REPORT FOR THE HEARING

in Joined Cases E-31/24 and E-32/24

APPLICATIONS to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Toska ehf., established in Reykjavík, Iceland,

Lyf og heilsa hf., established in Reykjavík, Iceland,

and

the EFTA Surveillance Authority,

seeking the annulment of the EFTA Surveillance Authority's Decision No 158/24/COL of 3 October 2024 requiring Toska ehf. together with all undertakings directly or indirectly, solely or jointly controlled by it, including Lyf og heilsa hf., to submit to an inspection pursuant to Article 20(4) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Case E-31/24);

and in the case between

SKEL fjárfestingafélag hf., established in Reykjavík, Iceland,

and

the EFTA Surveillance Authority,

seeking the annulment of the EFTA Surveillance Authority's Decision No 159/24/COL of 3 October 2024 requiring SKEL fjárfestingafélag hf. together with all undertakings directly or indirectly, solely or jointly controlled by it, including Lyfjaval ehf., to submit to an inspection pursuant to Article 20(4) of Chapter II of Protocol 4 to the Agreement

between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Case E-32/24).

I Introduction

1. The cases concern two decisions adopted by the EFTA Surveillance Authority ("ESA") on 3 October 2024, each relating to a requirement to submit to an inspection pursuant to Article 20(4) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The application in Case E-31/24 challenges Decision No 158/24/COL, addressed to Toska ehf. together with all undertakings directly or indirectly, solely or jointly controlled by it, including Lyf og heilsa hf. (collectively referred to as "Toska"). The application in Case E-32/24 challenges Decision No 159/24/COL, addressed to SKEL fjárfestingafélag hf. together with all undertakings directly or indirectly, solely or jointly controlled by it, including Lyfjaval ehf. (collectively referred to as "SKEL").

2. In the contested decisions, ESA claims to be in possession of information indicating that Toska and SKEL may have been, and may still be, participating in anti-competitive agreements and/or concerted practices on the Icelandic retail pharmacy market. ESA ordered an inspection to be in a position to ascertain all the relevant facts concerning the possible agreements and/or concerted practices and the context in which they operate.

3. In its application, Toska raises three pleas in support of its request for the annulment of Decision No 158/24/COL:

(i) ESA lacked competence to take the contested decision, as it should have been both clear and obvious to ESA that it does not have jurisdiction over the alleged infringements, as even if founded, they are not capable of affecting trade between the Contracting Parties to the EEA Agreement, within the meaning of Article 53 of the EEA Agreement.

(ii) The contested decision contains insufficient reasoning, in particular due to the fact that the alleged infringement outlined in the decision had already been notified as mergers under Icelandic competition law and approved as such. That fact furthermore leads to the contested decision being in breach of the fundamental rights of legal certainty, ne bis in idem and no dual process, enshrined in the EEA Agreement and the European Convention on Human Rights ("ECHR").

(iii) ESA did not objectively fact check the information the decision is said to be based on, leading it to conduct the inspection on the basis of factually false premise. Thus, ESA did not have sufficient grounds (indicia) to justify an inspection, which also constitutes a separate breach of the proportionality principle, as the information could have been fact checked and proven misguided, through less intrusive means.

4. In its application, SKEL raises four pleas in support of its request for the annulment of Decision No 159/24/COL:

(i) The contested decision provides insufficient reasoning.

(ii) There is no effect on trade.

(iii) ESA did not have sufficiently serious indicia to justify an unannounced inspection.

(iv) The conduct relied on by ESA to justify the inspection has already been approved by the competent Icelandic authorities as notified and approved mergers.

5. Due to the close connection between the subject matter of the contested decisions and the pleas raised by the applicants, the Court has decided to join the cases for the purposes of the oral procedure and for the decision which closes the proceedings, pursuant to Article 46(1) of the Rules of Procedure ("RoP").

II Legal background

EEA law

6. Article 53 EEA reads, in extract:

> *1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*
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> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
> *(b) limit or control production, markets, technical development, or investment;*
> *(c) share markets or sources of supply;*
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(e) make 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.*
>
> *...*

7. Article 4 of Chapter II of Protocol 4 to the SCA reads:

> *For the purpose of applying Articles 53 and 54 of the EEA Agreement, the EFTA Surveillance Authority shall have the powers provided for by this Chapter.*

8. Article 20 of Chapter II of Protocol 4 to the SCA reads, in extract:

> *1. In order to carry out the duties assigned to it by this Chapter, the EFTA Surveillance Authority may conduct all necessary inspections of undertakings and associations of undertakings.*
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> ...
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> *4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the EFTA Surveillance Authority. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the EFTA Court. The EFTA Surveillance Authority shall take such decisions after consulting the competition authority of the EFTA State in whose territory the inspection is to be conducted.*

9. Article 16 SCA reads:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

III Facts and pre-litigation procedure

10. The following is a summary of the facts based on the written submissions filed in Cases E-31/24 and E-32/24.

Toska

11. Toska ehf. and all undertakings directly or indirectly, solely or jointly, controlled by it, is an undertaking active in different sectors of the Icelandic economy such as horse breeding, real estate activities and the operation of music stores and pharmacies.

12. Lyf og heilsa, at the time of the application a subsidiary of Toska ehf., operates a pharmacy chain active in the Icelandic retail pharmacy market under the Lyf og heilsa, Apótekarinn and Garðs Apótek brands. 18 pharmacies are operated in the greater capital area, and six elsewhere in Iceland.

13. Toska ehf. wholly owns the shares of Faxi ehf., which in turn wholly owns the shares of Faxar ehf., an undertaking whose main activity is holding the real estate properties used by Lyf og heilsa for their daily operations as a pharmacy chain.

SKEL

14. SKEL fjárfestingafélag hf. (previously known as Skeljungur hf.) operates as an investment undertaking with an asset portfolio of multiple undertakings active in the Icelandic retail sector, among others.

15. Lyfjaval is a subsidiary controlled indirectly by SKEL. At the time of the application, Lyfjaval operated seven retail pharmacies in Iceland under the Lyfjaval brand, six in the area of the capital Reykjavík and one in Keflavík. All these pharmacies take walk-in customers, but a number of them have an additional drive-through option.

The events leading up to the contested decisions

16. On 17 May 2021, investors were invited to bid for the purchase of Lyfjaval and Landakot ehf., both companies wholly owned by the couple Thorvald Árnason and Auðar Harðardóttir at the time.

17. On 18 May 2021, Lyf og heilsa sent a letter to the Icelandic Competition Authority ("ICA") seeking guidance regarding its potential participation in the process by which all the share capital in Lyfjaval was to be sold, and whether there was reason to believe that a potential merger between the companies would result in a significant disruption of competition within the meaning of Article 17(c) of the Icelandic Competition Act No 44/2005 ("the Competition Act"). In the letter, Lyf og heilsa expressed its intention to close Lyfjaval's pharmacies in Mjódd and Keflavík (Reykjanesbær) if its bid were to be accepted.

18. On 25 June 2021, Lyfsalinn ehf. announced that its bid for 100% of the shares in Lyfjaval and Landakot had been accepted. The merger was cleared by the ICA by Decision No 34/2021, dated 7 September 2021. SKEL (at the time, Skeljungur hf.) held a 10% share in Lyfsalinn. From 1 October 2021, SKEL became the ultimate owner of Lyfjaval by increasing its holding in Lyfsalinn.

19. In the spring and summer of 2021, Lyf og heilsa attempted to sell its pharmacy located in the outlet of Glæsibær, Reykjavík. The sale process proved unsuccessful, with no interested parties making an offer.

20. On 26 April 2022, Lyfjaval and Faxar entered into an asset swap agreement ("the Asset Swap Agreement"). In the agreement, Lyfjaval sold its retail property in the Mjódd shopping centre in Reykjavík to Faxar. The sales object included all appurtenances and associated rights, including any goodwill connected to the property, where Lyfjaval had operated a pharmacy. As consideration, Faxar transferred its retail property with all associated rights in the Glæsibær shopping centre in Reykjavík, where Lyf og heilsa operated a pharmacy under the name Apótekarinn, as well as a cash payment.

21. 12 August 2022, Lyfjaval opened a new pharmacy in Suðurfell 4, close to the Mjódd shopping centre.

22. On 5 August 2022, Lyf og heilsa notified the planned acquisition of Lyfjaval's property in Mjódd to the ICA as a merger within the meaning of Article 17a(1) of the Competition Act. In the notification, Lyf og heilsa informed the ICA of its intention to discontinue the operations of the pharmacy in Mjódd if the transaction was finalised. After receiving an updated merger notification from Lyf og heilsa upon request, the

ICA announced by letter dated 26 September 2022 that the notification was considered satisfactory under the Competition Act, and that the time-limits for intervention started to run on 27 September 2022.

23. On 5 August 2022, Lyfjaval also informed the ICA by letter of the planned acquisition of Faxar's property in Glæsibær, with reference to Article 17b(4) of the Competition Act. In the letter, Lyfjaval informed the ICA of its intention to continue its pharmacy operations in Glæsibær, whereas the operations of Apótekarinn would be ceased. By letter dated 22 August 2022, the ICA requested that Lyfjaval notify the transaction on the basis of Article 17b(3) of the Competition Act. On 25 October 2022, the ICA received a formal merger notification from Lyfjaval. The ICA confirmed by letter dated 26 October 2022 that a satisfactory merger notification had been received from Lyfjaval, and that the time-limits for examining the merger started to run on the same date.

24. According to the Icelandic Government, the mergers were described in the respective merger notifications as involving the acquisition and change of control of two operating pharmacies and their locations. However, Toska and SKEL contend that the mergers were described as the acquisition of real estates. In both notifications, the parties defined and maintained that the relevant market was the retail of over-the-counter and prescription medicine. The Reykjavík capital area was defined as the affected geographical market of the transaction, either including or excluding the municipality of Mosfellsbær.

25. The ICA investigated the notified mergers in connection with each other, as the mergers were considered closely connected as they both stemmed from the Asset Swap Agreement.

26. On 13 February 2023, the ICA issued a Statement of objections ("SO") covering both mergers, addressed to both Lyf og heilsa and Lyfjaval. The preliminary assessment of the ICA was that:

(i) both mergers impeded effective competition, within the meaning of Article 17(c) of the Competition Act on the retail pharmacy market in the capital area, giving grounds for intervention in connection with the transaction; and

(ii) the Asset Swap Agreement may entail unlawful market sharing in violation of the prohibition in Article 10 of the Competition Act and, where applicable, Article 53 of the EEA.

27. Lyf og heilsa and Lyfjaval gave their comments on the SO on 27 February 2023. They both argued that the mergers neither disrupted competition, within the meaning of Article 17(c) of the Competition Act, nor violated Article 10 of the Competition Act or Article 53 EEA. Further, they both maintained that the Asset Swap Agreement only concerned the acquisition of the real estate property and did not concern any purchase of an ongoing business.

28. On 15 February 2023, Lyfjaval closed its pharmacy in Keflavík (Reykjanesbær) located at Hringbraut 99 (Apótek Suðurnesja). The pharmacy operation was moved to a new location in the same area on 17 February 2023.

29. By letter dated 1 March 2023, the ICA informed the merging parties of its intention to discontinue the investigation. It was the ICA's assessment that the parties, in their comments on the SO, had provided different descriptions of the nature and scope of the Asset Swap Agreement, compared to the initial merger notifications. In light of this, the ICA considered the initial merger notifications to be incomplete from the outset. Since the transactions did not involve any purchase of an ongoing business to which turnover could be attributed, the ICA determined that it did not constitute a notifiable merger in which the ICA was required to investigate.

30. The merging parties were given one day to comment on the content of the letter. On 2 March 2023, the merging parties argued that there were no discrepancies in the information provided in the case.

31. On 2 March 2023, the ICA adopted a decision to discontinue the examination of the mergers on the grounds that there had been inconsistencies in the merging parties' descriptions of the content of the transaction. As a result, the merger notifications were deemed incomplete, and the time-limits applicable to investigating the mergers had not started to run.

32. On 30 March 2023, both merging parties submitted an appeal to the Competition Appeals Committee ("CAC") against the ICA's decision of 2 March 2023.

33. On 23 June 2023, Lyf og heilsa decided to close its pharmacy in Glæsibær.

34. On 8 August 2023, the CAC issued rulings in Cases No 1/2023 and 2/2023, annulling the ICA's decision of 2 March 2023. The CAC found that the decision of the ICA to not investigate the transaction further was in breach of the Competition Act on the handling of merger notifications. Consequently, the CAC ruled that the ICA should assess the competitive effects of the mergers notified by Lyf og heilsa and Lyfjaval, taking into account the statutory time-limits that started to run on 26 October 2022.

35. According to Toska, the CAC held in its rulings that the transaction constituted a merger within the meaning of the Competition Act. The Icelandic Government disagrees, stating that the CAC did not carry out its own assessments nor did it adopt a position on the substance as to whether the notified transactions constituted a merger within the meaning of Article 17 of the Competition Act. The Icelandic Government further states that the CAC neither took a position on whether or how turnover relating to the relevant real estate properties should be attributed so that the transactions would meet the turnover thresholds and could constitute a notifiable merger.

36. According to Toska, the ICA closed the matter by letter dated 18 September 2023 on the grounds that the time-limits to intervene in a merger had lapsed. In that letter, the ICA maintained its position that the transaction did not constitute a merger within the

meaning of the Competition Act and reiterated its view that the transaction entailed market sharing in breach of Article 10 of the Competition Act.

37. SKEL submits that the concentrations were effectively approved following the CAC rulings, as the ICA had not adopted any prohibition decision within the deadline for intervention.

38. The Icelandic Government highlights that in the letter dated 18 September 2023 the ICA presented its preliminary assessment regarding the continuation and outcome of the cases and requested the parties to submit their positions on possible resolutions, considering the rulings of the CAC. Comments were received from SKEL on 21 September 2023 where it maintained, inter alia, that the transaction constituted a notifiable merger, and that the ICA was required to conclude its investigation within the time-limits set out in the ruling of the CAC. Toska, in its comments dated 22 September 2023, pointed out that it was unclear what kind of decision the ICA intended to adopt regarding the outcome of the case, in accordance with the provisions of the Competition Act and in light of the CAC's rulings. According to Toska, the transaction could no longer be considered a notifiable merger in light of its decision, on 23 June 2023, to close its pharmacy in Glæsibær, which had ceased operations on 31 August 2023.

39. The Icelandic Government submits that the ICA notified the merging parties of the conclusion of its investigation by letter dated 14 November 2023. The conclusion of the ICA was that the transactions did not constitute a notifiable merger, within the meaning of the Competition Act, and consequently that the ICA had no jurisdiction over the transactions as a merger. The decision indicates that since the transactions were solely real estate transactions, with no business assets included, it is not possible to refer to turnover of the pharmacies or the relevant outlets as the merging parties initially did in their merger notifications. Since there is no turnover clearly identifiable and attributable to the properties in question, therefore there is no evidence of change in control of undertakings or parts thereof in the pharmacy market. In relation to a possible incompatibility of the transactions with Article 10 of the Competition Act and Article 53 of the EEA Agreement and potential market sharing as mentioned in the SO, the ICA concluded in its decision that no further guidance could be provided at that time as the ICA had not decided on the next steps or prioritisation of its investigations in that regard.

40. Furthermore, the Icelandic Government informs the Court that neither Toska nor SKEL appealed or opposed the ICA's decision dated 14 November 2023.

41. In December 2023, Lyfjaval closed its pharmacy in Mjóddin.

42. In February 2024, Lyfjaval opened a new pharmacy in Miklabraut, where Lyf og heilsa already operates two pharmacies.

43. On 14 October 2024, ESA commenced an unannounced inspection at the business premises of Lyf og heilsa on the basis of Decision No 158/24/COL dated 3 October 2024. An unannounced inspection also commenced on the same date at the

business premises of SKEL and Lyfjaval on the basis of Decision No 159/24/COL. During the inspection, ESA was accompanied by its counterparts from the ICA.

IV Procedure and forms of order sought by the parties

44. By an application registered at the Court on 13 December 2024 as Case E-31/24, Toska brought an action under the second paragraph of Article 36 SCA, requesting the Court to:

(i) Annul ESA decision no. 158/24/COL, dated 3 October 2024, requiring Toska ehf. together with all undertakings directly or indirectly, solely or jointly controlled by it, including Lyf and heilsa hf., to submit to an inspection in accordance with Article 20(4) of Chapter II of Protocol 4 to the Surveillance and Court Agreement;

(ii) Adopt a measure of organisation of procedure ordering ESA to produce all of the documents and other information on the basis of which it considered on the date of the contested decision that it had sufficient justification to carry out an inspection at the applicants' premises, and requesting the applicants to express its views on the documents and information produced;

(iii) Order ESA to pay the costs of the proceedings.

45. By an application registered at the Court on 16 December 2024 as Case E-32/24, SKEL brought an action under the second paragraph of Article 36 SCA, requesting the Court to:

(i) Adopt a measure of organisation of procedure ordering ESA to produce all of the documents and other information on the basis of which it considered on the date of the contested decision that it had sufficiently serious indicia to justify carrying out an inspection at the Applicant's premises, and requesting the Applicant to express its views on the documents and information produced;

(ii) Annul ESA Decision No 159/24/COL of 3 October 2024 requiring SKEL fjárfestingafélag hf. together with all undertakings directly or indirectly, solely or jointly controlled by it, including Lyfjaval ehf., to submit to an inspection pursuant to Article 20(4) of Chapter II of Protocol 4 to the Surveillance and Court Agreement; and

(iii) Order ESA to pay the costs of the proceedings.

46. On 3 March 2025, ESA submitted its defences in both cases pursuant to Article 107 RoP.

47. In both Case E-31/24 and Case E-32/24, ESA requests the Court to:

(i) Dismiss the Application in its entirety; and

(ii) Order the Applicant or Applicants to pay the costs of the present proceedings.

48. On 3 April 2025, Toska submitted its reply pursuant to Article 108 RoP. In the reply, Toska withdraws its request for a measure of organisation of procedure but maintains the other claims.

49. On the same date, SKEL submitted its reply pursuant to Article 108 RoP. In the reply, SKEL maintains all its claims.

50. On 2 May 2025, ESA submitted its rejoinder in both Case E-31/24 and Case E-32/24 pursuant to Article 108 RoP.

51. On 5 May 2025, the Court received written observations from the European Commission pursuant to Article 20 of the Statute of the EFTA Court in both cases. Similarly, the Court received written observations from the Icelandic Government in both cases on 6 May 2025.

52. On 15 May 2025, the Court informed the parties that it was considering joining Cases E-31/24 and E-32/24 for the purposes of the oral procedure and the decision which closes the proceedings. In addition, the parties were asked to address whether the case file contains confidential information that should be excluded from the consultation referred to in Article 46(2) or the service provided for in Article 46(3) RoP. On the same date, SKEL was asked, by email, whether it maintains its request for a measure of organisation of procedure, should the cases be joined.

53. On 21 May 2025, Toska informed the Court that it had no objections to the cases being joined and that it considered the conditions of Article 46 RoP to be met. Regarding confidential information in the case file of Case E-31/24, Toska informed the Court that it considered Annex A.13 "Merger notification, dated 22nd September 2022" to include confidential information. Toska does not consider other information in the case file to include confidential information as SKEL should have received an identical SO from the ICA as Toska.

