

# **Six months with the Unfair Trading Practices Act (UTP Act) in Sweden – what has happened so far?**

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## Six months with the Unfair Trading Practices Act (UTP Act) in Sweden – what has happened so far?

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### Introduction

It has now been just over six months since the Act on the Prohibition of Unfair Trading Practices in the Purchase of Agricultural and Food Products (the so-called UTP Act, Sw. lagen om förbud mot otillbörliga handelsmetoder vid köp av jordbruks- och livsmedelsprodukter) came into force. The UTP Act transposes the EU-directive 2019/633 on unfair trading practices in the agricultural and food supply chain, the purpose of which is to even out imbalances between suppliers and buyers of such products. The scope of the UTP Act has been described in a previous newsletter.<sup>1</sup>

Below, we briefly describe statements on the interpretation of the legislation that the Swedish Competition Authority has so far made through so-called position papers, summarize the status regarding supervisory matters and report on some additional news from the authority.

This newsletter contains links to further reading, which is unfortunately only available in Swedish.

### Interpretations by the Swedish Competition Authority in position papers

#### *Initial comments*

At first glance, the provisions of the UTP Act may appear fairly clear. However, most persons having participated in contract negotiations due to the UTP Act will be able to testify to the irreconcilable views of buyers and suppliers

with respect to its interpretation. It is therefore much appreciated that the Swedish Competition Authority, as the supervisory authority, has provided guidance on a number of issues. Below, we summarize the most important statements by the authority since the UTP Act came into force.

#### *Suppliers shall have the right to stick to what has been agreed upon*

As a supplier, refusing contractual changes is typically a legal right and must therefore not be met with commercial retaliation (e.g. delisting).<sup>2</sup>

#### *Bonuses and discounts should be understandable*

The Swedish Competition Authority has stated the following regarding the requirement for there to be a connection to the sale of the suppliers' goods in order for bonuses and discounts paid by the supplier to be lawful: "If a supplier cannot influence whether a bonus is charged or not, or understand why a bonus is charged, nor understand the value of the bonus in question, it is an indication that the buyer is demanding payment from the supplier for something that is not related to the suppliers' sales."<sup>3</sup>

Issues relating to bonuses, discounts and consistency with the UTP Act are complex. We therefore welcome the fact that the Swedish Competition Authority has also stated that such matters will be subject to the authority's supervision.

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<sup>1</sup> Read more here.

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<sup>2</sup> Read more here.

<sup>3</sup> Read more here.

## *Public sector canteens must not cancel orders any later than 30 days before delivery*

Buyers who acquire goods for use in activities conducted in a “restaurant, other catering establishment or catering activity” may cancel orders up to five days before delivery (instead of 30 days). According to the Swedish Competition Authority, public sector canteens (such as school canteens) cannot constitute “other catering establishments” within the sense of the UTP Act. The reason being that they cannot be considered to be operating within the framework of trade or business activities and that the general public does not have access to the establishment, as required for the special rule to be applicable. <sup>4</sup>

## *Supply chain financing arrangements could be lawful if the supplier is paid more quickly than 30 days*

The Swedish Competition Authority has produced a draft position paper on financing solutions (so-called supply chain financing arrangements). The draft shows that the authority considers that the UTP Act does not provide for any general prohibition on the use of factoring services. However, fees or deductions may only be charged to the extent that the supplier benefits proportionally from the arrangement. According to the Swedish Competition Authority, this may be true if there is at value methodology where an earlier payment is worth more to the supplier than a later one. However, only if the arrangement entails payment being made earlier than 30 days from the date when the period of time for payment under the UTP Act is to be calculated. Otherwise, the arrangement is considered by the authority to be prohibited. <sup>5</sup>

Supply chain financing arrangements have been a contentious topic in a number of contract discussions that we have been involved in. We look forward to reading the final version of the position paper.

## *Snus-like products are not food products*

According to the Swedish Competition Authority, snus-like products (e.g. nicotine pouches) are not considered as food products in the sense of the UTP Act and are therefore not subject to the legislation. <sup>6</sup>

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<sup>4</sup> Read more here.

<sup>5</sup> Read more here.

<sup>6</sup> Read more here.

