[Translated from Icelandic]

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19th day of July 2017

REYKJAVÍK DISTRICT COURT

Request for an Advisory Opinion from the EFTA Court

30 June 2017

Case No. E-4525/2013:

Plaintiff: Fjarskipti hf.
(Dóra Sif Tynes, District Court Attorney)

Defendant: Síminn hf.
(Halldór Brynjar Halldórsson, District Court Attorney)

and counter-action

Judge: Barbara Björnsdóttir, District Court Judge

Request for an Advisory Opinion from the EFTA Court

With reference to Article 1 of Act No. 21/1994, on Application to the EFTA Court for an Advisory Opinion on the Interpretation of the EEA Agreement (*cf.* Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice), it is hereby requested that the EFTA Court give an advisory opinion in connection with the hearing of Case No. E-4525/2013, Fjarskipti hf. v. Síminn hf. and counter-action, which is currently before the Reykjavík District Court.

The questions on which the resolution of the EFTA Court is sought are as follows:

1. Does it constitute part of the effective implementation of the EEA Agreement that a natural or a legal person in an EFTA State should be able to invoke Article 54 of the Agreement before a domestic court in order to claim compensation for a violation of the prohibitions of that provision?
2. When assessing whether the conditions are fulfilled for a compensation claim in view of a violation of competition rules, is it of significance whether the competent authorities have delivered a final ruling on a violation of Article 54 EEA?
3. Is it regarded as an unlawful margin squeeze, violating Article 54 EEA, when an undertaking in a dominant position on a wholesale market sets termination rates applying to its competitors in such a way that the dominant undertaking's own retail division would be unable to profit from the sale of telephone calls within its system if it had to bear the cost of selling them under the same circumstances, when the dominant undertaking itself is also obliged to purchase termination from these same competitors at a higher price than that at which it sells termination to its competitors?
4. Is the fact that an undertaking is in a dominant position on the relevant wholesale market sufficient for it to be guilty of applying an unlawful margin squeeze, violating Article 54 EEA, or must the undertaking also be in a dominant position on the relevant retail market?

Claims submitted to the court by the principal plaintiff in the principal action: The principal plaintiff's claims to the court are, primarily, that the counter-plaintiff be ordered to pay it ISK 912,935,301, with interest according to the first paragraph of Article 8 of the Interest and Indexation Act, No. 38/2001, from 31 December 2007 until 13 October 2013, and

with interest in arrears in accordance with the first paragraph of Article 6 of the same Act from that date until the date of payment. In the alternative, it is demanded that the counter-plaintiff be ordered to pay it compensation as assessed by the court.

Claims submitted to the court by the counter-plaintiff in the principal action: The counter-plaintiff demands, as its principal claim, that it be acquitted of the principal plaintiff's demands in the principal action. In the alternative, it demands that the principal plaintiff's demands be substantially reduced.

Claims submitted to the court by the counter-plaintiff in the counter-action: The counter-plaintiff demands, as its principal claim, that the principal plaintiff be ordered to pay it ISK 2,491,822,443, with interest according to the first paragraph of Article 8 of the Interest and Indexation Act, No. 38/2001, from 31 December 2007 until the date of the institution of the counter-action, and with interest in arrears in accordance with the first paragraph of Article 6 of the same Act from that date until the date of payment. In the alternative, it demands that the principal plaintiff be ordered to pay it compensation as assessed by the court.

Claims submitted to the court by the principal plaintiff in the counter-action: The principal plaintiff demands, as its principal claim, that it be acquitted of the counter-plaintiff's demands in the counter-action. In the alternative, it demands that its demands be substantially reduced.

Facts of the case

The parties are telecoms providing general telecom services in Iceland, including mobile phone services. The principal plaintiff provides services under the Vodafone trademark.

The predecessors of the counter-plaintiff were the Post and Telecommunications Agency and later Landssími Íslands hf., which were owned by the Icelandic state. For decades they had a monopoly on owning and operating general telecommunications networks in Iceland; this state monopoly was abolished by law on 1 January 1998. The counter-plaintiff commenced its telecom operation in 1994.

The principal plaintiff's activity can be traced back to 1998 when the telecom company Tal hf. commenced its operation. In 2002, the companies Tal and Íslandssími merged under the name of Og fjarskipti hf. In 2004, Og fjarskipti and Norðurljós merged, later becoming 365 ljósvakamiðlar, and in 2005 the company was named Dagsbrún. That same year, the group's

telecom operations were separated from it and located in a special subsidiary, which is the principal plaintiff. Under the separation schedule, the principal plaintiff took over all assets, rights and obligations pertaining to the telecom operations. In 2006, Dagsbrún was split into two companies, 365 hf. and Teymi hf.; after the split, the latter became the parent company of Og fjarskipti ehf. Teymi hf. was then split into two companies in 2010: Skýrr hf. (now Advania) and Eignarhaldsfélagið Fjarskipti hf. (Fjarskipti Holdings Ltd.); after this split, the latter became the parent company of the principal plaintiff, which also changed its name and is now called Fjarskipti hf.

Tal and Íslandssími complained to the competition authorities regarding the counter-plaintiff's conduct on the mobile phone market. The Competition Authority, in its decision No. 17/1999, came to the conclusion that the counter-plaintiff had abused its dominant market position by granting a 'major user discount' on the mobile phone market. In its judgment of 8 November 2011 in Case 120/2001, the Supreme Court rejected the counter-plaintiff's demand that this decision be annulled. The Competition Authority stated in its decision that the price reductions by the counter-plaintiff constituted a competitive measure in response to the entry by Tal into the mobile telephone market. Thus, much discussion had been found in the counter-plaintiff's materials about the need to cut rates in order to ensure that new users, and the counter-plaintiff's largest customers, would not begin business with Tal before it began its operations and also speculations about the reduction of rates in those areas of mobile phone services where Tal was offering more attractive terms, without any intention to have a general lowering of rates for the counter-plaintiff's services.

In its Decision No. 20/2002, the Competition Authority examined the counter-plaintiff's 'group discount.' The predecessors of the principal plaintiff, Tal and Íslandssími, had complained to the Competition Authority about this subscription option because, in their view, it involved damaging under-pricing. The Competition Authority, however, did not agree with this finding but rather concurred with the view of the counter-plaintiff, which was expressed in its submission, that the general view was that each and every telecom company was, in effect, in a dominant position on the market for telephone calls that ended in the network of the company in question.

In its Decision No. 7/2012, the Competition Authority came to the conclusion that the counter-plaintiff had violated Articles 11 and 19 of the Competition Act and Article 54 EEA. These violations by the counter-plaintiff were seen as consisting of having applied an unlawful

margin squeeze against its competitors, including the principal plaintiff, from 2001 until the end of 2007, in the setting of its 'termination rates.'

The counter-plaintiff lodged an appeal with the Competition Appeals Committee against the Competition Authority's decision on 30 April 2012. In its ruling No. 1/2012, the Competition Appeals Committee upheld the decision of the Competition Authority stating that the appellant had violated Article 11 of the Competition Act and Article 54 EEA.

On 26 March 2013, the Competition Authority and the counter-plaintiff entered into a general settlement (*cf.* Decision No. 6/2013, which was confirmed by the Competition Appeals Committee's ruling No. 3/2013) on the closure of certain matters that the authority had received for examination. Amongst other things, this settlement meant that the Competition Appeals Committee's ruling in Case No. 1/2012 became the final decision in this matter and that the ruling could not be referred to a court of law.

The principal plaintiff considers that it paid excessively high termination rates to the counter-plaintiff during the period 2001-2007, as a consequence of which it incurred substantial losses. The principal plaintiff sent the counter-plaintiff a claim on 13 September 2013 demanding compensation and giving the counter-plaintiff three weeks to respond. By its letter of 21 October 2013, the counter-plaintiff rejected this claim as it considered that there was no basis for compensatory liability and that no demonstration had been made of the alleged losses.

As is stated above, the counter-plaintiff instituted a counter-action against the principal plaintiff. It argues that, on the basis on which the principal plaintiff presents its demands, it is clear that it paid the principal plaintiff excessive termination rates that amounted to even more than the claim being presented against it. It argues that Tal hf. and Íslandssími hf., which later merged under the name of the principal plaintiff, fixed their pricing in such a way that phone calls between their own customers within their system were priced far below the termination rates that they demanded of the counter-plaintiff in cases where the counter-plaintiff's customers made phone calls to their customers.

Termination rates were determined on the basis of agreements between the companies; telecoms are obliged (*cf.* Article 24 of the Telecommunications Act, No. 81/2003) to agree termination rates between themselves. Under a decision by the Post and Telecom Administration of 23 April 2003, the counter-plaintiff was obliged to reduce its termination rates for phone calls that ended in the GSM mobile phone network. Following this decision by

the administration, the counter-plaintiff's termination rates were lowered. The termination rates of its competitors, however, rose during the period until near the end of 2006.

At a session of the court on 10 October 2014, the principal plaintiff submitted a request for an assessment, and at a session of the court on 19 December of the same year a request for an assessment was submitted on behalf of the counter-plaintiff with the aim of answering certain questions about the alleged losses sustained by the parties. The parties were given a period of time in which to adopt a position on each other's requests for assessment and to agree on assessors. On 4 March 2015, the court appointed two economists, Gunnar Haraldsson and Ólafur Ísleifsson, as assessors. According to their assessments, both of which are dated 5 September 2016, they estimate the excess amount paid by the principal plaintiff according to the 'retail minus' method as ISK 898,358,312. They considered the counter-plaintiff's loss to lie in the range ISK 3.4-6.2 billion; using the same method of assessment as is used above concerning the principal plaintiff, the counter-plaintiff made excess payments amounting to ISK 2,492,828,972.

Icelandic law

The point at issue in this case is whether a violation of Article 11 of the Competition Act, No. 44/2005, took place; according to this article, abuse by one or more undertakings of a dominant market position is prohibited. The second paragraph of the article enumerates instances, in indents marked a-d, that constitute abuse of a dominant market position; this is not an exhaustive enumeration. The instances of abuse enumerated are: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In the explanation of terminology in Article 4 of the Competition Act, a dominant position is defined as meaning a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave, to an appreciable extent, independently of its competitors, customers and consumers. A market is defined as the area within which goods and their substitute goods,

and/or a service and its substitute services, are sold. Substitute goods and substitute services are goods or services which, entirely or to a substantial degree, may replace others of their type.

According to Article 1 of the Competition Act, its objective is to promote effective competition and thereby increase the efficiency of the factors of production of society. This objective is to be achieved by: a. preventing unreasonable barriers and restrictions on freedom of economic operation, b. opposing harmful oligopoly and restrictions on competition, and c. facilitating the access of new competitors to the market.

