Brussels, 03 March 2025
Case No: 93334
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**ORIGINAL**

**IN THE EFTA COURT**

# DEFENCE

Submitted, pursuant to Article 107 of the Rules of Procedure of the EFTA Court, by

**THE EFTA SURVEILLANCE AUTHORITY**

represented by
Claire Simpson, Daniel Vasbeck, Sigrún Ingibjörg Gísladóttir
and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents, in

**CASE E-31/24**

**Toska ehf. and Lyf og heilsa hf.**

**Applicants**

**v**

**EFTA Surveillance Authority**

**Defendant**

regarding the application, pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("**SCA**"), for the annulment of Decision No 158/24/COL of 3 October 2024 of the EFTA Surveillance Authority in Case No 91392, 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 SCA.

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# 1 INTRODUCTION

## 1.1 OVERVIEW

1. The Authority hereby responds to the application ("**the Application**") of Toska ehf. and Lyf og heilsa hf. ("**the Applicants**"), for the annulment of Decision No 158/24/COL of 3 October 2024 of the EFTA Surveillance Authority in Case No 91392 ("**the Decision**").

2. The Decision requires the Applicants to submit to an inspection ordered by the Authority under Article 20(4) of Chapter II of Protocol 4 to the SCA.[1]

3. The Applicants request the Court to: (i) annul the Decision; (ii) adopt a measure of organisation of procedure ordering the Authority to produce the information and indicia on the basis of which the Authority adopted the Decision; and (iii) order the Authority to pay the costs of the proceedings.

4. In support of its action for annulment, the Applicants raise three pleas: (i) that the Authority lacked competence to adopt the Decision, because the alleged infringement(s) were not capable of affecting trade within the meaning of Article 53 EEA; (ii) that the Decision contains insufficient reasoning, in particular as the alleged infringement(s) had already been approved as mergers by the Icelandic Competition Authority (*Samkeppniseftirlitið*) ("**ICA**"), which means also that the Decision breaches the principles of legal certainty and *ne bis in idem*; (iii) that the Authority did not objectively verify the information in its possession (on which the Decision was based), and thus did not have sufficiently serious indicia to justify an inspection, in breach also of the principle of proportionality.

5. In the Authority's submission, and for the reasons given below, the Application should be dismissed in its entirety.[2] Before addressing the three pleas, the Authority makes the following preliminary remarks.

## 1.2 PRELIMINARY REMARKS AND FACTUAL BACKGROUND

[1] "**Chapter II Protocol 4 SCA**".
[2] To the extent that this Defence does not expressly address points set out in the Application, this does not constitute acceptance of the Applicants' position.

6. At its heart, the Application is based on two erroneous factual presumptions, namely that the Authority: (i) seeks merely to reinvestigate an asset swap agreement of 26 April 2022 ("**the asset swap agreement**") in relation to "*two small distinct local shopping outlets*";[3] and (ii) did not have sufficiently serious indicia providing reasonable grounds for suspecting the Applicants' involvement in a competition law infringement. These factual presumptions are flawed, as follows.

7. First, the suspected infringement which forms the subject matter of the Decision is not the (local) asset swap agreement of 26 April 2022. Instead, the Decision clearly identifies the suspected infringement as *anticompetitive coordination* of the conduct of Toska[4] (the operator of a pharmacy chain) with its competitor SKEL[5] (the operator of a pharmacy chain) on the Icelandic retail pharmacy market.[6] Recital 3(a) of the Decision specifies that the asset swap agreement is *one of the ways* in which this anticompetitive coordination may have been *implemented*. In other words, the asset swap agreement and its execution constitute *indicia* of suspected wider anticompetitive collusive conduct, which is of a different geographic and temporal scope, pre- and post-dating the asset swap[7]. It is this wider suspected collusion which the Decision seeks to investigate. The Applicants' failure to acknowledge this means *inter alia* that: (i) their arguments on effect on trade (the First Plea) in relation to the "*local*"[8] nature of the asset swap are misguided and ineffective (Section 2 below); (ii) the arguments under the Second Plea that the Authority is seeking to "*reexamine the same conduct*"[9] as that assessed under the Icelandic merger rules by ICA are unfounded (Section 3 below); and (iii) the contention under the Third Plea that the Authority cannot have had sufficiently serious indicia that "*the asset swap* […] *constituted an infringement of Article 53*"[10] is misdirected and ineffective (Section 4 below).

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[3] See e.g. Application ¶37, and similarly ¶¶33, 50, 52, 55, 58, 81.f.
[4] This includes (as defined in the Decision, in particular Recital 1) all undertakings directly or indirectly, solely or jointly controlled by it, including, in particular, Lyf og heilsa hf.
[5] This includes (as defined in the Decision, in particular Recital 2) all undertakings directly or indirectly, solely or jointly controlled by it, including, in particular, Lyfjaval ehf.
[6] Recitals 1-5 and Article 1 of the Decision, and see further paragraphs 17-19 below.
[7] Recital 5 of the Decision specifies that the anticompetitive conduct may have started at least in May 2021, and may still be ongoing. The asset swap agreement is dated 26 April 2022.
[8] Application ¶¶32, 33, 35, 37-43, 45 and 50.
[9] Application ¶¶64 and similarly ¶¶52, 58, 62, 63, 74.a. and 87.
[10] Application ¶¶81.e (and similarly 81.f).

8. Second, the Decision is based on sufficiently serious indicia. The fact that the Authority was in possession of such indicia was sufficiently disclosed in the Decision, which also precisely defined the presumed facts the Authority wished to investigate and the matters to which the inspection related. The Applicants have failed to cast doubt on the reasonableness of the Authority's grounds or indicia for suspecting an infringement. Accordingly, the Authority submits that there is no need for the Court to order the further disclosure of such indicia (Sections 4.2 and 5 below). In the interests of the expeditious execution of these proceedings however, and to assist the Court, the Authority nevertheless provides, in Section 1.2.1 below, a more detailed description of its indicia. The Authority respectfully submits that, on any view, this more detailed description sufficiently enables the Court to determine, without the need for a measure of organisation of procedure, that the Authority possessed sufficiently serious indicia justifying the adoption of the Decision.

