LOGOS

TO THE EFTA COURT

Reykjavík, 13 December 2024

APPLICATION FOR ANNULMENT

PURSUANT TO ARTICLE 36 OF THE SURVEILLANCE AND COURT AGREEMENT

by

Toska ehf., registration no. 670112-0390, Síðumúla 20, 108 Reykjavik ("**Toska**"), and Lyf og heilsa hf., registration no. 650299-2649, Síðumúla 20, 108 Reykjavik ("**L&H**"), as the applicants

represented by supreme court attorney-at-law Halldór Brynjar Halldórsson, LOGOS legal services, Efstaleiti 5, 103 Reykjavik

v.

The EFTA Surveillance Authority ("**ESA**") as the defendant

seeking the annulment of the EFTA Surveillance Authority Decision No. 158/24/COL of 3 October 2024, presented to the applicants on 14 October 2024, to submit to an inspection in accordance with Article 20 (4) of Protocol 4 to the Surveillance and Court Agreement.

A. THE CONTESTED DECISION

1. On Monday 14 October 2024, representatives of ESA conducted an inspection at the premises of the applicant L&H. The inspection was concluded on Friday 18 October 2024. During the inspection, ESA seized 687 items, all the property of the applicant L&H.

2. The grounds for the inspection was ESA's decision no 158/24/COL of 3 October 2024, obliging the applicant Toska ehf. (the applicant's L&H ultimate parent company), and all its subsidiaries, to submit to an inspection, in accordance with Article 20 (4) of

Protocol 4 to the Surveillance and Court Agreement (the "**contested decision**" or the "**decision**").

3. The applicants maintain that the EFTA Court should annul the contested decision and declare it void. As the contested decision was addressed to the applicant Toska, and all items seized during the inspection were the property of the applicant L&H, Toska's subsidiary, both applicants have standing to challenge the decision.

4. ESA's decision stipulates that it is in possession of information, indicating that the applicant Toska, and in particular the applicant L&H, has and still may be, participating in concerted practices, in breach of Article 53 of the EEA Agreement, together with SKEL fjárfestingafélag hf. ("**SKEL**"), in particular its subsidiary Lyfjaval ehf. ("**Lyfjaval**").

5. The decision maintains in paragraph 3 that the alleged concerted practice consists of the following:

    a. An asset swap agreement dated 26 April 2022, between Lyf & heilsa hf. and Lyfjaval ehf., with certain *"traditional pharmacies"* of the parties, which were subsequently closed;

    b. Coordination on Lyfjaval's *"new policy"* for *"car pharmacies"*;

    c. Limitation of Lyf & Heilsa's capacity to open *"car pharmacies"* and Lyfjaval's capacity to open *"traditional pharmacies."*

6. Paragraph 4 of the decision states that according to ESA's information, the parties (SKEL and its subsidiaries, in particular Lyfjaval on the on hand, and Toska and its subsidiaries, in particular L&H on the other), operate pharmacies both within and outside the capital area. The paragraph goes on to state that 70% of the retail sale of medicine in Iceland is sold within the capital area. Thus, the paragraph concludes, *"the alleged concerted practice includes a significant part of the Icelandic market."*

7. Paragraph 5 of the decision states that according to ESA's information, the alleged concerted practice may have started *"at least"* in May 2021, and may still be ongoing. This unsupported statement is difficult to reconcile with the fact that SKEL did not become Lyfjaval's indirect owner until sometime after 7 September 2021, cf. paragraph 13 of this application.

8. *In the first place*, 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.

9. *Secondly*, 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 bid in idem and no dual process, enshrined in the EEA Agreement and the ECHR.

10. *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 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.

B. FACTUAL BACKGROUND

11. The applicant Toska is a holding company with no independent operations, the ultimate owner of the applicant L&H. The latter applicant operates pharmacies located around Iceland. The applicant Toska is also the ultimate owner of the company Faxar ehf., which owns all real estate in which the applicant's L&H pharmacies are operated.

12. Lyfjaval was previously owned by two individuals, Mr. Þorvaldur Árnason and Ms. Auður Harðardóttir. It was purchased by Lyfsalinn ehf., a subsidiary of SKEL, in June 2021.

13. The merger between Lyfsalinn ehf. and Lyfjaval was cleared by the Icelandic Competition Authority by its decision no. 34/2021, dated 7 September 2021. Thus, SKEL became the ultimate owner of Lyfjaval ehf. after that date, the specific date of which is not being known be the applicants.

14. In the spring and summer of 2021, the applicant L&H attempted to sell its loss making pharmacy located in the outlet of Glæsibær, Reykjavik. The sale process proved unsuccessful, with no interested parties making an offer.

15. On 26 April 2022, Lyfjaval and Faxar ehf., entered into an asset swap agreement (the "**asset swap**"), whereby Faxar ehf. sold its retail space in the outlet Glæsibær, in which the applicant L&H's pharmacy had been operated, to Lyfjaval's, for Lyfjaval's retail space in the outlet Mjódd, Reykjavik. The contested decision incorrectly states that the asset swap was entered into between Lyfjaval and the applicant L&H.

16. As the applicant L&H and Lyfjaval are competitors, the parties treat carefully in all discussions and no sensitive business information exchange took place. All communication was through intermediaries, with the applicant L&H utilizing the financial advisor Jón Scheving Thorsteinsson, and Lyfjaval utilizing the lawyer Einar Sverrisson.

17. The parties notified the Icelandic Competition Authority (the "**ICA**") of the asset swap as a merger within the meaning of Article 17 of the Icelandic Competition Act no. 44/2005 (the "**Competition Act**"). Article 3.1. of the asset swap specifically stated as a requirement that the transaction would not be completed until the conditions of Article 17 were fulfilled.

18. The ICA confirmed on 25 October 2022 that the merger notification was complete within the meaning of Article 17, and that the time limits for the ICA to intervene had therefore started to lapse.