54. On 22 May 2025, SKEL informed the Court that it had no objections to the cases being joined. SKEL highlighted that the joining of the cases would necessitate exclusion of confidential information in the case file of Case E-32/24, and provided the Court with a list of documents which should be excluded from the consultation referred to in Article 46(2) RoP and the service provided for in Article 46(3) RoP. The list contains SKEL's merger notification (Annex B.1) and its reply to the SO (Annex B.2), paragraphs in the application (paragraphs 28 and 55) and a number of annexes to the application (Annexes A.7, A.8, A9, A.10, A.11, A.12, A.13, A.14, A.15, A.16, A.17, A.18, A.23 and A.24) in which SKEL reveals plans for new pharmacies, annexes describing commercial interests (Annexes A.19, A.20, A.25, A.26, C.4, and C.5), and personal data of a number of individuals not involved in the alleged infringement (Annexes A.21 and A.22).

55. In an email received by the Court on the same date, SKEL informs the Court that, provided the cases are joined, and whilst maintaining its pleas, it does not maintain its request for a measure of organisation of procedure.

56. On 22 May 2025, ESA submitted its replies to the Court's notification of the potential joinder of the cases. ESA indicates that, in principle, it has no objections to the Court joining the cases for the purposes of the oral procedure and/or the decision closing the proceedings. As an alternative to a full joinder of the cases under Article 46 RoP, ESA suggests that the Court could consider, in respect of the oral procedure, achieving these procedural efficiencies by holding a joint hearing pursuant to Article 73 RoP, accompanied by a more targeted access to the Court's case files. Under this alternative, ESA suggests that access is only given to documents relied on by ESA in its defence in either non-confidential versions or, with the agreement of the parties, on counsel-to-counsel bases.

57. ESA submits that, in the case file of Case E-31/24, the relevant documents for such a targeted access would be the reply of Toska to the ICA SO of 27 February 2023 (Annex B.2/B.2a), the presentation of Toska for its meeting with Íslandsbanki (Annex B.4/B.4a), and the letter from Toska to the ICA of 18 May 2021 (Annex B.6/B.6a). If the presentation of Toska for its meeting with Íslandsbanki and the letter from Toska to the ICA of 18 May 2021 are considered confidential, ESA submits that it would need to agree with Toska on whether non-confidential versions of paragraph 13(vi) and (vii) of ESA's defence should be produced.

58. In the case file of Case E-32/24 the targeted documents would be the merger notification submitted by SKEL (Annex B.1/B.1a) and the reply of SKEL to the ICA SO (Annex B.2/B.2a).

59. If the Court decides not only to grant targeted access under Article 73 RoP but decides to join the cases for the oral procedure under Article 46 RoP, ESA submits that additional documents in the case file may contain confidential information and may require production of non-confidential versions, to be agreed with the party whose confidential information is concerned. In Case E-31/24, ESA contends that this is the letter from Toska to the ICA of 22 September 2023 (Annex B.1/B.1a). In Case E-32/24, ESA contends that this is the investor teaser for the sale of Lyfjaval (Annex B.7/B.7a).

60. In addition, ESA anticipates that Toska and SKEL will make confidentiality claims with respect to documents annexed by each of them to their application and replies. To the extent such claims are accepted by the Court, ESA submits that it would then need to assess whether material should be redacted from its respective defences and rejoinders.

61. By decision of 5 June 2025 pursuant to Article 46 RoP, the Court joined the two cases for the purposes of the oral procedure and the decision which closes the proceedings. Furthermore, the Court decided that Confidential information identified by Toska and SKEL in their respective case files is excluded from the consultation of the case files under Article 46 RoP.

V Written submissions in Case E-31/24

Pleadings and written observations

62. Pleadings have been received from:

(i) the applicants, represented by Halldór Brynjar Halldórsson, advocate; and

(ii) the defendant, represented by Claire Simpson, Daniel Vasbeck, Sigrún Ingibjörg Gísladóttir and Melpo-Menie Joséphidès, acting as Agents.

63. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

(i) the European Commission ("the Commission"), represented by Ekaterina Rousseva and Brian Cullen, acting as Agents; and

(ii) the Government of Iceland, represented by Hendrik Daði Jónsson, Steindór Dan Jensen and Guðmundur Haukur Guðmundsson, acting as Agents.

Application

64. The application contains three pleas:

> *First*, the applicants maintain that ESA lacked competence to take the contested decision, as it should have been both clear and obvious to ESA that it does not have jurisdiction over the alleged infringements, as even if founded, they are not capable of affecting trade between the Contracting Parties to the EEA Agreement, within the meaning of Article 53 of the EEA Agreement.
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> *Second*, the applicants maintain that the contested decision contains insufficient reasoning, in particular due to the fact that the alleged infringement outlined in the decision had already been notified as mergers under Icelandic competition law and approved as such. That fact furthermore leads to the contested decision being in breach of the fundamental rights of legal certainty, ne bis in idem and no dual process, enshrined in the EEA Agreement and the ECHR.
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> *Third*, the applicants maintain that ESA did not objectively fact check the information the decision is said to be based on, leading it to conduct the inspection on the basis of a factually false premise. Thus, ESA did not have sufficient grounds (indicia) to justify an inspection, which also constitutes a separate breach of the proportionality principle, as the information could have been fact checked and proven misguided, through less intrusive means.

Preliminary remarks

65. Before setting out in detail its three pleas, Toska makes several preliminary remarks regarding the factual background.

66. The first remark concerns the parties to the Asset Swap Agreement. Toska notes that SKEL became the ultimate owner of Lyfjaval after the merger between Lyfsalinn and Lyfjaval was approved by the ICA in Decision No 34/2021, dated 7 September 2021, but the specific date of SKEL's acquisition of control in Lyfjaval is not known to Toska. During the spring and summer of 2021, Lyf og heilsa sought to sell its loss-making pharmacy in Glæsibær. However, the sale process was unsuccessful, as no interested parties submitted an offer. On 26 April 2022, Lyfjaval and Faxar entered into the Asset Swap Agreement. Toska notes that Decision No 158/24/COL incorrectly identifies the parties to the agreement as Lyfjaval and Lyf og heilsa.

67. The second remark concerns the merger notification. Toska notes that the Asset Swap Agreement was notified to the ICA as a merger within the meaning of Article 17 of the Competition Act. Article 3.1 of the agreement stipulated that the transaction would not be completed until the conditions set out in Article 17 were fulfilled. On 25 October 2022, the ICA confirmed that the merger notification was complete and that the statutory time-limits for its intervention had started to run. However, in a letter dated 1 March 2023, the ICA stated that it intended to discontinue the investigation, taking the view that the transaction did not constitute a merger within the meaning of Article 17 of the Competition Act.

68. According to Toska, the ICA's position expressed in the letter dated 18 September 2023 that the transaction did not constitute a merger within the meaning of the Competition Act contradicts the clear findings of the CAC, which are legally binding on the ICA.

69. Third, Toska submits that the contested decision is based on a misunderstanding of the facts concerning the alleged market sharing between "traditional pharmacies" and "car pharmacies". Toska argues that all "car pharmacies" also qualify as "traditional pharmacies", as Icelandic law requires every physical pharmacy to have both an entrance where customers can enter and a secluded space where customers can consult with a pharmacist in private, cf. Article 26 of Icelandic Regulation No 1340/2022. In Toska's view, this fact does not appear to have been known to ESA when the contested decision was adopted.

70. Lastly, Toska highlights that it has not considered pharmacies with a drive through option as an attractive option for its business. The CEO of Lyf og heilsa, a certified pharmacist, maintains that the future development of the market is likely to focus on more personalised and tailor-made services for customers. Moreover, Lyf og heilsa does not own properties that are well-suited for drive-through operations. This stands in contrast to SKEL, which owns companies with petrol station real estate now seeking alternative uses due to the decline of the petrol market. Nevertheless, Toska has

reviewed two potential opportunities to open pharmacies with a drive-through option, both of which were ultimately deemed not economically viable.

First plea: ESA lacked competence to adopt the contested decision

71. By its first plea, Toska submits that ESA lacked competence to adopt the contested decision, because the alleged infringement was not capable of affecting trade between Contracting Parties within the meaning of Article 53 of the EEA Agreement.

72. Toska highlights that, for certain conduct to be deemed unlawful under Article 53 EEA, it is a necessary condition that the conduct may affect trade between the Contracting Parties to the EEA Agreement. Consequently, the effect on trade criterion defines the scope of application of EEA competition law.

73. In its application, Toska argues that the retail pharmaceutical market in Iceland is local in nature, confined to specific areas within Iceland or limited to certain neighbourhoods. Toska refers to two decisions by the ICA in previous merger cases, in which the retail pharmaceutical market was geographically limited to Mosfellsbær, a town located close to Reykjavík. According to Toska, the retail pharmaceutical market in Iceland has never been considered to be national in scope.

74. Toska further relies on the assessment of the geographic market affected by the Asset Swap Agreement between Lyfjaval and Faxar in the ICA's SO dated 13 February 2023. In the SO, the ICA's preliminary conclusion was that the mergers entailed harmful local competitive effects in the area containing Mjódd and its immediate surroundings, as well as Glæsibær and its immediate surroundings. The ICA referred, amongst other things, to a decision by the United Kingdom Competition and Markets Authority[1] and its own Decision No 28/2018, where a market analysis suggested that competition is local in the retail pharmaceutical market.

75. In particular, Toska stresses that, in the SO, the ICA assumes that the Asset Swap Agreement only will have an effect on competition within a 2 km radius of the pharmacies in Mjódd and Glæsibær.

76. Furthermore, Toska refers to the judgment of the European Court of Justice ("ECJ") in Case C-393/08, in which the ECJ held that "it is quite obvious that the national legislation at issue in the main proceedings, relating to the possible grant of an exemption in relation to the opening periods of a pharmacy located in a specific municipal area of the municipality of Rome, cannot, in itself or by its application, affect trade between Member States within the meaning of Articles 81 EC and 82 EC".[2]

77. Lastly, Toska argues that the volume of sales affected by the Asset Swap Agreement is insignificant in proportion to the overall volume of sales of pharmaceutical products in Iceland. In addition, there is no cross-border retail sale of

[1] Celesio/Sainsbury's Pharmacy Business merger inquiry.

[2] Reference is made to the judgment of 1 July 2010 in *Sbarigia*, C-393/08, EU:C:2010:388, paragraph 32.

pharmaceutical products between EEA States. In light of ESA's own 2006 guidelines on the effect on trade concept contained in Article 53 of the EEA Agreement, the Asset Swap Agreement could thus not have an effect on trade within the EEA.

78. Moreover, Toska highlights that ESA's investigation took a full working week (Monday to Friday), with the number of ESA and ICA agents exceeding all the employees in Toska's office, occupying all the company's meeting rooms for a full working week and effectively rendering Toska's business activities virtually inoperable the entire week.

Second plea: Insufficient reasoning

79. By its second plea, Toska submits that the contested decision was insufficiently reasoned. Toska appears to address two types of issue under this plea: first, an alleged breach of legal principles such as legal certainty, no dual process and ne bis in idem and, second, alleged deficiencies in ESA's reasoning.

Second plea, first issue: breach of the principles of legal certainty, ne bis in idem and no dual process

80. The first issue raised by Toska under the second plea is the allegation that the contested decision violates various legal principles. First, Toska argues that the alleged infringement of Article 53 EEA had already been notified as two mergers to the ICA and approved as such, following the ruling by the CAC. The harmonised system for merger filings assumes that mergers which are notified and approved are not subsequently subject to retrospective infringement investigations by competition authorities. A contrary approach would undermine the effectiveness, predictability, and legal certainty essential for parties to a concentration.[3]

81. Second, Toska is of the opinion that the alleged anticompetitive conduct is subject to ongoing investigation by both the ICA and ESA, in breach of the principle of no dual process enshrined in the EEA Agreement and the ECHR.

82. Third, the subsequent investigation therefore breaches the right of ne bis in idem, protected by Article 4 of Protocol 7 to the ECHR, and enshrined in the EEA Agreement.

Second plea, second issue: deficiencies in ESA's reasoning

83. The second issue addressed by Toska's second plea is the requirement on ESA to state reasons for its decisions provided for in Article 16 SCA. Toska submits that Article 16 SCA requires the reasoning to align with the measure in question and to present clearly and unequivocally ESA's rationale for the decision. This ensures that the affected parties can understand the basis for the measure, allowing them to defend their rights, and enables the Court to carry out its review. It follows that Decision No

[3] Reference is made to the judgment of 3 September 2024 in *Illumina* v *Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677, paragraph 206.

158/24/COL should detail the characteristics of the suspected infringement, including the market believed to be impacted, the nature of the suspected restrictions on competition, the sectors involved in the alleged infringement, and how the undertaking is thought to be implicated.

84. Toska submits that ESA must demonstrate that it has solid evidence of a possible infringement. While it is not required to include this evidence in the decision, it must confirm that its files contain sufficient information to justify the investigation.[4] Toska submits that the contested decision does not meet these conditions.

85. According to Toska, Decision No 158/24/COL does not sufficiently explain:

(i) How transactions which the relevant competent authority in Iceland has deemed to be mergers, and approved as such, can also constitute an infringement of Article 53 of the EEA Agreement.

(ii) How Toska could have restricted Lyfjaval's ability to open "traditional pharmacies". Toska argues that, under Icelandic pharmaceutical law, it would have been legally and factually impossible to engage in the alleged unlawful concerted practice. Specifically, Toska contends that it could not have implemented any practice aimed at limiting Lyfjaval to operating only "car pharmacies," as all pharmacies are, by law, required to function as "traditional" walk-in pharmacies.

(iii) How it could possibly make sense for Toska to let a small competitor, Lyfjaval, restrict its capacity to open "car pharmacies".

(iv) How the alleged concerted practice could have begun "at least" in May 2021, when only one of the alleged participants was active on the market. The contested decision concerns potential unlawful coordination between Toska and SKEL fjárfestingafélag hf., yet SKEL did not acquire control of Lyfjaval until after 7 September 2021.[5] Toska therefore argues that any alleged concerted practice with SKEL could not have taken place in May 2021, as SKEL was not active in the pharmacy market through control of Lyfjaval at that time.

86. Further, Toska highlights that, prior to the Asset Swap Agreement, Lyfjaval had already opened a new pharmacy in Suðurfell, located just 1 km from its former pharmacy in Mjódd. As a result, the closing of Lyfjaval's pharmacy in Mjódd had no effect on competition, as the new pharmacy was in direct competition with Lyf og heilsa's pharmacy in Mjódd.

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[4] Reference is made to the judgment of 5 October 2020 in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 114.

[5] Toska refers to the ICA Decision No 34/2021, in which the merger between Lyfsalinn and Lyfjaval was cleared by the ICA.

Third plea: insufficient grounds and breach of the principle of proportionality

87. By its third plea, Toska submits that ESA did not have in its possession "sufficiently serious indicia" of the existence of an alleged infringement to justify an inspection decision, as required by case law.[6] Furthermore, Toska argues that ESA did not objectively fact check the information that forms the basis for the contested decision and that ESA based its decision on a misrepresentation of the actual facts. Toska contends the Court must review whether ESA had such indicia at the time of the contested decision.

88. To that effect, Toska refers to the submissions made under the second plea, and highlights in particular the following:

(i) ESA cannot have a sufficiently serious indicia of SKEL and Toska having begun the alleged concerted practices "at least in May 2021", when SKEL did not obtain indirect control of Lyfjaval until after 7 September 2021.

(ii) The contested decision incorrectly states that the Asset Swap Agreement was entered into between Lyf og heilsa and Lyfjaval, when it was entered into between Faxar and Lyfjaval.

(iii) The contested decision appears to be based on the false premise that the Icelandic pharmacy market can be segmented into "traditional pharmacies" and "car pharmacies". However, all pharmacies with a drive through option in Iceland are also "walk-in" pharmacies, as required by law.

(iv) Since no such thing as "car pharmacies" exists, ESA cannot have any sufficiently serious indicia that Toska has "limited Lyfjaval's capacity to open 'traditional pharmacies'" or Lyfjaval has "limited Lyf og heilsa's capacity to open 'car pharmacies'".

(v) As the Asset Swap Agreement constituted two notified and approved mergers under Icelandic law, ESA cannot have had any indicia that they constituted an infringement of Article 53 of the EEA Agreement. This is especially serious since the ICA was consulted.

(vi) Since pharmacy markets have been defined narrowly in Iceland by the ICA itself, ESA could not have had any indicia that the Asset Swap Agreement could be capable of affecting trade between the Contracting Parties, within the meaning of Article 53 of the EEA Agreement.

(vii) That neither of these two clear facts nor any other information from the ICA's merger file which was exculpatory for Toska was referred to in the

[6] Reference is made to the judgment of 9 March 2023 in *Casino, Guichard-Perrachon and AMC* v *Commission*, C-690/20 P, EU:C:2023:171, paragraph 122.

> contested decision appears to indicate that either ESA cherry picked the facts or that the ICA cherry picked the facts before submitting the file to ESA.

89. Toska further submits that the absence of an objective factual basis for the contested decision constitutes a separate breach of the proportionality principle and ESA's investigatory duties. Reference is made to Article 20(1) in Section V of Chapter II of Protocol 4 to the SCA, which requires an inspection decision to be necessary for ESA to carry out its duties. Toska argues that the ICA must have had all the relevant information at its disposal to present its initial assessment in the SO dated 13 February 2023. As a result, given the obligation to share information between ESA and the ICA under Article 11 in Section IV of Chapter II of Protocol 4 to the SCA, it was not necessary for ESA to conduct an inspection to gather information. Hence, Toska maintains that the information forming the basis for the contested decision could have been fact checked and proven misguided through less intrusive means than an inspection.

Defence

Preliminary remarks

90. In its defence, ESA makes the following preliminary remarks before addressing Toska's three pleas.

91. According to ESA, the application is based on two erroneous factual presumptions, namely that ESA: (i) seeks merely to reinvestigate an asset swap agreement of 26 April 2022 in relation to "two small distinct local shopping outlets";[7] and (ii) did not have sufficiently serious indicia providing reasonable grounds for suspecting Toska's involvement in a competition law infringement.

92. First, ESA argues that the suspected infringement forming the subject matter of the contested decision is not the Asset Swap Agreement of 26 April 2022. Rather, the contested decision identifies the suspected infringement as anticompetitive coordination between Toska and its competitor SKEL on the Icelandic retail pharmacy market.[8] The Asset Swap Agreement is cited as one of the ways in which this anticompetitive coordination may have been implemented, as noted in Recital 3(a) of the contested decision. According to ESA, the Asset Swap Agreement and its execution serve as indicia of suspected wider anticompetitive collusive conduct, which is of a different geographic and temporal scope, pre- and post-dating the Asset Swap Agreement.

93. Second, ESA submits that the contested decision is based on sufficiently serious indicia, derived from various sources, including information provided by the ICA, publicly available documents and data, and ESA's own monitoring of market conduct. Toska has failed to cast doubt on the reasonableness of ESA's grounds or the indicia

[7] Reference is made to Toska's application, paragraph 37 as well as paragraphs 33, 50, 52, 55, 58 and 81.

