

**Delphi**

# **The UTP Directive – new rules on unfair trading practices in the food supply chain proposed to enter into force on 1 November 2021**

**Elisabeth Eklund** / Partner / Advokat



## The UTP Directive – new rules on unfair trading practices in the food supply chain proposed to enter into force on 1 November 2021

Elisabeth Eklund / Partner / Advokat

### **The aim of the suggested legislation**

The aim of the proposed new legislation (the Governmental Bill; prohibition of unfair trading practices on purchase of agricultural and food products, Prop. 2020/21:134) is to protect the suppliers of agricultural and food products from certain unfair trading practices imposed by the buyers. The proposed legislation – based on the EU's so-called UTP Directive, Directive (EU) 2019/633 – is a supplement to inter alia competition law and market practices law. The rules aim to ensure that suppliers of agricultural and food products are protected from the use of unfair trading practices by their buyers (e.g. grocery chains and restaurants but also public operators).

The UTP Directive entered into force on 30 April 2019 and shall be implemented by the EU Member States by 1 May 2021. The provisions shall apply by the latest 1 November 2021. The UTP Directive emerged from a long-running discussion on competitive conditions in the agricultural and food supply chain.

Even before the proposal for a directive was presented, a majority of the EU Member States had introduced national legislations against unfair trading practices. Sweden belonged however to the minority of Member States that lacked specific legislation in this area. The Commission found that the Member States' prohibitions against, and handling of unfair trading practices, differed greatly from each other, which was considered

to negatively affect trade in the internal market.

Furthermore, the complainants fear of commercial retaliation was considered to limit the practical value of the possibility of complaining under contract law rules or self-regulation initiatives (as e.g. the Swedish industry agreement "Principles of Good Business Practices" (Sw: "Principer för god affärsed").

### **Scope of the proposed legislation**

The legislation applies to companies that buy agricultural or food products in the EU and thus protects suppliers from unfair trading practice conducted by commercial customers. The Swedish law applies to all agricultural and food products and – in difference to the EU Directive – it provides the same level of protection irrespectively of whether the products sold are perishables. Agricultural and food products will inter alia include food products, animal feed and cut flowers.

The legislation is applicable if the supplier or buyer is established in Sweden. Farmers' transactions with their own cooperatives are also covered. However, the legislation, like the directive, does not apply to contracts between suppliers and consumers.

Buyers with a turnover of less than EUR 2 million annually (about 20 million SEK/year) are however excluded from the scope of the legislation. Such companies are often smaller restaurants and smaller grocery retailers, while large grocery chains, hotels and

restaurants generally exceed EUR 2 million in annual turnover and are thus subject to the rules. However, when there is a purchasing cooperation, the turnover of the different companies in the cooperation shall be aggregated, this also applies to the turnover of companies within the same group. The requirement for certain annual turnover shall not apply to public authorities. Furthermore, public authority outside the EU are also excluded from the scope of the legislation.

The proposed legislation does not apply the so-called “step approach” according to the UTP Directive whereby the scope of the legislation would be depending on the annual turnover of both the supplier and the buyer based on complex assessments. This is a positive aspect as it gives protection to all suppliers.

### **Unfair trading practices banned under the so-called blacklist**

Considerable imbalances in the bargaining power between suppliers and buyers of agricultural and food products are common. These imbalances may in turn lead to unfair trading practices, when a larger and stronger trading party seeks to introduce certain methods or contractual arrangements that are to its advantage. Such practices may, for example, deviate strongly from good business practice, violate good faith and honor and be unilaterally imposed on a trading party by the other party. Furthermore, they may force an unjustified and disproportionate transfer of financial risk to the other party or force a significant imbalance between the rights and obligations of a trading party. Some practices may be manifestly unfair even when both parties have agreed to them.

The ten prohibited unfair trading practices under the so-called blacklist provides that the buyer must not:

1. *pay later than after 30 days* (the starting point for this calculation varies depending on how the delivery has been made);
2. *cancel an order with less than 30 days’ notice*, unless otherwise provided in regulations;
3. *unilaterally change the terms of a supply agreement* in terms of the frequency, method, place, time or volume

of a delivery, quality requirement, payment or price;

4. *unilaterally amend the terms of a supply agreement* in respect of the services listed in the so-called grey list below;
5. *require payments* from the supplier that are not related to the sale of the agricultural and food products of the supplier,
6. *request the supplier to pay the costs of deterioration* or loss occurring on the buyer’s premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused to the negligence or fault of the supplier;
7. *not comply with the supplier’s request to obtain written confirmation* of the terms of a supply agreement;
8. *retaliate or threaten to retaliate* acts of commercial retaliation against the supplier *if the supplier exercises its contractual or legal right*;
9. *require compensation from the supplier for the cost of examining customer complaints* relating to the sale of the supplier’s products despite the absence of negligence or fault on the part of the supplier.
10. Provisions on *unauthorized attacks on trade secrets* are contained in the Trade Secrets Act.