Principal plaintiff's primary grounds for action in the principal action

The principal plaintiff bases its demands primarily on the view that the counter-plaintiff, by its conduct, caused it loss which for which it is bound to pay compensation according the *culpa* rule and the general principals of tort law. It argues that the counter-plaintiff grossly and unlawfully abused its position on the market during the years 2001-2007 and applied an unlawful margin squeeze to the principal plaintiff. Thus, it priced the termination of phone calls to competitors of the company in such a way as to prevent the principal plaintiff from making a normal profit from its operations. In other words, the principal plaintiff paid a far higher amount for the termination of phone calls than could be regarded as normal; this conclusion was confirmed by the competition authorities.

Under Article 11 of the Competition Act, No. 44/2005, abuse by one or more undertakings of a dominant market position is prohibited. The second paragraph of the same article enumerates instances, in indents a-d, which constitute abuse of a dominant market position, though this enumeration is not exhaustive. Abuse of a dominant market position involves measures by an undertaking in a dominant position to strengthen its market position, measures other than those that constitute normal competition on the basis of operational performance being prohibited. Such measures include margin squeeze. A margin squeeze is a situation in which an undertaking operating vertically in a dominant market position exerts its control over certain supplies to its competitors in such a way as to prevent its competitors from profiting on a retail market on which the dominant entity is also active.

The counter-plaintiff has also priced the termination of phone calls and calls within its system in a way that the Competition Authority has viewed as margin squeezing thereby violating Article 11 of the Competition Act and Article 54 EEA. During the period from 1 May 2001 to 1 September 2006, the counter-plaintiff did apply unlawful margin squeeze against its competitors, including the principal plaintiff. During that period, the company's termination

rates alone amounted to more than the retail price of phone calls within the counter-plaintiff's system. If the counter-plaintiff's GSM retail operations had been obliged to pay the same termination fees, then each phone call would have been sold at a loss. In the same way, the principal plaintiff argues, it sustained loss amounting at least to the difference between the termination fee charged by the counter-plaintiff and a "normal" termination fee. From 1 September 2006, the counter-plaintiff's termination fee went down at the behest of, and owing to intervention by, the Post and Telecom Administration. The price difference has therefore not been negative since that time. However, it must be borne in mind that other costs, such as connection charges for phone calls and normal profit margins on services, have not been taken into account. Thus, an unlawful margin squeeze was still being applied by the counter-plaintiff during the period referred to.

Article 11 of the Competition Act is based on Article 54 EEA. When interpreting the provisions of the Competition Act, it is therefore appropriate to take account of the EEA Agreement regarding competition law. Under Article 3 of Act No. 2/1993, the court is under an obligation to interpret legislation and regulations in accordance with the EEA Agreement and legislation based thereon, to the extent appropriate. It follows from Article 6 EEA and also the second paragraph of Article 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice that the case-law precedents of the Court of Justice of the European Union (ECJ) are to be taken into account when provisions of the Treaty on the Functioning of the European Union (TFEU) are substantively identical to those of EEA rules. Article 54 EEA is substantively identical to Article 102 TFEU. Thus, when interpreting Article 11 of the Competition Act and assessing the compensatory liability of an undertaking in a dominant market position resulting from violations of that provision, the case-law of the ECJ must be taken into account, to the extent appropriate.

The principal plaintiff argues that the counter-plaintiff's violation of the Competition Act is extremely serious and of a nature to create substantial obstacles to competition. It must be borne in mind that the counter-plaintiff was in a very strong position on the market during the period under discussion. It had a market share of about 74% of the total telecom market. Taking individual market segments, it had, for example, 100% of the telecommunications network market. As was noted in the Competition Authority's decision, the counter-plaintiff was in a vastly superior position to all its competitors. It had succeeded repeatedly, in the period 1998-2002, in driving all its competitors off the market. Besides having a substantial market share in all areas, the counter-plaintiff had long and extensive experience of

telecommunications and was in a greatly superior position, compared with its competitors, in terms of the services it offered.

The principal plaintiff points out that the counter-plaintiff set its termination rates in such a way as to attempt to reduce the principal plaintiff's share, and therefore its contribution margin, on the retail market. The principal plaintiff therefore experienced difficulty in growing and competing effectively on the market. During the period from 2001 to 2007, the principal plaintiff paid an unnaturally high price for the termination of phone calls to the counter-plaintiff. The margin squeeze applied by the counter-plaintiff could be seen, for example, in the fact that if the same retail pricing of the termination of phone calls between mobile phone networks had applied to the counter-plaintiff's retail operations, regarding phone calls within its system, then its earnings from phone calls within its system would not have paid its costs.

It is clear that the measures taken by the counter-plaintiff were organised and were applied deliberately in order to attempt to prevent the principal plaintiff and its predecessors from entering the market. Thus, it is clear that the lowering by the counter-plaintiff of its rate per minute for phone calls within its system first occurred after the competition authorities came to the conclusion that the counter-plaintiff's special discount on the mobile phone market was unlawful. In Case No. 17/1999, the counter-plaintiff declared that the earnings from its mobile phone services and the number of users of these services were already far in excess of projections, with the result that the cost of building up its system, which had gone ahead in the sheltered environment of a monopoly licence, had already been recovered. For this reason already, there was no objective argument in favour of pricing wholesale supplies to its competitors in the way that the counter-plaintiff did at the same time as the price of calls within its system was substantially reduced.

The principal plaintiff argues that it must at least have been clear to the counter-plaintiff in 2002 that the market for the termination of calls within its own mobile phone network constituted a special market on which it enjoyed a dominant position (*cf.* Decision No. 20/2002). Thus, the requirements for the application of the *culpa* rule to the case are met.

The counter-plaintiff's mobile phone service delivered very good operational results during the period in question. When assessing a margin squeeze, the starting point must be the price at which the counter-plaintiff, as an undertaking in a dominant market position, sold its wholesale supplies to its competitors. Furthermore, it is necessary to examine what significance it would have had for the counter-plaintiff's retail operations if it had had to pay the same price as its competitors paid for their wholesale supplies. As is discussed in detail in Decision No.

7/2012, if the counter-plaintiff's retail division had had to pay the same termination rates as its competitors paid, then its mobile-phone service would have run at a loss. The principal plaintiff considers that the counter-plaintiff tried, by means of the measures it took, to put pressure on its (the principal plaintiff's) operational basis in such a way as to render its operations unprofitable.

The principal plaintiff points out that the counter-plaintiff's pricing during the period under examination was considerably above the undertaking's costs. The discrepancy gave the counter-plaintiff a substantial competitive gain and advantage. Thanks to this gain, it was able to offer its customers far lower rates for calls within its system. This subsidy then meant in turn that it would have been impossible for the principal plaintiff to respond to competition if it had paid the additional cost that it faced due to the high termination rates. Thus, it bore the loss without compensation, as it was impossible for it to maintain prices that were competitive with those of the counter-plaintiff when it tried to enter the market on which the counter-plaintiff had been the sole operator under a monopoly. The principal plaintiff was obliged to purchase termination of calls in the counter-plaintiff's mobile phone network in order to be able to operate on the market.

The principal plaintiff also points out that when telephone calls to other telecommunications networks are priced high by an undertaking in a dominant position on the market, with a high initiation fee as compared with the actual cost, then users will tend to reduce the length and number of such calls. Obviously, this trend reduces earnings, and undermines the operational base for smaller telecoms in view of their lower termination rates. Thus, the counter-plaintiff's pricing, which violated Article 11 of the Competition Act, was intended to reduce the number and length of the calls that ended in its competitors' networks and so reduce the competition from other mobile phone networks. The principal plaintiff was forced to price phone calls within its own network far lower, with a view to attracting customers and having a chance of operating on the market in question. It is clear, that the competitive premises on the mobile phone market were difficult for new parties. Several undertakings attempted to compete with the counter-plaintiff. The principal plaintiff had a very difficult struggle during a period of turmoil and change which resulted in the merger of Tal and Íslandssími.

The principal plaintiff notes that the competition authorities came to the conclusion that the counter-plaintiff applied a margin squeeze to its competitors, which constituted a violation of Article 11 of the Competition Act. By entering into a settlement with the Competition

Authority, the counter-plaintiff confirmed that this was a final conclusion in the matter. Thus, the conditions for applying the *culpa* rule to an unlawful activity are met.

The principal plaintiff also bases its claim on the view that Iceland's obligations under EEA law entail that all those who incur loss or damage as a result of violations of Article 54 EEA are to be guaranteed compensation. The competition authorities have confirmed a violation of Article 54 EEA, which was incorporated in Icelandic law by Act No. 2/1993. Furthermore, under Article 3 of the same Act, legislation and regulations are to be interpreted, as appropriate, in conformity with the EEA Agreement and rules based thereon. When interpreting the EEA Agreement, the relevant rulings of the ECJ concluded prior to the date of signature of the Agreement are to be taken into account; this also follows from Article 3.

In the *Courage* ruling, the ECJ concluded that the substantive effects of the prohibitory provisions of the TFEU would be jeopardised if natural and legal persons were unable to seek compensation before domestic courts for losses resulting from violations of those provisions. Thus, the Court considered that legal actions brought to claim compensation following violations of competition rules were therefore likely to promote effective competition on the internal market. Even though procedure in such compensation cases was to be in accordance with domestic law, such rules should not be of such a nature as to render it abnormally difficult for the injured party to seek such compensation; otherwise the principle of effective application of EU law would be jeopardised.

The principal plaintiff argues that when the *culpa* rule is applied in cases where compensation is sought for the abuse of a dominant market position, whether this is viewed under Article 11 of the Competition Act or Article 54 EEA, the aforementioned principle of effective implementation of the rules of the EEA Agreement must be taken into consideration. Thus, the conditions of the *culpa* rule may not result in it becoming needlessly difficult or impossible, in practice, to obtain compensation for loss of damage resulting from such conduct.

During the period under examination, the counter-plaintiff's termination rates lay in the range ISK 12 to ISK 7.85. During the greater part of the period, the counter-plaintiff's termination rates were higher than the retail price of phone calls within its own system. The principal plaintiff argues that its loss is at least equivalent to the difference between 'normal' termination rates and those that were charged by the counter-plaintiff. The loss may, however, have been far greater, e.g. if lost profits, reduced business, etc., are also taken into account. As a simplification, the claim is limited to the actual difference between the termination rates charged and a normal price for wholesale supply based on the counter-plaintiff's retail price

within its own system. When assessing a normal wholesale price, it is assumed that the difference between the wholesale and retail price should have been at least 25% at any given time. By way of comparison, it is pointed out that the difference between the principal plaintiff's termination rate on 1 September 2013 and the average retail rate for calls per minute was 80%, i.e., the termination rate was ISK 4 per minute, while the average rate per minute for phone calls was ISK 19.9. Furthermore, it is right to bear in mind that the retail price is intended to correspond to both the initiation cost and the termination cost of the calls. It could be argued, that the difference between the termination rate and the retail price should be even greater than 25%, as the wholesale price does not include the initiation cost of the phone calls.