[8] Reference is made to Decision No 158/24/COL, recitals 1 to 5 and Article 1.

supporting its suspicion of an infringement. In its defence, ESA contends that there is no need for the Court to order further disclosure of these indicia.

94. However, in the interests of ensuring the expeditious execution of the proceedings and to assist the Court, ESA provides a more detailed account of its indicia. These indicia include the following information:

(i) Through the Asset Swap Agreement of 26 April 2022, the competitors Toska and SKEL exchanged retail locations for traditional walk-in pharmacies in Reykjavík.[9] Subsequently, Toska closed its pharmacy in Glæsibær[10] (while SKEL's pharmacy in that location remained), and SKEL closed its pharmacy in Mjódd[11] (while Toska's pharmacy in that location remained).[12] As a result, the direct competition between Toska and SKEL in each of these shopping centres was effectively eliminated.

(ii) Toska and SKEL ambiguously described the real nature of the Asset Swap Agreement in their interactions with the ICA, presenting it in some instances as a retail pharmacy market transaction,[13] and in others as a pure real estate transaction.[14]

(iii) The total consideration for the retail property in Mjódd appeared excessive, suggesting that it was in part a payment to SKEL for possibly wider restrictive actions. SKEL sold its property in Mjódd to Toska for ISK 352.5 million, consisting of ISK 280 million cash payment and the transfer of the property in Glæsibær. However, the public property value valuation of the Mjódd property was ISK 135.9 million,[15] the Lyfjaval

[9] Reference is made to the Asset Swap Agreement, attached as Annex A.5a (English translation) / Annex A.5 (Icelandic original).

[10] Reference is made to a letter dated 22 September 2023 from Toska's counsel which mentions the decision to close the pharmacy, attached as Annex B.1 (English) /Annex B.1a (Icelandic original). ESA considers the closure of the pharmacy to be a fact. A non-confidential version of the annex is available in the Court's case file.

[11] Reference is made to the merger notification submitted by Toska to the ICA, attached as Annex A.13a (English) / A.13 (Icelandic original). A non-confidential version is available in the Court's case file.

[12] Reference is made to the ICA's SO, in which the ICA reaches the preliminary conclusion that the Asset Swap Agreement will result in the disappearance of Toska's pharmacy in Glæsibær and SKEL's pharmacy in Mjódd, attached as Annex A.9a (English) / Annex A.9 (Icelandic original).

[13] Reference is made to the merger notification submitted by Toska, attached as Annex A.13a (English) / Annex A.13 (Icelandic original) sections 3.1 and 3.3. Reference is also made to the merger notification submitted by SKEL, which is attached as Annex B.1 (English) / Annex B.1a (Icelandic original) in Case E-32/24. A non-confidential version of the annexes is available in the Court's case file.

[14] Reference is made to the letter of 27 February 2023 from Toska replying to the ICA's SO, attached as Annex B.2 (English) / Annex B.2a (Icelandic original). In the letter Toska specifies that the Asset Swap Agreement only relates to real estate including goodwill and not any business.

[15] Reference is made to the ICA's SO, paragraph 242, attached as Annex A.9a (English) / Annex A.9 (Icelandic original).

investor presentation estimated its value to be ISK 87.5 million,[16] and Toska considered that it would benefit from the closure of the pharmacy.[17]

(iv) Direct competition between Toska and SKEL was eliminated in Keflavík (Reykjanesbær) through the closure in early 2023 by SKEL of its traditional walk-in pharmacy located at Hringbraut 99 (Apótek Suðurnesja),[18] within 550 metres of Toska's traditional walk-in pharmacy (with the Keflavík hospital being in between).

(v) There were indications that SKEL implemented its drive-through strategy by prioritising the opening of drive-through pharmacies and the closure of its traditional walk-in pharmacies in locations where those traditional pharmacies competed directly with Toska's traditional walk-in pharmacies (e.g. Mjódd and Keflavík (Reykjanesbær)).[19]

(vi) Documentation showed that the actions of SKEL in closing two of Lyfjaval's pharmacies in Mjódd and Keflavík were steps which SKEL's competitor Toska had assessed and considered highly beneficial to itself.[20]

(vii) SKEL has not opened any traditional walk-in pharmacies in Iceland since May 2021 and Toska has not opened any drive-through pharmacies in Iceland[21] – despite indicia suggesting that the operation of such pharmacies could be considered desirable.[22] ESA emphasises that this information must be seen in the context of there being a growing demand for this service and Lyfjaval's position being unique.[23]

95. ESA argues that various parts of the application (in particular the second plea) challenge the very existence of the suspected coordination. According to ESA, such arguments are irrelevant at this stage of the administrative proceedings – but might be relevant at the second *inter partes* stage. ESA emphasises that it has made no finding

[16] Reference is made to a Lyfjaval investor presentation of 17 May 2021, attached as Annex B.3 (English) / Annex B.3a (Icelandic original)

[17] Reference is made to a presentation by Toska in a meeting with Íslandsbanki slide 4, attached as Annex B.4 (English) / Annex B.4a (Icelandic original).

[18] Reference is made to a newspaper article of 24 February 2023, attached as Annex B.5 (English) / Annex B.5a (Icelandic original).

[19] Reference is made to publicly available information on the opening and closure of these pharmacies.

[20] Reference is made to a presentation by Toska in a meeting with Íslandsbanki slide 4, attached as Annex B.4 (English) / Annex B.4a (Icelandic original), and the letter dated 18 May 2021 from Toska to the ICA, page 1, final paragraph, attached as Annex B.6 (English) / Annex B.6a (Icelandic original).

[21] Reference is made to publicly available information on the opening and closure of pharmacies.

[22] Reference is made to a presentation by Toska in a meeting with Íslandsbanki slide 4, attached as Annex B.4 (English) / Annex B.4a (Icelandic original) and the letter dated 18 May 2021 from Toska to the ICA, pages 1 and 2, attached as Annex B.6 (English) / Annex B.6a (Icelandic original).

[23] Reference is made to a SKEL investor presentation slide 19, attached as Annex B.7, and a newspaper article of 22 March 2024, attached as Annex B.8 (English) / Annex B.8a (Icelandic original). A non-confidential version of Annex B.7 is available in the Court's case file.

of infringement but rather had information and indicia reasonably leading it to *suspect* unlawful conduct. The inspection seeks to verify whether these suspicions were well founded.

First plea: ESA lacked competence to adopt the contested decision

96. In its defence, ESA submits that Toska's first plea is without basis and must be rejected. In support of this, ESA presents five arguments.

97. First, ESA submits that the legal test applied by Toska in the first plea is erroneous. At the preliminary investigative stage of an inspection decision, ESA is not required to establish an infringement and is similarly not required to establish all the elements of the suspected infringement. It is sufficient, under settled case law, to demonstrate reasonable grounds for suspecting that the conditions set out in Article 53 EEA are fulfilled, including the existence of an actual or potential effect on trade.[24] Referring to the ECJ judgment in *České dráhy*,[25] ESA argues that it is not required at this stage to provide evidence establishing the existence of even a potential effect on trade between Contracting Parties.

98. Second, the contested decision clearly identified the nature and scope of the suspected infringement in such a way that there were reasonable grounds for suspecting that there could be an actual or potential effect on trade between Contracting Parties. ESA submits that the involved undertakings operate pharmacy chains within and outside the Reykjavik capital area. ESA maintains that the Reykjavík capital area represents almost 70% of all retail sales of pharmaceuticals in Iceland, and, consequently, the alleged anti-competitive conduct covers a significant part of the Icelandic market. In line with settled case law, an agreement or practice covering all or part of a territory may be capable of affecting trade between EEA States.[26]

99. As a third argument, ESA contends that Toska is mischaracterising the nature, scope and potential effects of the alleged anticompetitive conduct. In the contested decision, Toska is accused of anticompetitive coordination with its competitor SKEL. The Asset Swap Agreement is considered as only one of the ways in which this coordination may have been implemented. Due to the different and broader scope of conduct under investigation, in ESA's submission, Toska's arguments concerning the purely local effects of the Asset Swap Agreement concerning the pharmacies in Glæsibær and Mjódd must be rejected.

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[24] Reference is made to the judgment of 20 June 2018 in *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraphs 36, 43 and 48. ESA also refers to the judgments of 30 January 2020 in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, EU:C:2020:53, paragraphs 42 and 43; of 25 June 2014 in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraphs 36 and 37; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 112.

[25] Judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 80.

[26] Reference is made to the judgments of 29 June 2023 in *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraphs 59 to 65 and case law cited; and of 19 April 2016 in *Holship*, E-14/15, paragraph 76.

100. Fourth, ESA contends that it is legally required to make its own assessment of the relevant market and any related effects under Article 53 EEA.[27] The inferences drawn in Toska's application from the ICA's SO and other merger decisions are therefore irrelevant. Furthermore, ESA argues that an assessment of the effect of a merger is necessarily different to an assessment of the effect of suspected coordination and that Toska's application conflates the questions of relevant market and effect on trade.

101. Lastly, ESA submits that Toska's references to the conduct of the inspection is irrelevant to the first plea. The way in which a decision ordering an inspection is applied has no bearing on the lawfulness of the inspection decision itself.[28]

Second plea: insufficient reasoning

102. ESA submits that Toska's claim regarding the insufficient reasoning of the contested decision is without basis and should be rejected. In its defence, ESA first addresses the alleged deficiencies in the reasoning of the contested decision, and second, responds to the alleged breach of legal principles such as legal certainty, no dual process and ne bis in idem.

Second plea, second issue: deficiencies in ESA's reasoning

103. As a preliminary point, ESA outlines the legal principles governing the obligation to state reasons in inspection decisions in competition cases. In accordance with Article 16 SCA, ESA highlights that the statement of reasons must be appropriate to the measure in question, which is, in this case, an inspection decision within the legal framework of Articles 4 and 20 of Chapter II of Protocol 4 to the SCA.

104. ESA submits that, according to settled case law, an inspection decision must contain four "essential features of the suspected infringement", stating (i) the market thought to be affected; (ii) the nature of the suspected restrictions of competition; (iii) the supposed degree of involvement of the undertaking concerned; and (iv) the powers conferred on ESA.[29] Since, at this stage, ESA does not yet have precise information allowing it to make a specific legal assessment of whether the conduct in question may

[27] Reference is made to the judgments of 5 May 2022 in *Telenor* v *ESA*, E-12/20, paragraph 97; and of 22 March 2000 in *Coca-Cola* v *Commission*, T-125/97 and T-127/97, EU:T:2000:84, paragraph 82.

[28] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 100; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 22; and of 6 September 2013 in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 49 and case law cited.

[29] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 110 and case law cited; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 39; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 171.

be characterised as an infringement, "the purpose of the inspection is precisely to gather evidence related to the suspected infringement".[30]

105. In order to safeguard the effectiveness of an inspection, ESA contends that it is not required to communicate to the addressee of an inspection decision all the information at its disposal concerning the presumed infringements, to delimit precisely the relevant market, to set out the exact legal nature of the infringements, or to indicate the period during which those infringements are alleged to have been committed.[31] In addition, ESA is not required to inform the undertaking in its decision of the information or indicia which justified the inspection.[32]

106. ESA maintains that the contested decision specifies the subject matter and purpose of the inspection in accordance with the requirements that follow from Article 16 SCA and case law:

(i) Recital 2 and Article 1(1) of the contested decision identify the market thought to be affected as "the Icelandic retail pharmacy market" and "the retail pharmacy market in Iceland". Recital 4 specifies that the undertakings involved operate pharmacy chains in an area which "represents almost 70% of all retail sales of pharmaceuticals in Iceland", and that the alleged anticompetitive behaviour therefore "covers a significant part of the Icelandic market".

(ii) The nature of the suspected restrictions of competition is described in recitals 2 to 4 and Article 1(1) of the contested decision as "anti-competitive agreements and/or concerted practices related to coordination of their conduct with SKEL" by (1) "eliminat[ing] direct competition between each other that took place using traditional walk-in pharmacies", (2) "[benefiting] from Lyfjaval's closure of certain of its traditional walk-in pharmacies, which previously directly competed with Lyf og heilsa's traditional walk-in pharmacies", and (3) allowing "Lyfjaval [to concentrate] on drive-through pharmacies, while Lyf og heilsa does not enter the drive-through pharmacy segment". The possible implementation of these practices is described as involving (a) "an asset swap agreement of 26 April 2022 between Lyf og heilsa and Lyfjaval related to certain of the parties' walk-in pharmacies operated and subsequently closed in Mjóddin and Glæsibær", (b) "coordination on the realisation of Lyfjaval/SKEL's new drive-through pharmacy strategy", and (c) "a restriction on Lyf og heilsa's ability to open

[30] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 43.

[31] Reference is made to the judgments in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraphs 41 to 42; and of 5 October 2020 in *Intermarché* v *Commission*, T-254/17, EU:T:2020:459, paragraph 111; in *Casino, Guichard-Perrachon and AMC v Commission*, T-249/17, cited above, paragraph 112; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 170.

[32] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraphs 85, 91 and 113 and case law cited.

drive-through pharmacies and a restriction on Lyfjaval's ability to open traditional walk-in pharmacies".

(iii) Recitals 2 to 4 and Article 1(1) of the contested decision describe the supposed degree of involvement of Lyf og heilsa and Lyfjaval and recital 5 specifies that this conduct "may have started at least in May 2021 and could be still ongoing".

(iv) Recitals 11 to 12 and Article 2 of the contested decision identify the powers conferred on ESA in conducting the inspection.

107. ESA contends that Toska has not identified any insufficiencies in the reasoning of the contested decision itself. Rather, the arguments presented in Toska's application essentially relate to the merits of the reasons and information given in the contested decision and Toska is merely providing alternative explanations for certain facts. Thus, in ESA's submission, Toska's arguments concern whether unlawful behaviour has occurred and are therefore irrelevant to the issue of whether the obligation to state reasons has been fulfilled.[33]

108. According to ESA, the contested decision complied with the requirement to disclose that ESA was in possession of information and indicia providing reasonable grounds for suspecting the infringement in question.[34]

109. In ESA's view, it had reasonable grounds, on the basis of the public notification of SKEL's purchase of Lyfjaval on 25 June 2021 and other information/indicia in its possession, for suspecting anticompetitive collusion at or around that time. In addition, ESA argues that whether or not SKEL had control of Lyfjaval in May 2021 does not preclude possible coordination between SKEL (as a potential competitor in relation to the Icelandic retail pharmacy market) and Toska in the period preceding 25 June 2021. In any event, ESA is not required to indicate the period during which the infringements are alleged to have been committed, even less the exact date. Consequently, ESA may not be reproached when deciding to state in the contested decision that it had information in its possession which indicated that the anticompetitive conduct may "at least" have commenced in May 2021.[35]

110. In response to Toska's argument that that all "car pharmacies" also qualify as "traditional pharmacies", ESA claims that Toska misses the point. The terms used in

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[33] Reference is made to the judgments of 8 March 2007 in *France Télécom* v *Commission*, T-340/04, EU:T:2007:81, paragraph 97; of 17 December 2015 in *Orange Polska* v *Commission*, T-486/11, EU:T:2015:1002, paragraph 70; of 14 March 2014 in *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 59; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 222.

[34] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 114; in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 172; and in *France Télécom* v *Commission*, T-340/04, cited above, paragraph 60.

[35] Reference is made in particular to the judgment in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 47.

the contested decision of "traditional walk-in" versus "drive-through" pharmacies seek simply to distinguish those pharmacies with a drive through option (which may be a particular factor of competition) compared with those which lack this option. ESA submits that the arguments made by Toska in its preliminary remarks make plain that they have understood this distinction.

111. ESA submits that Toska's claim that ESA should have provided reasons as to how "transactions which [ICA] deemed to be mergers, and approved as such, can also constitute an infringement of Article 53 [EEA]" must be rejected. Toska's assertion is based on the erroneous premise that the conduct under investigation by ESA is the same as the conduct previously investigated by the ICA. In addition, the notification of the Asset Swap Agreement to the national competition authority is not relevant to ESA's duty to give reasons.[36]

Second plea, first issue: breach of the principles of legal certainty, ne bis in idem, and no dual process

112. In its defence, ESA submits that Toska's claim is in essence jurisdictional in nature and is not relevant to the duty to give reasons. In any event, ESA argues that the claim is based on a number of inaccuracies and is unsupported by authority.

113. First, ESA reiterates that the conduct under investigation is of a different nature and of a different temporal and geographic scope to the Asset Swap Agreement alone. Therefore, Toska mischaracterises the contested decision when claiming that the alleged infringement is the same conduct as previously investigated and approved by the ICA.

114. Second, even if the transactions under the Asset Swap Agreement were approved by the ICA as mergers, ESA argues that this does not affect its competence to investigate whether such transactions were evidence of a broader anticompetitive conduct, distinct from the Asset Swap Agreement itself. ESA is entitled to conduct an investigation into anticompetitive conduct under Article 53 EEA, using information obtained from the ICA, irrespective of possible investigation proceedings by the national competition authority.[37]

115. Third, as the investigation is broader than the Asset Swap Agreement, ESA argues that the investigation does not undermine any legal certainty obtained under the

[36] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 50, where the ECJ held that the fact that the Commission in that case had "information collected by the Czech competition authority … cannot, as such, have any consequences for the Commission's obligation to state reasons".

[37] Reference is made to the judgment in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 117 to 119; and in *Orange Polska* v *Commission*, T-486/11, cited above, paragraphs 26 to 27 and 52.

merger regime. Toska can have no expectation that its broader conduct would not be investigated.[38]

116. Fourth, even if the ICA was already given sufficient material to assess the broader Article 53 EEA market sharing conduct, ESA is entitled under Chapter II of Protocol 4 to the SCA to investigate the same broader conduct.

117. Fifth, ESA submits that the application of the ne bis in idem principle in competition law proceedings is subject to a twofold condition: (i) there must be a prior final decision of the requisite nature, and (ii) the prior decision and the subsequent proceedings or decisions must concern the same conduct.[39] As there has been no determination as to the merits of the case by the ICA, and the facts under consideration in the processes are different, the conditions for applying the ne bis in idem principle are not met.

Third plea: insufficient grounds and breach of the principle of proportionality

118. In response to Toska's third plea, ESA submits that the summary of the case law cited by Toska is incomplete. ESA argues that it is sufficient that ESA is in possession of information and indicia providing "reasonable grounds for suspecting an infringement"[40] (also referred to as "sufficiently serious indicia"[41]). ESA is not required to inform the undertaking in its inspection decision of the information or indicia which justified the inspection.[42] Provided that the facts ESA wishes to investigate and the matters to which the inspection relates are defined sufficiently precisely in the inspection decision, the Court may assume that ESA had reasonable grounds to suspect an infringement and order an inspection.[43]

119. According to ESA, the statement of reasons in the contested decision alone sufficiently disclosed that it was in possession of information and indicia in relation to all essential elements of the suspected infringement, thereby providing reasonable

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[38] Reference is made to French Competition Authority Décision No 24-D-05 of 2 May 2024, paragraphs 107 to 120; and the Opinion of Advocate General Kokott of 13 October 2022 in *Towercast*, C-449/21, EU:C:2022:777, point 60.

