

Delphi

One year with the Swedish Unfair Trading Practices Act (the UTP Act)

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Introduction

It has now been a year since the Swedish 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. In this newsletter, we briefly describe the Swedish Competition Authority's activities within this area since our newsletter in June and reflect on the past year.¹

Position papers and statements by the Swedish Competition Authority

Initial comments

Since our last newsletter, the Swedish Competition Authority has adopted a position paper on supply chain financing. The final version of the position paper is essentially the same as the draft version we wrote about in June. In addition to this formal (but not legally binding) position paper, the authority has made statements about the prohibitions of cancellations at short notice and late payments.

The Swedish Competition Authority's position paper on supply chain finance

According to the Swedish Competition Authority's position paper published in July, supply chain finance solutions are not prohibited by the UTP Act per se but could be unlawful depending on the circumstances of the individual

1. Read Delphi's June newsletter on the UTP Act here.

case. Neither the agreed nor the actual payment period may exceed 30 days and payment must be received by the supplier within this period, not the supply chain finance provider. According to the Swedish Competition Authority, fees or deductions may only be charged to the extent that the supplier benefits proportionally from the arrangement. The position paper is rather brief and does not contain any detailed guidelines on what constitutes a proportionate benefit but the Swedish Competition Authority states that a present value methodology, according to which an earlier payment is worth more to the supplier than a later one, may be considered. Any deductions or fees where the supplier does not receive payment in less than 30 days are however prohibited.²

The UTP Act provides for certain flexibility in terms of cancellations and changes to orders

In June, the Swedish Competition Authority stated that the UTP Act does not prevent buyers, with the supplier's consent, from changing an order with less than 30 days' notice in case of incorrect orders (e.g., when accidentally ordering the wrong package size). Buyers acquiring goods for use in activities conducted in a "restaurant, other catering establishment or catering activity" are subject to a special five-days cancellation exemption. However, buyers are prohibited from unilaterally enforcing such changes and, according to the Swedish Competition Authority, (unilateral) partial changes of an order are likely prohibited as well. The Swedish Competition Authority intends to return with further guidance on this issue in a

2. Read more here.

position paper. It also points out that the UTP Act does not prohibit suppliers from unilaterally adjusting the terms of an order or cancelling it altogether. However, depending on the circumstances, such adjustment may constitute a breach of contract.³

Public sector healthcare providers must pay within 30 days (but not according to the UTP Act)

In September, the Swedish Competition Authority stated that it has noted that public sector healthcare providers are indeed exempt from the prohibition against paying later than 30 days from the time specified in the UTP Act. Yet, according to the Swedish Interest Act (Sw. "räntelagen"), they are obliged to pay the supplier within 30 days of the supplier's request for payment. Failure to comply with the latter rule is however not subject to the Swedish Competition Authority's supervision under the UTP Act.⁴

Decisions from the Swedish Competition Authority

Initial comments

During the past year, the Swedish Competition Authority has issued decisions in eight supervisory matters. The matters concerned cancellations by municipalities with shorter notice than 30 days, claims for compensation for goods that have deteriorated after delivery (in Sweden known as "crushed goods compensation") and payment times for potato cultivation. All supervisory matters were closed without further measures by the Swedish Competition Authority. The decisions are available on the authority's website.⁵

Closed supervisory matters on cancellation times

All of the supervisory matters since our last newsletter were aimed at municipalities' application of cancellation periods of less than 30 days. The Swedish Competition Authority held that there had been violations of the UTP Act but chose to close the cases without action on the grounds that the municipalities had already taken or announced that they intend to take corrective action. Three of the matters were initiated following inquiries made by the authority with a number of public sector buyers

3. Read more here.

4. Read more here.

5. Read more here.

in March this year. Read more under the heading Lack of knowledge about the UTP Act among public sector buyers below.

Other news from the Swedish Competition Authority

Buying alliances and the UTP Act

A buying alliance may e.g. consist of grocery chains that join forces at the international level to negotiate discounts on behalf its members. These have historically been assessed under the competition rules.⁶ The Swedish Competition Authority has noted that there is now a debate as to whether a buying alliance can be subject to, for example, the prohibition against commercial retaliation in the UTP Directive even though it does not make any purchases in its own name. Unfortunately, the Swedish Competition Authority has not adopted any position on this issue, nor is it aware that any other supervisory authority has done so.⁷ Hopefully there will be more guidance provided in the future.

Interim report on the Swedish Competition Authority's work against unfair trading practices

In September, the Swedish Competition Authority presented an interim report on the authority's activities in relation to the UTP Act.⁸ The authority noted that although it aims at spreading awareness of the legislation, its core activities are to investigate possible infringements and to adopt position papers on issues of principle importance. It further noted that it has received many complaints about possible violations but has thus far not been forced to de-prioritize any of them for lack of resources. However, several of the fundamental prohibitions in the UTP Act have yet to be put to test in the Swedish Competition Authority's supervisory activities, including the prohibition against commercial retaliation.

Meetings on international cooperation within the EU

The EU Member States' supervisory authorities met in June to exchange experiences and discuss cooperation on cross-border issues. One of the challenges discussed was the common experience that, despite the possibility of anonymity, suppliers are reluctant to report breaches

6. Read more here.

7. Read more here.

8. Read more here.

of the national legislations.⁹ In September, the directors of the supervisory authorities met to discuss similar issues – including the issue of deciding on applicable law and which country’s supervisory authority that should investigate possible breaches when the buyer and supplier are established in different Member States. Unfortunately, no conclusions from these very interesting discussions have been presented. At the meeting, a number of working groups were however tasked with deepening the work on certain issues. Their work will hopefully result in useful guidance.