The principal plaintiff takes the view that a normal termination rate can never be greater than 75% of the retail price (the 'retail minus' method). During part of the period in which the violations took place, on the other hand, the termination rate was well over 100% of the principal plaintiff's retail price. In this context it should be borne in mind that at present, the counter-plaintiff's termination rate is 20% of the retail price, i.e. ISK 4 per minute. A 'normal' payment for terminating a phone call could be, at the most, the counter-plaintiff's retail price minus 25%. The calculations presented by the principal plaintiff in the case are based on these premises. The principal plaintiff employs the same methodology as the counter-plaintiff in calculating the cost of phone calls within the counter-plaintiff's [system].

The principal plaintiff says it is difficult to see how prices would have developed if there had been normal competitive conditions on the market. The principal plaintiff considers that it has been demonstrated that the undertaking did not pay a normal price for the termination of phone calls in the years 2001-2007. It points out that case-law shows a certain relaxation regarding the requirements made of injured parties regarding the burden of proof when demonstrating loss, and regarding the methods used by injured parties when demonstrating the extent of loss and proof in support of compensation claims. It is argued that it would be contrary to the fundamental principles of tort law if the tortfeasor were to benefit because the injured party is not able to demonstrate what the rate on a competitive market would have been without the collusion and violations which the tortfeasor itself established and maintained. The Competition Authority's Decision No. 7/2012 and Ruling No. 1/2012 by the Competition Appeals Committee constitute a legally valid proof of a serious violation of Article 11 of the Competition Act. Under these circumstances, the burden of proof in tort cases should be reversed so that the tortfeasor is required to demonstrate that the injured party's financial loss cannot be attributed to unlawful conduct on the part of the tortfeasor; if the injured party fails

to demonstrate the extent of its financial loss, the tortfeasor must demonstrate that there is no causal connection between the injured party's financial loss and the tortfeasor's conduct and that the injured party's loss is not likely to have been in consequence of the tortfeasor's violation of the Competition Act.

The principal plaintiff considers that its claim has not expired; under Article 4 of the Expiry of Debts and other Claim Rights Act, No. 14/1905, compensation claims expire after 10 years. The current Expiry of Claim Rights Act, No. 150/2007 applies, under Article 28 of the Act, only to claims that were established after 1 January 2008. All the principal plaintiff's claims therefore come under Act No. 14/1905. Its compensation claim was not established until the counter-plaintiff ceased its unlawful conduct. The loss event on which the principal plaintiff's compensation claim is based only came to an end at the end of 2007, according to the decision by the Competition Authority and the ruling by the Competition Appeals Committee. The violations were continuous, or may be regarded as having constituted a situation of violation, and therefore the violation cannot be considered as having ended until the unlawful situation ceased to obtain. The beginning of the expiry period therefore runs from that time, i.e. from 31 December 2007. If the court does not accept the above argument, then the principal plaintiff argues that the period for calculating the expiry date of the compensation claim did not begin until it was possible to seek payment of the claim. Under the first paragraph of Article 5 of Act No. 14/1905, the period over which a compensation claim lapses (expires) does not begin until it is possible to seek payment of the claim. The principal plaintiff's claim could not be pressed in this sense until it had received the necessary information regarding its loss and the party responsible. At the earliest, this did not happen until after the Competition Authority's decision was made known on 3 April 2012.

If the court does not accept the principal plaintiff's calculation of its loss, then it demands, in the alternative, compensation as assessed by the court. Courts have on numerous occasions awarded compensation which they assess themselves when no accurate figure for the extent of loss or damage is regarded as established. In addition, the principal plaintiff reserves the right to have assessors appointed by the court, as it requested during the hearing of the case, as has been described above.

Counter-plaintiff's primary grounds for action in the principal action

The counter-plaintiff's demand for an acquittal is based, firstly, on the argument that the conditions for compensatory liability are not fulfilled. Secondly, it submits that the principal

plaintiff did not incur loss. Thirdly, it argues that the principal plaintiff's claim has lapsed due to failure to exercise it, and, fourthly and finally, it argues that the claim has, at least in part, expired due to limitation.

The counter-plaintiff considers that the conditions for compensatory liability are not fulfilled because no violation of Article 11 of the Compensation Act took place, nothing of a culpable nature was committed, there is no causal relationship between its conduct and the alleged loss, the alleged loss is not the consequence of its conduct and the interests of the principal plaintiff are not protected by Article 11 of the Competition Act.

The counter-plaintiff rejects the basic premises on which the principal plaintiff bases its case, i.e., that it is sufficient for one party in a private-law action to refer, in support of its claim, solely to a government authority's decision in another branch of law and take the matter no further. It argues that a government authority's conclusion regarding an entity's violation of the Competition Act does not constitute a sufficient basis for regarding conduct entailing liability towards a third party as being demonstrated. Naturally, there is no discussion of the conditions for compensatory liability in decisions taken by the of authorities. Thus, the question of conditions for compensatory liability is seriously neglected in the writ of summons and there is reason to examine whether the writ of summons meets the requirements of Article 80 of the Code of Civil Procedure, No. 91/1991.

The counter-plaintiff considers that no violation of Article 11 of the Competition Act took place. It says it was under no obligation to demand the annulment of the Competition Appeals Committee's ruling by the courts. It argues that the Competition Appeals Committee's conclusion on the matter is not beyond dispute. It is absurd, to maintain that the decision not to challenge an administrative decision before the courts implies that the party recognises the legitimacy of that decision. In fact, there may be many reasons for not challenging such a decision before the courts. It argues that administrative decisions only have a legal effect on relations between the parties and the government authority, and not on a private action in law between two legal persons (*cf. a contrario* Article 116 of Act No. 91/1991). Thus, the court must adopt a position on the legitimacy of the resolutions by the authorities in a private action between two legal persons; no judgment has previously been delivered on the legitimacy of these resolutions.

The counter-plaintiff considers that an incorrect conclusion was reached when it was stated that it had abused its dominant market position and thus violated Article 11 of the Competition Act and Article 54 EEA. It argues that the conclusions reached by the competition

authorities are seriously flawed in a substantive manner, as the substantive assessment on which they are based is not in conformity with the correct interpretation of the legal provisions as these should be interpreted in the light of legal interpretative materials and valid case-law.

The counter-plaintiff says it has been regarded as having applied ‘an unlawful margin squeeze,’ which is what is involved when an undertaking that is in a dominant market position at the wholesale level and sells its competitors supplies that are necessary for their operations prices its services in such a way that an equally efficient competitor is not able to compete with the undertaking on the retail market. The counter-plaintiff argues that its pricing during the period of the alleged violations did not fall under this substance in the provision and that, in fact, this assessment was not employed in the administrative resolutions which are in dispute in this case, even though it is said to have been used as a basis. In any event, it argues, the assessment is wrongly used. It argues that the methodology applied by the Competition Authority in its assessment consisted of taking, on the one hand, the setting of the counter-plaintiff’s termination rates, and regarding this as constituting the wholesale service in the case, and on the other, its pricing to its own customers of phone calls within its own system, which was regarded as constituting the retail service in the case. It says the Competition Authority came to the conclusion that because of the setting of the counter-plaintiff’s termination rates, an equally efficient competitor could not price its phone calls between systems to the counter-plaintiff’s mobile phone network in a similar way to phone calls within its [the counter-plaintiff’s] system without making a loss. It seems, that this methodology formed the basis of the ruling by the Competition Appeals Committee. There, it is stated as a fact that this resulted in competitors’ being placed in a ‘rather hopeless position’ on that part of the market that covered ‘the actual phone calls.’ This assertion is simply incorrect, substantively, in consequence of which the competition authorities applied a fundamentally flawed methodology in their decision.

The counter-plaintiff says that the retail market in this case was defined as the market for the GSM mobile-phone service. On this market, the counter-plaintiff says, it was in competition with its competitors. It says no party operating on the market offers only one circumscribed service such as phone calls within its system. Even if only the actual phone calls are considered, and other service aspects of the GSM mobile-phone service are ignored, it says, these may be divided into two groups. In the one are phone calls between systems, i.e., when a customer makes a call to a customer of another telecom; in the other are phone calls within the system, i.e., when a customer calls a customer of the same company. In order to offer phone

calls between systems, telecoms must pay their competitors termination rates. This applies equally to both parties in this case and also to other competitors. Thus, termination can be viewed as a wholesale supply product used in phone calls between systems. However, no termination is involved in phone calls within the same system; it is included in the linking of mobile-phone networks. Thus, termination is not a wholesale supply product used in phone calls within the same system. Nevertheless, termination may be regarded as a wholesale supply product used in the GSM mobile-phone service, as it is necessary in order to offer one aspect of services on that market.

There is a fundamental flaw in the decision by the competition authorities in that this one type of wholesale supply product, termination, is taken and then competitors' pricing of phone calls between systems, which involve the use of this product, is compared with the counter-plaintiff's pricing of calls within its system, which do not involve the use of this product. It argues that this completely ignores the other type of 'the actual phone calls,' i.e., the counter-plaintiff's phone calls from one system to another, which involve the use of the wholesale product, termination, which is purchased by competitors, and calls within competitors' systems, which do not involve the use of the supply product. In other words, two dissimilar service aspects are taken out of the context of the defined market and compared. Using this methodology means that the substantive assessment which the Competition Authority itself used, and which is generally acknowledged, i.e., to examine whether an equally efficient competitor is able to compete on the service market as it is defined in the case, is ignored. Instead, the examination has concentrated solely on whether competitors were able to compete with the counter-plaintiff's phone calls within its own system, one aspect of the service market, with their phone calls between systems, another aspect of it. This flawed methodology, argues the counter-plaintiff, resulted in an incorrect substantive conclusion.

Had the correct, and recognised, methodology been applied, it would have led to a completely different conclusion and shown that an equally efficient competitor would demonstrably have been able to compete with the counter-plaintiff during the period, as was clearly borne out by the actual developments on the market. Thus, the counter-plaintiff paid the principal plaintiff nearly ISK 2.6 billion more in termination rates during the period than the principal plaintiff paid the counter-plaintiff. Also, the principal plaintiff's operations yielded a high contribution margin throughout the period of the alleged violations, with EBITDA averaging 26.6%. A contribution margin of this order is simply not possible, theoretically, at an undertaking that is under an unlawful margin squeeze at the same time.