In our view the prohibited practice on unilateral changes to contract terms, the ban on requirements for payment for costs not linked to the sale as well as the ban on retaliation are expected to be particularly efficient for protecting suppliers from unfair practice. It should, however, be noted that in the case of agreements that have expired and are to be renegotiated, it is the Government’s opinion that retaliation should not be covered by the ban.

The recitals to the Directive mention, as examples of commercial retaliation, to delist products, reduce the quantities of products ordered or discontinue certain services provided by the buyer to the supplier such as marketing or promotion of the supplier’s products. It is therefore a question of a supplier exercising only its legitimate rights being met with a repressive response. In our experience, such situations have mainly arisen when the supplier has tried to bring about price adjustments

due to e.g. increased raw material costs but instead it has been threatened with e.g. delisting of products.

The preparatory works states that the contractual or legal rights of a supplier may be understood as a broad concept intended to capture anything that could be considered as legal rights. The question of what is covered by the term will have to be developed in case law.

As regards unilateral changes in conditions, the following is noted in the preparatory works. In the Government's view, making a requirement for a unilateral change in the terms and conditions which does not result in a unilateral amendment, since the supplier accepts it, is not covered by the prohibition. As regards the problem of suppliers feeling compelled to agree to changes in the supply agreement, the Government believes that the introduction of the prohibition should make it easier for a supplier to reject unilateral changes. If the buyer implements such a unilateral change in conditions, the supplier will have the opportunity to file a complaint to the Swedish Competition Authority.

It should be noted that, unlike the Directive, it is proposed in the Swedish legislation that the maximum of 30-days payment deadline, and the ban on late cancellations of orders (less than 30 days), should apply to perishables products as well as other food and agriculture products.

### **The "grey list" for which agreements are required**

Certain trading practices are only permitted in cases where the buyer and seller have clearly agreed on them in advance, the so-called grey list. Such trading practices consists of that the buyer:

1. *returns unsold agricultural and food products to the supplier without paying for them;*
2. *returns unsold agricultural and food products to the supplier without paying for the disposal of the products;*
3. *requires payment as a condition for the storage, signage or listing of the supplier's agricultural and food products, or for the provision of such products on the market;*

4. *requires the supplier to pay for the buyer's marketing of agricultural and food products;*

5. *charges the supplier for staff for fitting-out premises used for the sale of the supplier's products; and*

6. *requires the supplier to bear all or part of the cost of discounts on agricultural and food products sold by the buyer as part of a marketing campaign without the buyer having specified before the start of the campaign the period during which the measures will be implemented and the expected quantity of products that will be ordered.*

### **The UTP Directive is a so-called minimum harmonization**

The UTP Directive is a so-called minimum directive, which means that the Member States may introduce or maintain national provisions that provide stronger protection than the ones provided by the directive, as long as the provisions are compatible with EU law.

The UTP Directive complements existing rules, including those established by voluntary initiatives such as the Principles of Good Business Practice in Sweden. The directive is not intended to define all trading practices that may be unfair, but rather to establish a minimum list of the most serious forms of unfair trading practices. For example, Member States have the possibility to include more companies and prohibit additional unfair trading practices than those that are covered by the directive.

As stated above, the proposed Swedish legislation applies to a wider scope of suppliers than the directive. However, the various unfair trading practices included in both the black and grey list correspond to the directive, no additional practices have been added.

The UTP Directive provides for stronger protection of perishable products than other goods. However, since the Member States may have stricter rules than those resulting from the directive, it is possible to introduce the same strong protection for all agricultural and food products as for perishables, as proposed in the Swedish legislation.

Due to the differences in the implementation in the various Member States it is therefore important that suppliers selling their agricultural and food products to different countries are well informed about the rules in force in different Member States in order to best protect their rights. This also applies to suppliers who buy agricultural and food products from different countries.

### **Supervision and sanctions**

The Swedish Competition Authority is appointed as the supervisory authority and may decide that buyers who break the law by applying unfair trading practices shall pay administrative fines of up to 1 % of the annual turnover (cf. maximum 10 % under the competition rules). In determining the amount of the fine, account shall be taken of the nature, duration and extent of the infringement and of whether the buyer has previously breached the prohibition. Administrative fines may also be imposed if a buyer has unauthorizedly attacked the supplier's trade secrets under the Trade Secrets Act. The fines are based on so-called strict liability, i.e. that the administrative fines are imposed without there being intent or negligence.

