KVALE

Oslo, 14 December 2024
GMA/40365-501

TO THE REGISTRAR OF THE EFTA COURT

APPLICATION

submitted in accordance with Article 108(2)(b) of the EEA Agreement, Article 36 of the Surveillance and Court Agreement, and Article 19 of the Statute of the EFTA Court, by

SKEL fjárfestingafélag hf.

with its permanent address at Bjargargata 1, 102 Reykjavík, Iceland, represented by Gjermund Mathisen, Kvale Advokatfirma DA, as Counsel, against the

EFTA Surveillance Authority

for the annulment of EFTA Surveillance Authority ("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 ("SCA") ("the contested decision").

I. INTRODUCTION AND OVERVIEW

(1) Lyfjaval ehf. ("Lyfjaval") operates seven retail pharmacies in Iceland – six in the greater capital area and one in Keflavík. Lyfjaval is a relatively small player in the Icelandic retail pharmacy sector, and has some 7% of total annual turnover in retail pharmacy sales in Iceland. The company is indirectly controlled by SKEL fjárfestingafélag hf. ("SKEL" or the "Applicant").

(2) Lyf og heilsa hf. ("Lyf og heilsa") also operates retail pharmacies in Iceland – 18 in the greater capital area and six elsewhere.[1] With more than 29% of total annual turnover in retail pharmacy sales in Iceland, Lyf og heilsa is a significantly larger player in the sector, at over four times the size of Lyfjaval. Lyf og heilsa is controlled by Faxar ehf., which is wholly owned by Faxi ehf., which in turn is wholly owned by Toska ehf.

(3) At the heart of the case is an asset swap agreement of 26 April 2022 between Faxar ehf. and Lyfjaval ("the asset swap agreement") **(Annexes A.1 and A.2)**, pursuant to which the parties traded retail spaces in two small, local shopping centres in Reykjavík municipality, where each party operated a pharmacy. Lyfjaval gave up its retail space in Mjóddin[2] – after opening a new pharmacy around the corner, in Suðurfell 4, a move which had been in the works since long before the asset swap agreement was entered into. Faxar ehf. gave up its retail space in Glæsibær[3], in which Lyf og heilsa operated a pharmacy that had long since been for sale, for lack of profitability.

(4) The asset swap agreement was duly notified to the Icelandic Competition Authority ("ICA") as two mergers. The ICA opened a phase II investigation and issued a Statement of Objections, but ultimately the mergers were approved as the ICA did not adopt any decision to prohibit them, or impose remedies, within the legal time limit.

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1 See Apótek - Lyfjastofnun, Lyf og heilsa and About Apótekarinn

2 Forsíða | Mjóddin.

3 Forsíða | Glæsibær.

(5) On 14 October 2024, ESA commenced an unannounced inspection at the business premises of SKEL and Lyfjaval, based on the contested decision **(Annexes A.3 and A.4)**. In accordance with its Articles 3 and 4, the contested decision was notified to SKEL immediately before the inspection.

(6) The same day, ESA published a brief press release regarding the inspection.[4]

(7) According to Article 1 of the contested decision, ESA suspects Lyfjaval of participating in anti-competitive conduct contrary to Article 53 EEA, "in relation to the retail pharmacy market in Iceland". Specifically:

The suspected agreements and/or concerted practices include the elimination of direct competition with Toska (in particular through Toska ehf.'s subsidiary Lyf og heilsa hf.) that took place using traditional walk-in pharmacies, where Lyf og heilsa hf. benefits from Lyfjaval ehf.'s closure of certain of its traditional walk-in pharmacies which previously directly competed with Lyf og heilsa hf.'s traditional walk-in pharmacies, and where Lyfjaval ehf. concentrates on drive-through pharmacies, while Lyf og heilsa hf. does not enter the drive-through pharmacy segment.

(8) SKEL seeks the annulment of the contested decision. The application is based on four pleas. First, that the contested decision provides insufficient reasoning. Second, that there is no effect on trade. Third, that ESA did not have sufficiently serious indicia to justify an unannounced inspection. Fourth, that conduct relied on by ESA to justify the inspection has already been approved by the competent Icelandic authorities as notified and approved mergers.

(9) In a separate section of the Application, SKEL proposes the adoption of a measure of organisation of procedure.