[39] Reference is made to the summary of the case law in the judgment of 22 March 2022 in *Nordzucker AG and Others*, C-151/20, EU:C:2022:203, paragraphs 28 to 33; and of 22 March 2022 in *bpost*, C-117/20, EU:C:2022:202, paragraphs 22 to 28.

[40] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 66; in *Cementos Portland Valderrivas* v *Commission*, T-296/11, cited above, paragraph 43; of 29 February 2016 in *EGL and Others* v *Commission*, T-251/12, EU:T:2016:114, paragraph 149; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 230.

[41] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 165 and case law cited.

[42] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 164; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 45; and in *Orange Polska* v *Commission*, T-486/11, cited above, paragraph 81.

[43] Reference is made to the judgments in *Orange Polska* v *Commission*, T-486/11, cited above, paragraphs 91 to 93; and in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 49 to 51.

grounds to suspect a breach of Article 53 EEA. ESA submits that Toska has failed to "produce evidence casting doubt" on the existence of such grounds. Consequently, ESA argues that the Court is not required to examine those grounds and determine whether they are reasonable.[44] In this regard, ESA emphasises that the recitals of the contested decision describe the relevant market, the suspected conduct, the geographical area of suspected conduct and the possible temporal scope of the suspected conduct.

120. In any event, ESA argues that it did possess sufficient information and indicia providing reasonable grounds to suspect an infringement. In response to Toska's arguments, in addition to the submissions made in the defence in relation the first and second pleas, ESA highlights the following:

(i) The date and other described characteristics of the agreement were sufficiently precise for Toska to understand which agreement the contested decision intended to refer to. Toska's complaint that the contested decision erroneously refers to Lyf og heilsa as a party to the Asset Swap Agreement, instead of Faxar, is merely formalistic in nature and incapable of casting doubt on whether ESA had reasonable grounds for adopting the contested decision.

(ii) ESA refers to Toska's statement in its application, paragraph 87, where Toska highlights that the ICA in its SO made the preliminary assessment that certain conduct under the Asset Swap Agreement "could perhaps infringe Article 53 of the EEA Agreement". ESA questions how Toska can acknowledge this while simultaneously maintaining, in the application, paragraph 81e, that "ESA cannot have had any indicia that [the Asset Swap Agreement] constituted an infringement of Article 53".

(iii) Toska's application, paragraph 81g, criticises the contested decision for failing to refer to "information from the ICA's merger file which is exculpatory for the applicants" ("cherry picking"), but fails to specify which information and why. According to ESA, this part of the third plea is therefore inadmissible. In any event, ESA is not required to have assessed all exculpatory evidence at this preliminary stage of the investigation, let alone disclose it in its inspection decision.[45]

121. ESA also rejects Toska's allegation of a breach of the principle of proportionality. First, ESA contends that even if it already has indications or evidence of the existence of an infringement, ESA may legitimately consider it necessary to order additional investigations to gain a better understanding of the infringement, its duration,

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[44] Reference is made to the judgments in *Nexans and Nexans France* v *Commission*, C-37/13 P, cited above, paragraph 72; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 49; and in *Orange Polska* v *Commission*, T-486/11, cited above, paragraph 88.

[45] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 64.

or the groups of undertakings involved.[46] Second, the information provided by the ICA was not complete or comprehensive with respect to the subject matter and purpose of the investigation, as well as limited to that provided voluntarily by Toska and its competitor SKEL. ESA refers to Recital 9 of the contested decision, which emphasises the need for unannounced inspections in the event of suspected infringements of Article 53 EEA.

Reply

122. In its reply, Toska submits (i) that there was a lack of reasonable suspicion and (ii) that the alleged unlawful conduct is by law impossible and (iii) makes further observations on the defence.

Lack of reasonable suspicion

First subheading: the Asset Swap Agreement is the only ground for the contested decision

123. Toska notes that, in paragraph 7 of the defence, ESA maintains that the "suspected infringement which forms the subject matter of the decision is not the (local) asset swap agreement". However, Toska contends that this statement is inconsistent with the arguments presented in Section 1.2.1 of the defence, where ESA argues that, through the Asset Swap Agreement, Toska and SKEL eliminated direct competition between each other.

124. Toska submits that ESA has no other evidence of an infringement beyond the Asset Swap Agreement and the documents submitted in the merger case to the ICA. According to Toska, ESA relies almost exclusively on the Asset Swap Agreement when asserting that it had sufficiently serious indicia. When Toska points out that the Asset Swap Agreement has been investigated by the ICA and reviewed by the CAC, ESA's references to "wider anticompetitive collusive conduct" are made without further explanation or any evidence.

125. Toska contends that neither Decision No 24-D-05 of 2 May 2024 by the French Competition Authority, cited by ESA in its defence, nor the *Towercast* judgment applies to the case at hand. In contrast to these decisions, the case at hand concerns a situation where the merger has been notified.

126. Thus, Toska submits that both conditions for the application of the ne bis in idem principle are met. Toska argues that the CAC decision dated 9 August 2023 must be considered as a final decision of the requisite nature, fulfilling the first condition, as neither Toska nor the ICA appealed the ruling. Toska asserts that the Asset Swap Agreement was thoroughly investigated on its substance and merits by the ICA, who found no reason to intervene. In relation to the second condition, Toska maintains that

[46] Reference is made to the judgments in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 63; and in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 115 and case law cited.

the contested decision is based on the Asset Swap Agreement that was reviewed by the ICA and that no other substantial evidence has been presented by ESA.

127. Further, Toska refers to case law from the ECJ, in which the principle of ne bis in idem in competition law has been considered to be "subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected".[47] Toska argues that these conditions are met in the current case: the conduct is the same (Asset Swap Agreement); the condition of unity of the offender is fulfilled; and the condition of unity of the legal interest is fulfilled, as both the Article 101 TFEU proceedings and the merger control assessment seek to safeguard undistorted competition.

128. In relation to the closing of SKEL's pharmacy in Keflavík, Toska argues that the situation was not exactly as presented by ESA. SKEL opened another pharmacy further away from its competitor, but the new location was both more favourable from a business standpoint and attracted all the longtime customers of Lyfjaval.[48] In addition, the new pharmacy is within the 2 km radius that the ICA has in practice defined as a relevant pharmacy market.

129. In response to ESA's reference to Toska's stated intention to close Lyfjaval's pharmacies in Mjódd and Keflavík (Reykjanesbær) following a successful bid, Toska replies that ESA has failed in its duty of objectivity. Toska points out that, after the closures by SKEL, Lyfjaval (under SKEL's control) opened two new pharmacies within 2 km radius of the closed locations, thereby maintaining competition within the same relevant markets. This outcome, Toska notes, clearly diverges from what it intended had it acquired Lyfjaval, and is not reflected in its guidance letter to the ICA dated 18 May 2021.

130. Toska reiterates that ESA must have in its possession information leading to a reasonable suspicion of a breach of Article 53 EEA.[49] Toska reiterates that ESA does not have, and could not have had, any such information.

131. Toska objects to ESA's statement that it has failed to produce evidence casting doubt on whether ESA had reasonable grounds for adopting the contested decision, and to claim that the Court is not required to examine those grounds and determine whether they are reasonable. According to Toska, it clearly argued this in the application and Toska requests the Court to assess whether ESA had information that would fulfil the requirement of reasonable grounds to suspect an infringement.

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[47] Reference is made to the judgments of 7 January 2004 in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 338; and of 14 February 2012 in *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 97.

[48] Reference is made to the newspaper article of 24 February 2024, attached as Annex B.5 (English) / Annex B.5a (Icelandic original).

[49] Reference is made to the judgment of 25 November 2014 in *Orange* v *Commission*, T-402/13, EU:T:2014:991.

Second subheading: lack of reasonable grounds due to incorrect market definitions

132. Toska submits that the requirement to state the market thought to be affected in an inspection decision is not met, leading the contested decision to be insufficiently reasoned. According to Toska, the market definition presented in ESA's decision is inaccurate and contradictory to the evidence on which the suspicion is based. Toska argues that it appears that references to the retail pharmacy market in the "Reykjavík Capital Area" or "Iceland" are being used to justify the requirement of an effect on trade between EFTA States. As the market definition is inconsistent with previous competition authority precedents, and ESA relies on information from the ICA, Toska submits that ESA is required to present its assessment in the contested decision.

133. In response to ESA's assertion that it must conduct its own assessment of the relevant market, Toska argues that ESA appears not to have conducted any such assessment. In this regard, Toska notes that the turnover of the two pharmacies in Glæsibær and Mjódd combined only amounts to approximately 2 % of the total turnover of all pharmacies located in the greater Reykjavík capital area.

134. Toska contends that, although a detailed market definition may not be necessary at this stage, ESA's approach is vague and seemingly random. According to Toska, this could potentially undermine the requirement to define the relevant market in an inspection decision established in case law. In this regard, Toska reiterates that the key condition of Article 53 EEA is the effect on trade between EFTA States. Toska questions how ESA could have had reasonable grounds to suspect that the conditions of Article 53 EEA were met, particularly when relying on information provided by the ICA, where the relevant market was defined as local in nature.

135. Under this subheading, Toska also challenges the existence of collusion as SKEL has opened two new pharmacies within the same market, as defined by the ICA, as Toska's pharmacies in Reykjenesbær and Mjódd.

The alleged unlawful conduct is by law impossible

136. In its reply, Toska reiterates that the alleged collusive conduct is by law impossible. As all "drive-through pharmacies" are "traditional walk-in pharmacies" due to the requirements applicable to physical pharmacies under Icelandic Regulation No 1340/2020, Toska argues that there was no way it could restrict SKEL's ability to open a traditional walk-in pharmacy.

Further observations on the defence

137. Under this subheading, Toska makes various further observations. Toska notes that there is a discrepancy between the contested decision and the defence regarding the timing of the alleged unlawful conduct. According to Toska, the contested decision explicitly stated that the companies eliminated competition between them from at least May 2021, whereas the defence now suggests that SKEL's control allowed the unlawful conduct to be implemented in September 2021 (thus the conduct first starting in

September 2021). Toska submits that the contested decision thus is unclear and so did not enable Toska to understand the reasons behind the measure and its obligations during the inspection.

138. Toska maintains that it is factually incorrect to suggest that Toska and SKEL ambiguously described the real nature of the Asset Swap Agreement in their interactions with the ICA. According to Toska, the CAC has already rejected similar arguments made by the ICA. The merger notification clearly stated that the transaction entails an asset swap of real estate. It also provided a detailed explanation of how the closure of the respective pharmacies would affect competition, concluding that the effect was not to the scale that an intervention was justified. Thus, the merger notification offered both the ICA and ESA an objective description of the transaction, sufficient to assess the transaction under the merger rules.

139. Toska argues that it is not merely offering "alternative explanations for certain facts" in the application, as claimed by ESA, but instead identifies deficiencies in the reasoning itself. According to Toska, it is presenting a comprehensive analysis of the facts, as it believes the contested decision contains clear factual errors.

140. In the defence, ESA questions how Toska can recognise the ICA's preliminary assessment in the SO while also claiming that ESA had no indicia that the Asset Swap Agreement constituted an infringement of Article 53 EEA. In response, Toska notes that the ICA's SO was issued on 13 February 2023 prior to the CAC's decision on 8 August 2023, which confirmed that the Asset Swap Agreement constituted a merger and should be investigated as such. Toska emphasises that it is fundamental that a ruling from the CAC exists in the case regarding the exact same conduct subject to the contested decision, as it appears that the ICA has done nothing further in the matter since the ruling was issued.

141. Toska emphasises that the reason behind its application is to obtain review by the Court whether there were legitimate grounds for the contested decision. In this regard, Toska submits that it cannot be enough for ESA to vaguely refer to having had some suspicion of unlawful conduct entirely unrelated to the facts of the case or the affected market. If it is sufficient to refer in such unclear manner to a suspicion, the right to appeal the contested decision is entirely meaningless. Although Toska understands that ESA must gather information and must have discretion to assess whether there is any merit to the case, Toska argues that this case is fundamentally different from the ECJ case law cited by ESA. Toska reiterates that a final ruling has already been issued in this matter by a higher administrative authority in Iceland and the ICA has conducted a thorough investigation into the exact same conduct. Toska notes that its fundamental right to not be subjected to arbitrary dawn raids is at stake in this regard.

142. Finally, Toska argues that ESA's description of the Asset Swap Agreement as "in part payment to SKEL for possibly wider restrictive actions, to the benefit of Toska" is misleading. According to Toska, the purchase price included goodwill, as one of the properties housed a significantly more profitable pharmacy than the other. Therefore, it

was appropriate for the purchase price to reflect the fact that one party was transferring an item of real estate, which had the opportunity to render greater commercial value than the other, beyond the mere market value of the real estate itself. Toska asserts that documents supporting this explanation are part of the case file. Since the purchase price precisely accounted for the profitability disparity between the two pharmacies, it cannot have included payment for wider restrictive actions.

Rejoinder

143. In its rejoinder, ESA maintains the arguments given in the defence and makes the following additional arguments, grouped under four headings.

Sufficiently serious indicia were present and no breach of the principle of ne bis in idem

144. ESA submits that Toska, in its reply, fails to engage in any meaningful way with the selected indicia described in Section 1.2.1 of the defence, which must be viewed as a whole.[50] When claiming that only the Asset Swap Agreement is advanced by ESA to suggest a "wide" or "broad" anticompetitive conduct, and that the contested decision only concerns the Asset Swap Agreement, Toska fails to take into account the terms of the contested decision, as well as the arguments and indicia presented in the defence.

145. ESA addresses Toska's attempt, in its reply, to distinguish the present case from Decision No. 24-D-05 of 2 May 2024 by the French Competition Authority. ESA clarifies that it relied on a specific section of that decision which, unlike the subsequent part cited by Toska, does not concern the application of the *Towercast* judgment. Instead, it addresses the existence of a market allocation arrangement outside the context of merger control, irrespective of whether the transaction was subject to prior notification. ESA therefore maintains its view that the decision of the French Competition Authority is a helpful illustration of the possibility to lawfully review, under Article 53 EEA, broader anticompetitive conduct that is distinct from a merger transaction.

146. In relation Toska's claim that the principle of ne bis in idem has been infringed, ESA refers to the arguments presented in its defence and makes the following additional submissions:

(i) The legal test referred to and applied by Toska in the reply in connection with the application of the ne bis in idem principle in competition matters is outdated. The correct test is set out in the defence.

[50] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC v Commission*, T-249/17, cited above, paragraph 223; and of 30 April 2025 in *Symrise* v *Commission*, T-263/23, EU:T:2025:417, paragraphs 60 and 75.

(ii) Toska does not provide an effective answer to ESA's argument that the CAC rulings did not involve a decision on the substance or merits of the case.

(iii) Toska simply repeats that the subject-matter of the contested decision and the ICA merger proceedings are one and the same. It ignores the fact that different conduct is under scrutiny (collusion rather than mergers), that a different time-frame is involved (at least from May 2021 onwards), and that there is a different geographical scope (Icelandic retail pharmacy market rather than the effects of a transaction concerning retail locations in two Reykjavík shopping centres).

147. ESA emphasises that the various indicia on the basis of which an infringement may be suspected must be assessed not in isolation but as a whole, and they may reinforce each other.[51]

148. Furthermore, ESA emphasises that it did not assert in its defence that Toska had failed to request a review of ESA's grounds, as Toska appears to suggest in its reply. Rather, ESA argues that Toska has failed to produce evidence casting doubt on those grounds, and that, consequently, the Court is not required to examine those grounds and determine whether they are reasonable.

Market definition

149. ESA submits that Toska fails to indicate which plea(s) in law of the application the subheading "lack of reasonable grounds due to incorrect market definitions" aims to amplify. Nor does Toska indicate which part(s) of the defence the section is intended to address. ESA questions whether this section is admissible in its entirety, referring to the restrictions imposed by Article 110 RoP. However, ESA indicates that it understands the section as seeking primarily to expand the first plea, as well as to a certain extent the second plea.

150. First, ESA reiterates that the essential elements required in the reasoning of an inspection decision, do not encompass a precise definition of the relevant market, but only an indication of the market thought to be affected.[52] Additionally, ESA argues that even at the stage of a final decision finding an infringement of Article 53 EEA, it is often not necessary to precisely define the relevant market. This is particularly true in cases where the agreement's object is to restrict competition through market sharing, as long as it can be shown that actual or potential competition was necessarily restricted.[53]

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[51] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 223; and *Symrise* v *Commission*, T-263/23, cited above, paragraphs 60 and 75.

[52] Reference is made to case law cited in the defence, as well as to the judgment in *Symrise* v *Commission*, T-263/23, cited above, paragraph 24.

[53] Reference is made to the judgments of 28 June 2016 in *Telefónica* v *Commission*, T-216/13, EU:T:2016:369, paragraphs 213 to 214 and case law cited; and of 8 July 2004 in *Mannesmannröhren-Werke* v *Commission*, T-44/00, EU:T:2004:218, paragraph 132 and case law cited. Reference is also made to the European Commission

In line with case law, the decision thus merely identifies the market thought to be affected, with a view, in particular, to enabling the undertaking to identify the scope of its obligation to cooperate during the inspection.

151. Second, ESA submits that it is not required to explain how its case is potentially different from the recent ICA merger case in which Toska was involved. ESA is legally required to give reasons for its own decision to conduct an inspection, and information collected by national authorities does not change this. ESA submits further that it is clear from the reasons given in the contested decision that the scope of the inspection is different from the ICA merger case as it involves different conduct.

152. Third, ESA reiterates that the suspected infringement which forms the subject matter of the contested decision is not the Asset Swap Agreement, but wider anticompetitive collusive conduct. Toska's arguments in the reply, alleging a contradiction between the local effects of the asset swap agreement and the identification of the retail pharmacy market in Iceland as the market thought to be affected, are consequently misguided and ineffective.

153. Fourth, ESA maintains that the definition of the relevant geographic market and the effect on trade constitute two separate questions, which must not be conflated. Trade between Contracting Parties may be affected also in cases where the relevant market is national or subnational.[54] Also ESA must have reasonable grounds to suspect an actual or potential effect on trade. Thus, ESA asserts that the notion put forward by Toska that ESA's jurisdiction fundamentally depends on the market definition lacks any legal foundation, as it neglects the relevance of the geographic scope or coverage of the conduct as a whole. If Toska's reasoning were to be followed, Article 53 EEA could never apply to collusive conduct affecting local geographic markets, for example to anticompetitive agreements involving the retail distribution of daily consumer goods (for which the relevant geographic market is typically defined as a local area), even where that conduct extends to the entire territory or a significant part of the territory of a given EEA State.[55]

154. In addition, ESA highlights the following:

(i) Contrary to the allegation in the reply, identifying the geographic scope of the suspected conduct by reference to an entire EEA State (such as Iceland) or a subpart thereof (such as the Reykjavík capital area) is, as a matter of principle, permissible and sufficiently precise in light of the applicable case law.

Notice on the definition of the relevant market for the purposes of Union competition law, OJ C, C/2024/1645, 22.2.2024 ("Commission Market Definition Notice").

[54] Reference is made to ESA's Guidelines on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement, OJ 2006 C 291, p. 46, ("Effect on Trade Guidelines"), paragraph 22.

