 1994. Since 2014 Sweden is part of an individual partnership with NATO and as such has the status of a so-called Enhanced Opportunities Partner (EOP), the same applied to Finland until its accession to NATO in April 2023. Sweden's Cooperation with NATO increased gradually since 1994 and included, i.a., participation in exercises and NATO-led military operations in several conflicts. The Swedish Armed Forces adapted to NATO-standards and developed interoperability with NATO. Sweden is also cooperating with NATO on development regarding standardization and capabilities. Sweden and NATO entered into an agreement in 2016 on Sweden providing so called Host Nation Support covering both military and civil support aiming at enabling armed forces from NATO countries to operate on Swedish territory. Sweden's application for NATO membership is dated 17 May 2022. On 5 July 2022, all NATO member countries signed the accession protocol for Sweden. Until all NATO member countries have ratified Sweden's application for NATO membership, Sweden has the status of invited country (invitee).

As of August 2023, Türkiye and Hungary have not yet ratified Sweden's application, even though both countries have announced that they will. When exactly they will ratify the application is presently unclear.⁴⁰ Türkiye has expressed concern with Sweden's handling of terrorists and terrorist organisations. As a response, Sweden adopted a new act on terrorism on 2 June 2022, the Terrorist Crimes Act (Sw. *Terrorisbrottslagen*, 2022:666). The Terrorist Crimes Act regulates criminal liability for terrorist offences, associations with a terrorist organisation, financing of terrorism or a particularly serious crime, public incitement to terrorism or to a particularly serious crime, recruitment for terrorism or a particularly serious crime, training for terrorism or a particularly serious crime and travel for terrorism or a particularly serious crime. In 2023, the Swedish Parliament voted yes to the Government's proposal to introduce a new crime in the Terrorist Crimes Act, 'participation in a terrorist organisation'. The new crime entails special criminal liability for anyone who participates in a terrorist organization in a way that is intended to promote,

³⁶ See the press releases; <https://www.regeringen.se/pressmeddelanden/2023/06/tolfte-stodpaketet-till-ukraina/> and <https://www.gov.uk/government/news/ukraine-to-receive-multi-million-pound-capability-boost-from-international-fund>.

³⁷ See <https://www.forsvarsmakten.se/sv/aktuellt/2023/06/ukrainska-soldaterna-redo-for-fronten/>.

³⁸ See The injured Ukrainian soldiers receiving specialist care in Sweden (24 February 2023), <https://sverigesradio.se/artikel/the-injured-ukrainian-soldiers-receiving-specialist-care-in-sweden>.

³⁹ See the FAQs of the Finnish Ministry of Foreign Affairs the Finnish Government: <https://um.fi/finlands-membership-in-nato>.

⁴⁰ See <https://www.regeringen.se/regeringens-politik/sverige-och-nato/sveriges-och-natos-historia/>.

strengthen or support the organization. The amendments of the Terrorist Crimes Act entered into force on 1 June 2023.

It is interesting to note is that on 1 February 2022, Sweden made changes to its procurement legislation regarding procurement below the EU thresholds. Today it is no longer mandatory for Swedish contracting authorities or entities to exclude a supplier convicted of a terrorist crime if the procurement falls outside the DSD. This was the case before, when the same provision on exclusion in art.39(1)(d)-(e) DSD due to a conviction of terrorism was applicable to all Swedish procurement. There has been no discussion in Sweden on these changes.

According to the Finnish Government Proposal on Finland's accession to NATO, Finland is an EU Member State and although EU membership itself allows defence cooperation, the EU does not have its own defence forces. A significant number of EU Member States are members of NATO and there has been no need for an overlapping defence alliance. Furthermore, according to the Proposal, the defence cooperation structures or arrangements in which Finland is involved are not a security solution similar to a common defence and do not include security guarantees or obligations. For this reason, NATO membership is seen as an important preventative solution for Finland, enabling Finland to be covered by the security guarantees of art.5 of the NATO Treaty.⁴¹

Further, according to the Finnish Government Proposal on Finland's accession to NATO, the current legislation allows for accession to the North Atlantic Treaty and the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, without any necessary changes to national law. Any national substantive legislative actions relating to membership e.g. based on accession to other NATO treaties or based on the Standardisation Agreements (STANAG) will be assessed and executed in due time. Changes to procurement legislation have not been mentioned in the Government Proposal.