The counter-plaintiff considers this methodology to be the correct way to apply Article 11 of the Competition Act and Article 54 EEA, as they are to be interpreted with reference to Article 102 TFEU. It argues that this methodology is recognised in practice. It says the Competition Authority rejected the above arguments, chiefly on the grounds that the ECJ rejected comparable arguments in *Deutsche Telekom*, Case C-208/08. On the contrary, the counter-plaintiff considers that the conclusion in that case supports its arguments. The circumstances in the present case are precisely of the type which the court said were not available to support a conclusion in that case and which otherwise could have changed the outcome. Thus, it is not disputed in this case that both phone calls within a system and phone calls between systems belong to the same market, the market for GSM services. Only by examining the circumstances and taking account of all the earnings and costs on the defined market is it possible to assess whether an unlawful margin squeeze was involved. In the same way, it has been established that the counter-plaintiff, like its competitors, needed access to their wholesale supplies in order to be able to offer a service on this same market. Thus, the parties were in fact on an equal footing in the way referred to by the court, and actually the situation even favoured its competitors, as they enjoyed a considerable competitive advantage, both in the form of higher termination rates and in the form of higher payments made by the counter-plaintiff to them than the payments they made to the counter-plaintiff, throughout the period of the alleged violations. The counter-plaintiff considers that the conclusion that must be drawn from the aforementioned judgment is that it was not guilty of having applied an unlawful margin squeeze.

Furthermore, the counter-plaintiff considers that the methodology applied by the competition authorities failed to take account of the difference in nature that exists between a situation when, on the one hand, one undertaking is in a dominant position on a wholesale market and sells supplies to its competitors, as is assumed in the methodology used in assessing unlawful margin squeezes and, on the other, the situation on the market for mobile phone services. This fundamental difference consists in the fact that on the Icelandic market for mobile phone services during the period of the alleged violations, both, or, as appropriate, all, the competitors were in dominant market positions on the wholesale market in their own telecommunications networks and sold each other supplies which the opposite party used in its services on the retail market, the GSM mobile phone service. The counter-plaintiff points out that nothing is said about this fundamental difference in the resolutions by the competition authorities.

During the entire period of the alleged violations, the principal plaintiff's termination rates and those of other competitors were higher than the termination rates of the counter-plaintiff. It follows from this that the counter-plaintiff had to pay a higher price for the wholesale supply item, termination, than did its competitors. Its costs for acquiring these supplies were higher than those of its competitors, in addition to which they received higher earnings than it did from these rates. Thus, the difference between the parties to the case was nearly ISK 2.6 billion during this period. The counter-plaintiff says it cannot see how it is possible to maintain that under circumstances like these, an equally efficient competitor is unable to compete with it. It is obvious, that no violation of Article 11 of the Competition Act took place.

The communication from the EFTA Surveillance Authority, which the Competition Authority submitted to the Competition Appeals Committee, supports this stance. It is stated clearly in paragraph 16 of the communication that the fact that the counter-plaintiff needed access to the networks of its competitors, and paid them termination fees, is a point that must be taken into consideration when assessing whether an unlawful margin squeeze took place. This was not done in the decisions by the competition authorities. Next, it is maintained, in fact, that it is unlikely that new parties on the market could set their termination rates in such a way as to enable them to compete with the principal plaintiff. The circumstances could have been different if the supervisory authorities had set a ceiling on the counter-plaintiff's termination rates that was appreciably lower than the rates that the new parties were able to charge. The fact is that in this case, the only conclusion to be drawn is that the EFTA Surveillance Authority is in agreement with the counter-plaintiff.

The counter-plaintiff also points out that during the period of the alleged violations, its competitors' share of the mobile phone market grew from about 30% in 2001 to 40-45% near the end of the period. In the same way, the principal plaintiff's business went well, producing a substantial contribution margin every year.

The counter-plaintiff notes that the assessment of whether an unlawful margin squeeze was applied at the wholesale and retail level is determined by whether an equally efficient competitor is unable to compete with the dominant market player on the retail market. It is asserted in the ruling by the Competition Appeals Committee, that competitors were placed in a 'rather hopeless position.' The counter-plaintiff argues that all the foregoing shows, unequivocally, that an equally efficient competitor was able to compete with its pricing, and in fact did so in a successful manner. Thus, this basic premise in the appeals committee's ruling is incorrect. It points out that the competition authorities' resolutions do not take account of

what actually happened on the market in making their assessment. A growth in market share together with profit is simply not possible for a competitor of an undertaking that applies an unlawful margin squeeze. It follows from this, that it must be regarded as established beyond all doubt that it did not apply an unlawful margin squeeze.

The counter-plaintiff argues that the methodology adopted by the competition authorities, involving an examination of whether the counter-plaintiff's retail operations would have resulted in profits on sales of phone calls within its system if it had paid its own termination rates, was intended to be in conformity with the methodology adopted by the European Commission and the ECJ. However, there is the fundamental difference that no 'termination', in the sense of telecommunications law, takes place in calls within a system. It is therefore untenable, to work on the premise that its retail operations should bear the costs of operational supplies that it does not use.

In a nutshell, conditions on the market may be described as having been that there were two undertakings in operation during the period of the alleged violations: the counter-plaintiff and the principal plaintiff. They competed with each other on the GSM mobile phone service market. Their customers on this market were able to make phone calls both within their own systems and between their systems. Various costs were involved in these services, including termination fees. The principal plaintiff had to pay the counter-plaintiff termination fees for phone calls between systems to its system, and the counter-plaintiff had to pay the principal plaintiff termination fees for phone calls by its customers to the principal plaintiff's system. One consequence of this was that the pricing by both undertakings of phone calls within their own systems was lower than that of calls between their systems. However, neither the principal plaintiff nor the counter-plaintiff had to pay termination fees on calls within their own systems, as no termination takes place in them. Thus, the counter-plaintiff's mobile phone network did not give it any special advantage over the principal plaintiff's mobile phone network, as both parties needed access to each other's mobile phone networks. On the contrary; the principal plaintiff had a considerable competitive advantage in the form of its having the possibility of demanding far higher termination fees from the counter-plaintiff than the counter-plaintiff could demand from it. Furthermore, the principal plaintiff offered lower prices on the retail market than the counter-plaintiff for calls within its system during all of the period in question.

It has been specifically recognised in this case that two explanatory alternatives, which led to opposite conclusions, were available for answering the question of whether or not a violation had been committed. As there was substantial doubt as to whether a violation of the

Competition Act by the counter-plaintiff had taken place, the alternative involving less encumbrance for the counter-plaintiff ought to have been chosen (*cf.* the fundamental principles of administrative law).

At no stage of the proceedings, have either the competition authorities or the principal plaintiff explained in a satisfactory manner how the counter-plaintiff's conduct obstructed competition or was, from an objective point of view, of such a nature as to do so. Thus, it has not been demonstrated that any unlawful margin squeeze was involved. The counter-plaintiff's pricing during the years 2001-2007 was, not of such a manner, when viewed objectively, as to have a damaging effect on competition on the market for GSM mobile phone services.

If, for some reason, the court accepts the view that the counter-plaintiff's pricing could, when viewed objectively, have constituted an unlawful margin squeeze, then the counter-plaintiff argues that it was justified in terms of its authorisation to respond to competition. The right to respond to competition is an objective ground for justification which is recognised in competition law. Thus, pricing which would otherwise be considered unlawful may be considered lawful if it is part of a response to competition. The counter-plaintiff points out that this argument is not mentioned in the Competition Appeals Committee's ruling. In the Competition Authority's decision, on the other hand, it is rejected by means of what might be called a circular argument; the decision states that an unlawful margin squeeze took place and for that reason, the conduct could not be regarded as a natural response to competition. This argument does not stand up to examination, since according to it, there is no objective basis for justification, yet it is also stated in the same decision that such a justification does exist in Icelandic law. By its nature, the ground for justification that authorises dominant undertakings on the market to respond to competition assumes precisely that under certain circumstances, the undertakings in question may take measures on the market which, viewed objectively, involve violations of Article 11 of the Competition Act. However, the counter-plaintiff concedes, the authorisation that dominant market players have to respond to competition is certainly subject to conditions. Thus, the response measures must be moderate, be based on economic performance and be in conformity with the interests of consumers. They must conform to the principle of proportionality and are not appropriate if their real purpose is to reinforce and abuse a dominant market position.

The counter-plaintiff argues that its pricing was fully in conformity with the considerations mentioned above. Thus, its response measures were in conformity with the principle of proportionality, and in fact they would have been permitted to go further than they

did. The measures were based on economic performance, since the service continued to be sold, as it had been previously, above cost price. The measures were taken in good faith in order to respond to competition and defend the company's position, and not to put pressure on its competitor's customers. They were in conformity with consumers' interests, as prices were reduced. In fact, it must be said that the conclusion reached by the competition authorities caused consumers far more damage, as it excluded the possibility that undertakings on the defined market could offer services designed to meet consumers' needs, i.e. to pay lower rates for phone calls within a system than for other aspects of services on the same market. Furthermore, nothing has been submitted to show that the real aim of the measures was anything other than normal price competition. It is scarcely possible to deny, that it was in good faith in believing that it was responding to competition by authorised means, as it complied entirely with decisions by the PTA (Post and Telecom Administration) on termination rates.

The counter-plaintiff argues that the calculations on which the Competition Authority's conclusion was based, and which were not specifically rejected in the ruling by the Competition Appeals Committee, were based on the wrong premises and consequently led to a substantively incorrect conclusion. The Competition Authority's conclusion was, in its fundamentals, based on the view that in the period from 1 May 2001 to 1 September 2006, the termination rate for each minute was higher than the retail price of a phone call within the system, and that during the period from that time to the end of 2007 it was such that an equally efficient competitor was unable to compete. This means that if the retail operations of the plaintiff had had to bear the cost of termination fees on phone calls within its system, then each phone call within the system would have been retailed at a loss. This does not take account of its actual earnings on average phone calls in retail and therefore results in a substantively incorrect solution. Furthermore, no proper account is taken of the average monthly fee which the counter-plaintiff charged its customers, in which the expenses involved were greater than the earnings. In the light of the foregoing, the outcome is that it was wrongly assumed as a premise in the competition authorities' resolutions that phone calls within its system would have resulted in a loss for the counter-plaintiff if it had had to bear the costs of its own termination fees.