(10) It is known that ESA also carried out an inspection at the premises of Lyf og heilsa. Further, SKEL understands that the inspection decision on which ESA must have

[4] In Icelandic: Samkeppni: Eftirlitsstofnun EFTA gerir fyrirvaralausa athugun | ESA.
In English: Competition: The EFTA Surveillance Authority carries out unannounced antitrust inspection | ESA.

based that inspection will be challenged in a separate Application. Seeing as the present Application effectively concerns the same case, substantively, and presumably the same investigation on ESA's part, SKEL would encourage the Court to see the two Applications in context.

II. FIRST PLEA: INSUFFICIENT REASONING

(11) 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 (see, inter alia, the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458,[5] paragraph 107 and case law cited; and Case E-1/22 *G. Modiano Limited & Standard Wool (UK) Limited* v *ESA*, judgment of 24 January 2023, paragraph 84 and case law cited).

(12) In an inspection decision, such as the contested decision, 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, and explanations of the way in which the undertaking is supposed to be involved in the infringement (see,

[5] The judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, is part of a complex of cases which also includes, from the General Court, the judgments in *Intermarché Casino Achats* v *Commission*, T-254/17, EU:T:2020:459, and *Les Mousquetaires and ITM Entreprises* v *Commission*, T-255/17, EU:T:202:460; and, from the Court of Justice, the judgments in *Les Mousquetaires and ITM Entreprises* v *Commission*, C-682/20 P, EU:C:2023:170, *Casino, Guichard-Perrachon and AMC* v *Commission*, C-690/20 P, EU:C:2023:171, and *Intermarché Casino Achats* v *Commission*, C-693/20 P, EU:C:2023:172. Through these six judgments, the Commission inspection decisions at issue were all ultimately annulled in full.

inter alia, the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 110 and case law cited).

(13) That obligation to state specific reasons constitutes a fundamental requirement in order to show not only that the proposed intervention within the undertakings concerned is justified, but also to enable the undertakings concerned to understand the scope of their duty to cooperate while at the same time maintaining the rights of the defence. Indeed, it is important to enable the undertakings covered by inspection decisions imposing obligations on them, which entail interferences with their private life and failure to comply with which can expose them to heavy fines, to grasp the reasons for those decisions without excessive interpretative effort, so that they can exercise their rights efficiently and in good time. It follows, moreover, that the scope of the obligation to state reasons for inspection decisions, as set out in the preceding paragraph, cannot in principle be restricted on the basis of considerations concerning the effectiveness of the investigation (see, inter alia, the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 111 and case law cited).

(14) In an inspection decision, ESA must supply information showing that it has serious indicia of an infringement. Albeit without having to disclose the indicia *in the inspection decision itself*, ESA is required to disclose in detail in the decision that it had in its file information and indicia providing reasonable grounds for suspecting the infringement of which the undertaking subject to inspection is suspected (see, inter alia, the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 114 and case law cited).

(15) ESA failed to meet this standard in the contested decision.

(16) Key parts of the contested decision were, and remain, difficult for SKEL to understand.

(17) In recital (4), chapeau, of the contested decision, ESA alleges 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". This is difficult to understand, for five reasons.

(18) First, in August of 2022, Lyfjaval opened a new pharmacy in Suðurfell 4, no more than a four or five minute drive from its old pharmacy in Mjóddin.[6] The new location is in a property owned by another company in the same entity, the move was commercially motivated, and it enabled Lyfjaval to keep competing effectively in the area. Almost a year and half later, in December 2023, the old pharmacy in Mjóddin was then closed. Contrary to what is alleged in recital (4), chapeau, of the contested decision, it is difficult to see this case as an example of Lyf og heilsa benefitting from losing direct competition through a closure of a Lyfjaval pharmacy. On the contrary, Lyfjaval moves just around the corner and strengthens its presence in this local market by improving its service with longer opening hours and a drive-through option.

(19) Second, Lyfjaval also moved its pharmacy in Reykjanesbær to a better location in January/February of 2023, opening in the new location the week after closing in the old location. Moreover, the Lyfjaval pharmacy in the new location in Reykjanesbær remains in direct competition with Lyf og heilsa's pharmacy in Reykjanesbær; again, it is a four or five minute drive.[7] Contrary to what ESA alleges in recital (4) of the contested decision, it is difficult to see this case as an example of Lyf og heilsa benefitting from losing direct competition through a closure of a Lyfjaval pharmacy. Rather, Lyfjaval strengthens its presence in this local market as well, through offering a better location, longer opening hours and better services for customers, including a drive-through option.