9. Further and more generally, various parts of the Application (in particular the Second Plea) raise arguments contesting the very existence of the suspected coordination. While such arguments may be relevant at the second, *inter partes*, stage of the administrative proceedings,[11] or in the context of any eventual finding of infringement, they: (i) are irrelevant to whether the duty to give reasons was complied with (Section 3 below); and (ii) fail to take into account the correct legal standard for inspection decisions, namely whether the Authority had reasonable grounds to *suspect* the existence of an infringement (Sections 2 and 4). In short, it is important to bear in mind that, at this exploratory stage, the Authority has made no finding of infringement. Instead, the Authority had information and indicia reasonably leading it to *suspect* unlawful conduct. The inspection seeks to verify whether these suspicions were well-founded.

#### *1.2.1 The Authority had sufficiently serious indicia to suspect the Applicants' involvement in an infringement*

10. The Decision is based on sufficiently serious indicia, reflecting information drawn from various sources, including information received from ICA, publicly available documents and information (such as investor presentations, annual reports, and newspaper

[11] See paragraphs 52-53, and the related footnotes, below, for a description of the distinct and successive stages of the administrative procedure under Chapter II Protocol 4 SCA. Inspections form part of the preliminary investigation stage.

articles) and the Authority's own monitoring of market conduct. The Authority examined these indicia carefully and critically.

11. Based on these indicia, the Authority had reasonable grounds for suspecting that Toska and SKEL have been and may still be participating in anti-competitive agreements and/or concerted practices related to coordination of their conduct on the Icelandic retail pharmacy market.

12. The Authority had indicia suggesting that: (i) SKEL and Toska eliminated direct competition between each other in certain locations; and (ii) SKEL concentrates on drive-through pharmacies, while Toska does not open any such pharmacies; and that (iii) this conduct reflected anti-competitive coordination between these undertakings rather than their independent commercial behaviour.

13. The Authority's indicia included the following information:[12]

    (i) The competitors, Toska and SKEL, exchanged retail locations in Reykjavík through the asset swap agreement of 26 April 2022.[13] Toska sold SKEL its retail property in the Glæsibær shopping centre. In that retail property, Toska operated a traditional walk-in pharmacy in direct competition with a traditional walk-in pharmacy of SKEL in the same centre. SKEL sold Toska its retail property in the Mjódd shopping centre. In that retail property, SKEL operated a traditional walk-in pharmacy in direct competition (next door) with a traditional walk-in pharmacy of Toska. Subsequently, Toska closed its pharmacy in Glæsibær[14] (while SKEL's pharmacy remained) and SKEL closed its pharmacy in Mjódd[15] (while Toska's

[12] For some of these indicia, the Authority is in possession of documents that are similar for Toska and SKEL. However, in this Defence, the Authority will only refer to, and annex, supporting documents that can be shared with Toska, excluding documents that are or may be confidential in relation to SKEL.
[13] Asset swap agreement: Application, **Annexes A.5a** (English translation) and **A.5** (Icelandic original).
[14] Letter dated 22 September 2023 from Toska, represented by its external legal counsel LOGOS, to ICA, **Annexes B.1** (English translation) and **B.1a** (Icelandic original), page 2, paragraph 8, referring to the decision of 23 June [2023] by Toska to close its pharmacy in Glæsibær and the subsequent closure on 31 August [2023]. The closure of this pharmacy is a fact, which the Authority assumes to be not contested.
[15] Merger notification form submitted by Toska on 22 September 2022 to ICA, Application, **Annexes A.13a** (English translation) and **A.13** (Icelandic original), pages 3-4, section 3.1, stating that it is planned to discontinue the operations of the acquired pharmacy of SKEL in Mjódd if the merger takes place. The closure of this pharmacy is a fact, which the Authority assumes to be not contested.

pharmacy remained).[16] This resulted in the elimination of direct competition between Toska and SKEL in each of these shopping centres.

(ii) Toska and SKEL ambiguously described the real nature of this asset swap in their interactions with ICA, presenting it in some instances as a retail pharmacy market transaction,[17] and in others as a pure real estate transaction.[18]

(iii) Under the asset swap agreement, SKEL sold its Mjódd retail property to Toska for a total consideration of ISK 352.5 million, which consisted of a ISK 280 million cash payment and the transfer of ownership of Toska's Glaesibaer premises (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)[19] and the property value appraisal (ISK 87.9 million) attributed in a Lyfjaval investor presentation,[20] suggesting that it was in part a payment to SKEL for possibly wider restrictive actions, to the benefit of Toska.[21]

(iv) Direct competition between Toska and SKEL was eliminated in Keflavík (Reykjanesbær),[22] through the closure in early 2023 by SKEL of its traditional

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[16] See also ICA Statement of Objections ("**ICA SO**"): Application, **Annexes A.9a** (English translation) and **A.9** (Icelandic original), ¶¶93 and 241, where ICA preliminarily concludes that the asset swap agreement will result in the disappearance of (i) the pharmacy of SKEL in Mjódd and (ii) the pharmacy of Toska in Glæsibær, leaving only one pharmacy operated by either SKEL or Toska in each shopping centre.

[17] Merger notification form submitted by Toska on 22 September 2022 to ICA, Application, **Annexes A.13a** (English translation) and **A.13** (Icelandic original): page 4, section 3.1 refers to the hope of Toska that the revenue of its pharmacy in Mjódd will increase by part of the revenue previously generated by the pharmacy of SKEL in Mjódd; page 5, section 3.3 indicates that the merger primarily covers the market for the operation of pharmacies. Merger notification form submitted by SKEL on 25 October 2022 to ICA (confidential).

[18] ICA SO: Application, **Annexes A.9a** (English translation) and **A.9** (Icelandic original), ¶¶91-92, where ICA preliminarily concludes that the title of the asset share agreement (i.e. "*purchase agreement of real estate*") and other descriptions or references in the agreement are misleading as the scope of the agreement appears to encompass not just real estate but also pharmacy operations. Reply of 27 February 2023 by Toska to the ICA SO, **Annexes B.2** (English translation) and **B.2a** (Icelandic original), where Toska asserts that the asset swap agreement only relates to real estate including goodwill but does not include any business (¶24). Reply of 27 February 2023 of SKEL to the ICA SO (confidential).

[19] ICA SO: Application, **Annexes A.9a** (English translation) and **A.9** (Icelandic original), ¶242, where ICA observes that Toska will pay ISK 352.5 million to SKEL, despite the public property valuation of the Mjódd premises in 2023 representing only ISK 135.9 million, resulting in a difference of ISK 216.6 million.

[20] Lyfjaval investor presentation (information memorandum) for bids to purchase Lyfjaval by 17 May 2021, **Annexes B.3** (English machine translation, apart from page 16, translated by the Authority) and **B.3a** (Icelandic original), page 16, where the Mjódd premises are given an estimated value of ISK 87.9 million (highlight added by the Authority), resulting in a difference of ISK 264.6 million.