Lack of knowledge about the UTP Act among public sector buyers

In the spring, the Swedish Competition Authority conducted a survey to investigate knowledge of the UTP Act among 15 randomly selected public sector organizations. The result indicated that there was room for improvement in this regard and it also led to the opening of supervisory matters against three municipalities on unlawful cancellations (read more above under the heading Closed supervisory matters on cancellation times). The authority urges public sector buyers to (in particular) examine whether their activities are subject to the UTP Act, whether products bought by them constitute food products, whether their contracts contain provisions on cancellation periods shorter than 30 days, whether payment periods exceeding 30 days are applied and whether their organizations have sufficient knowledge of the legislation in general.¹⁰

The Swedish Competition Authority has also initiated work on creating guidance aimed specifically at public sector buyers and stated that it will arrange webinars on a regular basis to answer questions and provide guidance.¹¹

No indications that the UTP Act has reduced local purchasing

The Swedish Competition Authority has performed a market survey in which approximately

30 randomly selected local grocery stores were contacted in order to get an idea of whether the UTP Act has had a

9. Read more here.

10. Read more here.

11. Read more here.

negative impact on the volume of their local purchases. During the legislative process leading up to the UTP Act, the grocery industry voiced concerns that the legislation would have a disincentive effect in this regard. The results of the survey certainly indicated that the UTP Act is perceived as complex and difficult to interpret, but only one store stated that it has led to a reduction in local purchases.¹²

Differences in the Member States’ implementation of the UTP Directive

The Swedish Competition Authority has compared the implementation of the UTP Directive in Sweden, Denmark, Finland, Germany, Poland and Ireland. Unlike in Sweden, where the legislation as a general rule applies to all buyers and sellers (regardless of size)¹³, to a varying extent these countries have chosen to use the “step approach”, as provided for by the UTP Directive. In short, the step approach entails that suppliers only have rights in relation to buyers with a greater annual turnover than the supplier.¹⁴

The Finnish legislation applies to buyers with an annual turnover exceeding two million euros in their business relationships with suppliers with a smaller turnover. Suppliers with an annual turnover exceeding EUR 350 million are not offered any protection in relation to buyers with a higher turnover.

In Denmark, as a starting point the legislation applies to all buyers regardless of turnover. However, buyers with a turnover of up to two million euros are exempt from the rules on payment deadlines. These rules are also less stringent if the supplier’s turnover exceeds EUR 350 million.

Reflections on the past year

The Swedish Competition Authority has been fairly active during the past year. Among other things, it has adopted several position papers, provided general guidance and decided on a number of supervisory matters. To this date,

12. Read more here.

13. Section 2 of the UTP Act sets out that buyers with an annual group turnover that does not exceed two million euros (in the case of a purchasing cooperative, the joint turnover) are exempt from the UTP Act.

14. Read more here.

it has focused on informing and educating about the UTP Act and no injunctions or fines have been imposed. It is however fair to assume that such decisions will be made – not least in case of repeated violations or if the authority perceives that the approach does not have the desired effect among buyers. The Swedish Competition Authority’s approach may also be influenced by the ambitions to cooperate with other Member States’ supervisory authorities.

It may be somewhat of a surprise that only one of eight supervisory matters decided on so far concerned a buyer in the grocery industry, while five of them concerned municipalities and the remaining two were aimed at potato buyers. We believe that the lack of complaints against buyers within the grocery industry shows that few suppliers are willing to openly challenge their customers. At the same time, we hope that the rules have at least had some deterrent effect on buyers within the grocery industry. The many supervisory matters initiated against municipalities is due to the special review of cancellations by public sector buyers commented on above.

The shared experience of many suppliers we have been in contact with is that buyers have embraced the straightforward rules of the UTP Act (such as the rules on payment times and cancellations) but they tend to disagree on other issues. Further guidance in the form of position papers and case law would be welcome. We believe that many suppliers would be particularly interested in guidance on how to interpret the prohibition against commercial retaliation. It seems like the Swedish Competition Authority have taken note of this. However, the authority relies partly on complaints to investigate possible violations of the UTP Act and, in extension, to create case law. As stated above, complaints can be submitted anonymously (according to the Swedish Competition Authority, most supervisory matters are initiated following anonymous complaints¹⁵), but without the active participation of suppliers, we unfortunately believe that it may be some time before we learn more about the proper interpretation of the prohibition against commercial retaliation.

The Swedish Competition Authority recently completed

15. Read more here.

a survey aimed at suppliers in the food supply chain regarding the occurrence of unfair trading practices. It will be very interesting to take part in the suppliers’ views on how buyers have adapted to the UTP Act one year after it came into force.

We urge suppliers to continue enforcing their rights by reviewing contracts (especially when existing contracts are being re-negotiated), monitor actions taken by their buyers and seek to reach commercially viable solutions with them. If necessary, with the assistance of a lawyer. Buyers on the other hand need to ensure that they comply with the requirements to avoid sanctions. Although no fines have yet been imposed, it will certainly occur in the future.

We continue monitoring developments and will return with further updates.



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