19. In the latter stages of the merger process, the ICA reversed course, suddenly stating on 1 March 2023, its view that the transaction did not constitute a merger within the meaning of Article 17 of the Icelandic Competition Act, and dropped the investigation.

20. The parties appealed that decision of the ICA to the Competition Appeals Committee (the "**CAC**", in Icelandic: áfrýjunarnefnd samkeppnismála), which rendered its rulings in cases no. 1/2023 and 2/2023, on 9 August 2023. The rulings annulled the ICA's decision to drop the investigation, stating i.a. that:

> *"By confirming a complete merger notification, the ICA was obligated to assess the competitive effects* ***of the merger in question****, in conformity with the Competition Act and rules no. 1390/2020."* (p. 19) (emphasis added).
>
> *"If the appellant's views on the transaction had changed, or new evidence surfaced which changed the ICA's views on the transaction, that could naturally possibly lead to the ICA* ***annulling the merger*** *or imposing remedies."* (emphasis added). (p. 20)
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> *"The ICA is hereby instructed to finish the process of the merger case in conformity with the competition act, with reference to the fact that the time limits stipulated in the act started lapsing on 26 October 2022..."*[1]

21. Thus, the Competition Appeals Committee clearly held that the transaction constituted a merger within the meaning of the Icelandic Competition Act.

22. As the time limits to intervene in a merger had lapsed, the ICA closed the matter with a letter dated 18 September 2023. However, the letter stated that the ICA was of the view that the transaction did not constitute a merger within the meaning of the Competition Act, contrary to the clear findings of the CAC, of which the ICA is bound by law. Thus, Icelandic law stipulates the clear rule of law that a lower authority governmental entity is bound by decisions and rulings of a higher authority governmental entity. The ICA further stated that its preliminary assessment, that the transaction entailed market sharing in breach of Article 10 of the Competition Act, remained unchanged.

23. As regards the allegation of market sharing between *"traditional pharmacies"* and *"car pharmacies"*, the applicants note that the contested decision appears to be based on a misunderstanding of the facts.

24. Thus, all *"car pharmacies"* in Iceland are also *"traditional pharmacies"*. This stems from the simple fact that Icelandic law clearly states that every physical pharmacy must have an entrance where customers can enter, and a secluded space where

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[1] Translation LOGOS. In Icelandic: *"Við móttöku á fullnægjandi samrunatilkynningu hvíldi sú skylda á Samkeppniseftirlitinu að taka viðkomandi mál til rannsóknar og meta samkeppnisleg áhrif umrædds samruna í samræmi við ákvæði samkeppnislaga og reglur nr. 1390/2020."* [...] *"Hafi afstaða áfrýjanda til þeirra viðskipta sem lágu að baki samrunatilkynningunni tekið breytingum eða ný gögn haft í för með sér breytingar af hálfu Samkeppniseftirlitsins til rannsóknar málsins gat það eðli málsins samkvæmt mögulega haft það í för með sér að ástæða þætti til að hafna samrunanum eða setja honum skilyrði af þeim sökum."* [...] *"Er því lagt fyrir Samkeppniseftirlitið að ljúka samrunamálsinu í samræmi við ákvæði samkeppnislaga, að teknu tilliti til þeirra lögbundnu tímafresta sem byrjuðu að líða 26. október 2022, sbr. 1. mgr. 17. gr. d. Samkeppnislaga."*

customers can consult with a pharmacist in private, cf. Article 26 of Regulation no. 1340/2022.[2] Accordingly, customers can enter all *"car pharmacies"* in Iceland on foot.

25. From the reading of the contested decision, this key fact does not appear to have been known to ESA.

26. The applicants would however like to point out that they have not been of the view that pharmacies with a drive through option is an attractive option for their business. For that reason, they have not opened such a pharmacy to date, almost two decades after the first such pharmacy was opened in Iceland. The applicant L&H, who's CEO is a certified pharmacist, thus maintains that the development of the market is likely to be through more personal and tailor-made services to customers, provided by pharmacists. This is difficult to establish via drive-through services.

27. The emphasis of certain competitors on those types of services can in the applicants' view primarily be explained by the fact that they are owned by holdings companies which also own petrol stations. These holding companies thus own properties primarily located for drive-through services, which need a new role with the decline of the petrol market.

28. Conversely, the applicants own no such prime real estate. Nevertheless, and notwithstanding the CEO's firm believe referred to above, the applicant L&H has reviewed possible opportunities to open a new pharmacy with a drive through option. In particular, two such opportunities were reviewed carefully but ultimately were not considered economically viable.

C. FIRST PLEA – LACK OF COMPETENCE

29. By its first plea, the applicants argue that ESA lacked competence to take the contested decision, as the alleged infringements are not capable of affecting trade between the Contracting Parties, within the meaning of Article 53 of the EEA Agreement.

30. According to Article 53 of the EEA 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 are prohibited as incompatible with the functioning of the Agreement."* Therefore, it is a necessary condition, for certain conduct to be considered unlawful within the Article, that the conduct may affect trade between the member states to the Agreement.

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[2] Paragraps 1-2 of the Article read as follows: *"Í lyfjabúð sem afgreiðir lyf til sjúklings eða umboðsmanns hans yfir afgreiðsluborð skal vera fyrir hendi samtalsaðstaða sem gerir viðskiptavinum kleift að ræða í einrúmi við lyfjafræðing eða lyfjatækni. Sé lyf afgreitt í gegnum netverslun með lyf eða aðrar fjarskiptaleiðir er heimilt að samtalsaðstaða sé á formi netspjalls eða í gegnum síma.*

Skal aðstaða þar sem afhending lyfja fer fram vera útbúin með þeim hætti að aðstaðan geri viðskiptavinum kleift að ræða í næði við lyfjafræðing, lyfjatækni eða annað þjálfað starfsfólk og hægt sé að sýna sjúklingi eða umboðsmanni hans lyf og veita ráðgjöf."