[20] Presentation of Toska (confidential).

[21] Presentation of Toska for its meeting with Íslandsbanki on 12 May 2021, **Annexes B.4** (English translation) and **B.4a** (Icelandic original), slide 4, which shows that Toska considered that 70% of the turnover generated by Lyfjaval's pharmacy in Mjódd would pass to it if closed, and 50% of the turnover generated by Lyfjaval's pharmacy in Keflavík would pass to it if closed.

[22] In the Authority's indicia, the relevant SKEL pharmacy is sometimes referred to as being in Reykjanesbær, which area includes Keflavík.

walk-in pharmacy located at Hringbraut 99 (Apótek Suðurnesja),[23] 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)).[24]

(vi) During the spring of 2021, Lyfjaval was put up for sale. Toska communicated to ICA that if its bid for Lyfjaval were to be accepted, it intended to close two of Lyfjaval's pharmacies which were in direct competition with its own, namely Lyfjaval's Mjódd and Keflavík (Reykjanesbær) traditional walk-in pharmacies.[25] These actions, which Toska saw as highly beneficial to its own operation and which it planned itself to execute,[26] had it successfully managed to buy Lyfjaval in 2021,[27] were in fact subsequently executed by Toska's competitor SKEL.

(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[28] (despite Toska's hope in May 2021 to buy and continue to operate Lyfjaval's Hædasmari drive-through pharmacy[29]).

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[23] Newspaper article of 24 February 2023 published in Víkurfréttir, **Annexes B.5** (English translation) and **B.5a** (Icelandic original). This article shows that SKEL's original pharmacy, Apótek Suðurnesja, moved its operations from Hringbraut to a new area. While the pharmacy representatives interviewed describe the new location as the new centre of the town for the future, the fact remains that the new location is further away from the Keflavík hospital and SKEL's competitor Toska than the traditional walk-in pharmacy that was closed.

[24] This pattern of behaviour was observed by the Authority in particular from publicly available information on openings and closings of these pharmacies.

[25] Letter dated 18 May 2021 from Toska, represented by its external legal counsel LOGOS, to ICA, **Annexes B.6** (English translation) and **B.6a** (Icelandic original), page 1, final paragraph, indicating that the pharmacies of Lyfjaval in Mjódd and Reykjanesbær would be closed.

[26] Presentation of Toska for its meeting with Íslandsbanki on 12 May 2021, **Annexes B.4** (English translation) and **B.4a** (Icelandic original), slide 4, which states the intention of Toska to close Lyfjaval's pharmacies in Mjódd and Keflavík and its assumption that 70% (for Mjódd) and 50% (for Keflavík) of the revenues generated by those pharmacies will be transferred to it.

[27] Toska did not ultimately acquire Lyfjaval, which was instead purchased by SKEL.

[28] This pattern of behaviour was observed from publicly available information on openings and closings of these pharmacies. The absence of openings by Toska of any drive-through pharmacies in Iceland must be viewed in a context where there is significant and growing demand for this service, as highlighted by a SKEL investor presentation for the second half of 2023 (**Annex B.7**, slide 19) and a newspaper interview of 22 March 2024 with a representative of Lyfjaval who is describing Lyfjaval's position on this market as unique (**Annexes B.8** (English translation) and **B.8a** (Icelandic original)).

[29] Presentation of Toska for its meeting with Íslandsbanki on 12 May 2021, **Annexes B.4** (English translation) and **B.4a** (Icelandic original), slide 4, which states the intention of Toska to continue to operate Lyfjaval's Hædasmara pharmacy in unchanged form in the event of a successful bid. The same

14. These indicia[30] provided reasonable grounds for the Authority to suspect Toska and SKEL's involvement in a competition law infringement, as described in the Decision. To gather evidence in order to verify the validity of the Authority's suspicions,[31] the Authority considered it necessary to order an unannounced inspection at the premises of Toska and SKEL.

## 2 FIRST PLEA: THE STANDARD FOR EFFECT ON TRADE WAS MET

15. The First Plea contends that there is no effect on trade within the meaning of Article 53 EEA, and that therefore the Authority was not competent to adopt the Decision. This plea is without basis, and must for the following reasons be rejected.

16. First, the legal test applied in the First Plea is erroneous. The Application asserts that "*the alleged infringements are not capable of affecting trade between the Contracting Parties*."[32] It is however settled case-law that, at the preliminary investigative stage of an inspection decision, the Authority is not required to establish an *infringement*, and is similarly not required to establish all the elements of the suspected infringement (such as an actual or potential effect on trade).[33] All that is required are *reasonable grounds for suspecting* that the conditions of Article 53 EEA are met,[34] and thus for suspecting an actual or potential effect on trade.[35] Accordingly, as the CJEU held in ***České dráhy*** (and contrary to the test relied on in Application ¶31), "*provided that the inspection decision contains the essential elements* [(which it does: see Section 3.2.1

follows from the letter dated 18 May 2021 from Toska, represented by its external legal counsel LOGOS, to ICA, **Annexes B.6** (English translation) and **B.6a** (Icelandic original), final paragraph on page 1 and first paragraph on page 2.

[30] 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: Case T-249/17 *Casino* v *Commission*, EU:T:2020:458 ("***Casino GCEU***"), ¶223.

[31] Cases C-538/18 P and C-539/18 P, *České dráhy* v *Commission*, EU:C:2020:53 ("***České dráhy CJEU***"), ¶43.

[32] Application ¶29, and see similarly ¶¶8, 50. Application ¶47 (wrongly) appears to consider that the Authority is required to show "[an] *actual effect on trade under Article 53 EEA*."

[33] *České dráhy CJEU* ¶¶42-43; see also Case C-37/13 P *Nexans and Nexans France* v *Commission*, EU:C:2014:2030 ("***Nexans CJEU***"), ¶¶36-37; and *Casino GCEU* ¶112.

[34] See e.g. Case T-325/16 *České dráhy a.s.* v *Commission*, EU:T:2018:368 ("***České dráhy GCEU***"), ¶¶36, 43, 48 and more generally Section 3.1 below.