The Swedish Government Proposal for approval of Sweden's accession to NATO does not include any proposals for substantial changes to Swedish legislation other than changes to provisions regarding conditions under which the Swedish Government may request direct military support from NATO and NATO countries.⁴² The Government has concluded that NATO-membership will prevent military attacks on Sweden and work as a deterrent for military conflict in Northern Europe and that the security guarantees of art.5 of the NATO Treaty is a major motivation for joining NATO.

The Swedish Government has concluded that a NATO-membership will bring with it, i.a., increased military expenditure, a need for changes to regulations under which Swedish companies within the defence industry operate, and that it will bring new tasks for the Swedish Armed Forces, the Swedish Defence Materiel Administration, and other government agencies within the area of national defence. No specific consequences are mentioned in the Swedish Government Proposal for approval of Sweden's accession to NATO regarding a need to change the Swedish procurement legislation or otherwise regarding public procurement.

It is however mentioned that the Swedish Defence Materiel Administration will receive new assignments to some extent and that reaching the NATO target of committing 2 percent of GDP on defence spending will

⁴¹ Finnish Government Proposal for the adoption and entry into force of the North Atlantic Treaty and the North Atlantic Treaty Organization, National Representatives, and International Staff (315/2022).

⁴² See the Swedish preparatory works, prop. 2022/23:74, Sweden's membership to NATO (Sw. *Sveriges medlemskap i Nato*).

cause challenges to the supply of military materiel.⁴³ Continued analysis of the legal conditions for an effective Swedish participation within NATO is being conducted within the Department of Defence.⁴⁴

Fulfilling the NATO requirement for 2 percent of GDP

NATO's general objective for its members in respect of the size of the defence budget is 2 percent of GDP with at least 20 per cent of the defence budget allocated for the purchase of new material.

Finland currently meets the above requirements. The GDP share of Finnish defence expenditure is estimated to be 2.38 percent in 2023 and around 2 percent in 2024—2025 due to the financing of strategic projects for air and naval forces.⁴⁵ According to a report of the Finance Committee of the Finnish Parliament, as the fighter jets' procurement payments are expected to decline after 2025, the 2 percent goal will not be reached unless new (political) budget decisions are made. Further, according to the Report, the share of materiel purchases in the defence budget has traditionally been significantly higher in Finland than the 20 per cent objective.⁴⁶

According to the Swedish Government, there is a broad political consensus in Sweden that the appropriations for military defence must continue to increase and reach two percent of GDP as soon as practically possible. This is evident, among other things, from the political agreement that was entered into between all parties in the Swedish Parliament on 16 March 2022 and from the Defence Committee's report Control Station 2023.⁴⁷

The Government's direction is to gradually increase the allocations to military defence so that in 2028 it amounts to 2 per cent of GDP and then remains at this level over time. The orientation thus means that Sweden's total defence expenditure in accordance with the broader NATO definition will be slightly above 2 per cent of GDP.⁴⁸

If Finland and Sweden decide constantly to fulfil the objectives of 2 and 20 per cent, the defence sector procurement is expected to increase or to stay on a higher level than before the Ukraine crisis and the application for/joining NATO.

The effects on national procurement legislation

As mentioned above, Finnish procurement legislation has not been amended nor suggested to be amended due to the application for NATO membership or joining NATO. The situation is the same for Sweden. There has been no discussion in Sweden on changing the procurement legislation due to the application of a NATO membership. The change discussed above, were the Swedish Defence Materiel Administration and for the Swedish Armed Forces may decide on exceptions from the Swedish Act in accordance with art.346(1)(b) TFEU up to SEK 200,000,000, was implemented due to Russia's invasion of Ukraine.

⁴³ See the Swedish preparatory works, prop. 2022/23:74, Sweden's membership to NATO (Sw. *Sveriges medlemskap i Nato*), p. 42-48.

⁴⁴ See the Swedish preparatory works, prop. 2022/23:74, Sweden's membership to NATO (Sw. *Sveriges medlemskap i Nato*), p. 47.

⁴⁵ Based on information available on the Ministry of Foreign Affairs, see <https://um.fi/finlands-membership-in-nato>.

⁴⁶ Finance Committee report VaVM 277/2022 on the Government's budget proposal (HE 154/2022) and its complement (HE 277/2022) available in Finnish: https://www.eduskunta.fi/FI/vaski/TalousarvioMietinto/Documents/VaVM_37+2022.pdf, p. 31.