## **Supervisory matters**

### *Introduction*

The Swedish Competition Authority has announced that the authority will initially focus on ensuring compliance with the rules through communication and guidance rather than pursuing supervisory matters with the aim of imposing fines. Naturally, this does not mean that fines are off the table. Below, we briefly describe the status of some of the supervisory matters that the Swedish Competition Authority has initiated since the UTP Act came into force on 1 November 2021.

### *Ongoing supervision of 15 public sector players*

The Swedish Competition Authority has launched a review of 15 public players’ compliance with the UTP Act. The inquiry takes place against the background of public players often being influential buyers of agricultural and food products, especially with respect to meals in healthcare, schools and social care.<sup>7</sup> The inquiry is performed through a questionnaire to test the respondents’ awareness of the legislation, with focus on payment and cancellation periods.

### *A supervisory matter against buyers of potatoes has been closed*

Two companies in the potato industry were not considered to act in breach of the prohibition against paying suppliers later than 30 days from the time specified in the UTP Act. According to the agreement, the buyer had to pay the supplier no later than 30 days from the time the potatoes were sorted. As sorting always took place on the same day as delivery, the Swedish Competition Authority did not consider that there was reason to pursue the case further and it was therefore closed. <sup>8</sup>

### *A supervisory matter with respect to compensation for goods that has deteriorated after delivery (in Sweden known as “crushed goods compensation”) has been closed*

The Swedish Competition Authority decided to close a matter concerning compensation for crushed goods. In end of 2021, a supplier received an invoice for

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<sup>7</sup> Read more here.

<sup>8</sup> Read more here.

a “cooperation agreement” from Bergendahls. The complainant stated that the invoiced amount had been calculated as if it related to “crushed goods compensation”, i.e. compensation for goods that had deteriorated after the time of delivery. The Swedish Competition Authority’s investigation revealed that several suppliers had received similar invoices. The Swedish Competition Authority found that it was in fact unlawful under the UTP Act, but nevertheless closed the case on the grounds that Bergendahls stated that the company had changed its procedures.<sup>9</sup>

## **Other news from the Swedish Competition Authority**

### *The Swedish Competition Authority’s international cooperation*

The Swedish Competition Authority has stated that international cooperation with the Commission and the supervisory authorities in other Member States is a priority and that it intends to be a driving force in this. The authority points out, among other things, that there are many outstanding questions with respect to the applicability of the UTP Act in an international context. In principle, the UTP Act merely sets out that it shall apply if the buyer or supplier has ties to Sweden.<sup>10</sup>

### *Potato industry survey*

In a survey conducted by the Swedish Competition Authority in autumn 2021 among potato growers, 85 % of the respondents stated that they had encountered unfair trading practices by buyers, e.g. unilaterally changes to contracts. This compares to 45 % for the food industry as a whole.<sup>11</sup>

### *A reminder that the Swedish Act on Trade Secrets Act shall be respected*

The Swedish Competition Authority has stressed that the UTP Act prohibits unauthorised use of trade secrets. In the statement, the Authority also briefly summarised the meaning of a number of important concepts used in the Swedish Act on Trade Secrets.<sup>12</sup>

### *Buyers within the school program may pay later than 30 days*

The Swedish Competition Authority has issued a reminding statement that buyers under the so-called school program (Sw. skolprogrammet), which subsidises the purchase of milk, fruit and vegetables by schools, are exempted from the prohibition to pay later than 30 days.<sup>13</sup>

## **Concluding remarks**

Although we welcome the fact that the Swedish Competition Authority has chosen to take an active role, we note that there is still a great need for further guidance on a number of issues. We therefore hope for continued activity on the part of the authority. Our experience is that many suppliers have been working actively on these issues and received a positive response for their proactivity in contract negotiations. The legislation also seems to have had an impact on buyers, although there is naturally a margin for different interpretations of the legislation differently and negotiations.

It is important that suppliers continue to ensure that their rights are respected and to find commercially viable solutions in consultation with buyers. Buyers need to ensure compliance to avoid sanctions. Although there have not yet been any fines imposed, it will certainly happen in the future. We continue to monitor developments and will provide further updates.

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<sup>9</sup> Read more here.

<sup>10</sup> Read more here.

<sup>11</sup> Read more here.

<sup>12</sup> Read more here.

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