31. The effect on trade criterion defines the scope of application of EEA competition law. If agreements or practices are not capable of appreciably affecting trade between EEA states, EEA competition law, and therefore Article 53 of the EEA Agreement, is not applicable.

32. The retail pharmaceutical market in Iceland is, and has always been, considered local in nature, i.e. geographically limited to certain areas within Iceland, or restricted to certain neighborhoods. In previous decisions by the ICA, no. 28/2018 and 9/2021, the ICA concluded that the market for retail sales of pharmaceutical products was geographically limited to Mosfellsbaer, a town located close to Reykjavik which however in any other context has always been considered a part of the greater Reykjavik capital area. To be precise, the geographical Icelandic retail pharmaceutical market has never been considered Iceland as a whole.

33. Under the merger investigation of the aforementioned asset swap, the ICA issued a Statement of Objection dated 13 February 2023. In its statement, the ICA's preliminary conclusion was that the mergers entailed "harmful local competitive effects of the area containing Mjodd and its immediate surroundings" and "harmful local competitive effects of the area containing Glæsibær and its immediate surroundings".

34. Furthermore, in its Statement of Objection, the ICA referred to a decision by the CMA, the British Competition and Markets Authority from 2016, concerning a merger between Celesio and Sainsbury's.[3] The ICA stated that CMA's inspection relied, among other things, on an analysis of a number of competitors to identify areas where there was a risk of competition problems following the merger. The areas served by the pharmacies of Celesio and Sainsbury's were investigated, but the area was generally within a radius of 2.3 to 5.5 km from each pharmacy located in adjacent conurbations, cities and towns, and a radius of 3.7-7.5 km in rural and very rural areas. Where the merger affected competition, the distance between the merging parties' pharmacies was generally short, or from about 50 meters to about 2 km (5.5 km in exceptional cases). Substitutability was considered high, or in the range of 37% to 89%. In response to the aforementioned distortion of competition, the merging parties agreed to divest pharmacies in the aforementioned areas following the merger.

35. Further, the ICA referred to its previous decision no. 28/2018, where in the opinion of the ICA, numerous observations by the ICA indicated that competition in the retail pharmaceutical market was very local. Thus, the results of an observation among pharmacy licensees where they were asked, among other things, about their main competitor were that 42% of respondents named a main competitor that was located 1 km away or less, 72% named a main competitor 2 km away or less and 88% named a main competitor 3 km away or less. Only three respondents named a main competitor that was more than 3 km away. The ICA concluded that this indicated that important competitors in the retail sale of medicines are generally close to each other, which indicates that competition is very local.

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[3] The decision is available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://assets.publishing.service.gov.uk/media/56a9e335e5274a24e900000a/Full_text_decision-Celesio-Sainsburys.pdf.

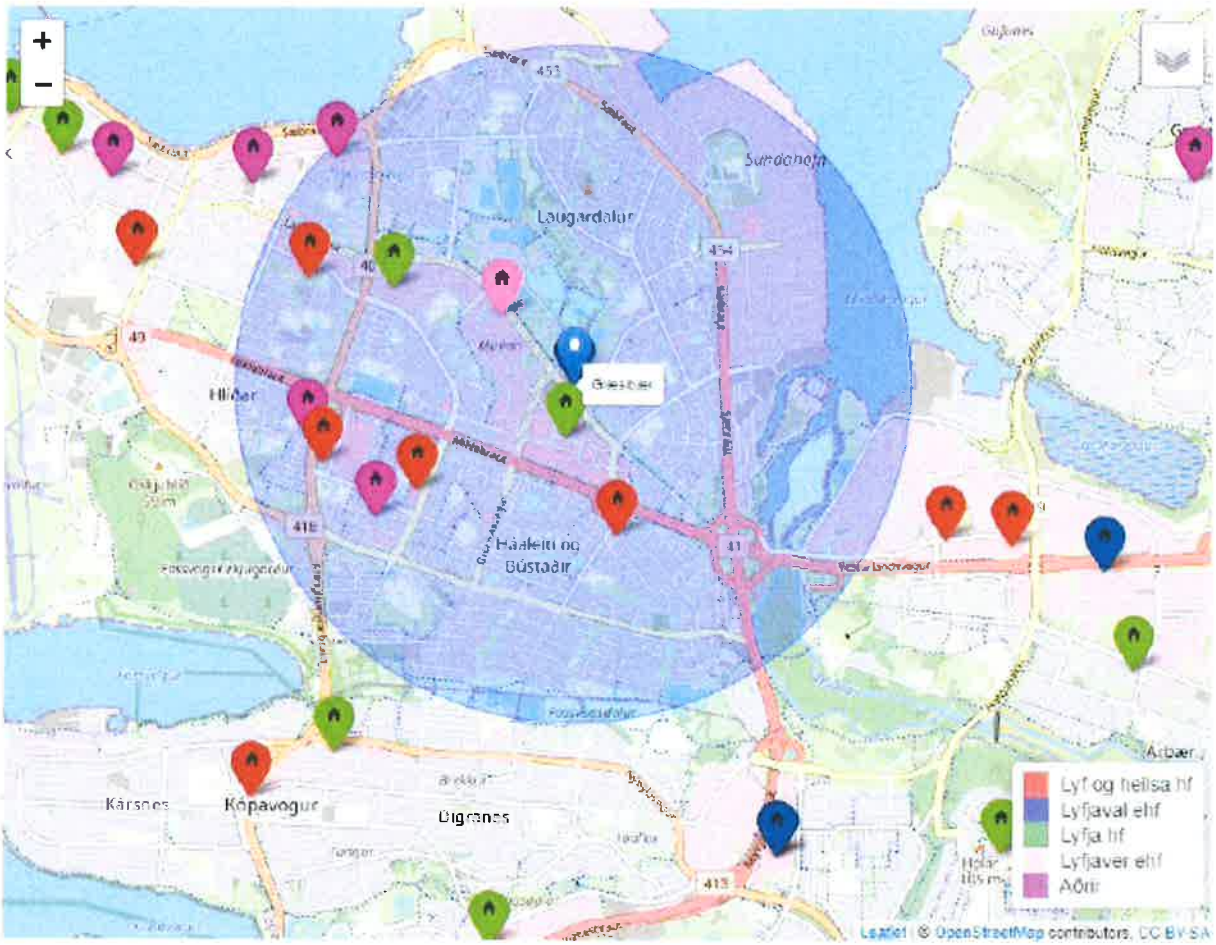
36. In 2006 ESA issued guidelines on the effect on trade concept contained in Article 53 of the EEA agreement.[4] In its own guidelines, ESA stipulates that in case of agreements that cover only part of an EEA state, it must be taken into account what proportion of the national territory is susceptible to trade. Furthermore, the ESA guidelines stipulate the following:

> *Where an agreement forecloses access to a regional market, then for trade to be appreciably affected, the volume of sales affected must be significant in proportion to the overall volume of sales of the products concerned inside the EEA State in question.* [...]
>
> *In general, the best indicator of the capacity of the agreement to (appreciably) affect trade between EEA States is therefore considered to be the share of the national market in terms of volume that is being foreclosed.* [...]
>
> *Agreements that are local in nature are in themselves not capable of appreciably affecting trade between EEA States. This is the case even if the local market is located in a border region.*

37. The contested decision seems to derive mainly from the asset swap. The agreement concerned an asset swap, whereby Faxar ehf. gave up the retail space in the outlet of Glæsibær, in which the applicant L&H's pharmacy had been operated, in exchange for Lyfjaval's retail space in the outlet Mjódd, Reykjavik. The agreement therefore concerned two retail spaces for pharmacies, in two small distinct local shopping outlets.

38. In its Statement of Objection, the ICA concluded that within a 2 km radius of Glæsibær, in total 10 pharmacies were being operated: 4 by the applicants, 2 by Lyfja, 1 by Lyfjaver, 1 by Efstaleiti Apotek, 1 by Farmasia and 1 by Borgar Apotek. The ICA therefore concluded that *"following the merger it can be assumed that Lyfjaval will face competitive constraints from pharmacies owned by five competitors within a two-kilometer radius of Glæsibær."* Furthermore, the ICA stated: *The Competition Authority's preliminary assessment is that the merging parties are each other's closest competitors* ***in Glæsibær****, which will lead to a significant distortion of competition as a result of the merger."* The following picture was depicted in the Statement of Objection:

[4] See here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:E2006C1130(01)&qid=1412259258329&from=EN

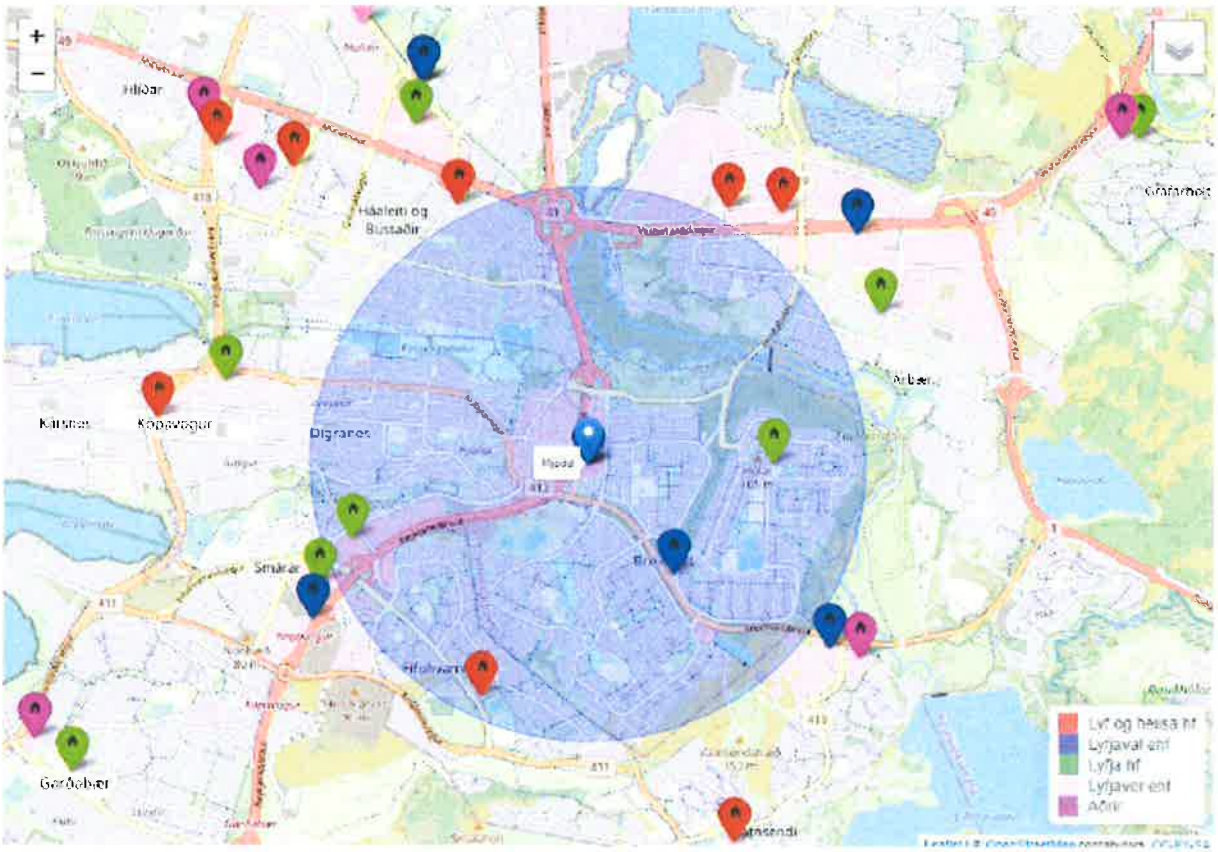


39. The applicants cannot assume otherwise than that outside the depicted radius, the asset swap would not entail competitive effects.