[35] Note that the actual or potential effect on trade may be a direct or indirect effect on the pattern of trade: see e.g. Case T-251/12, *EGL and Others* v *Commission*, EU:T:2016:114, ("***EGL***"), ¶64 and the case-law cited. The Authority recalls that, even at the stage of a final finding of infringement, potential (rather than actual) effects on trade are enough: see Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and others*, EU:T:2006:396, ¶166.

below)], *first, the Commission cannot be required to provide, in its inspection decision, a precise definition of the relevant market and, second,* ***it is not a fortiori essential to show, in such a decision, the appreciable nature of the effect on trade between the Member States***."[36] It is therefore in no way a requirement for the Authority at this stage to *provide* evidence which establishes the existence of even a potential effect on trade between Contracting Parties.

17. Second, the Decision clearly identified the nature and scope of the suspected infringement – anticompetitive coordination between Toska and SKEL – 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. The Decision (Recital 2, Article 1) clearly identifies that the suspected infringement relates (emphasis added) to the "***Icelandic*** *retail pharmacy market*." Recital 4 states that, according to information available to the Authority, "*the involved undertakings operate pharmacies as pharmacy chains both within and outside the Reykjavík capital area. The* ***Reykjavík capital area represents almost 70% of all retail sales of pharmaceuticals in Iceland****.* […]." These matters are not disputed by the Applicants. Recital 4 concludes: *"*[t]*he alleged anti-competitive conduct therefore covers a* ***significant part of the Icelandic market***." It is settled case-law that an agreement or practice covering all or part of a territory may be capable of affecting trade between EEA States.[37] Thus, while at this stage of the investigation the precise geographical scope of the suspected coordination is unknown, even if confined to the Reykjavík capital area, this is a significant part of the Icelandic market. Contrary to Application ¶¶47-48, this gave the Authority reasonable

[36] *České dráhy CJEU* ¶80 (referring to ¶42 of the judgment and the case-law cited), emphasis added. ¶¶90-91 of the Authority's *Guidelines on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement* ("***Effect on Trade Guidelines***") (OJ C 291, 30.11.2006, p.46), referred to at Application ¶36, concern appreciability and are therefore not relevant at this stage of the investigation.

[37] Case C-211/22, *Super Bock Bebidas*, EU:C:2023:529, ¶¶59-65, and case-law cited. See also Case E-14/15 *Holship* ¶76. The suspected conduct relates at least to an area representing almost 70% of sales of pharmaceuticals in Iceland. In such circumstances, the Authority had reasonable grounds to suspect that the conduct may have had an influence, direct or indirect, actual or potential, on the pattern of trade between EEA States: see e.g. *EGL* ¶64; and ¶23 of the Authority's *Effect on Trade Guidelines* and the case-law cited. Further, the nature or type of the products involved in the suspected infringement may also give an indication of possible effects on trade. While the Authority was not required to disclose such information in the Decision (see paragraph 16 above and Section 3.1 and paragraphs 28-29 below for a description of the relevant legal principles), it refers to figures from the European Federation of Pharmaceutical Industries and Associations (2022 and 2023), **Annexes B.9 and B.10**, in each case at p. 19, which indicated, together with other publicly available data, that a significant amount of the pharmaceuticals sold in Iceland were imported.

grounds to suspect, in line with this settled case-law, the existence of an actual or potential effect on trade.[38]

18. Connected to this point and third, the Application wrongly fixates on the asset swap agreement, thus mischaracterising the nature, scope and potential effects of the anticompetitive conduct described in the Decision. The Applicants (¶¶47, 50) claim that the conduct under investigation by the Authority is the "*same conduct*" as the asset swap agreement assessed by ICA under the merger rules. This is not the case. Rather, as Recitals 2, 3, 5 and Article 1(1) of the Decision make clear: (i) the suspected infringement, commencing at least in May 2021, is *anticompetitive coordination* of Toska's conduct with its competitor SKEL on the Icelandic retail pharmacy market; and (ii) the asset swap agreement of 26 April 2022 (which related to two locations in Reykjavík) is one of the ways in which this anticompetitive coordination (which may still be ongoing) may have been implemented.[39] Thus the conduct under investigation by the Authority is not "*the same conduct*" as that assessed under the merger rules by ICA: it is of a different nature and of a different temporal and geographic scope. Put differently, the asset swap agreement and its execution constitute *indicia* of suspected wider underlying anticompetitive collusive conduct (pre- and post-dating the asset swap), which suspected collusion the Authority seeks to investigate. Thus, the different and broader scope of conduct under investigation by the Authority means that the Applicants' arguments about the effects of the (narrower) asset swap agreement being purely "*local*"[40] in nature are misguided and ineffective – as are the Applicants' arguments about the limited nature of the turnover of their pharmacies in Glæsibær and Mjódd.[41]

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[38] Recital 4 of the Decision did not merely state that the Reykjavik capital area represents almost 70% of all retail sales of pharmaceuticals in Iceland. It also referred to the fact that the undertakings involved operated pharmacy chains within (and outside) that area. Further, it is clear from Recitals 2-3 of the Decision that the suspected practices concern anti-competitive coordination between the undertakings concerned on the Icelandic retail pharmacy market, thus going beyond, in particular, the asset swap agreement of 26 April 2022. Accordingly, the causal link which Application ¶47 criticises as being missing was in reality present to the requisite legal standard, supporting thus the existence of reasonable grounds for suspecting an actual or potential effect on trade.

[39] Recital 3.a specifically refers to the asset swap agreement as being part of the "*implementation*" of the suspected practices. Recitals 3.b and c of the Decision refer to other methods by which, *inter alia*, such implementation may have taken place. Application ¶5 wrongly claims that the alleged concerted practice "*consists*" of the matters described at Recitals 3.a, b and c.

[40] See Application ¶¶33-35, 37-43, 45, 47 and 50.

[41] Application ¶45. More generally, Application ¶45 asserts that cross-border retail sales of pharmaceuticals may be illegal under Icelandic law, and that the pricing of pharmaceuticals is largely regulated. Such matters (even if correct) do not however exclude potential indirect effects on trade by

19. Fourth, the inferences drawn from ICA's SO (Application ¶¶33-34, 38-43, 47)[42] that only very local markets were affected, or from other ICA merger decisions (Application ¶¶32, 35) that retail pharmacy markets in Iceland are local, are flawed also because the Authority is legally required to make its *own* assessment, under Article 53 EEA, of the relevant market and any related effects.[43] Further, any merger assessment of the effects of adding or removing one pharmacy in a given area of Iceland is necessarily different from an assessment of the effects of suspected coordination in relation to pharmacy chains on the Icelandic retail pharmacy market which, even if just restricted to the Reykjavik capital area, relates at least to an area covering almost 70% of all retail sales of pharmaceuticals in Iceland (Recitals 2 and 4 of the Decision).[44] Moreover, the Applicants erroneously conflate the questions of relevant market and effect on trade. As noted in paragraph 17 and footnote 37 above, an agreement or practice covering all or part of a territory may be capable of affecting trade between EEA States. The geographic dimension of the markets affected by the conduct is therefore not in itself determinative, since even conduct that affects local markets may be capable of affecting trade between Contracting Parties.