The Swedish Competition Authority also has the possibility to order the buyer to cease an infringement (such decisions apply as a rule immediately) and such decisions may be issued under penalty of a fine, which may be imposed in the event of a breach of the prohibition). Thus, it will not be possible for a buyer to delay an investigation by filing an appealing against an injunction. On the other hand, according to general procedural rules, there is a possibility of claiming a suspension, i.e. that the decision, while pending the final review of the courts, shall not apply.

The Swedish Competition Authority is currently establishing the department that will handle complaints and investigations and has already started its work by providing a survey to a number of industry players in order to review the situation as of today.

In the course of its investigations, the Swedish Competition Authority may require a buyer, supplier or a third party to provide information, documents etc., as well as carrying out hearings with the person who

may be in possession of information. The Swedish Competition Authority will also be able to carry out unannounced inspections without a court order, similar to the possibility of conducting dawn raids for investigating alleged competition law infringements. So far, the scope of such an inspection is more limited than in a dawn raid, but this matter will be further investigated. The preparatory work states that once the Swedish Competition Authority has entered the premises, the Authority should primarily try to gain access to the information needed for supervision on a voluntary basis. The Swedish Competition Authority also has the possibility to issue an injunction on the provision of information, documents or other information on the spot. However, the proposal does not mean that the Swedish Competition Authority has any right under the new suggested legislation to e.g., search for documents on the premises. The Government states that it envisages a need for the supervisory authority to have more far-reaching powers and therefore intends to consider whether the legislation can be supplemented in this regard.

Decisions of the Swedish Competition Authority may be appealed to the Stockholm Administrative Court. A review in the Administrative Court of Appeal requires a review permit. In this context, it can be noted that the similar competition and market law cases are instead handled by the patent and market courts.

### **Confidentiality of the identity of the complainant**

A new provision is also proposed to be inserted in the Public Access to Information and Secrecy Act, which provides the possibility for the Swedish Competition Authority to apply confidentiality for information that can reveal the identity of the complainant. With regard to this new rule, it is proposed that a presumption of confidentiality should apply, i.e. that confidentiality applies if it is not clear that the information can be disclosed without harming the complainant. The same applies to the identity of a supplier to which such complaint relates. For information in a public document, confidentiality apply for a maximum of 20 years.

In practice, it may however be necessary for the complainant to waive its confidentiality claims in order for an investigation to be carried out and an intervention to take place.

### **Cooperation, reporting and evaluation between the Member States**

In view of the cross-border dimension of the UTP Directive, the directive requires the supervisory authorities to cooperate effectively and meet at least once a year. The Commission shall develop a website to enable the exchange of information between the supervisory authorities and the Commission. The Commission shall also develop a public website where, inter alia, there will be contact information to the supervisory authorities of the various Member States. National supervisory authorities shall publish an annual report on their activities and shall send a report on unfair trading practices by 15 March each year at the latest to the Commission. By 1 November 2025, the Commission shall carry out the first evaluation of the Directive.

### **Next step – vote in the Parliament 10 June 2021**

The next step in the legislative process is the Parliamentary vote on the proposed legislation on 10 June 2021.

Suggested entry into force on 1 November 2021 – what applies to agreements concluded before the entry into force?

The rules are suggested to be fully applicable from 1 November 2021 and also apply to agreements concluded before that date. It is therefore high time to review that the current agreements are adapted to the legislation, which should mean a good negotiating position for suppliers.

### **Concluding remarks**

The proposed rules are long awaited by suppliers in an industry that for many years has been characterized by uneven negotiation powers. Unfortunately, the previous voluntary industry agreement has not had as much

impact as the parties intended, largely due to the lack of effective sanctions. Hopefully, the proposed legislation can also have positive effects on other products that are sold to buyers but not covered by the new legislation. These products continue to be subjected to the Principles on Good Business Practices.

We hope that the new legislation will be adopted by the Swedish Parliament and that the rules will thereby, foremost, have a preventive effect. However, if a buyer does not comply with the legislation, it is positive that there will be a possibility for the buyer to file a complaint to the Swedish Competition Authority and that there will be effective sanctions. Unfortunately, there is no right to damages under the proposed legislation. However, if the buyer's conduct constitutes a breach of contract, there is the possibility of damages on a contractual basis. Since the UTP Directive does not aim at civil regulation, the rules on the conclusion of contracts, etc., under the Swedish Contracts Act, will continue to apply.

It is important that suppliers who also act as buyers ensure compliance with the legislation as they have to comply with the rules that apply to buyers.

We will return shortly with a description of the design of the approved legislation and will be happy to assist, based on our industry experience and experience in EU law, competition law and the Principles of Good Business Practice to suppliers regarding the interpretation of the new legislation.

Contact:  
Elisabeth Eklund / Partner / Advokat  
elisabeth.eklund@delphi.se