40. Regarding Mjodd, the ICA stated in its Statement of Objections the following:

> *The pharmacies Lyfjaval and Apótekarinn* [the applicant's L&H trademark] *in Mjódd are the only two pharmacies located in Mjódd, as previously stated. Therefore, the planned closure of one of them following the merger transaction will mean that those receiving healthcare services* ***in Mjódd*** *will only have one pharmacy to choose from if they decide to buy medicines after a doctor's visit* ***within the same shopping centre****.*
>
> *The two pharmacies in question are also the only two pharmacies* ***in postal code 109****. The Authority also notes that foreign case law has been based on the assumption that the market for retail medicines is always local and that foreign competition authorities have, among other things, used scales ranging from 1 km to 2.3 km. The analysis looks at a 2 km radius around Mjódd.* [...] *I.e. The Competition Authority's initial assessment is that it is unlikely that customers of Lyfjaval in Mjódd will shift their business to competitors of Lyf and heilsa pharmacy in Mjódd on a large scale.*

41. The following picture was depicted in the SO, regarding Mjódd:



42. The applicants cannot assume otherwise than that outside the depicted radius, the asset swap would not entail competitive effects.

43. To this end, it should also be noted that according to the ICA, there is not even a competitive constraint or effect between pharmacies in Mjódd on the one hand and Glæsibær on the other, as they fall outside of each other's 2 km radius.

44. The applicants refer to the Judgment of the EU Court (First Chamber), case no. C-393/08, EU:C:2010:388, paragraph 32:

"In that regard, however, 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 (see, a contrario, Case 8/72 Vereniging van Cementhandelaren v Commission [1972] 977, paragraph 29; Case C-179/90 Merci convenzionali porto di Genova [1991] ECR I-5889, paragraphs 14 and 15; and Case C-35/99 Arduino [2002] ECR I-1529, paragraph 33)." (emphasis added)

45. The annual turnover of the applicants' pharmacies in Glæsibær and Mjódd combined amount to approx. 2% of the total turnover of all pharmacies located in the greater Reykjavik capital area and thus even a less share of the entire country. The volume of sales affected by the asset swap is therefore insignificant in proportion to the overall volume of sales of the products concerned inside the EEA State in question, as required to significantly affect trade, per ESA's own guidelines. No retail sales of pharmaceutical products across the borders of the EEA states take place. In fact,

such a cross border retail sale is illegal, cf. Article 37 of Act no. 100/2020 on Medicine. Further, its pricing is largely determined by relevant authorities.

46. In the contested decision, ESA stipulates the following in recital (4):

"According to the information available to the Authority, the involved undertakings operate pharmacies as pharmacy chains both within and outside the Reykjavik capital area. In the Reykjavik capital area almost 70% of all retail sales of pharmaceuticals in Iceland take place. Therefore, the alleged anti-competitive conduct covers a significant part of the Icelandic market."

47. It follows from the aforementioned case-law, and even the ICA merger cases regarding the same conduct that falls under the contested decision, that pharmaceutical markets are by their nature very local. The fact presented by ESA, that "[i]*n the Reykjavik capital area almost 70% of all retail sales of pharmaceuticals in Iceland take place"* has in fact no practical significance in justifying ESA's jurisdiction. ESA's statement has no causal link with the alleged conduct. If such a statement is sufficient to justify the contested decision, it is hardly difficult for ESA to simply justify all decisions of inspections without there being actual effect on trade under Article 53 EEA, and thereby extend ESA's competence far beyond the EEA Agreement. In the same way as in the contested decision, ESA could in effect claim that the relevant undertakings are active in Iceland and "*100% of all retail sales of pharmaceuticals in Iceland take place in Iceland and therefore the conduct covers a significant part of the Icelandic markets.*"

48. Such an oversimplistic statement cannot, in the opinion of the applicants, justify a coercive measure such as an inspection carried out in the entire offices and other areas of the applicant's private business area. In this regard and although it may not be relevant to the substantive assessment of the Court, it should nevertheless be noted 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 the applicant's office, occupying all the company's meeting rooms for a full working week and effectively rendering the applicants business activities virtually inoperable the entire week.

49. It is of the opinion of the applicants that such an extensive coercive measure by a public entity, requires a substansive assessment by the Court, especially when such a measure is justified, based upon simplistic statements by the same public entity, which believes that it has no duty to further explain or objectively justify, as the applicants where in fact, on the first day of the inspection, informed by ESA agents that if the applicants were to seek an order from an Icelandic national court to assess the legality of the inspection, such a measure would be considered an unlawful obstruction of the inspection, subject to fines by ESA.

50. It is clear from the fact that ICA agents were present during the investigation and from ICA's press lease, that ESA was assisted by ICA before and during the inspection.[5] In light of ICA's previous investigation into the same conduct as that under the contested decision, ESA must be required to explain and argue, in glaring

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[5] See: https://www.samkeppni.is/utgafa/frettir/eftirlitsstofnun-efta-framkvaemir-fyrirvaralausa-athugun

contradiction to ICA's conclusion into the same conduct, why the alleged unlawful conduct has in its opinion effect on trade between EEA States, where the ICA was of the opinion, when assessing the same transaction, that it could not affect competition outside a small radios around two local shopping outlets. Such arguments have as of yet not been presented to the applicants.