The counter-plaintiff considers that even if its conduct is regarded as having violated Article 11 of the Competition Act, it was not culpable in the sense of the general *culpa* rule in tort law. It completely rejects as incorrect and unproven that an official decision establishing unlawfulness means that the conditions of the *culpa* rule are met. On the contrary, it is necessary to assess in each individual case whether the conditions are met. The counter-plaintiff argues

that they are not met in this case. The general rules of tort law apply in full in cases that arise due to alleged violations of competition legislation. The legislator has not made any concessions regarding the burden of proof in such cases. Thus, the injured party bears the burden of proving that tortious activity, involving liability, took place. It must demonstrate the occurrence of culpable and unlawful conduct, and that it caused loss or damage, that the loss or damage is the probable consequence of the conduct and that the conduct interfered with interests that are protected under the rules of tort law.

In the writ of summons, it is argued that the immediate aim of its pricing was to prevent the principal plaintiff and its predecessors from entering the market. This assertion is based solely on the competition authorities' having come to the conclusion that the counter-plaintiff had been found to have engaged in unlawful conduct and that it should have been clear to the counter-plaintiff, by 2002 at the latest, that it had a dominant position on a special market for the termination of phone calls in its own system, and that in consequence of this, the conditions of the *culpa* rule regarding culpability were also met. The counter-plaintiff dismisses this completely, as it has no basis in the evidence in the case. It argues that the aim of its conduct was completely lawful: to compete on a market for business that yielded a contribution margin, in addition to which it was responding to an attack by the principal plaintiff on its undertaking. In this, nothing more than healthy price competition was involved; in the circumstances on the market at the time, the counter-plaintiff would have been completely non-competitive if its retail price alone had had to be based on its wholesale termination rate. It argues that it is a fundamental misunderstanding to claim that the conditions for culpability of an action are automatically met. The parties to this case were in competition with each other. The aim and nature of competition is to do better than one's competitor. This inevitably involves upsetting the interests of one's competitor, as entities in competition with each other obviously cannot attend to each other's interests.

The counter-plaintiff says it is argued in the writ of summons that the principal plaintiff could not be expected to have been aware of its loss before it received information about it, which was, at the earliest, following the Competition Authority's decision of 3 April 2012. During the period of the alleged violations, it had all the same information that the counter-plaintiff had regarding the counter-plaintiff's pricing which is under discussion. That the principal plaintiff could not be expected to have known of the alleged unlawfulness and culpability, as well as the alleged loss, is explained by the counter-plaintiff's having been in good faith regarding the lawfulness of its pricing. Thus, the parties seem to be in agreement that

the circumstances gave no reason to believe that any tortious activity was involved. In this, the principal plaintiff acknowledges precisely that the condition for culpability of the action was not met, as the parties could not have been expected to be aware of the alleged tortious activity until long after the end of the period of the alleged violations.

The counter-plaintiff does not consider that there was any causal connection between its conduct and the alleged loss or damage suffered by the principal plaintiff. In any event, no such connection has been demonstrated in the case. When assessing causal connections, it is necessary to compare the course of events that took place, including the alleged unlawful conduct, and the course of events that would have taken place otherwise. The counter-plaintiff says it is completely uncertain, based on the premises adopted by the Competition Appeals Committee, how the counter-plaintiff would have structured its pricing or how it would have conducted itself in other respects. Since the fundamental premise for the alleged loss is subject to such uncertainty and the principal plaintiff adopts no significant position on it in the writ of summons, the only course of action is to acquit the counter-plaintiff.

In the writ of summons, there is only information about its wholesale termination rates, which are compared with its retail price for phone calls within its system. The principal plaintiff then asserts, that the difference between the two, plus 25%, represents its loss resulting from payment of allegedly over-priced termination rates that may be traced to the counter-plaintiff's alleged violations in the case. Thus, the principal plaintiff has not in any way adopted a position on its own operations or what direction developments might otherwise have taken on the market, including changes in retail pricing reflecting changing conditions. The principal plaintiff has no right to calculate its loss in the way it has done, as it is clear that many factors must be examined when estimating how circumstances might have changed if the alleged unlawful conduct had not gone ahead.

There is nothing to support the principal plaintiff's assertions that its losses may be attributed to the alleged violation by the counter-plaintiff of the Competition Act. When a comprehensive assessment is made of the consequences of the counter-plaintiff's actions during the period in question, it is found that on the relevant market, the market for GSM mobile phone services, the principal plaintiff's market share grew. Furthermore, it is also found that the principal plaintiff profited considerably more than did the counter-plaintiff on the pricing of its termination fees. In any event, the principal plaintiff's profits should be taken into account when its overall losses are assessed.

The principal plaintiff's alleged loss is described in such a way as having resulted from a violation that was completely different from a margin squeeze, though without this violation being defined. A violation involving a margin squeeze, by itself, could not be the direct cause of the wholesale price's having been too high, as a margin squeeze consists of the interplay of how a retail product is priced, drawing on the wholesale product and the wholesale pricing of that product. The relationship between these two is crucial, and not the pricing of wholesale supplies, alone and in isolation, which the principal plaintiff's claim is based on. In any event, the counter-plaintiff says it has not been demonstrated that its pricing during the period 2001-2007 had damaging effects of any kind on the principal plaintiff and caused it a loss. Moreover, the principal plaintiff's alleged loss was not a probable consequence of the counter-plaintiff's alleged violation. In particular, attention must be given to the fact that the counter-plaintiff had been completely unable to foresee that its conduct constituted a violation of Article 11 of the Competition Act, and consequently that it would result in loss for the principal plaintiff.

All telecoms had the opportunity of entering into comparable agreements, notes the counter-plaintiff, and in fact did so. In the writ of summons it is asserted that with the PTA's Decision, No. 20/2002, it should have been clear to the counter-plaintiff that the market for the termination of phone calls in one's own mobile phone network constituted a special separate market. From this it follows, that it must have been clear to all undertakings on the GSM mobile phone market that they were in a 100% dominant position on the market for the termination of phone calls in their own systems. Thus, the counter-plaintiff could not have had any reason to believe that its pricing was such as to cause damage or loss involving compensatory liability, while the same sort of pricing by its competitors did not do so.

The Competition Act is based on the fundamental premise that effective competition is in the consumer's interest in the long term. The aim of Article 11 of the Act is to protect effective competition, but not competitors. The protection of competitors is far from being among the objectives of the Competition Act. On the contrary, competitors should, generally speaking, fight each other without armour. Such a situation will bring benefit to consumers in the long term. Compensation to competitors for a violation of Article 11 of the Competition Act would not, in the counter-plaintiff's opinion, serve the aims of the Competition Act.

The counter-plaintiff argues that the principal plaintiff's loss has not been demonstrated, and that all the discussion in the writ of summons regarding this alleged loss is based solely on unilateral calculations by the principal plaintiff and on premises that it gives itself as a basis for those calculations. Such materials have no evidential value in Icelandic law and cannot be used

as the basis of a judgment. In fact, the discussion of the principal plaintiff's alleged loss is so substantially lacking as to make it difficult for the counter-plaintiff to present a satisfactory defence in the case. The principal plaintiff's calculations are not designed to calculate its loss. They are not in conformity with the recognised methods of tort law for assessing damage or loss, in which the actual course of events is compared with the course of events that would have taken place without the tortious action. The principal plaintiff bases its alleged loss solely and in isolation on a comparison between the counter-plaintiff's termination rates and its retail price, but it is not realistic to compare only these two items. In particular, the counter-plaintiff rejects the assertion that the difference between wholesale and retail prices should have been at least 25% at any given time.

The counter-plaintiff considers that the principal plaintiff did not suffer any actual loss. It argues that the principal plaintiff had sufficient room for manoeuvre to offer more attractive prices in all other parts of the retail market. Thus, for example, it set its termination fees in such a way as to derive earnings from them that were about one and a half billion ISK higher than those which the counter-plaintiff derived from its termination fees. In the writ of summons, no account is taken of this profit when the principal plaintiff's alleged loss is assessed. When this is done, however, then it becomes obvious that the measures taken by the counter-plaintiff did not have any competition-distorting effect on the market for GSM mobile phone services, and the principal plaintiff suffered no loss.

The counter-plaintiff argues that the regulatory framework of the EEA regarding termination rates is designed in order to facilitate the entry of new parties into the market by having rates unequal for a limited time. Thus, there is a certain positive discrimination in favour of the undertaking that is able to charge higher termination fees. The principal plaintiff enjoyed this advantage insofar as the PTA imposed an obligation on the counter-plaintiff to charge certain termination fees that were far lower than those that the principal plaintiff charged to the counter-plaintiff. This regulatory framework fully secured the principal plaintiff's interest, and amongst other things, it ensured that the principal plaintiff could not sustain loss or damage as a result of the conduct by its competitors that is under discussion here. This advantage, which manifested itself in the fact that the counter-plaintiff paid the principal plaintiff ISK 2.6 billion more, in termination fees, than it received from it during the period of the alleged violations, ensured that the principal plaintiff could at all times respond to price competition of this type in a profitable manner.

The counter-plaintiff considers that the principal plaintiff's entitlement to make its claim has lapsed due to his failure to exercise it. The alleged actions by the counter-plaintiff of entailing tortious liability began in 2001, more than 12 years prior to the issue of the writ of summons, and ended in 2007, more than six years prior to the issue of the writ of summons. Moreover, Tal hf., now the principal plaintiff, submitted a complaint to the competition authorities concerning comparable pricing by the counter-plaintiff on 21 March 2002 (*cf.* the Competition Authority's decisions in Cases Nos. 20/2002 and 40/2013). At that time, it would have been extremely easy for the principal plaintiff to demand compensation from the counter-plaintiff if it considered that the alleged unlawful conduct had caused it loss or damage. However, the counter-plaintiff points out, that the principal plaintiff first demanded compensation in its letter of 13 September 2013, more than 12 years after the beginning of the allegedly tortious conduct and more than 11 years after it itself declared that it considered the counter-plaintiff's pricing to be unlawful.

In addition, the counter-plaintiff considers that the claim has lapsed in part due to limitation. Thus, the period of limitation [expiry of enforceability; prescription] began to run when the alleged violations were committed in the period 2001-2007. More specifically, the period of limitation regarding individual payments during this period began to run when the payments were made, as it is in them that the principal plaintiff alleges that tortious actions were involved. At the latest, the commencement of the period of limitation must be based on the payment of each invoice, as the principal plaintiff maintains that each invoice, separately, was over-paid by a specific excess amount. The period of limitation was not broken until the service of the writ of summons on 31 October 2013.

