

## Case law

### Case Details

**National ID:** MD 2009:35

**Member State:** Sweden

**Common Name:** link

**Decision type:** Court decision in appeal

**Decision date:** 17/11/2009

**Court:** The Swedish Market Court

**Subject:**

**Plaintiff:** The Consumer Ombudsman

**Defendant:** Bahnhof AB (publ)

**Keywords:** consumer rights, terms and conditions, unfair terms

### Directive Articles

Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [Article 3, 3.](#) Unfair Contract Terms Directive, [ANNEX I, 1., \(j\)](#)

### Headnote

(1) A trader's right to unilaterally increase the price for a service without any specific reason constitutes an unfair term when used in consumer relationships.

(2) A trader's right to increase the price due to circumstances outside of the trader's control or which the trader could not have foreseen constitutes unfair terms when used in consumer relationships insofar that the circumstances are not of force majeure nature.

### Facts

The defendant offers broadband and telephone services to consumers in the so-called open metro networks.

The defendant's general terms and conditions include certain provisions which the plaintiff found unfair when conducting a revision of the defendant's terms and conditions in 2008. The terms and conditions in question included a right for the defendant to immediately increase the price for the service by 10%, without any changes in the service, and in some cases to increase the price by up to 100%. Furthermore, the defendant was entitled to increase the price due to circumstances that the defendant has no control over or could not reasonably have foreseen, e.g. decisions of an authority, new or amended laws and regulations, or increased prices from sub-contractors and network owners. The plaintiff decided to initiate a matter against the defendant.

### Legal issue

The court prohibits the defendant, under the penalty of a fine, in agreements relating to internet and phone services provided to consumers, with a fixed agreement term, to apply the following contractual terms or substantially similar terms:

- The defendant may immediately increase the price for the service with up to 10 % of the monthly price without that the conditions for the service otherwise is amended (the original fixed agreement term for the customer will apply irrespective of such price increase).
- In order to secure the quality of the services we supply, we have chosen to reserve us the right to in certain cases apply a provision regarding an increased price adjustment – the purpose is generally to maintain low prices. The defendant may therefore increase the price by 100% (so called increased price adjustment).
- The defendant is furthermore entitled to change its prices at any time during the agreement term if the change is caused by significantly increased prices due to circumstances which the defendant cannot control and cannot reasonably foresee, e.g. decisions by authorities, new or amended laws and regulations or increased prices from sub-contractors and network owners.

The assessment to be made concerns whether or not the terms in question are generally unfair against consumers. This may be the case, inter alia, if the term is contrary to mandatory or non-mandatory laws, gives the trader a benefit or deprives the consumer a right and thereby causes an imbalance between the parties' rights and obligations in a sense that a reasonable balance between the parties no longer exists. The fact that a contractual term is contrary to a general principle of law can also entail that it is unfair. The list of terms that are considered unfair under Directive 93/13/EEC has not been incorporated into Swedish law but according to the preparatory works to the Act (1994:1512) on Contract Conditions in Consumer Relationships (implementing Directive 93/13/EEC), the terms in the list are generally considered unfair. The court states that an overall assessment shall be made of the parties' rights and obligations.

The general terms and conditions at hand are considered to be a standard agreement and cannot be deemed individually negotiated.

As regard the contractual terms a. and b. which gives the defendant the right to increase the price without any cause, the court makes the following assessments. It follows from the term j) in the list of terms that are considered unfair under Directive 93/13/EEC, that prices cannot be changed without cause. Furthermore, the fact that one party is entitled to change the agreement terms in its own discretion is contrary to the fundamental principle of law that agreements shall be held.

According to case law, it has previously been found that the possibility to increase the price shall be kept to circumstances which the trader cannot affect or foresee, furthermore price increases should only be made upon qualified cost increases.

The Market Court finds that both contractual terms a. and b. allow the defendant to unilaterally and unrestricted increase the agreed price. This is contrary to the general view of price increasing provisions and thus, unfair against consumers. The fact that a consumer is entitled to terminate the agreement if the price is increased does not affect the court's decision.

As regard contractual term c. the court makes the following assessments. The defendant has claimed that the circumstances allowing a price increase are force majeure like events. In the event cost increases affects a trader due to circumstances which are of force majeure like nature, the court states that price

increases can be accepted. However, normal and for the market general costs risks shall be borne by the trader, at least in the short term, as the trader is presumed to include such risks when calculating the price for its products or services.

The court finds that not all circumstances that are listed in the contractual term c. are of force majeure like nature, e.g. increased prices from sub-contractors or network owners, or amended or new acts and regulations. Thus the contractual term is deemed too wide.

Furthermore, the court finds that the unilaterally right for the defendant to increase the price upon cost increases, wherein the consumer is not given a similar right upon costs decreases, constitutes an imbalance between the parties' rights, meaning that a reasonable balance between the parties is not upheld. The fact that a consumer is entitled to terminate the agreement on the basis of a price increase does not affect the court's decision.

#### **Decision**

(1) Does the trader's right to unilaterally increase the price for a service without any specific reason constitute an unfair term when used in consumer relationships?

(2) Does a trader's right to increase the price due to circumstances outside of the trader's control or which the trader could not have foreseen constitute unfair terms when used in consumer relationships?

URL: <http://www.marknadsdomstolen.se/Filer/Avgöranden/Dom2009-35.pdf>

Full text: [Full text](#)

#### **Related Cases**

No results available

#### **Legal Literature**

No results available

#### **Result**

The claimant's claims were granted.