[55] Reference is made to the Commission Market Definition Notice, footnote 64, and the judgment in *Super Bock Bebidas*, C-211/22, cited above, paragraphs 60 to 63.

(ii) The case law cited by the ECJ in *Sbarigia*, C-393/08,[56] supports the position of ESA, as it confirms the relevance, for assessing effect on trade, of (i) the extent of the territory of an EEA State to which the anticompetitive conduct at issue extends; and (ii) the volume of trade which may be affected.

(iii) Toska's argument that there was a limited turnover at the pharmacies in Glæsibær and Mjódd is meaningless as it disregards the fact that the undertakings at issue operate pharmacy chains throughout Iceland and that the suspected conduct was not limited to the Asset Swap Agreement.

(iv) Toska's argument that, despite the suspected collusion, SKEL has opened new pharmacies in Reykjanesbær and Suðurfell concerns the substance of whether or not anticompetitive conduct took place and is not relevant at this stage of the proceedings – but may be put forward in the *inter partes* stage.

(v) Toska's argument that the requirement to state an affected market would become meaningless if it is permissible to refer to an EEA State as a whole conflates the concepts of relevant market and geographical scope. It also reflects a misunderstanding of the purpose of ESA's obligation to state reasons. ESA contends that if, for example, an undertaking is engaged in activities in sectors A, B, and C in countries X, Y, and Z, but the inspection decision only covers sector A in country X, ESA's powers and the undertaking's duty to cooperate would not, in principle, extend to the other sectors and countries.

(vi) Toska's claim that the case seems to be driven by the ICA's unwillingness to accept the outcome of the prior merger case must be rejected as speculative and unfounded.

The suspected conduct is possible

155. ESA maintains that the existence of the regulatory requirement on physical pharmacies, cited by Toska, does not call into question the fact that a pharmacy either has a drive-through option or not. ESA does not suspect an infringement of Icelandic regulatory rules related to the layout of pharmacies, and ESA's competition law suspicions would be unaffected by any non-compliance with these regulatory rules. According to ESA, it is both conceivable and factually possible for Toska and SKEL to coordinate their conduct by agreeing on a certain specialisation or market sharing.

[56] Reference is made to the judgment in *Sbarigia*, C-393/08, cited above, paragraph 32 and case law cited.

Further observations in the reply

156. ESA highlights that Toska's further observations in the reply are not attributed to any specific plea. In any event, none of the arguments call the defence into question.

157. In particular, ESA submits that Toska erroneously alleges that there is a discrepancy between the contested decision and the defence in terms of the time at which the unlawful conduct may have commenced. The defence is consistent with recital 5 of the contested decision, which states that the "alleged anticompetitive conduct may have started at least in May 2021 and could still be ongoing".

158. Further, ESA submits that Toska fails to engage with or contest the relevant passages from the documentation and descriptions cited in the defence, including the related footnotes, concerning the allegedly ambiguous description of the real nature of the Asset Swap Agreement. According to ESA, Toska appears to have accepted that they described the transaction in different ways. For instance, ESA highlights that paragraph 61 in the reply appears to accept that the merger notification described the transaction both as a transaction with an impact on the pharmacy market and as a real estate swap. Further, ESA submits that the CAC did not take a position on whether the statements may have been misleading or ambiguous. Rather, the CAC found that, regardless of whether Lyf og heilsa's description of the transactions underlying the merger notification had been misleading or changed over time, the ICA should not have suspended its merger investigation. Toska's claim that the CAC had rejected arguments of a similar nature by the ICA must therefore be dismissed.

159. ESA also notes that most of the complaints in the reply are directed at the substance or merit of the matters stated in the contested decision and not the obligation to state reasons. Thus, ESA argues, the assertion that these are fundamental issues does not change the fact that they are irrelevant to the plea. Furthermore, ESA notes that merger case before the CAC was not about market sharing under Article 53 EEA.

160. In relation to the purchase price of the Mjódd retail property, ESA notes that it does not have the information at this preliminary investigative stage to assess precisely what may or may not have been a reasonable compensation for goodwill. In ESA's view, the fact that Toska needed to make a very significant payment to SKEL for the alleged goodwill of the pharmacy suggests that Toska anticipated receiving a significant benefit (in terms of business gained) from SKEL's closure of the pharmacy. This is inconsistent with Toska's repeated claims that, following this Mjódd closure, SKEL maintained effective competitive pressure by opening a "new and improved" drive-through pharmacy some 1-2 km away.

European Commission

161. In its written observations, the Commission supports the interpretation of EU/EEA law provided by ESA in its defence. The Commission addresses three legal issues raised in Toska's pleas: (i) the evidentiary standard for an inspection decision,

(ii) the obligation to state reasons, and (iii) ESA's competence to investigate under Article 53 EEA.

Evidentiary standard to suspect an infringement of competition rules

162. The Commission notes that Article 20(1) and (4) of Chapter II of Protocol 4 to the SCA mirrors the legal basis for the power of the Commission to conduct an unannounced inspection laid down in Article 20(1) and (4) of Council Regulation (EC) No 1/2003.The Commission notes that Toska and ESA agree that the standards are the same.

163. The Commission emphasises that inspections constitute coercive measures that entail an invasion of the privacy of the persons subject to the inspection and that it is therefore important to ensure an adequate level of protection against arbitrary or disproportionate intervention – such protection is recognised as a general principle of Union law.[57] It follows that the inspection has to be directed at gathering the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which the Commission already possesses certain information, constituting sufficiently serious indicia for suspecting an infringement of the competition rules.[58]

164. Having reasonable grounds for suspecting an infringement of the competition law rules is a prerequisite, and the relevant standard, for the Commission to order an inspection pursuant to Article 20(4) of Regulation 1/2003.[59] The requirement for an inspection decision to be based on indicia that give rise to reasonable grounds for suspecting an infringement of competition rules precludes the Commission from carrying out "fishing expeditions" aimed at gathering evidence of an infringement for which the Commission does not possess any initial indicia.[60]

165. Furthermore, the Commission reiterates the legal principles put forward by ESA in the Defence. In particular, the Commission contends that since the investigation takes place at a preliminary stage, ESA is not required to be in the possession of information

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[57] Reference is made to the judgments of 21 September 1989 in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19; of 22 October 2002 in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 27; in *Orange* v *Commission*, T-402/13, cited above, paragraph 83; and in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 34.

[58] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 58; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 35; in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 63; in *Orange* v *Commission*, T-402/13, cited above, paragraph 84; and in *Roquette Frères*, C-94/00, paragraphs 59 to 61.

[59] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 59; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 36; in *Orange* v *Commission*, T-402/13, cited above, paragraph 84; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 111.

[60] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 63; of 14 November 2012 in *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraphs 45, 58 and 67; and in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 41 to 43.

to establish an infringement of competition law at this stage.[61] Moreover, ESA is not required to carry out a rigorous legal characterisation of the presumed infringement as long as the inspection decision clearly indicates which presumptions it intends to verify through the inspection.[62] In addition, ESA is not required to also assess all indicia that point towards a different direction.[63]

166. The Commission highlights that, according to established case law, the judicial determination of whether ESA was in possession of sufficiently serious indicia does not require a substantive assessment of the content of the indicia. Rather, the Court must satisfy itself that "there are reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned".[64] When the recipients of an inspection decision produce evidence casting doubt on whether the ESA had reasonable grounds for adopting the decision, the Court must examine those grounds and determine whether they are reasonable.[65] However, the Commission submits that the Court can conclude that ESA was in possession of sufficiently serious indicia (and, therefore, the inspection was not arbitrary) without it being necessary to check the content of ESA's indicia if the Court takes the view that the presumed facts which ESA wishes to investigate and the matters to which the inspection relates are defined sufficiently precisely in the decision.[66]

167. In the present case, the Commission considers that the non-exhaustive indicia at ESA's disposal described in the defence are reasonable grounds for ESA to suspect Toska's and SKEL's involvement in a competition law infringement. On this basis, the Commission agrees with ESA that it is not necessary for the Court to adopt a measure of organisation of procedure ordering ESA to produce all of the documents and other information on the basis of which ESA considered, at the date of the contested decision, that it had sufficiently serious indicia to determine whether ESA's inspection decision was not arbitrary and unjustified.

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[61] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 164; in *Orange* v *Commission*, T-402/13, cited above, paragraph 81; in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraphs 42 to 43 and 62; and in *Nexans and Nexans France* v *Commission*, C-37/13 P, cited above, paragraphs 36 to 37.

[62] Reference is made to the judgments in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 62. The ECJ also highlighted the difference between indicia and evidence in its judgment of 9 March 2023 in *Les Mousquetaires* v *Commission*, C-682/20 P, EU:C:2023:170, paragraph 92 et seq.

[63] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 64.

[64] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 48; and in *Nexans France and Nexans* v *Commission*, T-135/09, cited above, paragraph 43 and case law cited.

[65] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, paragraph 49; and in *Nexans France and Nexans* v *Commission*, T-135/09, cited above, paragraph 72.

[66] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, paragraph 51; and in *Orange* v *Commission*, T-402/13, cited above, paragraph 91.

The obligation to state reasons

168. The Commission notes that Article 20(4) of Chapter II of Protocol 4 to the SCA imposes the same obligation on ESA with respect to inspection decisions as Article 20(4) of Regulation 1/2003 does on the Commission, namely, to specify the subject matter and purpose of the inspection.

169. The Commission highlights that, on the one hand, the obligation to state specific reasons constitutes a fundamental requirement to show that the envisaged intervention within the undertakings concerned is justified and proportionate. On the other hand, the reasoning of the inspection decision puts the parties under investigation into the position to understand the scope of their duty to cooperate, while at the same time preserving their rights of defence.[67]

170. The Commission agrees with ESA that the inspection decision must state "as precisely as possible, the presumed facts that it wishes to investigate, namely what it is looking for and the matters to which the inspection must relate".[68] Specifically, the essential features of the suspected infringement must be stated by indicating (a) the market thought to be affected; (b) the nature of the suspected restriction of competition; (c) the supposed degree of involvement in the infringement of the undertaking(s) concerned; and (d) the powers conferred on the investigators.[69]

171. Further, the Commission agrees with ESA that the early timing of the inspection decision also determines the breadth and scope of the obligation to specify the subject matter of the investigation.[70] Thus, at this stage, ESA is not required to delimit the relevant market, to set out the exact nature of the infringement or to indicate the period during which the infringements were committed.[71] Moreover, an obligation to disclose all information and indicia informing ESA's inspection decision would compromise the efficiency of ESA's investigation, since the undertaking concerned would already be

[67] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 22; in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 40; in *Nexans and Nexans France* v *Commission*, C-37/13 P, cited above, paragraph 34; in *Hoechst* v *Commission*, 46/87 and 227/88, cited above, paragraph 29; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 170.

[68] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 24; and in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 39.

[69] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 29; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 39; in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 110; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 171.

[70] Reference is made to the judgments in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 43; and in *Nexans and Nexans France* v *Commission*, C-37/13 P, cited above, paragraph 37.

[71] Reference is made to the judgments in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 42; in *Nexans and Nexans France* v *Commission*, C-37/13 P, cited above, paragraphs 35 to 36; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 170.

able, at the preliminary investigation stage, to identify the information known to ESA and the information that could still be concealed.[72]

172. In the Commission's view, the contested decision complies with the obligation to state reasons. The contested decision identifies in a sufficiently precise manner the (i) market thought to be affected, (ii) the nature of the suspected restrictions of competition, (iii) the supposed degree of involvement of the undertakings concerned, and (iv) the powers conferred on ESA.[73] Conversely, ESA should not be required to define precisely the market in question, or to make a precise legal analysis of infringements, or indicate the period within which those infringements were allegedly committed.

ESA's competence to investigate under Article 53 EEA

173. As a preliminary point, the Commission notes that ESA's merger control powers and the relationship between merger control and Article 53 and 54 EEA are largely aligned – subject to certain adaptions – with the Commission's merger control powers and the relationship between Council Regulation (EC) No 139/2004 (the "EU Merger Regulation") and Articles 101 and 102 TFEU.

174. The Commission argues that the question of whether the Asset Swap Agreement qualifies as a concentration within the meaning of merger control appears to have no bearing on the assessment of the legality of the contested decision. Even assuming, as Toska contends, that the agreement constitutes two concentrations, the Commission maintains that Article 53 EEA would still apply to the suspected infringement described in the inspection decision and that ESA would therefore be competent to investigate the matter. In support of this position, the Commission advances four arguments.

175. First, Article 101 TFEU, and by analogy, Article 53 EEA, apply to anticompetitive coordination that goes beyond a concentration. This follows directly from Article 21(1) of the EU Merger Regulation as interpreted by the Union courts.[74]

176. Second, a concentration, if part of a broader scheme of anticompetitive coordination, can be considered to form part of an infringement of Article 101 TFEU. An infringement of Article 101 TFEU may result not only from an isolated act but also

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[72] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 88.

[73] Reference is made to the judgments in *Symrise* v *Commission*, T-263/23, cited above, paragraph 29; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 39; in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 110; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 171.

[74] In particular, reference is made to the judgment of 7 September 2017 in *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 33. Reference is also made to the Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, OJ 2023 C 259, p. 1, paragraph 46.

from a series of acts or from continuous conduct.[75] The Commission notes that the contested decision clearly indicates that the suspected infringement consists of three elements, whereby the swap agreement is only one of these elements, the other two elements pertaining to (i) anticompetitive coordination between the parties as regards their policy to "car pharmacies" and (ii) anticompetitive limitation of capacities to open "car pharmacies" or "traditional pharmacies".

177. Third, the Commission considers that the applicability of Article 101 TFEU and, by analogy, Article 53 EEA to the suspected infringement described in the contested decision cannot be excluded on the grounds that the other elements of the suspected infringement (pertaining to anticompetitive coordination between the parties as regards "car pharmacies" and limitation of capacities to open "car pharmacies" or "traditional pharmacies") are merely ancillary to a lawful concentration.[76]

178. Fourth, according to the Commission's decisional practice, upheld by the Union courts, the fact that the parties have merged, and their concentration has been cleared under the EU Merger Regulation, does not preclude investigations and sanctioning of an anticompetitive agreement between the parties that predates clearance of the concentration. In this regard, it appears clear to the Commission that the Asset Swap Agreement has not led to a merger between the parties and that they have continued to operate in the market as separate undertakings.

179. In relation to Toska's claim of a breach of the principle of ne bis in idem, the Commission considers that the application of Article 101 TFEU or, by analogy, Article 53 EEA to coordination going beyond the Asset Swap Agreement between Toska and SKEL does not violate this principle.

180. In addition to the legal principles presented by ESA in the defence, the Commission emphasises that ne bis in idem principle applies to the extent that the proceedings can be considered criminal on the basis of three criteria: (i) the legal classification of the offence under national law, (ii) the intrinsic nature of the offence, and (iii) the degree of severity of the penalty which the person concerned is liable to incur.[77] According to the Commission, it appears unlikely for proceedings leading to a clearance decision to meet these criteria. Further, the Commission emphasises that Article 14 of the EU Merger Regulation explicitly provides that any decisions imposing fines "shall not be of a criminal law nature".

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[75] Reference is made to the judgments in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, cited above, paragraph 258; of 6 December 2012 in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41; of 24 June 2015 in *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156; and of 24 September 2019 in *HSBC Holdings plc and Others* v *Commission*, T-105/17, EU:T:2019:675, paragraph 197.

[76] Reference is made to the Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005 C 56, p. 24, paragraph 7.

[77] Reference is made to the judgment in *Nordzucker and Others*, C-151/20, cited above, paragraph 30 and case law cited.

181. According to the Commission, the investigation is directed at broader coordination between Toska and SKEL, in which the alleged concentration is only one among several elements. The Commission therefore agrees with ESA that the "idem" condition is not fulfilled.

182. Finally, in response to Toska's argument concerning a breach of the principle of legitimate expectations, the Commission submits that the General Court has clarified that the fact that the Commission relieves, by virtue of Article 11(6) of Regulation 1/2003, a national competition authority of its competence to apply Article 101 TFEU does not violate the legitimate expectations of the parties concerned to have the infringement in question assessed by a national competition authority that had initiated the proceedings.[78] According to the Commission, this finding is also relevant for the application of Article 11(6) of Chapter II of Protocol 4 to the SCA, which provides for an identical mechanism to Article 11(6) of Regulation 1/2003 between ESA and the national competition authorities of the EEA EFTA States.

Icelandic Government

183. In its written observations, the Icelandic Government addresses two separate issues: (i) the facts and procedure before the ICA and the ruling of the CAC, and (ii) the role of market definitions and the legal framework for assessing effect on trade.

Facts and procedure at national level

184. Certain aspects of the written submissions from the Icelandic Government are reproduced in Section III, Facts, of this report for the hearing, as they pertain to the factual circumstances leading up to the contested decision.

185. The Icelandic Government notes that Toska's application omits any references to the conclusion of the ICA's investigation into the Asset Swap Agreement following the rulings of the CAC of 8 August 2023.

186. According to the Icelandic Government, Toska's characterisation of the proceedings before the CAC as the final rulings by the Icelandic authorities in the national proceedings is inaccurate.

187. For the sake of completeness and in the context of the present case, the Icelandic Government informs the Court that the ICA has not initiated an investigation concerning a possible infringement by Toska and SKEL of Article 10 of the Icelandic Competition Act and Article 53 of the EEA Agreement.

[78] Reference is made to the judgment of 2 October 2024 in *Silgan Holdings and Others* v *Commission*, T-589/22, EU:T:2024:662, paragraph 106, appeal pending in Case C-845/24 P.

Role of market definitions and the effect on trade criterion

188. The Icelandic Government highlights that a market definition serves different purposes depending on the type of competition case. In merger investigations, it is a key tool analysing the potential effects of a merger on competition and for identifying situations that may raise competitive concerns. However, in the context of the application of Article 53 EEA, particularly in cases involving agreements that have as their object the restriction of competition (such as market sharing agreements), a precise market definition is generally not required. The Commission frequently refrains from defining the relevant market in such cases, as confirmed in its recent market definition notice.[79] Additionally, the Government notes that the assessment of the effect on trade criterion is independent of the definition of relevant geographic market.[80]

189. Furthermore, the Icelandic Government emphasises that in both Toska's and SKEL's merger notifications to the ICA, the relevant geographic market was identified as the Reykjavík capital area. In its preliminary assessment, the ICA found it unnecessary to determine whether the geographic scope of the market excluded the municipality of Mosfellsbær, or whether a narrower market might be appropriate due to the proximity of the merging pharmacies. This was because the potential detrimental effects of the merger were assessed in the SO using the test of whether the concentration would significantly impede effective competition, focusing on possible local effects.

190. According to the Icelandic Government, the ICA has regularly defined the retail sales of over-the-counter and prescription medicine in the Reykjavík capital area as the relevant market. Nonetheless, it carried out an assessment of potential harmful local effects within the defined market, in accordance with its role and legal mandate, and in line with proven methodology in merger investigations within the EEA. The merger cases cited by Toska and SKEL do not involve the application of Article 53 EEA. The Icelandic Government submits that the contested decision cannot be prevented or excluded on the basis of inconclusive merger proceedings before a national competition authority.