The counter-plaintiff argues that the sanctions prescribed in the Competition Act should not be imposed as punishment. The only assessment possible is that the alleged violations were committed in full, and completed, when the principal plaintiff made each payment. Thus, each alleged violation was not continued in any way; what was involved was a series of constantly new alleged violations. The alleged compensation claims became open for payment when each allegedly excessive payment was made, since the general principle is that claims for compensation become due for payment as soon as the loss incident occurs. According to the foregoing, therefore, all claims based on allegedly excessive payments prior to 31 October 2003 have lapsed under Article 4 of Act No. 14/1905. Consequently, the principal plaintiff's demand in any event cannot be higher than ISK 670,457,360.

The counter-plaintiff’s reserve claim, for a substantial reduction of the demand imposed by the judgment, is for the most part based on the same reasons as its principal claim. In any event, the counter-plaintiff’s arguments support the view that the principal plaintiff’s claims should be substantially reduced.

Counter-plaintiff’s grounds for action in the counter-action

The counter-plaintiff’s demands in the counter-action are based on the view that if the court adopts the position that the principal plaintiff’s demands must be acceded to, then the counter-plaintiff has a claim against it that is equivalent to the claim before the court in the counter-action. If the court finds that the counter-plaintiff violated Article 11 of the Competition Act, No. 44/2005, and bears compensatory liability towards the principal plaintiff, then it is argued that the principal plaintiff similarly violated Article 11 of the same act and bears compensatory liability towards the counter-plaintiff. It is argued that the principal plaintiff’s violations took place in exactly the same way as the counter-plaintiff’s alleged violations and during the same period. The counter-plaintiff’s demand for compensation is raised on the same foundation, and can be traced to the same circumstances, as the principal plaintiff’s demand in the principal action.

A margin squeeze, denotes a situation where an undertaking that is in a dominant position on a wholesale market prices its services on the retail and wholesale market in such a way that there is so little difference between the two, or even a negative difference, that an equally efficient competitor is not able to compete on the retail market, since access to the system of the dominant player on the market is necessary to the competitor. The counter-plaintiff says the Competition Authority concluded that the counter-plaintiff ought to have its own retail price of phone calls within its system reflect the termination fees it charged to other telecoms. Its not having done this constituted an unlawful margin squeeze.

The counter-plaintiff says the competition authorities’ conclusion was based on the fact that it was in a dominant position on the wholesale market for the termination of phone calls in its own telephone system, where, in the nature of things, the company had a 100% market share, as was the case with all other telecoms. From this it follows, that other telecoms in Iceland, including the principal plaintiff, also abused their dominant market positions vis-à-vis the counter-plaintiff. Thus, the counter-plaintiff argues that the principal plaintiff was, and is, in a dominant position, in the sense of Article 11 of the Competition Act, No. 44/2005, on the

wholesale market for the termination of phone calls in its own GSM mobile phone network. The counter-plaintiff argues that the principal plaintiff ought to have been aware of this position right from the time when it is maintained in the principal action that the counter-plaintiff should have been aware of its position on the market under examination. The counter-plaintiff argues that when it comes to assessing whether an unlawful margin squeeze took place, it is of no significance whether an undertaking is also in a dominant position on the retail market. The circumstances of the counter-plaintiff and of the principal plaintiff were comparable in this respect.

The counter-plaintiff says that the principal plaintiff charged it a higher rate for the termination of calls in its system than it charged the principal plaintiff. At the same time, the principal plaintiff's pricing of calls, per minute, within its system was lower than that charged by the counter-plaintiff for calls within its system. Consequently, the counter-plaintiff argues that if the court concurs with the principal plaintiff that the counter-plaintiff abused its dominant position on the wholesale market for the termination of calls within its own phone system, by means of conduct that comes under the definition of a margin squeeze in the sense of competition law, then the principal plaintiff similarly abused its comparable dominant market position on the wholesale market by applying an unlawful margin squeeze to the counter-plaintiff on the retail market.

In addition, the counter-plaintiff argues that the principal plaintiff was under an obligation under Article 30 of the Telecommunications Act, No.81/2003, and under Article 25 of the older Telecommunications Act, to observe the principle of equality after it was named as an undertaking with a substantial market strength. Amongst other things, the undertaking was under an obligation not to discriminate, in its pricing, between its own departments, on the one hand, and competitors such as the counter-plaintiff, on the other (*cf.* the PTA's Decision of 12 April 2005). Based on the premises on which the principal plaintiff bases its case, and its pricing as described above during the period of the alleged violations, it is clear, that this pricing was in violation of the requirements that applied to the undertaking regarding equal treatment.

The counter-plaintiff says it believes it is not necessary that a decision be taken by a government organ, regarding particular conduct by an undertaking, in which an assessment is made as to whether or not it is compatible with the Competition Act, before an action for damages is instituted, based on loss or damage that results from the conduct. In support of this view, the counter-plaintiff refers to the Competition Authority's Decision No. 6/2013, the Judgment of the ECJ in Case C-453/99 and the announcement from the EFTA Surveillance

Authority of 2007 regarding its handling of complaints involving Articles 53 and 54 of the EEA Agreement. The counter-plaintiff points out that the principal plaintiff itself argues that, in the interpretation of the Icelandic Competition Act, the provisions of the EEA Agreement on competition law and, as appropriate, of Article 102 TFEU, together with the appropriate case-law of the ECJ, must be taken into account.

The counter-plaintiff points out that its demand is based on the *culpa* rule, like the principal plaintiff's demand in the principal action. If the court concurs with the principal plaintiff that the counter-plaintiff intentionally violated Article 11 of the Competition Act by the prices it charged it, then it must be clear, that the principal plaintiff violated Article 11 of the Competition Act by the pricing it charged to the counter-plaintiff. It argues that the principal plaintiff was as aware as was the counter-plaintiff of the decisions that were taken by the post and telecommunications authorities at this time. By some time during 2003 at the latest, the principal plaintiff ought to have been aware that it had enjoyed a dominant position on the market for the termination of phone calls within its own mobile phone system (*cf.* the PTA's Decision of 23 April 2003).

If the court accepts the way the principal plaintiff has calculated its loss, then it is right that the principal plaintiff bear, in a similar fashion, liability for the loss incurred by the counter-plaintiff which, calculated in this way, would amount at least to the difference between the termination fees charged by the principal plaintiff and 'normal' termination rates. A statement of the termination fees paid by the counter-plaintiff to the principal plaintiff between 1 January 2002 and 31 December 2007 is available. The counter-plaintiff bases its claim on the same sort of calculations as does the principal plaintiff. It points out that the principal plaintiff structured its pricing in exactly the same way towards the counter-plaintiff as it [the principal plaintiff] argues constitutes an unlawful margin squeeze with reference to the Competition Authority's Decision No. 7/2012 and Ruling No. 1/2012 by the Competition Appeals Committee.

The principal plaintiff argues that because the competition authorities found that the counter-plaintiff's conduct constituted a violation of Article 11 of the Competition Act, the burden of proof should be reversed so that the tortfeasor should be obliged to demonstrate that the injured party's financial loss cannot be attributed to the tortfeasor's culpable action. The counter-plaintiff considers this understanding by the principal plaintiff incorrect. In the unlikely event that the court concurs with this understanding on the part of the principal plaintiff, however, then this must also apply regarding the counter-plaintiff's loss.

The counter-plaintiff's reserve claim is based on the view that if the court considers that it must recognise the reserve claim in the principal action, then the counter-plaintiff's reserve claim must receive the same treatment. Even though the counter-plaintiff does not agree that the factors on which the principal plaintiff bases its reserve claim have the effect of restricting the definition of the loss, it is unavoidable, that it invoke the same premises. Thus, it is clear that the principal plaintiff's violation towards the counter-plaintiff was even more extensive than the counter-plaintiff's alleged 'gross' violation. The principal plaintiff's violations extended over an even longer period. Furthermore, the measures taken by the principal plaintiff went much further than those of the counter-plaintiff in the direction of preventing a competitor from having the opportunity to enjoy normal profits from its activities on the retail market, as the difference between wholesale and retail prices was far greater in the case of the principal plaintiff than that of the counter-plaintiff. In any event, the counter-plaintiff demands that the same premises be adopted when assessing its claims as when the principal plaintiff's claims in the principal action are assessed.

The counter-plaintiff's reserve claim is that the district court award it appropriate compensation at the court's discretion; nevertheless it reserves the right to obtain an assessment of its losses by court-appointed assessors. As has been stated above, this was done during the pleading of the case.

Principal plaintiff's grounds for action in the counter-action

The principal plaintiff's demand for an acquittal is based, firstly, on the argument that the conditions for compensatory liability are not fulfilled. Secondly, that the counter-plaintiff's alleged claim has lapsed due to its failure to exercise it, and thirdly that it has lapsed due to limitation (prescription).

The principal plaintiff points out that the counter-plaintiff's case is not based on any decision by the competition authorities as it was in the principal action. No complaint was lodged by the counter-plaintiff concerning alleged unlawful conduct on the part of the principal plaintiff. The counter-plaintiff's views in the counter-action were not expressed during the conduct of its case before the competition authorities. The principal plaintiff argues that even though it is not possible to demand that a decision shall have been taken by a government authority regarding specific conduct by an undertaking, in which an assessment is made of whether or not that conduct is contrary to the Competition Act, before a court action is brought

for compensation for loss or damage resulting from the conduct, other considerations apply to such an action than apply when such a decision has been taken. The principal plaintiff notes that the counter-plaintiff makes no attempt, in its counter-summons, to demonstrate that the principal plaintiff violated the Competition Act and caused it loss or damage. The counter-plaintiff refers only to the principal plaintiff's arguments in the principal action. The presentation of a case in this way possibly fails to meet the requirements of Article 80 of the Code of Civil Procedure, No. 91/1991. The difference between the parties, regarding the presentation of their cases, is that the principal plaintiff's presentation of its case is based on the incontrovertible conclusion of the Competition Authority and the Competition Appeals Committee, while the counter-plaintiff advances little or no arguments in support of its claim. The conclusion reached by the competition authorities, the principal plaintiff argues, was that the counter-plaintiff violated the Competition Act and was sentenced to pay a heavy fine. The counter-plaintiff did not refer the competition authorities' conclusion to a court of law, but accepted it as the final resolution of the matter, and paid a fine of ISK 390 million.

The principal plaintiff points out that in order for it to bear tortious liability for a loss, it must have caused that loss in a culpable or unlawful manner, and the loss must be the probable consequence of its conduct and interfere with interests that are protected under the principles of tort law. The counter-plaintiff argues that the principal plaintiff committed a violation by applying an unlawful margin squeeze at variance with Article 11 of the Competition Act. In order for the principal plaintiff's conduct to be regarded as unlawful, it must have been, on the one hand, in a dominant position on the market relevant to the case in the sense of indent 4 of the first paragraph of Article 4 of the Competition Act, while on the other it must have abused its position with the result that the conduct caused the counter-plaintiff loss or damage.