20. Finally, Application ¶¶48-50 refer also to the conduct of the inspection. This is not relevant to the First Plea (effect on trade). The Authority recognises that its powers can be intrusive: its officials and accompanying persons (including those from ICA) exercised those powers carefully, in accordance with the inspection Decision and

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way of imports or trade volumes (e.g. collusion may take place in relation to imported products: see further footnote 37 above).

[42] Application ¶¶33, 38 fail to indicate where in the ICA SO the relevant paragraphs can be found. The Authority understands them to be ¶¶65 and 230. Application ¶¶40-43 (especially 43) similarly do not indicate where ICA made the statements referred to. The Applicants had the relevant information available to them: there is no justification for their failure to specify such information, which is not in line with Article 101(1)(e) of the Court's Rules of Procedure. This part of the First Plea should therefore be rejected as inadmissible. More generally, certain documents are annexed to the Application. The Applicants fail, throughout the Application, to indicate to what extent they rely on information contained in any annex, and where in the annex any relevant information can be found. The Authority recalls the settled case-law according to which it is not for the Court (or the Defendant) to seek and identify in annexes the arguments on which the Court may consider the action to be based. The annexes have a purely evidential and instrumental function: E-12/20 *Telenor* v *ESA*, ¶87.

[43] E-12/20 *Telenor* v *ESA*, ¶97; Joined Cases T-125/97 and T-127/97, *Coca-Cola* v *Commission*, EU:T:2000:84, ¶82. As explained above and also below at paragraphs 27-28, at the inspection stage, the Authority is not required precisely to assess and define the relevant market and show effects on trade. If the present case progresses beyond the inspection stage, such assessments must (and will) be made.

[44] The reference in Application ¶44 to Case C-393/08, *Sbarigia*, EU:C:2010:388, which concerned the effects of the regulatory treatment of a *single* pharmacy in Rome, therefore misses the point and is irrelevant to the effects of the suspected conduct in the present case.

relevant EEA law. More generally, the Authority recalls the 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.[45]

## 3 SECOND PLEA:THE DECISION COMPLIES WITH THE OBLIGATION TO STATE REASONS; NO BREACH OF THE PRINCIPLES OF LEGAL CERTAINTY OR NE BIS IN IDEM

21. By its Second Plea, the Applicants contend, in particular, that the Decision was insufficiently reasoned. For the reasons given below, this claim is without basis and should be rejected. The Authority first sets out the legal requirements it must respect when drafting an inspection decision (Section 3.1), why the Decision meets these requirements (Section 3.2.1), and why the Applicants' claims that the Decision was insufficiently reasoned must be rejected (Section 3.2.2). It then sets out why, contrary to the Applicants' claims, there was no breach of the principle of legal certainty or of *ne bis in idem* (Section 3.3).

### 3.1 LEGAL PRINCIPLES GOVERNING THE REQUIREMENT TO STATE REASONS: INSPECTION DECISIONS IN COMPETITION CASES

22. The statement of reasons required under Article 16 SCA is a fundamental requirement. It enables affected parties to understand the reasons behind a measure, their obligations (for example their duty to cooperate[46]), and to exercise their rights of defence.[47] It enables the Court to ensure that the principle of protection against arbitrary and disproportionate intervention is respected, in so far as the statement of reasons makes it possible to show that the intervention envisaged on the premises of the undertakings concerned is justified.[48]

23. As the Court has held, the statement of reasons must be appropriate to the measure in question, and therefore depends on the circumstances of each case, in particular

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[45] *Casino GCEU* ¶100; *České dráhy GCEU* ¶22; Cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn a.o. v Commission*, EU:T:2013:404 ("***Deutsche Bahn GCEU***"), ¶49 and the case-law cited.

[46] See e.g. *České dráhy CJEU* ¶40, referring to the duty to cooperate during inspections in competition cases. In this Defence, the Authority refers extensively to case-law of the EU Courts. While this case-law concerns the powers of the European Commission, the Authority considers that it applies *mutatis mutandis* to its own powers, given the need to ensure a homogeneous interpretation of *inter alia* the substantively identical provisions of Article 20 of Council Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p.1) and Article 20 of Chapter II Protocol 4 SCA.

[47] Case E-1/22 *Modiano Ltd and Standard Wool (UK) Ltd* v *ESA* ("***Modiano***"), ¶¶84-85, *Casino GCEU* ¶111.

[48] *České dráhy GCEU* ¶51.

the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question of whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[49]

24. Inspection decisions of the Authority take place within the legal framework of Articles 4 and 20 of Chapter II Protocol 4 SCA. These confer powers of inspection on the Authority, which are designed to enable it to perform its task of protecting the internal market from distortions of competition and to penalise any infringements of the competition rules on that market.[50]

25. Article 20(4) of Chapter II Protocol 4 SCA provides (emphasis added): "[u]*ndertakings 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***. […]"

26. It is settled case-law that, to comply with these requirements, the Authority must state in its inspection decision "*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*."[51] The case-law requires "[m]*ore specifically*"[52] that the 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.[53]

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[49] *Modiano* ¶¶84, 85; *Casino GCEU* ¶¶107-108; Case C-264/16 P, *Deutsche Bahn AG a.o.* v *Commission*, EU:C:2018:60, ¶41.
[50] *Casino GCEU* ¶108; *Nexans CJEU* ¶33.
[51] *Casino GCEU* ¶110 and case-law cited; Case T-402/13 *Orange v Commission*, EU:T:2014:991 ("***Orange***"), ¶80.
[52] *Casino GCEU* ¶110 and the case-law cited. In *České dráhy GCEU* ¶39 and *Deutsche Bahn GCEU* ¶171 the phrasing is similar: "*To that end*".
[53] *České dráhy GCEU* ¶39; *Casino GCEU* ¶110, and the case-law cited.