VI Written submissions in Case E-32/24

Pleadings and written observations

191. Pleadings have been received from:

(i) the applicant, represented by Gjermund Mathisen, advocate; and

[79] Reference is made to the Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law of 22 February 2024, C(2023) 6789 final, paragraph 9(c). Reference is also made to the judgments in *Mannesmannröhren-Werke* v *Commission*, T-44/00, cited above, paragraph 132; and in *Telefónica* v *Commission*, T-216/13, cited above, paragraph 214.

[80] Reference is made to the Effect on Trade Guidelines, cited above, paragraph 22.

(ii) the defendant, represented by Claire Simpson, Daniel Vasbeck, Sigrún Ingibjörg Gísladóttir and Melpo-Menie Joséphidès, acting as Agents.

192. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

(i) the European Commission ("the Commission"), represented by Ekaterina Rousseva and Brian Cullen, acting as Agents; and

(ii) the Government of Iceland, represented by Hendrik Daði Jónsson, Steindór Dan Jensen and Guðmundur Haukur Guðmundsson, acting as Agents.

Application

193. The application contains four pleas:

First plea: the contested decision provides insufficient reasoning;

Second plea: there is no effect on trade;

Third plea: ESA did not have sufficiently serious indicia to justify an unannounced inspection;

Fourth plea: the conduct relied on by ESA to justify the inspection has already been approved by the competent Icelandic authorities as notified and approved mergers.

First plea: insufficient reasoning

194. In its application, SKEL submits that ESA has infringed its obligation to state reasons in the inspection decision as required under Article 16 SCA.

195. As a preliminary point, SKEL notes that, according to settled case law, the statement of reasons required under Article 16 SCA must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review.[81] SKEL submits that ESA must state as precisely as possible the presumed facts which it intends to investigate, namely what it is looking for and the matters to which the inspection must relate. More specifically, the inspection decision must contain a description of the features of the suspected infringement, indicating the market thought to be affected, the nature of the suspected restrictions of competition and the sectors covered by the alleged infringement to which the investigation relates,

[81] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 107 and case law cited; and of 24 January 2023 in *G. Modiano Limited & Standard Wool (UK) Limited* v *ESA*, E-1/22, paragraph 84 and case law cited.

and explanations of the way in which the undertaking is supposed to be involved in the infringement.[82]

196. Further, SKEL highlights that the obligation to state specific reasons constitutes a fundamental requirement and that the scope of the obligation to state reasons for inspection decisions cannot, in principle, be restricted on the basis of considerations concerning the effectiveness of the investigation.[83]

197. SKEL argues that ESA has failed to meet the abovementioned standard in Decision No 159/24/COL, as parts of the contested decision were, and remain, difficult for SKEL to understand.

198. First, SKEL challenges, as difficult to understand, the allegation in recital 4 (chapeau) of the contested decision that "Lyf og heilsa benefits from Lyfjaval's closure of certain of its traditional walk-in pharmacies, which previously directly competed with Lyf og heilsa's traditional walk-in pharmacies". In this regard, SKEL advances five reasons: (i) SKEL points out that, in August 2022, Lyfjaval opened a new pharmacy in Suðurfell 4, located only four to five minutes by car from its former pharmacy in Mjóddin. According to SKEL, the move strengthened Lyfjaval's presence in this local market by offering improved services, including extended opening hours and a drive-through facility. (ii) SKEL notes that in January/February 2023, Lyfjaval relocated its pharmacy in Reykjanesbær to a better location, while continuing to compete directly with Lyf og heilsa's pharmacy. (iii) SKEL observes that no other Lyfjaval pharmacy has been closed, and (iv) that a new pharmacy in direct competition with two of Lyf og heilsa's pharmacies in Miklabraut opened in February 2024. (v) SKEL emphasises that every opening and closure of any of Lyfjaval's pharmacies is a matter of public record.

199. Second, SKEL expresses difficulty in understanding ESA's reference to "SKEL's new drive-through pharmacy strategy" in recital 4(b) of the contested decision. SKEL notes that Lyfjaval has offered a drive-through service to its customers for nearly two decades. When Lyfsalinn opened a pharmacy with drive-through windows in July 2020, Skeljungur (now SKEL) held only a 10% stake in the company and therefore neither controlled the entity nor influenced its strategic decisions. Given that Skeljungur owned about 70 petrol stations across the country, it was in a good position to continue with Lyfjaval's strategy to emphasise the use of drive through windows to improve services to their retail customers. Moreover, SKEL highlights that all of Lyfjaval's pharmacies are walk-in pharmacies. In this regard, it refers to Icelandic law, which does not permit pharmacies to operate exclusively as drive-through facilities.[84]

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[82] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 110 and case law cited.

[83] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 111 and case law cited.

[84] Reference is made to the Medicinal Products Act No 100/2020 and the Regulation on Pharmacy Licences and Drug Stores No 1340/2020, especially Article 26, paragraphs 1 and 2 of the latter.

200. Third, SKEL contends that the allegation in recital 4 of the contested decision that the suspected practices may have involved "a restriction on Lyfjaval's ability to open traditional walk-in pharmacies" is confusing. In its application, SKEL highlights several instances, dating back to April 2021, in which the company has attempted or explored opportunities to acquire traditional walk-in pharmacies.

201. Fourth, SKEL finds it puzzling that, according to the allegation in recital 4(c) of the contested decision, the suspected practice may have involved "a restriction on Lyf og heilsa's ability to open drive-through pharmacies" when there is no indication as to why Lyf og heilsa, as one of the two major players in the Icelandic retail pharmacy sector, would coordinate with a smaller competitor such as Lyfjaval and agree to limit its own ability to open drive-through pharmacies. SKEL also points out that Lyf og heilsa lacks access to suitable retail premises for such facilities without significant investment or collaboration with third parties.

202. Fifth, SKEL notes that recital 6 of the contested decision alleges that the anticompetitive conduct may have started as early as in May 2021. However, no indication is given as to what might have happened in May 2021. The only indication provided in the contested decision of potentially anticompetitive conduct at a more specific time is the reference to the Asset Swap Agreement of 26 April 2022.

203. Sixth, viewed against the background of the national merger proceedings, referred to as an asset swap agreement in recital 4(a), SKEL contends that the remainder of recitals 3 to 6 appears an ill-founded attempt to justify ESA's jurisdiction.

204. In the event that the Court nonetheless finds the contested decision to be sufficiently reasoned, and therefore the Court must review the merits of the decision, SKEL submits that, in accordance with settled case law, this review must take into account the information on which ESA based the decision.

Second plea: no effect on trade

205. SKEL emphasises at the outset that retail pharmacy operations are local in nature, including in Iceland, where private cars are the preferred way of transport. Furthermore, SKEL notes that pharmacies do not differ in the quality of the medications they offer, and that prices for prescription drugs are essentially uniform. As a result, convenience, particularly in terms of accessibility, plays a decisive role in consumers' choice of pharmacy.

206. Further, SKEL submits that the local nature of competition in retail pharmacy operations is also reflected in the SO from the ICA in the merger cases concerning the Asset Swap Agreement. In the SO, the ICA's preliminary assessment was that the concentrations would significantly distort competition, as they entailed "harmful local competitive effects of the former concentration in Mjóddin, and the immediate vicinity, on the one hand, and ... harmful local competitive effects of the second concentration in Glæsibær and the immediate vicinity, on the other". In addition, SKEL highlights that when the ICA found in the SO that the Asset Swap Agreement violated Article 10

of the Competition Act, it referred to the small, local shopping centres in Glæsibær and Mjódd as separate "competitive areas".

207. SKEL submits that ESA is not required to precisely define the relevant market in an inspection decision and by extension is not obliged to positively demonstrate an appreciable effect on trade within the EEA at that stage.[85] Nevertheless, the particular type of markets involved forms the background against which ESA's competence must be assessed. According to SKEL, agreements that are local in nature are not in themselves capable of appreciably affecting trade between EEA States.[86] Accordingly, SKEL questions how the Asset Swap Agreement could have the required effect on trade.

208. Given the particularly local nature of retail pharmacy markets, ESA should not be considered to have sufficiently established the potential application of Article 53 EEA, and thereby ESA's competence, by way of recital 5 of the contested decision. This recital states that the undertakings operate in the Reykjavík capital area, representing almost 70% of all retail sales of pharmaceuticals in Iceland, and that the alleged anti-competitive behaviour therefore covers a significant part of the Icelandic market.

Third plea: sufficiently serious indicia not present

209. In its application, SKEL first outlines the legal standard applicable to the adoption of an inspection decision. SKEL emphasises that the requirement for protection against arbitrary interference by the public authorities with the sphere of private activities, as reflected, for example, in Article 8 ECHR, prohibits ESA from ordering an inspection if it does not have serious indicia to suspect an infringement of the competition rules.

210. According to SKEL, ESA must possess indicia of such a kind as to give rise to a reasonable suspicion leading to presumptions of an infringement.[87] Consequently, SKEL argues that it is necessary to identify the indicia in ESA's possession that formed the basis for ordering the inspection in question, before assessing whether those indicia were sufficiently serious to justify a suspicion that the alleged infringements had been committed and, to justify in law, the adoption of the contested decision.[88]

211. SKEL submits that, for the same reasons as set out in the first and second pleas, ESA could not have possessed sufficiently serious indicia of an infringement of Article 53 EEA. SKEL argues that, in light of the publicly available information regarding

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[85] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraphs 42 and 80 and case law cited.

[86] Reference is made to the Effect on Trade Guidelines, cited above, paragraph 91.

[87] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 183 and case law cited.

[88] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 168.

pharmacy relocations and openings, which appears inconsistent with ESA's allegations, it is unclear how ESA could have had information in its possession indicating that SKEL and Toska had "eliminated direct competition between each other". Furthermore, SKEL contends that ESA could not have had sufficiently serious indicia that the Asset Swap Agreement constituted an infringement of Article 53 EEA, seeing as the agreement consists of two previously notified and approved concentrations under Section 17(c) of the Competition Act.

212. Furthermore, SKEL contends that ESA must have been in possession of documentation from the merger cases at the time it adopted the contested decision. SKEL argues that, since this information is effectively exculpatory, it appears that ESA may have cherry-picked information when referring to indicia in the contested decision. Such selective use of information, according to SKEL, would constitute an arbitrary interference in the sphere of private activities and infringe SKEL's rights in this respect.

213. Finally, SKEL emphasises that, to the extent that the statement of reasons for an inspection decision circumscribes the powers conferred on ESA's agents, a search may only target documents that fall within the scope of the subject-matter of the inspection.[89] SKEL argues that, by reason of the contested decision defining the potential temporal scope of the suspected infringement, seemingly randomly, as May 2021 until today, the contested decision effectively constitutes a vehicle for a fishing expedition. SKEL highlights that ESA searched for information predating May 2021, even going back to 2019, during the inspection. SKEL presents a screenshot of the first few results of this search,[90] and a list of the documents from 2020 and the first months of 2021.[91]

Fourth plea: conduct cleared by way of approved mergers

214. SKEL notes that recital 4(a) of the contested decision specifies that the suspected practices may have involved the Asset Swap Agreement.

215. According to SKEL, Lyfjaval was under the obligation to sell its retail space in Mjóddin due to stipulations in its loan agreement with Arion banki hf. The buyer was Faxi ehf., and as consideration, Lyfjaval got Faxi's retail space in Glæsibær, where Lyf og heilsa's pharmacy was located, and a cash payment. SKEL submits that Lyf og heilsa had already decided to close its pharmacy in Glæsibær, due to poor financial performance. In addition, Lyfjaval had also, long beforehand, decided to open another pharmacy in Suðurfell 4. SKEL argues that, as these real estate transactions would have the same effect on the retail market for the sale of pharmaceuticals as selling the pharmacies as such, they were notified to the ICA. SKEL contends that the concentrations were effectively approved following the CAC's ruling, as the ICA did not adopt any prohibition decisions within the deadline for intervention.

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[89] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 99 and case law cited.

[90] Reference is made to Annexes A.21 and A.22.

[91] Reference is made to Annexes A.23 and A.24.

216. Thus, SKEL submits that the suspected infringement, insofar as it involves the Asset Swap Agreement, has already been assessed and approved under the Icelandic merger control regime. Accordingly, SKEL argues that ESA cannot initiate an ex post investigation into the same conduct as a potential breach of Article 53 EEA.

217. In this regard, SKEL refers to the harmonised and one-stop shop merger filing regime, and argues that it presupposes that notified and approved mergers are not subject to ex post infringement assessment by the competition authorities. Any other solution would undermine the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration.[92]

218. Looking at the Asset Swap Agreement in this case, SKEL contends that the ICA has assessed coordinated and non-coordinated effects of the notified concentrations that may limit effective competition, and, in its SO, found that the concentrations would amount to an infringement of Article 10 of the Competition Act and Article 53 EEA. According to SKEL, the ICA had sufficient information to evaluate the alleged infringement addressed in the contested decision. Therefore, SKEL contends that the same conduct has already been reviewed and approved under the Icelandic merger control regime, and, as a result, neither the ICA nor ESA has the authority to reassess it under Article 53 EEA. Consequently, SKEL asserts that ESA lacked competence to adopt the contested decision on this basis.[93]

219. Lastly, SKEL maintains that the *Towercast* judgment[94] does not apply in this context, as it dealt with a transaction that fell below national merger thresholds and had not been notified or assessed ex ante by a competition authority.

Defence

Preliminary remarks

220. In its defence, ESA makes the following preliminary remarks before addressing SKEL's four pleas.

221. According to ESA, the application is based on two erroneous factual presumptions, namely that ESA: (i) seeks merely to reinvestigate an asset swap agreement of 26 April 2022 in relation to "two small distinct local shopping outlets";[95] and (ii) did not have sufficiently serious indicia providing reasonable grounds for suspecting SKEL's involvement in a competition law infringement.

222. Firstly, ESA argues that the suspected infringement forming the subject matter of the contested decision is not the asset swap agreement of 26 April 2022. Rather, the

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[92] Reference is made to the judgment in *Illumina* v *Commission*, C-611/22 P and C-625/22 P, cited above, paragraph 206.

[93] Reference is made in particular to Article 21(1), cf. Article 3, cf. recitals 6 and 7, of the EU Merger Regulation, as an expression of the principles underpinning this conclusion.

[94] Judgment of 16 March 2023 in *Towercast*, C-449/21, EU:C:2023:207.

[95] Reference is made to SKEL's application paragraphs 3, 36, 38, 46, 55, 57 and 61.

contested decision identifies the suspected infringement as anticompetitive coordination between SKEL and its competitor Toska on the Icelandic retail pharmacy market.[96] The Asset Swap Agreement is cited as one of the ways in which this anticompetitive coordination may have been implemented, as noted in recital 4(a) of the contested decision. According to ESA, the Asset Swap Agreement and its execution serve as indicia of suspected wider anticompetitive collusive conduct, which is of a different geographic and temporal scope, pre- and post-dating the Asset Swap Agreement.

223. Secondly, ESA submits that the contested decision is based on sufficiently serious indicia, derived from various sources, including information provided by the ICA, publicly available documents and data, and ESA's own monitoring of market conduct. SKEL has failed to cast doubt on the reasonableness of ESA's grounds or the indicia supporting its suspicion of an infringement. In its defence, ESA contends that there is no need for the Court to order further disclosure of these indicia.

224. However, in the interests of ensuring the expeditious execution of the proceedings and to assist the Court, ESA provides a more detailed account of its indicia. These indicia include the following information:

(i) Through the Asset Swap Agreement of 26 April 2022,[97] the competitors Toska and SKEL exchanged retail locations in Reykjavík. Subsequently, Toska closed its pharmacy in Glæsibær (while SKEL's pharmacy in that location remained), and SKEL closed its pharmacy in Mjódd (while Toska's pharmacy in that location continued to operate).[98] As a result, the direct competition between Toska and SKEL in each of these shopping centres was effectively eliminated.

(ii) Toska and SKEL ambiguously described the real nature of the Asset Swap Agreement in their interactions with the ICA, presenting it in some instances as a retail pharmacy market transaction,[99] and in others as a pure real estate transaction.[100]

(iii) The total consideration for the retail property in Mjódd appeared excessive, suggesting that it was in part a payment to SKEL for possibly

[96] Reference is made to the contested decision, recitals 1 to 5 and Article 1.

[97] Reference is made to the Asset Swap Agreement, attached as Annex A.2 (English) / Annex A.1 (Icelandic original).

[98] Reference is made to this being a publicly known fact and the ICA's SO, attached as Annex A.20 (English) / Annex A.19 (Icelandic original). A non-confidential version of the annexes is available in the Court's case file.

[99] Reference is made to the merger notification submitted by SKEL, attached as Annex B.1 (English) / Annex B.1a (Icelandic original), and the merger notification by Toska attached in Case E-31/24 as Annex A.13 (English) / Annex A.13a (Icelandic original). A non-confidential version of the annexes is available in the Court's case file.

[100] Reference is made to the ICA's SO, attached as Annex A.20 (English) / Annex A.19 (Icelandic original), and SKEL's reply of 27 February 2023 to the ICA's SO, attached as Annex B.2 (English) / Annex B.2a (Icelandic original). A non-confidential version of the annexes is available in the Court's case file.

wider restrictive actions, to the benefit of Toska.[101] ESA highlights that the Mjódd retail property was sold to Toska for ISK 352.5 million, which consisted of a ISK 280 million cash payment and the transfer of ownership of Toska's Glæsibær property (valued at ISK 72.5 million). The total consideration appeared excessive when compared with the 2023 public property valuation of the Mjódd retail property (ISK 135.9 million)[102] and the property value appraisal (ISK 87.9 million) contained in a Lyfjaval investor presentation.[103]

(iv) Direct competition between Toska and SKEL was eliminated in Keflavík (Reykjanesbær), through the closure in early 2023 by SKEL of its traditional walk-in pharmacy located at Hringbraut 99 (Apótek Suðurnesja),[104] within 550 metres of Toska's traditional walk-in pharmacy (with the Keflavík hospital being in between).

(v) There were indications that SKEL implemented its drive-through strategy by prioritising the opening of drive-through pharmacies and the closure of its traditional walk-in pharmacies in locations where those traditional pharmacies competed directly with Toska's traditional walk-in pharmacies (e.g. Mjódd and Keflavík (Reykjanesbær)).[105]

(vi) Documentation showed that the actions of SKEL in closing two of Lyfjaval's pharmacies in Mjódd and Keflavík were steps which SKEL's competitor Toska had assessed and considered highly beneficial to itself.[106]

(vii) SKEL has not opened any traditional walk-in pharmacies in Iceland since May 2021 and Toska has not opened any drive-through pharmacies in Iceland[107] (despite indicia suggesting that the operation of such pharmacies could be considered desirable).[108] ESA emphasises that this

[101] Reference is made to a presentation by Toska which is attached as Annex B.4 (English) / Annex B.4a (Icelandic original) in Case E-31/24.

[102] Reference is made to the ICA's SO, attached as Annex A.20 (English) / A.19 (Icelandic original).

[103] Reference is made to a Lyfjaval investor presentation, attached as Annex B.3 (English) / B.3a (Icelandic original).

[104] Reference is made to a newspaper article of 24 February 2023, attached as Annex B.4 (English) /Annex B.4a (Icelandic original).