The principal plaintiff argues that it was not in a dominant position on the markets relevant to the case as these are defined in the conclusions of the Competition Authority and the Competition Appeals Committee. It argues that this would be an absolute requirement for identifying an unlawful margin squeeze from the point of view of competition. Immediately for this reason, the counter-plaintiff's demand for compensation cannot be entertained. Even if the markets relevant to the case are defined in some manner other than is done in the decision by the competition authorities, which in itself would be difficult to understand, i.e. if it were considered that the case concerned only the market for the termination of calls in a telecom's own mobile phone network, then the principal plaintiff argues that it was still not in a dominant market position in the sense of the Competition Act. And even if the view is taken that it was

in a dominant position on the market for the termination of calls in its own mobile phone network, then the principal plaintiff argues that it did not abuse that position by applying an unlawful margin squeeze.

There are four markets relevant to the case according to the conclusion reached by the competition authorities. The counter-plaintiff bases its demand for compensation on the view that it may be deduced from the competition authorities' conclusion that other telecoms in Iceland also abused their dominant market position vis-á-vis the counter-plaintiff, as they all had a 100% share of the market for the termination of phone calls in their own phone systems. The counter-plaintiff's argument is based entirely on the view that the market should be defined in this way when assessing what entities may be in a dominant position. In the counter-summons it is stated that the principal plaintiff was, and still is, in a dominant position, in the sense of Article 11 of the Competition Act, on the wholesale market for the termination of phone calls in its own GSM mobile phone network. Even though this is one of the counter-plaintiff's fundamental grounds for action, no further arguments are presented in the counter-summons as to why the view should be taken that a violation involving the application of an unlawful margin squeeze should affect only the market for the termination of phone calls in a telecom's own phone system. And as if it were not enough that no further reasoning is to be found in the counter-summons, this position of the counter-plaintiff's is opposed to the conclusion of the competition authorities, the counter-plaintiff's own pleading of its case at the administrative level and the general principles of competition law when it comes to defining a market when violations of Article 11 of the Competition Act are under examination.

The principal plaintiff points out that the counter-plaintiff does not mention the definition of the market referred to above in its deposition in the principal action, i.e. it maintains that there is only one market, and not four. On the contrary, it states specifically that a margin squeeze is what is involved when an undertaking at the wholesale level sells its competitors supplies that are necessary for their operations and prices its services in such a way that an equally efficient competitor is not able to compete with the undertaking on the retail market. The principal plaintiff says more markets relevant to the case should be examined than the one defined by the counter-plaintiff in the counter-summons. It argues that it is not possible to look only at the market for the termination of phone calls in a telecom's own phone system. A margin squeeze involves the pricing of termination in an undertaking's own mobile phone system being, when compared with the pricing by the undertaking in question at the retail level, of such a nature as to involve the abuse of a dominant market position.

The principal plaintiff argues that the counter-plaintiff misinterprets and twists the Competition Authority's wording. As the Competition Authority's conclusion is set forth, it is obvious that it did not only take the view that the counter-plaintiff was in a dominant position on the market for the termination of phone calls. That market was one of the markets involved, but as is stated above, more markets than this one were of significance for the conclusion. The margin squeeze affected not only the market for the termination of phone calls. It also affected another wholesale market, that for access and initiation of phone calls, and two separate markets at the retail level: the mobile phone and fixed-line phone markets.

Under Article 4 of the Competition Act, a market is the area within which goods and their substitute goods, and/or a service and its substitute services, are sold. When a suspicion of a margin squeeze in connection with termination fees and retail pricing arose, the Competition Authority and the Competition Appeals Committee took the view that the matter concerned two wholesale markets, i.e. the market for access and the initiation of phone calls in general mobile phone networks and the market for termination of phone calls in general mobile phone networks. In addition, a margin squeeze also affects two separate markets for services at the retail level: the GSM mobile phone service market, on the one hand, and the fixed-line phone market on the other. As regards the delineation of markets, when the case was being examined by the Competition Authority, the principal plaintiff says the counter-plaintiff considered it correct to define the market in this case as the market for the sale of GSM mobile phone services to individuals, on the one hand, and the market for the sale of GSM mobile phone services to undertakings on the other. The counter-plaintiff made no mention of the wholesale market in the case in its observations. It had countless opportunities to make its criticisms of the market definitions at earlier stages of the case when it was handled by the Competition Authority, but chose not to do so. It was only during the hearing of this case by the court that the counter-plaintiff started defining the markets in such a way that each and every telecom operating on the market, irrespective of its market share on the retail market or on other related markets, was counted as being in a dominant market position and having the chance to apply a margin squeeze. The principal plaintiff says that the definition of the market used by the counter-plaintiff receives no support in earlier decisions by the Competition Authority, in theory or in EU/EEA law.

It appears clearly in the Competition Authority's decision that the markets are those at the retail level for GSM mobile phone services and fixed-line services and, at the wholesale level, the market for access and initiation of phone calls in general GSM mobile phone networks

and the market for the termination of phone calls in general mobile phone networks. The Competition Appeals Committee confirmed the conclusion reached by the Competition Authority in the case and approved its definition of the markets relevant to the case.

As is stated in the conclusion of the Competition Appeals Committee, it is necessary, when examining violations on the telecommunications market, to make the relevant connections between the wholesale and retail market, as there is extensive interaction between the telecommunications networks of all the undertakings and, which is no less relevant, they are linked together due to the retail market, since users link the networks together by making phone calls to each other. It is not sufficient to regard one circumscribed market which is very peculiar in its structure without taking account of its interaction with other markets. Indent 4 of the first paragraph of Article 4 of the Competition Act says, moreover, that when a dominant position on the market is assessed, attention must be given to all markets that are relevant.

The principal plaintiff argues that the markets relevant to the case are the same as those on which the Competition Authority's decision and the Competition Appeals Committee's ruling were based. Furthermore, it argues that it was not in a dominant position on these four markets.

In order for an undertaking to violate Article 11 of the Competition Act, it is necessary that it be defined as being in a dominant position on the relevant markets. When assessing whether an undertaking is in a dominant position, it is necessary to examine the position of undertakings on the markets defined as relevant to the case. In the Competition Authority's Decision, No. 7/2012, and subsequently in the Competition Appeals Committee's ruling, a detailed examination was made of the standing of the parties to this case on the market.

During the period in which the alleged violations by the principal plaintiff are supposed to have taken place, from 1 May 2001 to the end of 2007, the counter-plaintiff was in a dominant position on the telecommunications market as a whole. The counter-plaintiff's share offer prospectus and listing document described the undertaking's position on the market as extremely strong; it was said that it had about 86%, by turnover, of the Icelandic telecommunications market and particular mention was made of its being dominant on the market. Its superior position in individual telecommunications segments was also described. In order to assess the parties' position, it is necessary not only to consider their market shares but also their aggregate earnings on the telecommunications market. Attention must also be given to the principal plaintiff's market share during the period in comparison with that of the counter-plaintiff. An examination of these things reveals unequivocally that the counter-plaintiff was in

a dominant position on the markets that are relevant to the case during the period in question. The principal plaintiff had a far smaller market share and inevitably it was not in a dominant market position.

In its conclusion, the Competition Appeals Committee declared that it concurred with the Competition Authority's assessment that the counter-plaintiff was in a dominant position on the markets defined as relevant to the case, both at the wholesale and the retail level, and in a superior position regarding the number of subscribers to its own network. In the PTA's Decision of 5 February 2007, the counter-plaintiff alone was defined as having considerable strength on the wholesale market for the termination of phone calls in individual mobile phone networks. In the PTA's Decision of 20 July 2016 it was also defined as having considerable strength on the wholesale market for the termination of phone calls in individual mobile phone networks. The Post and Telecom Administration did not consider the principal plaintiff as having considerable strength on the market for access and initiation of phone calls as the counter-plaintiff had. The principal plaintiff argues that consequently there are no reasons to define it as having been in a dominant position on the markets that are defined as relevant to the case. For this reason, the counter-plaintiff's compensation claim cannot be entertained, as an undertaking must be considered as being dominant on the market for an unlawful margin squeeze to take place.

The counter-plaintiff argued, amongst other things, during the treatment of the case by the competition authorities, that during the period the parties had a joint dominant market position on the markets relevant to the case. The Competition Authority rejected this argument with reference to its decision in Case No. 17/2007. The Competition Appeals Committee also rejected this, saying that the counter-plaintiff was far stronger than its competitors and that there was no reason to go further into the question of whether it had been in a joint dominant market position.

The principal plaintiff also rejects the counter-plaintiff's argument that it violated its obligation under Article 30 of the Telecommunications Act, No. 81/2003, and Article 25 of the older Telecommunications Act, to observe impartiality after it was nominated an undertaking with considerable market strength. It argues that the counter-plaintiff's argument is based on its mistaken interpretation of the conclusion reached by the Competition Authority and the Competition Appeals Committee.

Even if the court accepts the counter-plaintiff's argument that the market relevant to the case was only that for termination in an undertaking's own mobile phone network, the principal

plaintiff argues that it should be acquitted. It says it was not in a dominant position, in the sense of the competition law, on the market for the termination of phone calls in its own mobile phone network during the period in question. The European Commission came to the conclusion that the termination of phone calls in individual mobile phone networks could conceivably constitute a special market in the sense of competition law. As was stated in the Competition Authority's decision, one consequence of such a definition of a market is that all mobile phone network operators have a monopoly on the termination of phone calls in their networks. On the other hand, the principal plaintiff points out that special attention must be given to the Competition Authority's opinion that such a definition of the market need not mean that they were all in a dominant market position. That would depend on whether there was sufficient buyer power to balance mobile phone network operators' market strength in order to operate without taking account of competitors, customers and users.

The counter-plaintiff had 86%, by turnover, of the Icelandic telecom market. When assessing what constitutes a dominant market position on the defined market, it is also necessary to examine other factors, such as operational and financial strength, in addition to economies of scope, which consisted, for example, in the counter-plaintiff's position as the only all-round telecom in Iceland. The counter-plaintiff was in an extremely strong position on all the markets for telecom services during the period in question. The principal plaintiff, on the other hand, was at a considerable disadvantage vis-à-vis the counter-plaintiff, and its predecessors had difficulty in making a profit from their operations. There had been little or no competition on the telecom market.

Even if a telecom is able to operate alone on the market for terminations in its own mobile phone network, such an undertaking is in no position to apply a margin squeeze unless it has superior strength on other markets related to the mobile phone network. The principal plaintiff argues that the case concerns not only the setting of termination rates but also the interaction between it and other pricing by the undertaking. It argues that a small undertaking, even though it is able to operate alone on the market for the termination of phone calls for its own telecom network, cannot apply pressure through its pricing when its competitors have an aggregate market share of 60-70%, as in the case under discussion here.