27. The degree of precision, and the extent of the reasoning required in an inspection decision is moderated by the fact that inspections, by definition, take place at a *very preliminary stage* of the investigation. It is settled case-law that, at such a stage, the Authority does not yet have precise information allowing it to make a specific legal assessment of whether the conduct in question may be characterised as an infringement, and must first verify the validity of its suspicions and the scope of the facts that occurred, "*the purpose of the inspection being precisely to gather evidence relating to a suspected infringement*."[54]

28. Accordingly, in order to safeguard the effectiveness of an inspection, it is settled case-law that the Authority is not required to communicate to the addressee of an inspection decision all the information at its disposal concerning the presumed infringements, or to delimit precisely the relevant market, or 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.[55] The fact that the products/services or geographic scope are described in "*general terms*" does not mean that the decision is insufficiently reasoned, provided the description allows the undertaking to understand the full scope of the decision.[56]

29. Given the preliminary stage of the investigation, the Authority is also not required to inform the undertaking in its inspection decision of the information or indicia which justified the inspection: that is to say, the material which leads it to suspect an infringement of Article 53 EEA.[57] The only information which must be supplied in the inspection decision is that showing that the Authority had sufficiently serious indicia of an infringement, but without disclosing those indicia themselves. The decision must therefore disclose whether the Authority was in possession of information and indicia

[54] *České dráhy CJEU* ¶43; see also *Nexans CJEU* ¶37 and *Casino GCEU* ¶112.
[55] *České dráhy CJEU* ¶¶41-42; Case T-254/17 *Intermarché* v *Commission*, EU:T:2020:459 ("***Intermarché GCEU***"), ¶111; *Casino GCEU* ¶112; *Deutsche Bahn GCEU* ¶170.
[56] For example, in *Nexans CJEU* the CJEU found (¶¶38-39) that an inspection decision indicating that the suspected agreements/practices "*probably have a global reach*" had a sufficient statement of reasons regarding the geographical scope of the suspected infringement.
[57] *Casino GCEU* ¶¶85, 91, 113 and case-law cited: the rationale being that earlier disclosure could compromise the effectiveness of the inspection, and that the undertaking will have the opportunity to challenge evidence relied upon by the Authority at the *inter partes* stage: see ¶¶87, 88.

providing reasonable grounds for suspecting the infringement in question.[58] The Decision met this requirement: see Section 4.2 below.

## 3.2 NO FAILURE TO STATE REASONS

### *3.2.1 The Decision was sufficiently reasoned*

30. The Decision precisely specifies the subject matter and purpose of the inspection, in accordance with the requirements set out in Section 3.1 above.

31. The Decision clearly identifies each of the four essential features of the subject matter and purpose of the inspection, as required by case-law.[59]

32. First, the market thought to be affected: Recital 2 and Article 1(1) of the Decision identify this as "*the Icelandic retail pharmacy market*" and "*the retail pharmacy market in Iceland*." Recital 4 specifies that the involved undertakings operate pharmacy chains both within and outside the Reykjavík capital area, an area which "*represents almost 70% of all retail sales of pharmaceuticals in Iceland*", and that the alleged anti-competitive conduct therefore "*covers a significant part of the Icelandic market*."

33. Second, the nature of the suspected restrictions of competition: Recitals 2-4 and Article 1(1) of the Decision describe this as "*anti-competitive agreements and/or concerted practices related to coordination of their conduct with SKEL*"; the undertakings under investigation "*eliminated direct competition between each other that took place using traditional walk-in pharmacies*"; "*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*"; "*Lyfjaval concentrates on drive-through pharmacies, while Lyf og heilsa does not enter the drive-through pharmacy segment*"; possible implementation of the suspected practices involving "*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*"; "*coordination on the realisation of Lyfjaval/SKEL's new drive-through pharmacy strategy*"; "*a restriction on Lyf og heilsa's ability to open drive-through*

[58] *Casino GCEU* ¶114, *Deutsche Bahn GCEU* ¶172, Case T-339/04 *France Télécom* v *Commission*, EU:T:200:80 ("***France Télécom***"), ¶60.
[59] The Applicants (Application ¶66) appear to agree that these four features must be shown, yet do not allege (at least not clearly) that any feature was missing from the Decision.

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

34. Third, the supposed degree of involvement of the undertaking concerned: Recital 1 of the Decision identifies the Applicants and their activities in the Icelandic economy, including "*the operation of* […] *pharmacies*." The subsidiary Lyf og heilsa "*operates a pharmacy chain active in the Icelandic retail pharmacy market under the Lyf og heilsa, Apótekarinn and Gards Apótek brands*" (the Icelandic retail pharmacy market being that to which the suspected infringement(s) relate: Recital 2). Recitals 2-4 and Article 1(1) of the Decision describe the supposed degree of involvement of these undertakings, while Recital 5 specifies that the conduct "*may have started at least in May 2021 and could still be ongoing*."

35. Fourth, the powers conferred on the Authority: Recitals 11 and 12 and Article 2 of the Decision recall the powers conferred on the Authority in conducting the inspection.

36. Further, pages 4 and 5 of the Decision indicate the penalties provided for in Articles 23 and 24 of Chapter II Protocol 4 SCA and the right to have the Decision reviewed by the EFTA Court, while Article 3 appoints the date on which the inspection was to begin (or shortly thereafter).

#### *3.2.2 The complaints raised at Application ¶¶68-74 are irrelevant to the Second Plea and/or unfounded*

37. Rather than identifying any insufficiency in the reasoning itself, most of the complaints made at Application ¶¶68-74 (which are addressed individually below) in essence challenge the merits of the reasons and information given in the Decision – in other words, whether there was unlawful conduct at all. However, the Applicants' disagreement with potential anticompetitive inferences which might be drawn from matters described in the Decision, and their alternative explanations for certain facts, are not relevant to the question of whether the obligation to state reasons has been complied with.[60]

[60] Thus, as the GCEU held in T-340/04 *France Télécom*, EU:T:2007:81 at ¶97 (emphasis added): "*The fact that the Commission may, at a later stage of the procedure, be unable to establish the existence of* [the suspected infringement] *is not relevant. First of all, that question involves* ***an analysis of the merits****, which is made on the basis of the information collected during the inspection in question, and* ***is not therefore to be examined in the context of a review of the Commission's observance of the obligation to give reasons***. […]". See also T-486/11 *Orange Polska* v *Commission*, EU:T:2015:1002

38. Contrary to Application ¶67, the Decision complied with the requirement to disclose that the Authority was in possession of information and indicia providing reasonable grounds for suspecting the infringement in question.[61] See further Section 4 below.