(20) Third, no other Lyfjaval pharmacy has been closed. And so SKEL is at a loss as to what exactly ESA is referring to.

6 Suðurfell 4, 111 Reykjavík, Iceland to Mjóddin - Google Maps.

7 Apótekarinn Keflavík to Lyfjaval Reykjanesi (Apótek Suðurnesja) - Google Maps.

(21) Fourth, Lyfjaval even opened an entirely new pharmacy in direct competition with two of Lyf og heilsa's pharmacies in Miklabraut,[8] in February 2024.

(22) Fifth, every move, opening and closure of any one of Lyfjaval's pharmacies is a matter of public record.[9] All the more so, it is difficult to understand ESA's allegation.

(23) In recital (4), point b, ESA refers to "SKEL's new drive-through pharmacy strategy". SKEL struggles to identify with this. For nearly two decades, Lyfjaval has offered a drive-through service to its customers. In 2005, the former owner of Lyfjaval opened the first pharmacy with drive-through windows in Hæðarsmári. He also had drawn up plans to alter his pharmacy, in Reykjanesbær, by including drive-through windows.

(24) In July 2020, Lyfsalinn ehf. ("Lyfsalinn") opened a pharmacy with drive-through windows in Vesturlandsvegur. At that time, Skeljungur ehf. (now SKEL) held only a 10% stake in Lyfsalinn, and so did neither control that entity nor dictate its strategy. The following year, Lyfsalinn bought Lyfjaval, and Skeljungur later gained control over Lyfjaval by way of majority shareholding.

(25) Skeljungur was (and still is, now as Orkan) an Icelandic petrol station operator with about 70 petrol stations around the country.[10] Therefore, Skeljungur 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.[11] This strategy is not new, and has been a matter of public record for years.

(26) By way of example, when the pharmacy in Reykjanesbær was moved to a better location (see paragraph (19) above) and outfitted with a drive-in option, this was

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8 Lyfjaval Miklubraut to Lyf & heilsa Kringlunni - Google Maps.
Apótekarinn Austurveri to Lyfjaval Miklubraut - Google Maps.

9 See e.g. Um okkur - Lyfjaval.is.

10 Orkan: Um okkur.

11 For comparison, the owner of the largest petrol station operator in Iceland (Festi hf.) recently acquired the largest pharmacy chain in Iceland (Lyfja hf.). Following the merger, Festi hf. will focus on shared use of retail space, by using drive-through services for pharmaceutical sales. Presentation available here (see slide 7): PowerPoint Presentation or through the link on Festi's website: Financial information (2024 – 2. Quarterly – Investor presentation).

according to the plans laid by the former owner and the drawings he had made. The plans were executed under SKEL's ownership, but were by no means new (see paragraph (23) above).

(27) Moreover, all of Lyfjavals pharmacies are walk-in pharmacies, even as a number of them have a drive-through *option* for customers.[12] Lyfjaval has no such thing as a pure "drive-through pharmacy". Indeed, Icelandic law does not allow for pure drive-through pharmacies, as every physical pharmacy must have an entrance where customers can enter on foot, and a secluded space where the customer can consult the pharmacist in private. This follows from the Medicinal Products Act No 100/2020 and the Regulation on Pharmacy Licenses and Drug Stores No 1340/2020, especially Article 26, paragraphs 1 and 2 of the latter. For confirmation of this interpretation of national law, reference is made to explanations provided by the Icelandic Medicines Agency ("Lyfjastofnun") in February 2023 **(Annexes A.5 and A.6)**.

(28) Further, the allegations in recital (4), point c, that the suspected practices may have involved "a restriction on Lyfjaval's ability to open traditional walk-in pharmacies" are confusing. In April 2021, Lyfjaval made an offer to open and run a traditional pharmacy in Kirkjusandur **(Annexes A.7 to A.10)**, a complex owned by a third party, but ultimately Lyfjaval's offer was not accepted. In early 2022, Lyfjaval tried opening a traditional pharmacy in Austurstræti in one of SKEL's convenience stores **(Annexes A.11 to A.14)**, but could not get the necessary permits. Furthermore, in October 2023, SKEL – through its subsidiary Heimkaup ehf., which since 1 July 2023 owns Lyfjaval[13] – engaged an external advisor in a search for opportunities to buy other pharmacies, i.e. Lyfjaver **(Annexes A.15 and A.16, bottom of page 1)**. In 2024, SKEL considered buying Borgarapótek **(Annexes A.17 and A.18)**.