51. With reference to all of the above, ESA lacks jurisdiction for the contested decision.

D. SECOND PLEA – INSUFFICIENT REASONING – LACK OF LEGAL CERTAINTY – DUAL PROCESS AND NE BIS IN IDEM

52. By its second plea, the applicants maintain that the contested decision contains insufficient reasoning, in particular due to but not limited to the fact that the alleged infringement outlined in the decision, had already been notified as mergers under Icelandic Competition Act and approved as such.

53. In the contested decision, recital (3) point (a), ESA specifies that the applicants had conducted the suspected infringement of Article 53 of the EEA Agreement, by way of the asset swap. ESA specifies that the asset swap concerned *"certain traditional pharmacies of the Parties which were operated but later closed in Mjoddin (Mjódd) and Glaesibaer (Glæsibær)".*

54. The applicants refer to the fact that the asset swap, which the applicant L&H was in fact not a party to but Faxar ehf., was in fact notified to the Icelandic Competition Authority (ICA) as a merger, under Article 17 of the Icelandic Competition Act.

55. The agreement consisted of the selling of retail spaces in two local outlets, located in different suburbs in Reykjavik, Mjóddin on the one hand, and Glæsibær on the other. Both Parties owned a retail space in each centre, where they hosted their pharmacies. The applicant L&H purchased Lyfjaval's retail space in Mjoddin and in exchange, Lyfjaval purchased the applicant's retail space in Glæsibær. This transaction met the required criteria for a merger within the meaning of the Icelandic Competition Act as well as the EUMR and therefore, they were notified to the ICA as two separate mergers.

56. The applicants note that the ICA confirmed on 25 October 2022 that the merger filing was indeed complete, which in turn led to phase I of the investigative period to begin. Furthermore, this confirmation by the ICA also confirmed that the transactions were indeed a merger, thus procedural rules on merger investigations of the transactions ex-ante applied. During the investigation the ICA issued a Statement of Objections. After receiving responses from both parties, the ICA decided to discontinue its evaluation of the concentrations, neither confirming nor annulling the mergers.

57. On appeal, the CAC found that the ICA had acted unlawfully by discontinuing its review without either approving or prohibiting the mergers. The CAC ruled that the ICA was required to conclude the merger cases in accordance with the Icelandic Competition Act. Since the ICA failed to issue decisions within the investigative period deadline, the concentrations were effectively approved following CAC rulings No. 1/2023 and 2/2023.

58. The applicants therefore respectively submit to the EFTA Court that the alleged unlawful conduct, as described in the contested decision, has in fact already been reviewed and approved by the relevant authorities, following the CAC rulings. The harmonized 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.[6]

59. Due to the contested decision, the applicants have in fact received approval for their notified merger by way of CAC rulings, but subsequently have now lost all necessary legal certainty regarding the lawfulness of their transaction, thereby compromising predictability and rendering the system for ex-ante merger proceedings ineffective. The applicants submit that concentrations should not be subject to retrospective, ex-post review under Article 53 of the EEA Agreement after having undergone and been approved through ex-ante assessment.

60. Furthermore, the ICA decided to conclude its investigation by stating that the merger filings were incomplete, due to alleged lack of information provided by the applicants. However, the ICA also stated that this decision had no effect on the current investigation by the ICA that the transactions violated Article 10 of the Icelandic Competition Act, which is substantially identical to Article 53 of the EEA Agreement. In its Statement of Objection, ICA further contended that the concentrations could violate Article 10 of the Icelandic Competition Act and Article 53 of the EEA Agreement through market sharing.

61. Therefore, it seems ICA had already received sufficient information to assess the alleged unlawful conduct which ESA has now based its contested decision on.

62. Not only has the conduct been approved through CAC rulings, but the applicants seems to be subject of not only both ex-ante and ex-post investigations of the same conduct, but also the subject of dual procedures, whereas ICA seems to be still investigating the alleged breach of Article 10 of the Icelandic Competition Act at the same time the applicants received the contested decision of ECA of a possible breach of Article 53 of the EEA Agreement. It should be noted in this regard, that according to Article 26 of the Icelandic Competition Act, if the ICA so requests, when Icelandic courts apply the provisions of the Icelandic Competition Act in relation to agreements between undertakings, decisions of associations of companies, or concerted practices within the meaning of Article 53(1) of the EEA Agreement, which could affect trade between parties to the EEA Agreement, they *shall* also apply Article 53 of the EEA Agreement in relation to such agreements, decisions, or concerted practices.

63. The applicants submit that the contested decision appears to rest entirely on the same factual and legal allegations presented by the ICA during the merger procedures, whereas there is significant overlap between the approved mergers cf. CAC rulings, and the contested decision.

64. With reference to all of the above, the applicants submit that ESA does not have the authority to reexamine the same conduct ex post under Article 53 of the EEA

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[6] See *Illumina v Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677, paragraph 206.

Agreement, resulting in ESA lacking competence to issue the contested decision on this basis, whereas concentrations defined by the ECHR are governed exclusively by merger rules, and cannot be subject to ex-post investigations under Article 53 of the EEA Agreement.

65. In light of the above, the applicants maintain that the contested decision infringes upon the applicants' fundamental rights of legal certainty and no dual process, enshrined in the EEA Agreement. Further, the applicants could legitimately expect that the transactions had been ruled lawful by the relevant authorities. Thus, the subsequent investigation by ESA infringes upon the applicants' rights of ne bis in idem, protected by Article 4 to Protocol 7 the ECHR, enshrined in the EEA Agreement.

66. According to Article 16 of the Surveillance and Court Agreement the decisions of ESA shall state the reasons for which they are based. The reasoning required under Article 16 of the Surveillance and Court Agreement must align with the measure in question and clearly and unequivocally present ESA's rationale. 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. The contested decision should therefore 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.