[105] Reference is made to publicly available information on the opening and closure of these pharmacies.

[106] Reference is made to confidential documents of Toska, which are attached as Annex B.4 (English) / B.4a (Icelandic original) in Case E-31/24.

[107] Reference is made to publicly available information on the opening and closure of these pharmacies.

[108] Reference is made to confidential documents of Toska, which are attached as Annex B.4 (English) / Annex B.4a (Icelandic original) and Annex B.6 (English) / Annex B.6a (Icelandic original) in Case E-31/24.

information must be seen in the context of there being a growing demand for this service and Lyfjaval's position being unique.[109]

225. ESA argues that various parts of the application (in particular the first plea) raise arguments challenging the very existence of the suspected coordination. According to ESA, such arguments are irrelevant at this stage of the administrative proceedings, as no finding of an infringement has been made. ESA's objective is merely to verify whether the suspicion is well founded through ordering an unannounced inspection.

First plea: insufficient reasoning

226. In its defence, ESA submits that SKEL's claims: (i) that the decision was insufficiently reasoned and (ii) that, if the Court should nevertheless find the decision to be sufficiently reasoned, "the Court therefore must review the merits of the decision" are without basis and should be rejected.

227. As a preliminary point, ESA outlines the legal principles governing the obligation to state reasons in inspection decisions in competition cases. In accordance with Article 16 SCA, ESA highlights that the statement of reasons must be appropriate to the measure in question, which is, in this case, an inspection decision within the legal framework of Articles 4 and 20 of Chapter II of Protocol 4 to the SCA. ESA submits that according to settled case law, an inspection decision must contain four "essential features of the suspected infringement", by stating (i) the market thought to be affected; (ii) the nature of the suspected restrictions of competition; (iii) the supposed degree of involvement of the undertaking concerned: and (iv) the powers conferred on the Authority.[110] In order to safeguard the effectiveness of an inspection, ESA is not required to communicate to the addressee of an inspection decision all the information at its disposal concerning the presumed infringements, to delimit precisely the relevant market, to set out the exact legal nature of the infringements, or to indicate the period during which those infringements are alleged to have been committed.[111]

228. ESA maintains that the contested decision specifies the subject matter and purpose of the inspection in accordance with the requirements that follow from Article 16 EEA and case law. In particular:

(i) Recital 3 and Article 1(1) of the contested decision identify the market thought to be affected as "the Icelandic retail pharmacy market" and "the retail pharmacy market in Iceland". Recital 5 specifies that the undertakings involved operate

[109] Reference is made to a SKEL investor presentation, attached as Annex B.5, and a newspaper article of 22 March 2024, attached as Annex B.6 (English) / Annex B.6a (Icelandic original).

[110] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 110 and case law cited; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 39; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 171.

[111] Reference is made to the judgments in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraphs 41 to 42; in *Intermarché* v *Commission*, T-254/17, cited above, paragraph 111; in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 112; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 170.

pharmacy chains in an area which "represents almost 70% of all retail sales of pharmaceuticals in Iceland", and that the alleged anticompetitive behaviour therefore "covers a significant part of the Icelandic market".

(ii) The nature of the suspected restrictions of competition is described in recitals 3 to 5 and Article 1(1) of the contested decision as "anti-competitive agreements and/or concerted practices related to coordination of their conduct with Toska" by (1) "eliminat[ing] direct competition between each other that took place using traditional walk-in pharmacies", (2) allowing "Lyf og heilsa [to benefit] from Lyfjaval's closure of certain of its traditional walk-in pharmacies, which previously directly competed with Lyf og heilsa's traditional walk-in pharmacies", and (3) concentrating on drive-through pharmacies, while Lyf og heilsa does not enter the drive-through pharmacy segment". The possible implementation of these practices is described as involving (a) "an asset swap agreement of 26 April 2022 between Lyf og heilsa and Lyfjaval related to certain of the parties' walk-in pharmacies operated and subsequently closed in Mjóddin and Glæsibær", (b) "coordination on the realisation of Lyfjaval/SKEL's new drive-through pharmacy strategy", and (c) "a restriction on Lyf og heilsa's ability to open drive-through pharmacies and a restriction on Lyfjaval's ability to open traditional walk-in pharmacies".

(iii) Recitals 3 to 5 and Article 1(1) of the contested decision describe the supposed degree of involvement of the undertakings and recital 6 specifies that this conduct "may have started at least in May 2021 and could be still ongoing".

(iv) Recitals 12 and 13 and Article 2 of the contested decision identify the powers conferred on ESA in conducting the inspection.

229. ESA submits that the complaints made by SKEL under the first plea are irrelevant to the first plea and/or unfounded. According to ESA, SKEL has, rather than identifying any insufficiency in the reasoning itself, in essence challenged the merits of the reasons and information given in the contested decision. Thus, ESA submits that SKEL's arguments concern whether unlawful behaviour has occurred and are therefore irrelevant to the issue of whether the obligation to state reasons has been fulfilled.

230. ESA argues that the arguments SKEL presents to support its claim that certain aspects of the contested decision are difficult to understand reveal that SKEL has indeed been able to "grasp the reasons for th[e] decision … without excessive interpretative effort".[112] Thus, the arguments made simply disagree with the substance of whether there may have been anti-competitive conduct.

231. ESA highlights, in particular, the following arguments presented by SKEL as irrelevant and ineffective for the purposes of the first plea:

[112] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 111; and in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 40.

(i) The claim that Lyfjaval's decision to open a pharmacy in a new location with a drive-through option and close its traditional walk-in pharmacy in Mjóddin (where its competitor Lyf og heilsa had a traditional walk-in pharmacy) was commercially motivated and that the new location did not prevent it competing directly with Lyf og heilsa.

(ii) The claim that Lyfjaval's closing of its traditional walk-in pharmacy in Reykjanesbær (Keflavík) and the opening of a new pharmacy with a drive-through option did not prevent it continuing to compete directly with Lyf og heilsa's pharmacy in Reykjanesbær.

(iii) The assertion that Lyfjaval opened a new pharmacy in direct competition with those of Lyf og heilsa in Miklabraut.

(iv) The assertion that SKEL continues to seek opportunities to open traditional walk-in pharmacies.

(v) The question raised as to why (large) Lyf og heilsa would wish to coordinate with (small) Lyfjaval, to restrict its ability to open drive-through pharmacies.

232. Furthermore, ESA argues that SKEL's remaining arguments under the first plea fail to demonstrate that Decision No 159/24/COL was insufficiently reasoned.

233. ESA contends that SKEL's statement that, apart from the walk-in pharmacies in Mjóddin and Reykjanesbær, no other Lyfjaval pharmacies have been closed simply demonstrates that SKEL has understood this part of the contested decision, which refers to "Lyfjaval's closure of *certain* of its traditional walk-in pharmacies …."

234. According to ESA, SKEL fails to specify how the fact that every move, opening and closure of any Lyfjaval pharmacy is a matter of public record is relevant to the plea of failure to give reasons. ESA submits that, in any event, the fact that certain events are public does not preclude undertakings from colluding on their commercial strategy in private.

235. ESA argues that SKEL fails to explain how its claim that it "struggles … to identify" with the description of "SKEL's new drive-through pharmacy strategy" is relevant to the alleged failure to state reasons. ESA highlights that the complete description used in the contested decision is "Lyfjaval/SKEL's new drive-through pharmacy strategy", meaning the combined strategy of these undertakings (or of this company group).

236. In response to SKEL's argument that customers may also "walk in" to "drive-through" pharmacies, ESA claims that SKEL misses the point. The terms used in the contested decision of "traditional walk-in" versus "drive-through" pharmacies seek simply to distinguish those pharmacies with a drive through option (which may be a particular factor of competition) compared with those which do not. ESA submits that

the arguments made by SKEL in its preliminary remarks make plain that it has understood this distinction.

237. ESA submits that neither Article 20 of Chapter II of Protocol 4 to the SCA, nor the related case law, require it to indicate the period during which the infringements are alleged to have been committed, even less the exact date. Consequently, ESA may not be reproached when deciding to state in the contested decision that it had information in its possession which indicated that the anticompetitive conduct may "at least" have commenced in May 2021.[113]

238. Lastly, ESA argues that, contrary to what is alleged by SKEL in its application, there is no legal requirement for the Court to review the merits of the decision, should it consider it to be sufficiently reasoned. The Court's jurisdiction under Article 36 SCA involves a review of legality.[114] Furthermore, ESA reiterates that the Court may conclude that an inspection decision was not arbitrary without it being necessary to check the content of ESA's indicia, if the facts which ESA wishes to investigate and the matters to which the inspection relates are defined sufficiently precisely in the decision.[115]

Second plea: no effect on trade

239. In its defence, ESA submits that SKEL's second plea is without basis and must be rejected. As a preliminary point, ESA maintains that, at the preliminary investigative stage of an inspection decision, ESA is not required to establish an infringement, and is similarly not required to establish all the elements of the suspected infringement. It is sufficient, under settled case law, to demonstrate reasonable grounds for suspecting that the conditions set out in Article 53 EEA are fulfilled, including the existence of an actual or potential effect on trade.[116] ESA argues that it is not required at this stage to provide evidence establishing the existence of even a potential effect on trade between Contracting Parties.

240. First, ESA highlights that recital 3 and Article 1 of the contested decision clearly identified the nature and scope of the suspected infringement in such a way that there were reasonable grounds for suspecting that there could be an actual or potential effect on trade between Contracting Parties. ESA submits that the involved undertakings operate pharmacy chains within and outside the Reykjavik capital area. ESA maintains that the Reykjavík capital area represents almost 70% of all retail sales of

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[113] Reference is made in particular to the judgment in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 47.

[114] Reference is made to the judgment in *Telenor* v *ESA*, E-12/20, cited above, paragraphs 79 to 80.

[115] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 51; and in *Orange* v *Commission*, T-402/13, cited above, paragraph 91.

[116] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 36, 43 and 48; in *Cementos Portland Valderrivas* v *Commission*, T-296/11, cited above, paragraph 43; in *EGL and Others* v *Commission*, T-251/12, cited above, paragraph 149; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 230.

pharmaceuticals in Iceland, and, consequently, the alleged anti-competitive conduct covers a significant part of the Icelandic market. In line with settled case law, an agreement or practice covering all or part of a territory may be capable of affecting trade between EEA States.[117]

241. Second, ESA contends that SKEL wrongly fixates on the Asset Swap Agreement, thus mischaracterising the extent of ESA's concerns. The contested decision makes plain that the Asset Swap Agreement is merely one example of how the suspected infringement may have been implemented. The concerns expressed in the decision were broader, also in geographic scope.

242. Third, ESA highlights that it is legally required to make its own assessment of the relevant market and any related effects under Article 53 EEA.[118] The inferences drawn in the application from the ICA's merger assessment that only very local markets were affected is therefore flawed.

243. Fourth, ESA emphasises that paragraph 80 of *České dráhy*, C-538/18 P and C-539/18 P, referred to by SKEL in its application, states that it is not essential in an inspection decision to show the "appreciable nature" of any effect on trade.[119] ESA argues that SKEL appears to reproach it for not having done so in its application.

Third plea: sufficiently serious indicia not present

244. In response to SKEL's third plea, ESA submits that the summary of the case law cited in the application omits certain important elements. While the exercise of the powers of inspection conferred on ESA by Article 20(4) of Chapter II of Protocol 4 to the SCA vis-à-vis an undertaking interferes with the latter's rights of privacy, an inspection decision is arbitrary "only when it has been adopted in the absence of any facts capable of justifying an inspection".[120] ESA argues that this is not the case where the purpose of the inspection is to collect documentation necessary to check the actual existence and scope of a specific factual and legal situation in respect of which ESA already "has reasonable grounds to suspect an infringement of the competition rules by the undertaking concerned".[121]

245. ESA structures its defence to the third plea in four parts.

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[117] Reference is made to the judgments in *Super Bock Bebidas*, C-211/22, cited above, paragraphs 59 to 65 and case law cited; and in *Holship*, E-14/15, cited above, paragraph 76.

[118] Reference is made to the judgments in *Telenor* v *ESA*, E-12/20, cited above, paragraph 97; and in *Coca-Cola* v *Commission*, T-125/97 and T-127/97, cited above, paragraph 82.

[119] Judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 80.

[120] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 108; and in *Nexans and Nexans France* v *Commission*, T-135/09, cited above, paragraph 43 and case law cited.

[121] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 108; in *Nexans and Nexans France* v *Commission*, T-135/09, cited above, paragraph 43; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraphs 165 to 166.

246. First, ESA states the legal principles applicable to the situation.

247. ESA contends that it is sufficient that ESA is in possession of information and indicia providing "reasonable grounds for suspecting an infringement"[122] (also referred to as "sufficiently serious indicia"[123]). ESA is not required to inform the undertaking in its inspection decision of the information or indicia which justified the inspection.[124] Provided that the facts ESA wishes to investigate and the matters to which the inspection relates are defined sufficiently precisely in the inspection decision, the Court may assume that ESA had reasonable grounds to suspect an infringement and order an inspection.[125]

248. ESA highlights that an undertaking is only informed of all essential evidence once a statement of objections is issued at the start of the inter partes administrative stage. At that point, the undertaking gains access to the case file to ensure its rights of defence. Extending these rights to the earlier, preliminary investigation stage would undermine the effectiveness of ESA's investigation, as the undertaking could identify the information known to ESA, hence the information that could still be concealed from it.[126]

249. Second, ESA asserts the existence of sufficiently serious indicia.

250. According to ESA, the statement of reasons in the contested decision alone sufficiently disclosed that it was in possession of information and indicia in relation to all essential elements of the suspected infringement, thereby providing reasonable grounds to suspect a breach of Article 53 EEA. ESA submits that SKEL has failed to "produce evidence casting doubt" on the existence of such grounds. Consequently, ESA argues that the Court is not required to examine those grounds and determine whether they are reasonable.[127]

251. In any event, ESA maintains that the recitals in the contested decision describe that ESA was in possession of information (indicia) in relation to the relevant market,

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[122] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 66; in *Cementos Portland Valderrivas* v *Commission*, T-296/11, cited above, paragraph 43; and in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 230.

[123] Reference is made to the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 165 and case law cited.

[124] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraphs 164 and 91; in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 38 and 45; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 170.

[125] Reference is made to the judgments in *Orange* v *Commission*, T-402/13, cited above, paragraph 91-93; and in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 49 to 51.

[126] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraphs 87 to 88; and in *Orange* v *Commission*, T-402/13, cited above, paragraph 78 and case law cited.

[127] Reference is made to the judgments in *Nexans and Nexans France* v *Commission*, T-135/09, cited above, paragraph 72; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 49; and in *Orange* v *Commission*, T-402/13, cited above, paragraph 88.

the suspected conduct, the geographical area of suspected conduct and the possible temporal scope of the suspected conduct.

252. ESA argues that nothing raised by SKEL in its application calls the sufficiency of these indicia into question. According to ESA, the arguments presented by SKEL simply cross-refer to other pleas, which ESA already has addressed. Moreover, ESA notes that many of the key matters described in the contested decision are undisputed, and that SKEL merely advances alternative explanations or interpretations of matters described in the decision, unsupported by any evidence, or any evidence of probative value. Reference is made to case law stating that "the fact that the material taken into consideration may be open to different interpretations does not preclude it from constituting sufficiently serious indicia, provided that the interpretation favoured by [ESA] is plausible …".[128] ESA submits that this plausibility standard is met, and that, even if SKEL's assertions were correct, they would not call into question the existence of sufficient indicia.

253. Third, ESA addresses its cooperation with the ICA.

254. ESA rejects the assertion put forward by SKEL that it must have been in possession of exculpatory information from "the merger cases" when adopting the contested decision, and therefore has "cherry-picked" the information used as indicia in the decision.

255. ESA contends that SKEL's assertion that information from the merger cases is exculpatory is unsubstantiated, as SKEL does not specify which information, which mergers, or the reasons for its exculpatory value. If the reference is to the Asset Swap Agreement that SKEL notified to the ICA, SKEL has already access to the relevant materials and has not justified its failure to identify or submit them. Therefore, ESA argues that this part of the plea should be considered inadmissible. Additionally, ESA contends that the contested decision is based on sufficiently serious indicia, which SKEL has not effectively challenged. At this stage of the investigation, there is no requirement to include or evaluate potential exculpatory evidence in the inspection decision.[129]

256. Fourth, ESA submits that an undertaking may not plead alleged unlawfulness of inspection procedures in support of a claim for annulment of the inspection decision.

257. ESA rejects SKEL's assertion that ESA seized documents outside the temporal scope of the subject-matter of the inspection ("fishing expedition"). In any event, ESA

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[128] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 222; in *Intermarché* v *Commission*, T-254/17, cited above, paragraph 234; in *Cementos Portland Valderrivas* v *Commission*, T-296/11, cited above, paragraph 59; and in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraph 64.

[129] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraphs 52 and 64.

argues that it is settled case law that the way in which a decision ordering an inspection is applied has no bearing on the lawfulness of the inspection decision itself.[130]

258. ESA submits that the contested decision defines the alleged anti-competitive conduct as starting "at least" in May 2021, which makes clear that the conduct may have started earlier. Moreover, Lyfjaval was sold to Skeljungur ehf. in 2021 and it is not disproportionate or arbitrary to indicate a time period in 2021 in relation to which the conduct "at least" may have commenced.

259. Furthermore, ESA argues that the screenshot Excel list presented by SKEL does not show documents *copied* by ESA, nor does it support the claim that ESA was "fishing" for information going back to 2019. The Excel file lists email correspondence, but not the documents themselves, between the chairman of the board of directors and people identified with SKEL from an email address that was private, and to which ESA therefore did not get access as such.

Fourth plea: conduct cleared by way of approved mergers

260. In response to SKEL's claim that, as the matters falling under the Asset Swap Agreement were already approved by the ICA under the Icelandic merger control regime, ESA lacks competence to investigate "the very same conduct" under Article 53 EEA, ESA advances four arguments to demonstrate that this claim must be rejected.

261. First, ESA reiterates that the conduct under investigation by ESA is not "the very same conduct" as that assessed under the merger rules by the ICA. According to ESA, the Asset Swap Agreement and its execution constitute indicia of suspected wider anticompetitive collusive conduct under investigation.

262. Second, even if the transactions under the Asset Swap Agreement were approved by the ICA as mergers, ESA argues that this does not affect its competence to investigate whether such transactions were evidence of a broader anticompetitive conduct, distinct from the Asset Swap Agreement itself. In any event, ESA is entitled to conduct an investigation into anticompetitive conduct under Article 53 EEA, using information obtained from the ICA, irrespective of possible investigation proceedings by the national competition authority.[131]

263. Third, ESA argues that its investigation does not undermine any legal certainty obtained under the merger regime, nor does it amount to an impermissible application of Article 53 EEA to conduct already assessed and approved under the merger rules. ESA emphasises that the conduct under investigation goes beyond the transactions under the Asset Swap Agreement, and therefore SKEL could not expect that its broader

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[130] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 100; in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 22; and in *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, cited above, paragraph 49 and case law cited.