Even if the court concurs with the counter-plaintiff that the only market relevant to this case was that for the termination of phone calls in an undertaking's own mobile phone network, and that the principal plaintiff was therefore in a dominant market position, the principal plaintiff argues that its conduct cannot be considered as a violation of Article 11 of the

Competition Act. In the appendix to the PTA's Decision of 20 July 2006, the principal plaintiff was defined as having considerable strength on the termination market towards the end of the period of the alleged violations. The same appendix states the following: 'The PTA wishes to stress that it is considerable market strength that is the appropriate criterion, and not abuse of a dominant market position. Thus, in analysing the market, whether or not a dominant market position has been abused is not the main point.'

Even if the view is taken that the principal plaintiff was in a dominant position on the market for the termination of phone calls in its own mobile phone network, it argues that its conduct on the market did not violate Article 11 of the Competition Act. For there to be unlawful conduct, a margin squeeze applied by an undertaking in a dominant market position must be of such a nature as to distort competition on the retail market. The principal plaintiff would have had to employ its position on the wholesale market in such a way as to have prevented the counter-plaintiff from profiting and being able to operate vigorously on the retail market. If the situation on the retail market during the period in question is examined, then it is obvious, that it did not distort competition or bring about a situation in which the counter-plaintiff was not able to operate vigorously.

The ECJ has pointed out that it is necessary to assess whether a margin squeeze was likely to make it more difficult for a competitor to operate on the market. Cases that have been examined by the competition authorities and the courts during the period of the alleged violation show unequivocally, that the counter-plaintiff was able to continue, as it had done, to operate completely independently of all other parties on the retail market. During the period 2001-2007, competition on the market was repeatedly distorted in a culpable manner, not because of the principal plaintiff's conduct but by the repeated violations by the counter-plaintiff.

The counter-plaintiff's dominant market position was confirmed in various cases by the competition authorities and, as appropriate, the courts. It was confirmed by the Supreme Court, in its Judgment of 8 November 2001 in Case No. 120/2001, in which the dispute had concerned the prohibition of a 'major user subscription' and monthly bulk discounts in the counter-plaintiff's GSM service, that the counter-plaintiff had a superior position on the retail market in question. In its Decision No. 23/2002, the Competition Authority came to the conclusion that the counter-plaintiff was in a dominant position on the market for fixed-line telephone services and had abused that position. In the ruling by the Competition Appeals Committee in Case No. 2/2002, it was confirmed that the counter-plaintiff was dominant on the market in various fields of telecommunications and had violated Article 11 of the Competition Act by its actions, which

concerned, amongst other things, mobile phone services and fixed-line phone services. In its Decision No. 40/2003, in which the principal plaintiff had complained about the counter-plaintiff's abuse of its dominant market position with its 'group subscriptions,' the Competition Authority came to the conclusion that the counter-plaintiff was in a dominant position on the market for mobile phone services. Furthermore, it was concluded that the counter-plaintiff was in a dominant position on the mobile phone and fixed-line phone service markets in the Competition Authority's Decisions Nos. 21/2005, 10/2005, 10/2006 and 1/2007. From this it can be seen, that even though the counter-plaintiff bases its claim on the argument that the principal plaintiff distorted competition on the retail market for mobile phone and fixed-line phone services in the period 2001-2007, it itself was in a dominant market position which it repeatedly abused during the same period.

The principal plaintiff points out that the counter-plaintiff makes no attempt to argue how the principal plaintiff's conduct violated Article 11 of the Competition Act; rather, it seems to assume that its analysis of the market is sufficient in itself. The principal plaintiff says it considers its conduct was neither unlawful nor culpable. Its conduct did not distort competition on the retail market for mobile phone and fixed-line phone services. Even if the view is taken that the principal plaintiff's dominant position on the market for terminations in its own mobile phone network could result in a violation, the principal plaintiff argues that its pricing did not constitute a margin squeeze as the counter-plaintiff has maintained.

If the court concurs with the counter-plaintiff that the principal plaintiff's pricing could have constituted an unlawful margin squeeze, then the principal plaintiff argues that objective grounds for justification apply regarding its pricing. Pricing that can be regarded as unlawful in certain instances may be regarded as legitimate if it constitutes part of a response to competition. An undertaking in a dominant market position is authorised to respond to competition providing certain conditions are met. It must be borne in mind when objective grounds for justification are examined, that its position on all markets other than that for termination in its own telecommunications network was weak. Furthermore, it must also be borne in mind that at the same time, it was under a margin squeeze from by far the largest entity on the telecom market, the counter-plaintiff. The principal plaintiff says its response was intended to increase its chances of taking part in competition on the market. It points out that it is mentioned again and again in the reports of the Competition Authority how little competition there was on the telecommunications market.

The principal plaintiff says its pricing was a direct consequence of the culpable activity by the counter-plaintiff. As is stated in the Competition Authority's decision, competitors of the dominant undertaking on the market, i.e. the counter-plaintiff, were compelled to structure their retail pricing in such a way as to attract customers. In consequence of the margin squeeze applied by the counter-plaintiff, its competitors were unable to compete against the dominant market undertaking without pricing themselves far below their costs. The principal plaintiff says its pricing must be viewed in this light.

The termination rates of the smaller players on a market, which are attempting to build up their own mobile phone networks, are naturally higher than those of long-established undertakings like the counter-plaintiff, which had an extensive and general mobile phone network that had been developed with funding from the Icelandic state long before the smaller players came into existence. Furthermore, it must be borne in mind that the counter-plaintiff is integrated both vertically and horizontally on the telecom market and is the former holder of a monopoly and the only undertaking in Iceland that was able to offer telecommunications services to meet all the needs of its customers, both on the wholesale and retail levels, during the period in question.

The principal plaintiff considers that the counter-plaintiff has not demonstrated a causal connection between its alleged loss and the principal plaintiff's conduct, i.e. that the alleged loss was the probably consequence of its conduct. Furthermore, it has not been demonstrated in any way that the counter-plaintiff incurred any loss at all. It has been established, that during the period in question, the counter-plaintiff was in a far stronger position than the principal plaintiff on all markets for telecom services in Iceland. Its annual turnover was as much as three times that of the principal plaintiff during the period. The principal plaintiff argues that its pricing took account of the conditions prevailing on the market and was a direct consequence of the counter-plaintiff's conduct. It points out that the counter-plaintiff makes no attempt in the counter-summons to demonstrate that it incurred loss; rather, it simply refers to the principal plaintiff's presentation of its case in the principal action. The counter-plaintiff has not taken account of the parties' totally different circumstances. It was in such a strong position at the time when the principal plaintiff's alleged violations are supposed to have taken place that it was able to abuse its dominant market position on those markets where the distortion of competition is and its loss is supposed to have taken place, i.e. the retail market for mobile phone and fixed-line phone services. The counter-plaintiff has not demonstrated that there was any causal connection between the principal plaintiff's conduct and the alleged loss. No

reasoning is given on this point; instead, reference is merely made to the summons in the principal action. The same applies regarding probable consequences.

If the court concurs with the view that the principal plaintiff's claim has lapsed due to its failure to exercise it, then it argues that this also applies regarding the counter-plaintiff's claim in the counter-action. The principal plaintiff argues that a long time has elapsed since its alleged violations are supposed to have taken place. The period of limitation (prescription) was not broken until the counter-summons was served on 2 December 2013. If the court accepts the counter-plaintiff's argument that its compensation claim became due for payment at the time of each allegedly excessive payment was made, i.e. more or less each month, then the principal plaintiff argues that the same consideration must apply in the counter-action, i.e. the general principal of tort law that claims for compensation become due for payment as soon as the loss incident occurs. It points out that the counter-plaintiff has made no attempt to contact the principal plaintiff and request a statement of its position regarding tortious liability. Under such circumstances, the counter-plaintiff's claim has lapsed due to its failure to exercise it.

The principal plaintiff's reserve claim, for a substantial reduction, is based on the same views as have been discussed above, which it argues should entail, at least, that the counter-plaintiff's claim should be substantially reduced. It argues that the counter-plaintiff had such economic strength that it must have been a simple matter for it to limit its loss substantially. According to the decisions of the Competition Authority and the rulings of the Competition Appeals Committee, it was in such a position on the overall telecommunications market and all its sub-markets as to be able to operate on these markets completely independently of its competitors. Thus, it was fully capable to limit its loss, if there was any loss. In addition, the reserve claim is based on the view that the counter-plaintiff's calculations of its losses are incorrect or, at best, undemonstrated, as a considerable number of invoices issued are lacking in them.

Request for an advisory opinion

Article 54 EEA states that any abuse by one or more undertakings of a dominant position within the territory covered by the Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of the Agreement in so far as it may affect trade between Contracting Parties. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production,

markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The facts of the case are considered to be sufficiently clear at this stage to make it possible to obtain an advisory opinion from the EFTA Court under Article 1 of Act No. 21/1994, on Application to the EFTA Court for an Advisory Opinion on the Interpretation of the EEA Agreement. An additional condition for seeking such an opinion is that there must be justifiable doubt as to the interpretation of the EEA rules involved, and that it must be considered that the opinion of the EFTA Court could be of real significance for the resolution of the case.

The aforementioned Article 54 EEA is the provision of the Agreement which may be of relevance regarding the matter at issue in this case. The principal plaintiff bases its action on the view that it follows from Iceland's obligations under EEA law that all those who incur loss or damage as a result of a violation of Article 54 EEA must be guaranteed compensation for such loss or damage. Article 54 EEA is comparable with Article 11 of the Competition Act, No. 44/2005. Another disputed point is whether it is necessary that the competent authorities need to have reached a final conclusion concerning a violation of Article 54 EEA when an assessment is made as to whether the conditions of a compensation claim are fulfilled in connection with a violation of the competition rules, and for the interpretation of what constitutes an unlawful margin squeeze violating Article 54 EEA. Thus, the interpretation of the Article could be of substantial significance for the resolution of the case.

The parties to the case are in agreement on the desirability of seeking an advisory opinion from the EFTA Court on the questions that have been set forth; no clear precedent has been established in this area. It must be considered that there is justifiable doubt as to the interpretation of the EEA rules and consequently that it is clear that an advisory opinion on the points in question could be of real significance for the resolution of the case before the Icelandic courts. With reference to the foregoing, the request for an advisory opinion from the EFTA Court, under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, is reiterated.

This request is accompanied by photocopies of the materials submitted to the court.

Reykjavík District Court, 30 June 2017

Barbara Björnsdóttir (sign.)

District Court Judge

[Stamp of the Reykjavík District Court]