(29) Equally puzzling are the allegations in recital (4), point c, that the suspected practices may have involved "a restriction on Lyf og heilsa's ability to open drive-

[12] See e.g. Opnunartími - Lyfjaval.is.

[13] Heimkaup.

through pharmacies", as there is no indication – and certainly not in the contested decision – why Lyf og heilsa, as one of the two big players in the Icelandic retail pharmacy sector, would coordinate with a small player such as Lyfjaval, of one fourth the size, and agree to restrict its own ability to open "drive-through pharmacies". There is also no indication why Lyfjaval would desire any such coordination. In fact, there are no obvious indications that Lyf og heilsa is – or ever has been – inclined to offer drive-through services at all, as it does not have access to suitable retail spaces without substantial investment or cooperation with a third party.

(30) Further, according to recital (6) of the contested decision, the alleged anticompetitive conduct may have started as early as in May 2021. However, no indication is given as to what might have happened in May of 2021, or at any other time that year, so as to initiate an infringement of Article 53 EEA. Indeed, the only indication provided of potentially anticompetitive conduct at a more specific point in time, is the reference to the asset swap agreement, of 26 April 2022, see recital (4), point a.

(31) Especially viewed against the background of the national merger proceedings, which concerned precisely the transactions that in recital (4), point a, is referred to as an asset swap agreement (see section V below), the remainder of recitals (3) to (6) appears to SKEL as an ill-founded attempt to justify ESA's jurisdiction.

(32) For all these reasons, ESA has infringed its obligation under Article 16 SCA.

(33) In the event that the Court nonetheless should find the contested decision to be sufficiently reasoned, and the Court therefore 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. To that end, seeing as ESA has not disclosed the information referred to in the contested decision, SKEL will propose that the Court adopt a measure of organisation of procedure requiring ESA to produce the information (see section VI below) and requesting that SKEL express its views on the information produced.

III. SECOND PLEA: NO EFFECT ON TRADE

(34) Retail pharmacy operations are very much local, in Iceland as in many other countries, and the use of the private car is the preferred way of transport. People tend to go to the nearest pharmacy to where they are, or to a pharmacy "just around the corner" from their home or workplace, and they tend to go there by car. The one pharmacy does not sell better medication than the other, and for prescription drugs you pay basically the same, so convenience in the form of accessibility plays an important role.

(35) The local nature of competition in retail pharmacy operations is also reflected in e.g. the Statement of Objections from the ICA in the merger cases concerning the asset swap agreement (see further section V below). There, ICA's preliminary assessment was that the concentrations would significantly distort competition in the market, as they entailed "harmful local competitive effects of the former concentration in Mjóddin, and the immediate vicinity on the one hand, and by the harmful local competitive effects of the second concentration in Glæsibær and the immediate vicinity on the other" **(Annexes A.19 and A.20, page 16, paragraph 65)**.

(36) Further, arguing in its Statement of Objections that the asset swap agreement violated Article 10 of the Icelandic Competition Act and Article 53 EEA, the ICA described the small, local shopping centres in Glæsibær and Mjódd as separate "competitive areas" **(Annexes A.19 and A.20, pages 23–24, paragraphs 96–97)**. In this light, SKEL struggles to see how the transactions could now be considered to have an effect on trade within the EEA.

(37) Whereas ESA is not required, in an inspection decision, to delimit the relevant market *precisely*, and so by extension cannot be required to *positively demonstrate* the required effect on trade within the EEA (compare the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, EU:C:2020:53, paragraphs 42 and 80 and case law cited), the particular type of markets involved

forms the background against which ESA's competence – or lack of such – must be assessed.

(38) Agreements that are local in nature are in themselves not capable of appreciably affecting trade between EEA States.[14] It is therefore especially difficult to see how the asset swap agreement could have the required effect on trade.