67. This obligation cannot generally be reduced based on the need for investigative efficiency. ESA must demonstrate that it has in fact 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.[7] The applicants submit that these conditions have not been met.

68. Paragraph 5 of the contested decision states that according to ESA's information, the alleged concerted practice may have started *"at least"* in May 2021, and may still be ongoing. The applicants maintain that the contested decision regards potential unlawful conduct between the applicants and *"SKEL fjárfestingafélag hf."* However, SKEL did not have control over Lyfjaval, until sometime after 7 September 2021, cf. ICA decision no. 34/2024 which regarded the purchase of Lyfjaval by SKEL. Prior to that date, SKEL did in fact not have control over Lyfjaval. SKEL publicly notified of its purchase of Lyfjaval on June 25 2021, whereas the purchase was made subject to approval by the ICA.[8] Therefore, the applicants maintain, that any alleged concerted practice, between the applicants and SKEL, could not have taken place *"at least in May 2021"*, as stated by ESA in the contested decision, as SKEL was not at that time active on the pharmacy market through any control over Lyfjaval. In fact, nowhere in the contested decision is it further explained what is supposed to have happened in May 2021.

69. Paragraph 3, recital (B) and (C) stipulate that the alleged concerted practice consist of coordination on Lyfjaval's *"new policy"* for *"car pharmacies"* and limitation of the

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[7] See Casino, Guichard-Perrachon and AMC v Commission, T 249/17, EU:T:2020:458, paragraph 114

[8] See: https://www.globenewswire.com/news-release/2021/06/25/2253386/0/is/Skeljungur-hf-Kauptilbo%C3%B0i-Lyfsalans-ehf-%C3%AD-Lyfjaval-ehf-sam%C3%BEykkt-Skeljungur-hf-eignast-samhli%C3%B0a-%C3%BEv%C3%AD-56-%C3%AD-Lyfsalanum-ehf-gangi-kaupin-eftir.html

applicant L&H's capacity to open "car pharmacies" and Lyfjaval's capacity to open "traditional pharmacies."

70. As explained in para. 24 above, no such thing as *"car pharmacies"* exists in Iceland, and all pharmacies are in fact *"traditional pharmacies"*.

71. Therefore, the applicants are by Icelandic pharmaceutical laws unable to conduct the alleged unlawful concerted practice, as the applicants cannot conduct a concerted practice to limit Lyfjaval to only operating *"car pharmacies"*, as all pharmacies must in fact and by law also be *"traditional"* walk-in pharmacies".

72. Furthermore, prior to the asset swap, which led to Lyfjaval closing its operation in Mjódd, the company had already opened a new pharmacy in Suðurfell, located just 1 km from its former pharmacy in Mjódd. The new pharmacy is in direct competition with the applicant's L&H pharmacy located in Mjodd, as there is only approx. 1km between the two pharmacies. To that effect, the closing of Lyfjavals branch in Mjódd had no effect on competition, as the company had already opened up and operated a new and improved pharmacy close to Mjódd.

73. The applicants maintain that the only referred date in the contested decision is in fact the date of the asset swap, which was notified to the ICA. In all other respects, it seems that the contested decision is presented solely to justify ESA's jurisdiction in the case.

74. Considering all of the above, the applicants maintain that the contested decision does not meet the criteria of Article 16 of the Surveillance and Court Agreement. Thus, the contested decision does not sufficiently reason:

    a. 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;

    b. How the applicants could restrict Lyfjaval's capacity to open *"traditional pharmacies";*

    c. How it could possibly make sense for the applicants to let a small competitor, Lyfjaval, restrict its capacity to open *"car pharmacies";*

    d. How alleged concerted practices can have begun *"at least"* at a point in time where only one of the parties was active on the market;

E. THIRD PLEA – INSUFFICIENT GROUNDS AND BREACH OF PROPORTINALITY PRINCIPLE

75. By its third plea, 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 factually false premise. Thus, ESA did not have sufficient grounds in the form of valid evidence (indicia) to justify an inspection, rendering it illegal.

76. The applicants maintain that this also constitutes a separate breach of the proportionality principle, as the information could have been fact checked and proven misguided, through less intrusive means.

77. The applicants note in this regard that it should be borne in mind that in accordance with settled case-law, the interpretation of a provision of EU law requires account to be taken not only of its wording but also of its surrounding context and the objectives and purpose pursued by the act of which it forms part, cf. the ECJ's judgment in case C-690/20P, *Casino, Guichard-Perrachon SA and Achats Marchandises Casino SAS v. the Commission*, para. 82. The applicants maintain that the same must be held to apply in EEA law.

78. Taking into account the surrounding context, the object and purpose of an inspection decision, ESA cannot take such a decision unless, at the date of the decision, it has in its possession *"sufficiently serious indicia"* of the existence of an alleged infringement, to justify an inspection (see *Casino, Guichard-Perrachon SA and Achats Marchandises Casino SAS v. the Commission* previously cited, para. 122).

79. The applicants maintain that the EFTA Court must review whether such indicia existed at the time of the decision. Other result could lead to arbitrary use of ESA's powers, endangering the fundamental rights of the parties, enshrined in the EEA Agreement and the ECHR, including but not limited to Article 8 of the ECHR.

80. The applicants maintain that ESA cannot have had such a sufficiently serious indicia at the time of the contested decision. In fact, as has been specifically outlined under the second plea above, ESA based its decision on a serious misrepresentation of the actual facts.