[131] Reference is made to the judgments in *České dráhy* v *Commission*, T-325/16, cited above, paragraphs 117 to 119; and in *Orange* v *Commission*, T-402/13, cited above, paragraphs 26 to 27 and 52.

conduct would not be investigated.[132] Furthermore, ESA contends that SKEL's reference to Article 21(1) of the EU Merger Regulation does not support its position, as ESA is not seeking to apply the competition rules solely to the merger transactions resulting from the Asset Swap Agreement. For the same reasons, ESA maintains that the matters considered in the *Towercast* judgment[133] are not relevant to the present case.

264. Finally, even if it were true that the ICA had already been provided with sufficient material to assess the broader market sharing conduct under Article 53 EEA, ESA remains entitled, particularly at this preliminary stage, to investigate the same broader conduct pursuant to Chapter II of Protocol 4 to the SCA.[134]

Reply

First plea: insufficient reasoning

265. SKEL reiterates that the contested decision disregards the background against which the decision would naturally be read by SKEL, namely the particular history of SKEL's involvement with the ICA as to retail pharmacy markets in Iceland, and ESA's close cooperation with the ICA. According to SKEL, the contested decision postulates a national market where the ICA repeatedly has defined very local markets; it does not engage with how consumers in and around Reykjavík move about, and how they decide where to shop for pharmaceuticals; and it does not take into account Icelandic legislation on how pharmacies must be designed. SKEL argues that the contested decision is difficult to fit to the terrain without excessive interpretative effort, or such elaborate explanations as now provided by ESA in the defence. Given the particular circumstances of the case, and the information available to ESA, SKEL argues that ESA should have been more precise in the contested decision.

266. In addition to repeating some of the arguments from its application, SKEL highlights the following in its reply.

267. SKEL notes that, when served with the contested decision, it did not understand that ESA's reference to the "new strategy of Lyfjaval/SKEL" was intended to mean the continuation of Lyfjaval's previous strategy. Further, SKEL notes that it did not understand ESA's theory that the alleged collusion between SKEL and Toska may have started in May 2021 – or earlier – because Lyfsalinn ehf., where SKEL held a 10% stake, bought Lyfjaval in June 2021.

268. According to SKEL, ESA turns the distinction between "walk-in" and "drive-through" pharmacies into a question of semantics. SKEL argues that ESA appears to overlook the fact that Lyfjaval continues to compete directly with Lyf og heilsa, having opened new pharmacies in close proximity to those it previously closed. In response to ESA's argument that this goes to the substance of the case, and therefore is not relevant

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[132] Reference is made to French Competition Authority Décision No 24-D-05 of 2 May 2024, paragraphs 107 to 120; and the Opinion of Advocate General Kokott in *Towercast*, C-449/21, cited above, point 60.

[133] Judgment in *Towercast*, C-449/21, cited above.

[134] Reference is made to the judgment in *České dráhy* v *Commission*, T-325/16, cited above, paragraph 119 et seq.

at the preliminary investigative stage, SKEL maintains that it is evident that the pharmacies are in direct competition.

269. Furthermore, SKEL objects to ESA's claim that Lyfjaval was purchased "by SKEL (via Lyfsalinn ehf.) in June 2021". SKEL did eventually gain a majority shareholding in Lyfsalinn ehf., but only at a later time that year, specifically on 1 October 2021. SKEL argues that this fact was well known to ESA.

270. Finally, SKEL submits that ESA has not explained, neither in the contested decision nor in the defence, how "a restriction" may have been placed on respectively "Lyf og heilsa's ability to open drive-through pharmacies" and "Lyfjaval's ability to open traditional walk-in pharmacies". According to SKEL, this remains an open question.

Second plea: no effect on trade

271. In relation to ESA's statement (footnote 67 in the defence) that pharmaceuticals sold in Iceland are imported, SKEL highlights that it is not in business of importing pharmaceuticals. According to SKEL, the effect on trade criterion would be largely devoid of substance if it were decisive that the products in question are imported into the country. By way of example, SKEL argues that this would entail that an anticompetitive agreement in a local petrol station market would be considered to have an effect on trade in the EEA because petrol is imported into Iceland.

272. SKEL submits that the local nature of competition in retail pharmacy operations in Iceland is well known to ESA. At the time the contested decision was adopted, ESA had access to the ICA's SO in the merger cases in relation to the Asset Swap Agreement, where the ICA referenced both domestic observations and foreign case law suggesting that competition was local in nature in the market for retail pharmaceuticals. In addition, SKEL argues that ESA is familiar with the 2021 Nordic Competition Authorities' Joint Report on Online Pharmacy Markets in the Nordics, which notes that in 2018 the ICA prohibited a merger between Lyf og heilsa and Apótek Mos, following an investigation that found "the services of pharmacies were local in nature and that customers do not travel far for the service".[135]

273. Additionally, SKEL argues that ESA itself also shows concern for competition at an even more local level. Reference is made to the defence, where ESA discusses the Asset Swap Agreement relating to Mjóddin and Glæsibær and argues that it "resulted in the elimination of direct competition between Toska and SKEL in each of these shopping centres".[136]

[135] Nordic Competition Authorities' Joint Report on Online Pharmacy Markets in the Nordics, p. 33, footnote 86.

[136] Defence in Case E-32/24, paragraph 13(i).

Third plea: sufficiently serious indicia not present

274. SKEL is of the opinion that the indicia and annexes provided in the defence, read in context, and taken together, do not provide a reasonable basis for an inspection.

275. SKEL notes that ESA relies on SKEL's own merger notification form submitted to the ICA in the Asset Swap Agreement merger case and SKEL's own reply to the ICA's SO when arguing that SKEL ambiguously described the nature of the Asset Swap Agreement.[137] SKEL argues that this is a cherry-picking approach to the documentation available to ESA. According to SKEL, the only discrepancy was on the part of the ICA, as ESA will have read in Lyfjaval's application to the CAC.[138] SKEL argues that Lyfjaval never referred to the Asset Swap Agreement in any other way than as a real estate transaction. Additionally, SKEL highlights that, in any event, the ICA noted that a discrepancy in this respect does not matter, as the effect on the market would be the same.

276. In relation to ESA's claim that the total consideration for the retail property in Mjódd appeared excessive, SKEL notes that ESA refers to the "property value appraisal" in Lyfjaval's investor presentation for bids to purchase Lyfjaval by 17 May 2021.[139] According to SKEL, ESA appears to neglect information in the same document,[140] stating that the real estate is valued at a "very low price" as it has not been revaluated in the company books, and further that the capital ratio at the end of 2020 "does not reflect the actual value of the assets".

277. Further, SKEL argues that the newspaper article of 24 February 2023 relied on by ESA to argue that competition between Toska and SKEL was eliminated in Keflavik (Reykjenesbær), shows the opposite.[141] SKEL highlights that, in the article, the pharmacy's long-time manager explains how "all their longtime customer had followed them to the new location" in Keflavík, and how they benefit from longer opening hours.

278. SKEL argues that the SKEL investor presentation and the newspaper interview of 22 March 2024 only show that Lyfjaval, thus far, provides an option others have yet to provide.[142] Therefore, SKEL argues that the documents do not indicate coordination, but merely presents Lyfjaval's offering.

279. SKEL submits that ESA's claim that any exculpatory evidence held by ESA is equally available to SKEL is not necessarily accurate. Reference is made to a meeting, where the ICA summoned Lyfjaval's CEO on the basis of Article 19 of the Competition Act, during which the difference between the consideration and the property value in

[137] Reference is made to Annex B.1 and Annex B.2.

[138] Reference is made to Annex C.4 and Annex C.5.

[139] Reference is made to Annex B.3a, p. 16.

[140] Reference is made to Annex B.3a, p. 27.

[141] Reference is made to Annex B.4.

[142] Reference is made to Annex B.5 and Annex B.6.

Mjóddin was discussed. Neither SKEL nor Lyfjaval have received any copy of the recording or the minutes from that meeting.

Fourth plea: conduct cleared by way of approved mergers

280. SKEL submits that, based on ESA's defence, it is supposed to understand that the Asset Swap Agreement is *evidence* of the alleged infringement, but also *part of it*, though *not the same* as the infringement. SKEL notes that, uncertain on how to follow ESA's reasoning, it maintains its fourth plea.

Rejoinder

281. In its rejoinder, ESA maintains the arguments given in the defence and makes the following additional arguments.

First plea: the decision complies with the obligation to state reasons

282. ESA maintains that SKEL fails to identify, with reference to the requirements set out in case law or any legal principles, any deficiency in the reasoning of the decision. Several of the arguments presented by SKEL go to the substance of the alleged infringement and are irrelevant for the purposes of the first plea.

283. ESA interprets SKEL's reply as suggesting that ESA should have explained in the contested decision how ESA's case was potentially different from the recent ICA merger proceedings in which SKEL had been involved. ESA argues that there is no authority for such a proposition, and that ESA is only legally required to give reasons for its own decision to conduct an inspection. In addition, ESA argues that it is plain from the reasons given in the contested decision that the subject-matter and scope of the inspection is different from the ICA merger proceedings.

284. Further, ESA contends that it appears that SKEL in its reply argues that the duty to state reasons in an inspection decision is heightened where a large(r) amount of information is available to the Commission or ESA. ESA submits that this proposition does not find support in any case law. On the contrary, it follows from case law that information collected by a national competition authority does not affect ESA's obligation to state reasons.[143]

285. According to ESA, SKEL appears to accept in its reply that: (i) it, through its 10% shareholding in Lyfsalinn ehf., had an interest in the retail pharmacy market since July 2020 (at which time Lyfsalinn opened a drive-through pharmacy at the Orkan service station owned by SKEL on Vesturlandsvegur); (ii) Lyfjaval (which ran three pharmacies) was offered for sale in May 2021; and (iii) on 25 June 2021, Lyfsalinn's bid for 100% of the shares of Lyfjaval was accepted, and it was agreed that, through a share capital increase (subject inter alia to regulatory approval), SKEL's holding in Lyfsalinn would increase from 10% to greater than 50%. ESA argues that SKEL's

[143] Reference is made to the case law cited in the defence (footnote 60).

emphasis on the fact that the legal completion of the sale did not go through until 1 October 2021 misses the point. According to ESA, collusion may have taken place between SKEL and Toska before Lyfjaval was formally part of SKEL group.

Second plea: the standard of effect on trade was met

286. As a preliminary point, ESA reiterates the legal principles put forward in its defence, namely that, at the stage of an inspection decision, only reasonable grounds for suspecting an effect on trade are required. In any event, even at the stage of a final infringement finding, a potential effect on trade is sufficient. ESA contends that the arguments set out in the reply denying that the applicable standard for effect on trade was met must be examined against this legal background.

287. Second, ESA argues that the fact that a significant amount of pharmaceuticals is imported into Iceland is a legally relevant factor in assessing an actual or potential effect on trade between Contracting Parties, irrespective of whether SKEL itself is an importer of pharmaceuticals.

288. According to ESA, SKEL appears to deny the possibility of indirect effects on trade. ESA argues that this is a concept long established in EU/EEA case law and decisional practice. The existence of significant imports could lead ESA to find that the alleged conduct has such indirect effects on trade, which "often occur in relation to products that are related to those covered by an agreement or practice".[144] Given that the pharmaceutical retail market in Iceland is related to the wholesale supply of pharmaceuticals (that is to say, products where there are a significant amount of imports), ESA argues that indirect effects on trade may arise as a result of the alleged conduct.

289. ESA argues that, contrary to what SKEL suggests in its reply, taking imports into account does not entail that any conduct which has a link, however tenuous, to imported products would necessarily meet the criterion of effect on trade. ESA emphasises that it must conduct a sufficiently comprehensive assessment, taking into account all relevant factors, some of which may not be decisive when examined in isolation.[145]

290. In the present case, ESA argues that the significant amount of imports of pharmaceuticals into Iceland supports the existence of reasonable grounds for suspecting, at this preliminary stage of the investigation, that the alleged conduct had the requisite effect on trade. This is particularly so when considering these imports in conjunction with other factors which may be relevant in assessing the appreciable nature of the effect on trade, that is to say, the fact that the alleged conduct covers a significant part of the Icelandic market and involves undertakings with notable market positions.[146]

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[144] Reference is made to the Effect on Trade Guidelines, cited above, paragraph 38 and case law cited.

[145] Reference is made to the Effect on Trade Guidelines, cited above, paragraph 28 and case law cited.

[146] Reference is made to the Effect on Trade Guidelines, cited above, paragraph 31 and Section 2.4.

291. Additionally, ESA notes that anticompetitive agreements relating to petrol stations may well produce an effect on trade, and that the Commission has already found this to be the case in relation to agreements entered into between Repsol and service station operators in Spain.[147] ESA notes that the Commission, in its decision, clearly distinguished between the geographic scope of the market, identified (with reference to prior decisional practice) as local or national, and the (potential) effect on trade, arising from the scope of the conduct at issue – which extended to the national market because the agreements applied across the whole territory of the Member State at issue. Consequently, ESA argues that the analogy with a "local petrol station market" drawn by SKEL in its reply is flawed. Furthermore, ESA contends that the comparison is inadequate, considering that the suspected infringement involves undertakings that operate pharmacy chains both within and outside the Reykjavík capital area.

292. As a third argument, ESA considers SKEL's argument that the nature of competition in retail pharmacy operations in Iceland is local, and that this fact is well known to ESA, ineffective. ESA highlights that this argument conflates two separate questions, namely the definition of the relevant geographic market and the effect on trade. ESA reiterates that trade between Contracting Parties may be affected also in cases where the relevant market is national or subnational,[148] and that the suspected conduct as a whole relates at least to an area covering almost 70% of all retail sales of pharmaceuticals in Iceland. Consequently, ESA argues that the suspected infringement is not limited to the elimination of competition in two local shopping centres, as suggested by SKEL.

Third plea: sufficiently serious indicia were present

293. ESA maintains that it had sufficiently serious indicia providing grounds for suspecting an infringement, and that none of the arguments presented by SKEL in its reply call the sufficiency of these indicia into question.

294. ESA highlights that SKEL does not reply to the argument that, in some instances, it presented the Asset Swap Agreement as a pharmacy market transaction to the ICA. Reference is made to SKEL's merger notification, which explain that the impact of the closure of Toska's pharmacy in Glæsibær will likely strengthen SKEL's pharmacy market position at that location, but without increasing its market share to the extent that it would, for example, establish a dominant market position, and the competitive impact the asset swap transaction would produce on the retail pharmacy market. ESA argues that a pure real estate transaction (merely involving a transfer of ownership of premises, without meaningful impact on the structure of the Icelandic retail pharmacy market) would not be described in this way. Finally, ESA observes that, in its view, Toska also ambiguously described the nature of the Asset Swap Agreement.

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[147] Reference is made to the Commission Decision of 12 April 2006, Case COMP/B-1/38.348 – *REPSOL CPP*, OJ 2006 L 176, p. 104, recitals 19 and 25.

[148] Reference is made to the Effect on Trade Guidelines, cited above, paragraph 22 and case law cited.

295. ESA refers to SKEL's argument that the ICA, in its preliminary assessment, concluded that whatever the characterisation of the transaction, the effect on the market (that is to say, the disappearance of a competitor in each shopping centre) would be the same. ESA argues that this is irrelevant as to whether the parties described the transaction in an ambiguous manner and to whether such a circumstance might form part of ESA's indicia.

296. Further, ESA refers to SKEL's argument that ESA "cherry-picked" a low property value for its Mjódd retail property (ISK 87.9 million) from a Lyfjaval investor presentation (inviting bids to purchase Lyfjaval by 17 May 2021). ESA argues that SKEL fails to provide any alternative value, and neglects to mention that ESA, in its indicia, also included the 2023 public property valuation, which was significantly higher (ISK 135.9 million). Consequently, ESA notes that it took both of these valuations into account when considering that the total consideration paid for that property (ISK 352.5 million) appeared excessive.

297. ESA reiterates that the newspaper article of 24 February 2023 is relied upon to show that SKEL's traditional walk-in pharmacy at Hringbraut 99 (Apótek Suðurnesja) in Keflavík (Reykjanesbær) was closed, eliminating direct competition from SKEL which previously took place within walking distance (550 metres) of Toska's traditional walk-in pharmacy.[149] ESA maintains that whether there could still be some form of effective competition from the new, more remote, location, is a matter of substance and therefore to be determined as part of ESA's subsequent investigation.

298. ESA argues that the references to Annexes B.5 and B.6 in the reply fail to take into account that the documents constitute part of the indicia on the basis of which anticompetitive collusion is suspected, which indicia must be assessed not in isolation but as a whole, and which may reinforce each other.[150] In the context of ESA's other indicia, the fact that SKEL has not opened any traditional walk-in pharmacies in Iceland since May 2021 and Toska has not opened any drive-through pharmacies in Iceland (despite indicia suggesting that the operation of such pharmacies could be considered desirable) could constitute indicia of market-sharing.

299. ESA responds to SKEL's claim that a meeting took place between Lyfjaval's CEO and the ICA, during which the CEO allegedly offered certain explanations about the consideration paid for and the property value of the Mjódd property. ESA notes that SKEL asserts that it has not received a recording or minutes of this meeting and implies that ESA should possess them. ESA denies having this information and argues that it is SKEL's responsibility to present its case before the Court with sufficient particularity and to adduce supporting evidence. Given that the application was filed in December 2024, ESA contends that SKEL had time to request the minutes from the ICA, submit a witness statement from the CEO, or at least include a full explanation in the reply.

[149] Reference is made to Annex B.4 / Annex B.4a.

[150] Reference is made to the judgments in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, cited above, paragraph 223; and in *Symrise* v *Commission*, T-263/23, cited above, paragraph 60.

Instead, ESA asserts, SKEL has made vague and unsupported claims about missing exculpatory information while accusing ESA of "cherry-picking".

300. Further, and in any event, ESA reiterates that the purpose of an inspection decision is not to set out in a balanced fashion all available information and evidence, including any potential exculpatory information. At this preliminary stage of the investigation, ESA is not required to have assessed exculpatory evidence, let alone disclose it in its inspection decision.[151]

Fourth plea: ESA is competent to investigate under Article 53 EEA

301. In its rejoinder, ESA submits that the reply does not raise any new legal arguments in relation to the fourth plea. ESA reiterates that the Asset Swap Agreement is only referred to as one of the ways in which the suspected anticompetitive coordination may have been implemented. Furthermore, ESA argues that there is no contradiction in its reasoning. The Asset Swap Agreement and its execution can be part of the overall set of indicia which provide reasonable grounds for suspecting an infringement and, at the same time, the conduct under investigation may be broader and differ, in its nature, geographical and temporal scope, from the conduct assessed under the merger rules by ICA.

European Commission

302. In its written observations, the Commission presents the same arguments as in its written observations in Case E-31/24. Although not expressly raised by SKEL in the fourth plea, the Commission argues that that the application of Article 101 TFEU or, by analogy, Article 53 EEA does not in this case violate the principle of ne bis in idem.

303. The Court refers to the account of the Commission's submissions given in Case E-31/24 above.

Icelandic Government

304. In its written observations, the Icelandic Government presents the same arguments as in its written observations in Case E-31/24. The Court refers to the account of the Icelandic Government's submissions given in Case E-31/24 above.

Michael Reiertsen
Judge-Rapporteur

[151] Reference is made to the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, cited above, paragraphs 52 and 64.