(39) In any event, given the particularly local nature of retail pharmacy markets,[15] ESA should not be considered to have sufficiently established the potential application of Article 53 EEA, and thereby ESA's competence, through the one recital in the contested decision that appears to address this issue, namely recital (5):

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

IV. THIRD PLEA: SUFFICIENTLY SERIOUS INDICIA NOT PRESENT

Legal standard

(40) The requirement for protection against arbitrary interference by the public authorities with the sphere of private activities, as reflected in e.g. Article 8 ECHR, prohibits ESA from ordering an inspection if it did not have serious indicia to suspect an infringement of the competition rules.

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[14] See ESA's Guidelines on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement, OJ C 291/46, 30.11.2006, paragraph 91.

[15] Again, this goes for Iceland as it does for many other countries. For comparison, see the judgment in *Sbarigia*, C-393/08, EU:C:2010:388, paragraph 32, where the Court of Justice found it "quite obvious" that the rejection of an exemption in relation to the opening periods of "a pharmacy located in a specific municipal area of the municipality of Rome, cannot… affect trade between Member States within the meaning of Articles 81 EC and 82 EC", even as the pharmacy was situated "in the heart of the city's tourist area" (paragraph 6), and even if another pharmacy "located near the 'Termini' railway station, with the same specific type of clientele", did get an exemption (paragraph 8).

(41) Indeed, at the time of adoption of an inspection decision, ESA must have material and actual serious indicia that lead it to suspect the existence of an infringement. Or, in other words, indicia of such a kind as to give rise to a reasonable suspicion leading to presumptions of an infringement (see the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 183 and case law cited).

(42) It is for the Court, in order to be satisfied that an inspection decision is not arbitrary, that is to say, that it was not adopted in the absence of any circumstance of fact and of law capable of justifying an inspection, to ascertain whether ESA had sufficiently serious indicia to suspect an infringement of the competition rules by the undertaking concerned (see, inter alia, the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 166 and case law cited).

(43) It is therefore necessary to determine the indicia in ESA's possession and on the basis of which it ordered the inspection at issue (and to this end, the Applicant proposes a measure of organisation of procedure, see section VI below), before assessing whether those indicia were sufficiently serious for it to suspect that the infringements at issue had been committed and to justify in law the adoption of the contested decision (see the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraph 168).

ESA cannot have had sufficiently serious indicia

(44) SKEL refers to its submission in sections II and III above regarding insufficient reasoning and lack of effect on trade. Given how the public record of pharmacy moves and openings, etc., does not square with ESA's allegations, SKEL fails to understand that ESA could have had information in its possession, according to which SKEL and Toska "eliminated direct competition between each other".

(45) In any case, SKEL pleads – for the same reasons as set out in sections II and III above – that ESA cannot have had sufficiently serious indicia of a breach of Article 53 EEA.

(46) In particular, SKEL highlights that ESA cannot have had sufficiently serious indicia that the asset swap agreement referred to in recital (4), point a, of the contested decision, could constitute an infringement of Article 53 EEA, seeing as the asset swap agreement consists of two previously notified and approved concentrations under Section 17, litra c, of the Icelandic Competition Act. On this particular issue, see further section V below.

Cherry-picking

(47) It is standard practice for ESA to work closely with national authorities, in particular the national competition authority. ESA has not disclosed the origin of this investigation, however, at a meeting SKEL had asked for with ESA, in Brussels on 26 November 2024, it came to light that the investigation could stem from information provided by a national authority.

(48) Also, under Article 20(4) of Chapter II of Protocol 4 SCA, ESA shall take an inspection decision only after consulting the competition authority in whose territory the inspection is to be conducted, i.e. the ICA. That this was done, is confirmed in the preamble to the contested decision. ESA's press release also points to cooperation with the ICA. Moreover, effectively the same conduct has already been the subject of investigation by the ICA, and it appears inconceivable that the ICA and ESA would be running competing investigations.

(49) In any event, given the public history of the asset swap agreement in Iceland, ESA must have been in possession of documentation from the merger cases when adopting the contested decision. However, as information in the merger cases is effectively exculpatory for SKEL, it appears that ESA may have cherry-picked information when referring to indicia in the contested decision.

(50) Such cherry-picking, too, would entail arbitrary interference with the sphere of private activities and SKEL's rights in this respect.