39. Application ¶¶68 and 74.d argue that SKEL fjárfestingafélag hf. did not gain control over Lyfjaval until after September 2021, and therefore could not have coordinated Lyfjaval's conduct with the Applicants, from "*at least in May 2021*", which is when the Decision identifies that the alleged anticompetitive conduct may have started. This argument however goes to the substance of whether or not there was anticompetitive conduct, and fails to identify any deficiency in the Decision's reasoning. As the EU Courts have held, an applicant's disagreement with whether certain anticompetitive conduct took place, or its alternative explanations for certain facts are not relevant to the question of whether an inspection decision complies with the obligation to state reasons.[62] Further and in any event, as the Applicants acknowledge, SKEL publicly notified its purchase of Lyfjaval on 25 June 2021.[63] The Authority had therefore reasonable grounds on the basis of this, and other information/indicia in its possession, for suspecting and hence investigating anticompetitive collusion at or around that time ("*at least from May 2021*", just one month before SKEL's public notification of its purchase of Lyfjaval). Moreover, whether or not SKEL had *control* of Lyfjaval at that time (allowing any anticompetitive practices to be implemented) does not preclude

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at ¶70: "*a distinction should be made between the question of the obligation to state reasons, which requires that the contested decision contain the key factual and legal elements in order to show clearly and unequivocally the reasoning of the institution which adopted the measure, and the merits of the reasons given by that institution.*" Further, given the still open-ended nature of the Authority's inquiry into the alleged facts and circumstances, 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 the Authority is plausible: *Intermarché GCEU* ¶234; T-296/11 *Cementos Portland Valderrivas* v *Commission*, EU:T:2014:121 ("***Cementos***") ¶59; *Casino GCEU* ¶ 222. The question whether the Authority was in possession of sufficiently serious indicia to suspect an infringement, which is separate from the question of the sufficiency of the statement of reasons, is addressed under the Third Plea, below.

[61] *Casino GCEU* ¶114; *Deutsche Bahn GCEU* ¶172; *France Télécom* ¶60; and see paragraph 29 above.

[62] See the case-law cited at footnote 60 above. For the same reason, the following are also ineffective: (i) the argument made at Application ¶72, that Lyfjaval and Lyf og heilsa remained in direct competition following Lyfjaval's closure of its Mjódd pharmacy; (ii) the (unsupported) assertions/suppositions at Application ¶¶ 26-28 as to why Lyf og heilsa has tended to favour traditional walk-in pharmacies and why certain of its competitors may focus on drive-through services.

[63] See SKEL company announcement of 25 June 2021 that SKEL will acquire Lyfsalinn which will acquire Lyfjaval (**Annexes B.11** (English original) **and B.11a** (Icelandic original)). This document was referred to in Application footnote 8, but was not itself annexed to the Application.

possible coordination between SKEL (as a potential competitor in relation to the Icelandic retail pharmacy market) and Toska in the period preceding that date.[64]

40. In relation to the complaint in Application ¶¶68 and 73 that the Decision does not explain what is supposed to have happened in May 2021, the Authority recalls that neither Article 16 SCA nor Article 20 of Chapter II Protocol 4 SCA, or the related case-law, require the Authority to indicate the period during which the infringements are alleged to have been committed, still less the exact date at which the alleged infringement may have commenced.[65] As a consequence, the Authority may not be reproached when it decides, notwithstanding such jurisprudence, to state that it had information in its possession which indicated a date by reference to which the anticompetitive conduct may "*at least*" have commenced. For example, in ***České dráhy*** the CJEU held that: "*the Commission cannot be criticised for having simply stated, in the contested decision* […], *that 'such alleged anti-competitive practices* ***may have existed at least since* 2011** […] **and *could still be ongoing***'" (emphasis added).[66]

41. Application ¶¶23-25 and 69-71 contend that customers can enter all car (drive-through) pharmacies on foot, and therefore that all pharmacies in Iceland are "*traditional pharmacies*." This misses the point: the terms used in the 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. Further, the arguments made by the Applicants in ¶¶26-28[67] of the Application make plain that they have understood this distinction.

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[64] Recitals 2 and 3 of the Decision make clear that the suspected coordination is between Toska and SKEL, including their (in)direct subsidiaries, in particular Lyf og heilsa and Lyfjaval. The Decision does not particularise any allegation about the conduct of any individual company in any given time period.

[65] *Intermarché GCEU* ¶¶111 and in particular 127; *České dráhy CJEU* ¶¶41-42; *Casino GCEU* ¶112; *Deutsche Bahn GCEU* ¶170; and see more generally paragraph 28 above. Similarly, the assertions made in Application (i) ¶74.b (that the Decision should have explained *how* the Applicants could have restricted Lyfjaval's capacity to open traditional walk-in pharmacies), and (ii) ¶74.c (that the concrete motive or incentive for engaging in coordination should have been explained in the Decision), must be rejected. The case-law does not require such assessments at this preliminary stage of the investigation: see paragraphs 27-28 above and the case-law cited. What is required is that the Decision clearly identifies the four essential features of the subject matter and purpose of the inspection (this requirement is met) but there is no separate requirement to also state reasons regarding each and every aspect of the suspected conduct.

[66] *České dráhy GCEU* ¶47.

[67] The claims made in Application ¶¶26 and 28, about the preference of Lyf og heilsa's CEO for traditional pharmacies, and possible opportunities for buying pharmacies with a drive-through option, are unsupported by evidence.

42. The claim in Application ¶74.a (which is not further developed) that the Authority 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. This assertion is based on the erroneous premise that the conduct under investigation by the Authority is the same as the conduct previously investigated by ICA (see further paragraph 44 below). In addition, the notification of the asset swap agreement to the national competition authority is not relevant to the Authority's duty to give reasons: in *České dráhy CJEU* (¶50), the CJEU 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.*" Finally, as explained also at paragraph 16 above, the assertion that the Authority must explain how the conduct "*can also constitute an infringement*" is erroneous. The Authority must have reasonable grounds for suspecting an infringement.

### 3.3 NO BREACH OF THE PRINCIPLES OF LEGAL CERTAINTY OR *NE BIS IN IDEM*

43. As part of their Second Plea, the Applicants contend (Application ¶52) that "*the alleged infringement outlined in the [D]ecision, had already been notified as mergers under* [the] *Icelandic Competition Act and approved as such*." The Applicants entirely fail to explain why this is relevant to the duty to give reasons, and do not identify any deficiency in the Decision's reasoning within the meaning of the settled case-law referred to in Section 3.1 above. Rather, the claim raised by the Applicants is in essence *jurisdictional* in nature (see e.g. Application ¶64), namely that the Authority does not have competence to "*reexamine the same conduct* [approved by ICA under the national merger regime] *ex post under Article 53* [EEA]." In any event, this claim is based on a number of inaccuracies, is unsupported by authority and must, for the following reasons, be rejected.