81. To that effect, the applicants refer to the submissions made under the second plea, and highlight in particular the following:

    a. 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;

    b. The contested decision incorrectly states that the asset swap was entered into between the applicant L&H and Lyfjaval, where the fact is that it was entered into between Faxar ehf. and Lyfjaval;

    c. 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". Since 2005, when the first pharmacy with a drive through option was opened in Iceland, the Icelandic Competition Authority has never made such a distinction in its extensive practice on the pharmacy market. The simple fact is that no such distinction can be made, as all pharmacies with a drive through option in Iceland are also "walk in" pharmacies, as obligated by law;

    d. Thus, no such thing as "car pharmacies" exists. It follows that ESA cannot have any sufficiently serious indicia that the applicants have *"limited Lyfjaval's capacity to open "traditional pharmacies""* or Lyfjaval has *"limited Lyf og heilsa's capacity to open "car pharmacies""*, as is maintained in the contested decision;

e. As the asset swap constituted of 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 in light of the fact that the contested decision specifically states that the ICA was consulted, which nevertheless does not seem to have brought this fact to ESA's attention;

f. The same goes with the fact that as pharmacy markets have been defined narrowly in Iceland by the ICA itself, consisting at most of a 2 km radius, ESA could not have had any indicia that the asset swap could be capable of affecting trade between the contracting parties, within the meaning of Article 53 of the EEA Agreement;

g. The fact that the contested decision refers to neither of these two clear facts, nor any other information from the ICA's merger file which is exculpatory for the applicants, seems to indicate that either ESA cherry picked the facts outlined in the contested decision, or the ICA did the cherry picking before submitting it to ESA.

82. In either case, the contested decision does not objectively lay out the actual facts. The applicants maintain that in the absence of an objective factual basis, ESA cannot have held a sufficiently serious indicia to justify taking the contested decision.

83. The applicants further maintain that this separately constitutes a breach of the proportionality principle and ESA's investigatory duties.

84. Thus, had ESA fulfilled its investigatory duties, by fact checking and thoroughly reviewing the factual background in an objective manner, there would have been no need for the contested decision, as no indicia would exist of a breach. An inspection went far beyond what was necessary to assess that there could be no indicia of a breach, infringing the proportionality principle.

85. According to Article 20, recital (1) of Section V of protocol 4 of the surveillance and court agreement, on the functions and powers of the EFTA surveillance authority in the field of competition, ESA' powers of investigations are based upon the indispensable requirement that the inspection is necessary, for ESA to carry out its duties.

86. The inspection conducted at the premises of the applicants was an overwhelming coercive measure, whereas it must be assumed that ESA, which exercises public authority, has a duty to ensure that the action in question is necessary to achieve the stated objective. It is quite clear that the alleged unlawful conduct had already been investigated in detail by the ICA, whereas the ICA had obtained numerous documents from the applicants, incl. the asset swap agreement, and even presented the applicants with a Statement of Objections, 67 pages long, accompanied by 150 documentary evidence.

87. In the Statement of Objections, the ICA even concluded that its preliminary assessment was that the conduct could perhaps infringe Art. 53 of the EEA Agreement. This hardly indicates anything other than that the ICA already considered that it had all the relevant information at its disposal to be able to conclude in its

initial assessment that the conduct might infringe the aforementioned provision. From this it can hardly be considered that about a year and a half later, it was necessary, within the meaning of Article 20, recital (1) of Section V on the functions and powers of the EFTA surveillance authority in the field of competition, for ESA, another authority to submit the applicants to an on-site inspection, due to the same conduct.

88. To this extent, it must also be borne in mind that both Icelandic Competition rules and Art. 11 of Section IV of Protocol 4 of the surveillance and court agreement, on the functions and powers of the EFTA surveillance authority in the field of competition, assume a high level of cooperation between ESA and ICA, data sharing and the obligation to provide each other with all relevant information.

89. The applicants maintain that given the information and documents the applicants had already provided to the ICA, the indispensable requirement of necessity of the contested decision, was not met.

F. ADOPTION OF A MEASURE OF ORGANIZATION OF PROCEDURE

90. According to Article 57 of the Rules of Procedure of the EFTA Court, the purpose of measures of organization of procedure shall be to ensure that cases are prepared for hearing, procedures carried out, and disputes resolved under the best possible conditions. According to Article 57(3), measures of organization of procedure may, consist of asking the parties for information or particulars, asking the parties to produce documents or any papers relating to the case as well as inviting the parties to make written or oral submissions on certain aspects of the proceedings.

91. The applicants submit that it is necessary for the review of the contested decision, that all relevant documents obtained by ESA prior to the contested decision are at the Courts disposal, as the applicants has as of yet not received any documents of such, other than the contested decision itself.[9] Unless ESA produces the documents, the applicants cannot take adequate measures to protect their interests in the proceedings. Further, if the documents are not provided, the applicants maintain that the Court cannot ascertain whether ESA had sufficiently serious indicia to justify the contested decision, and must annul it.

92. The applicants reserve the right to submit further evidence, information and reasoning as appropriate, allowed by the Court and with the objective of ensuring the case is as informed as possible. The applicants furthermore cordially request to be given the opportunity to present their views in response to the arguments and documents presented by the defendant, as allowed by the Court.

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[9] See e.g. the judgments in Intermarché Casino Achats v Commission, T 254/17, EU:T:2020:459, paragraph 14, and Les Mousquetaires and ITM Entreprises v Commission, T-255/17, EU:T:202:460, paragraph 18, as well as České dráhy v Commission, T-325/16, EU:T:2018:368, paragraphs 72 et seq, České dráhy v Commission, T-621/16, EU:T:2018:515, paragraphs 14 and 31–34, and Deutsche Bahn and others v Commission, T-289/11, T-290/11 and T 521/11, EU:T:2013:404, paragraphs 28, 132 and 182

G. FORM OF ORDER SOUGHT

93. Based on the foregoing, the applicants respectfully request the Court to:

1. 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;

2. 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;

3. Order ESA to pay the costs of the proceedings.

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Reykjavik, 13 December 2024,
LOGOS legal services

Halldór Brynjar Halldórsson, supreme court attorney