Fishing expedition

(51) To the extent that the statement of reasons for an inspection decision circumscribes the powers conferred on ESA's agents, a search may be made only for those documents coming within the scope of the subject-matter of the inspection (see the judgment in *České dráhy* v *Commission*, C-538/18 P and C-539/18 P, EU:C:2020:53, paragraph 99 and case law cited).

(52) When the contested decision defines 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. Indeed, at the inspection ESA searched for information predating May 2021, even going back to 2019. A screenshot of the first few results of this search is annexed **(Annexes A.21 and A.22)**.[16] ESA also seized a significant number of documents from 2020 and the first months of 2021. SKEL has compiled a list of the documents at issue **(Annexes A.23 and A.24)**.[17]

(53) For this reason, too, the contested decision entails an arbitrary interference with the sphere of private activities and SKEL's rights in this respect.

V. FOURTH PLEA: CONDUCT CLEARED BY WAY OF APPROVED MERGERS

(54) In recital (4), point a, of the contested decision, ESA specifies that the suspected practices may, notably, have involved the asset swap agreement.

(55) The asset swap agreement consists of the selling of retail spaces in two small, local shopping centres in Reykjavík municipality, i.e. Mjóddin[18] and Glæsibær[19].

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16 The Applicant assumes that ESA will not dispute the fact that the search encompassed these messages, and so has not annexed the whole search, which includes a large number of messages, also from later years. The evidentiary point, however, is only that the search encompassed messages all the way back to 2019.

17 On the assumption that ESA will confirm, or at the very least not dispute, that the listed documents were indeed seized by ESA at the inspection, and so as not to unnecessarily overburden the Application with annexes, especially seeing that the evidentiary point is when the seized documents date from, and not their substantive contents, SKEL has not annexed the documents themselves.

18 Forsíða | Mjóddin.

19 Forsíða | Glæsibær.

Both parties owned a retail space in each centre, where one of their pharmacies was located. Due to stipulations in its loan agreement with Arion banki hf., Lyfjaval was under the obligation to sell its retail space in Mjóddin **(Annexes A.25 and A.26, Articles 8.2(b) and 14.2)**. 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. Lyf og heilsa had already decided to close its pharmacy in Glæsibær, due to poor financial performance. Lyfjaval had also, already long before, decided to open another pharmacy in Suðurfell 4, just around the corner from Mjóddin. As these real estate transactions would have the same effect on the retail market for sale of pharmaceuticals as selling the pharmacies as such, they were notified to the ICA, by late autumn 2022, as two separate concentrations under Article 17, litra c, of the Icelandic Competition Act.

(56) The ICA investigated the transactions and issued a Statement of Objections. After receiving comments from both parties, the ICA adopted a decision to discontinue its assessment of the concentrations. On appeal, the Competition Appeals Committee ("CAC") found that the ICA had erred in law when discontinuing its assessment, without approving or prohibiting the mergers. The CAC ruled that the ICA was obliged to conclude the merger cases pursuant to the Icelandic Competition Act. As the ICA had not adopted any prohibition decisions within the deadline for intervention, the concentrations were effectively approved following rulings No 1/2023 and 2/2023 of the CAC.[20]

(57) SKEL submits that suspected practices, insofar as they involve the asset swap agreement, have already been assessed and approved under the merger control regime in Iceland, based on comprehensive information and documentation. The ICA cannot then choose *ex post* to investigate the very same conduct as an alleged breach of Article 53 EEA, and neither can ESA.

(58) The system of a harmonised and one-stop shop merger filing regime presupposes that notified and approved mergers are not subject to *ex-post* infringement

[20] Ruling No 1/2023: https://www.samkeppni.is/media/urskurdir-2023/Urskurdur-AFNS-1-2023.pdf.
Ruling No 2/2023: https://www.samkeppni.is/media/urskurdir-2023/Urskurdur-AFNS-2-2023.pdf.

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 (compare the judgment in *Illumina* v *Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677, paragraph 206). Companies having had their notified mergers approved would lose the required legal certainty with respect to the lawfulness of the transactions, and with it the necessary predictability. In turn, the system would be rendered ineffective.