⁴⁷ See the Swedish Government report Ds 2023:12, Control Station 2023 (Sw. *Control Station 2023*).

⁴⁸ See <https://www.regeringen.se/regeringens-politik/sverige-och-nato/forsvarsfragor-om-sverige-och-nato/>.

Procurement cooperation with and within NATO

As mentioned above, Finland has been an active partner of NATO for years and this has included involvement in various programs of NATO support and its own procurement and maintenance agency (NATO Support and Procurement Agency, NSPA) in which new Member States such as Finland are expected to participate. The updated Materiel Policy Strategy for the Finnish Defence Administration notes membership in NATO which is said to deepen Finland's materiel cooperation within the NATO framework and new opportunities for cooperation will be created for procurement and R&D, for example.⁴⁹

Sweden has still not joined NATO, but as Finland, it has had several years of cooperation with NATO. The Swedish Act is neither applied to a defence or security procurement which is subject to specific procedural rules of an international organisation which a contracting authority shall apply in its procurement.⁵⁰ Whether Sweden will join NATO or not, procurements covered by the mentioned exception are not subject to Swedish legislation. There is therefore no need to change the Swedish procurement legislation due to cooperation with NATO.

CONCLUSIONS

Neither Finland or Sweden have changed their legislation on defence and security procurements due to Russia's invasion of Ukraine. Sweden has however on 1 June 2023 significantly increased the value for cases when the Swedish Defence Materiel Administration and the Swedish Armed Forces may decide on exceptions from the Swedish Act in accordance with art.346(1)(b) TFEU. Today these authorities can decide on excluding a procurement with reference to art.346(1)(b) TFEU up to SEK 200,000,000. Exceptions for procurements with a value above that must still be decided by the Swedish Government.

Finland has had a court case where the contracting authority referred to Russia launching a military invasion to Ukraine as grounds for a direct award. The Court ruled that because of the circumstances presented (which also included deficit of components on the market due to COVID-19), the award was in line with the relevant Finnish procurement act. Finland also has an ongoing procurement appeal case where a contracting authority, without having a formal public procurement process, refers to security of supply and that the awarded company is the only industrial manufacturer of defence materiel in Finland with the necessary and sufficient manufacturing capacity. Since this case concerns the interpretation of art.346(1)(b) TFEU, an EU related legal question, it may very well end up in the European Court of Justice.⁵¹ In Sweden there are no recorded cases regarding appeals on decisions in procurements made due to the war in Ukraine.

⁴⁹ See footnote 24.

⁵⁰ See Chapter 1, Section 8, of the Swedish Act.

⁵¹ Finland has previously had an important ruling due to a preliminary ruling requested by the Finnish Supreme Administrative Court on Article 346(1)(b) TFEU from the European Court of Justice, Judgment of 7 June 2012, *Insinööritoimisto InsTiimi (Tilttable Turntable)*, C-615/10, EU:C:2012:324, concerning the application of Article 346(1)(b) TFEU on products with both civil and military use in procurements for military material. The Supreme Administrative Court ruled in its decision (2013:2), after receiving this preliminary ruling from the ECJ, that the turntable was in itself a product specifically intended for military use to which the defence procurement exemption could apply. However, where recourse to the derogation had not been shown to be necessary to safeguard the essential security interests of the State, it was not a procurement that would have fallen outside the scope of the Act on public procurement (348/2007 as amended).

Both Finland and Sweden had already entered into several international agreements regarding defence and security procurements before February 2022. The countries also for a long time have had several mutual operations in these sectors. In both countries, the Governments are issuing statements on defence and security issues which will be initiated in the near future. A conclusion is that neither of the countries' legislation on defence and security procurement has been significantly changed due to Russia's invasion of Ukraine. However, both countries may be expected to increase the use of procurements referring to art.346(1)(b) TFEU.

Finland became a full member of NATO on 4 April 2023 while Sweden's application is still pending, waiting for approval of Türkiye and Hungary. Sweden has taken measures meet Türkiye's demands for anti-terrorist laws and other anti-terrorist actions. Sweden's constitutional freedom of expression is however making it difficult for Sweden to gain the trust of Muslim countries. As for a final summary – neither Finland or Sweden has had to make any changes to their procurement legislations due to Russia's invasion of Ukraine. Nor have Finland or Sweden had to make any changes to their procurement legislations due to their applications for/membership in NATO. This is mostly due to the flexibility already offered in the DSD, which has been used in both countries' legislation.