(59) Granted, a concentration between two competitors could have the same structural effects on competition as a market sharing agreement may have. But in terms of enforcement of competition rules, different rules apply. The former may be approved or prohibited based on an *ex-ante* assessment by the relevant competition authority. The latter may be subject to *ex-post* assessment. A concentration, however, should not as such be subject to *ex-post* assessment under Article 53 EEA where it has already been controlled and approved *ex ante*.

(60) Looking at the asset swap agreement in this case, the ICA has assessed coordinated and non-coordinated effects of the notified concentrations that may limit effective competition. In its Statement of Objections, the ICA also argued that the concentrations would amount to an infringement of Article 10 of the Icelandic Competition Act and Article 53 of the EEA Agreement by way of market sharing. **(Annexes A.19 and A.20, page 24, paragraph 101)**. The ICA has therefore not only been able to assess the filed concentrations as such, but in the view of the ICA itself, has also been given sufficient information and documentation to assess the same alleged infringement that the contested decision is based on.

(61) SKEL submits that the contested decision must thus be based on information and documentation already assessed and approved by the ICA and the CAC under the Icelandic merger control regime. In consequence, neither the ICA nor ESA has the competence to review the very same conduct again, *ex post*, under Article 53 EEA. The effect of this being that ESA was not competent to adopt the contested decision on the cited basis.

(62) The principles underpinning this conclusion find expression, in particular, in Article 21(1), cf. Article 3, cf. recitals (6) and (7), of Regulation (EC) No 139/2004 ("EUMR"). Concentrations, as defined by the EUMR, are regulated by the merger rules, and Regulation (EC) No 1/2003 implementing the rules on competition laid down in Articles 101 and 102 TFEU specifically does not apply. In line with the system of the EUMR and Article 57 EEA, ESA's competence to assess and enforce concentrations is thus limited by the EUMR.

(63) In a situation where a concentration without a Community or EFTA dimension is assessed and approved by the competent national competition authority, the EUMR does not allow ESA to effectively second-guess the national merger clearance through a review under Article 53 EEA. The judgment in *Towercast*, C-449/21, EU:C:2023:207, does not alter this, as *Towercast* did not concern notified and approved mergers, but rather a concentration falling below national merger thresholds, and which was never notified, assessed or approved *ex ante* by a competition authority. That is, as stated by the Court of Justice in paragraph 34 of the judgment, a situation where "no ex ante control under the law on concentrations has been carried out".

(64) In the view of SKEL, most if not all of the contested decision appears to be based on the same factual and legal allegations that the ICA put forward during the merger procedures. Although not a prerequisite for the annulment of the contested decision on grounds of lack of competence, the Court should take this into consideration.

VI. REQUEST FOR A MEASURE OF ORGANISATION OF PROCEDURE

(65) Pursuant to Article 57(4) RoP, SKEL proposes the adoption of a measure of organisation of procedure in the form of the Court (i) ordering ESA to produce the information referred to in recitals (3) to (6) of the contested decision, any information otherwise forming the basis for the adoption of the contested decision, and any information of a potentially exculpatory nature which ESA had

in its possession at the time of adopting the contested decision; and (ii) asking SKEL to express its views on the documents and information produced.

(66) Such a measure of organisation of procedure is foreseen under Article 57(3) RoP, in particular litra (d) and litra (a) thereof. The measure would serve the purpose, in particular, of ensuring the efficient conduct of the written and the oral part of the procedure, and determining the points on which the parties must present further argument or which call for measures of inquiry, see Article 57(2) RoP.

(67) In SKEL's submission, the Court's review of the contested decision must take into account the information that ESA based the contested decision on or had at its disposal so as to inform the adoption of the contested decision, but which so far has remained undisclosed. Moreover, in order to inform the Court's review, it is further necessary to take into account any comments from the Applicant.

(68) To illustrate how such measures of organisation of procedure are employed in practice, in a case such as this, reference may be made to e.g. the judgment in *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, EU:T:2020:458, paragraphs 11 and 14. This approach is a matter of settled case law,[21] and is necessary for the Court to properly assess the merits of the contested decision.

VII. FORM OF ORDER SOUGHT

(69) SKEL requests that the Court:

1. 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

[21] 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.

premises, and requesting the Applicant to express its views on the documents and information produced;

2. **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**

3. **order ESA to pay the costs of the proceedings.**

For SKEL fjárfestingafélag hf.

Gjermund Mathisen, Counsel