44. First and importantly, the Applicants mischaracterise the Decision when claiming that the alleged infringement is the same conduct as previously investigated and approved by ICA.[68] For example, Recital 3.a of the Decision does not state, as claimed by Application ¶53, that the Applicants "*had conducted the suspected infringement of*

[68] This claim is made in various guises in Application ¶¶52, 53, 58, 59, 61, 62, 63 and 64.

*Article 53 of the EEA Agreement,* ***by way of the asset swap***. (Emphasis added)." Rather, the Decision (Recital 3(a)) makes plain that the asset swap is merely one example of how the suspected infringement (anticompetitive coordination on the Icelandic retail pharmacy market) may have been *implemented*. As set out in more detail in paragraph 18 above, the concerns expressed in the Decision are of a different nature and of a different temporal and geographic scope. Thus, the conduct under investigation by the Authority is not "*the same conduct*."

45. Accordingly, second, even if the transactions under the asset swap agreement were approved by ICA as mergers,[69] this does not affect the Authority's competence to investigate whether such transactions were evidence of a broader anticompetitive conduct, distinct from the asset swap agreement itself.[70] As admitted by the Applicants, ICA's (merger) SO also identified the preliminary concern that the asset swap concentrations "*could violate Article 10 of the Icelandic Competition Act and Article 53 of the EEA Agreement through market sharing*."[71] The Authority was fully entitled to investigate, using information obtained from ICA and on the basis also of its own information, whether anticompetitive coordination in breach of Article 53 EEA has taken, or is taking place. The system instituted by Chapter II Protocol 4 SCA is one of consultation, cooperation and information exchange between the Authority and the competition authorities of the EFTA States.[72] It is settled case-law that the Authority is entitled to conduct an inspection based *inter alia* on information obtained from a

[69] The Authority understands that there is some dispute between ICA and the Applicants about the extent to which the transactions were properly "*concentrations*" within the scope of the Icelandic merger regime, and therefore whether they were even capable of being approved (or prohibited) as mergers. Even however on the Applicants' view, the Authority understands that the mergers were approved not on the substance, but by default, because they were not approved (or remedies imposed) within the legal time limit imposed by Icelandic law: Application ¶¶22, 57. It appears from the rulings (No 1/2023 and 2/2023) of the Icelandic Competition Appeals Committee referred to in e.g. Application ¶57 and **Annexes A.6A** and **A.7A** respectively, in the Sections V Verdict, Part 4, that the Applicants and other party to the mergers recognised and agreed that ICA's decision to terminate proceedings did not entail a substantive assessment, but was rather a procedural end to proceedings.

[70] In for example a recent case examined by the French Competition Authority (*Autorité de la concurrence*), Décision No 24-D-05 of 2 May 2024, that authority reviewed under Article 101 TFEU exchanges between the parties *inter alia* prior to the relevant mergers (**Annex B.12** (English translation) **and B.12a** (French original) ¶¶107-120. Specifically, the French Competition Authority analysed whether the information in the case file established the existence of an overall market allocation plan which included, but was not limited to, the merger transactions. On the facts of the case, it ultimately concluded that the existence of such a plan outside the scope of the mergers had not been proven (¶119).

[71] Application ¶60 and see ICA SO, **Annex A.9A**, ¶101 (and see also ¶¶23, 67, 293 and 297).

[72] Article 11(1) of Chapter II Protocol 4 SCA provides: "[t]*he EFTA Surveillance Authority and the competition authorities of the EFTA States shall apply the EEA competition rules in close cooperation*." See further Articles 11(2)-(7) and 12 of Chapter II Protocol 4 SCA.

national authority.[73] Further, it is not prohibited from conducting an inspection solely because a national authority is (or has been) investigating the same conduct under Articles 53 or 54 EEA.[74] Contrary to the Applicants' claims, there is therefore nothing improper in the Authority taking into account information from an investigation by ICA in the course of commencing its own investigation.

46. Third, the fact that the Authority is investigating a broader concern than 'just' the merger transactions/asset swap means that, contrary to Application ¶¶58-59 and 65, the Authority's investigation does not undermine any legal certainty obtained under the merger regime, or impermissibly apply Article 53 EEA to conduct already assessed and approved under the merger rules. Even if the transactions under the asset swap agreement met the thresholds under EEA merger rules applied in the present case (which they did not),[75] the conduct under assessment goes beyond the asset swap transactions and therefore the Applicants can have no expectation that their broader conduct would not be investigated.[76] If the contrary were true, notifying a concentration between colluding businesses under the merger rules would, if cleared, remove or insulate any broader related cartel behaviour from scrutiny.

47. Fourth, Application ¶61 appears to assert that ICA was already given sufficient material to assess the broader Article 53 EEA market sharing conduct ("*the alleged unlawful conduct*") now under consideration. Even if this were correct, the Authority would be entitled under Chapter II Protocol 4 SCA – especially at this preliminary stage – to investigate the same broader Article 53 EEA conduct.[77]

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[73] See e.g. ***České dráhy GCEU*** ¶117; *Orange* ¶52: indeed in that case (¶55) the GCEU regretted that the Commission ordered an inspection without first examining the information obtained by the French competition authority "*in relation to similar conduct*". The Commission's inspection decision nevertheless remained lawful.

[74] ***České dráhy GCEU*** ¶¶117-119; *Orange* ¶¶26-27. The Authority understands that ICA has not opened any further investigation into the Article 53 EEA concerns identified in its merger SO.

[75] The asset swap transactions did not meet the thresholds for concentrations with an "*EFTA dimension"*: Article 1 of the act referred to at point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004, commonly referred to as "the EU Merger Regulation" or "**EUMR**"). Accordingly, the Authority did not have competence to act under the EEA merger rules (see Chapter IV Protocol 4 SCA for the relevant rules). Application ¶64 refers to the "*ECHR*" but from the context the Authority understands this to mean the EUMR.

[76] French Competition Authority Décision No 24-D-05 of 2 May 2024, **Annexes B.12 and B.12a** ¶¶107-120. See also the Opinion of Advocate General Kokott in Case C-449/21, *Towercast,* EU:C:2022:777, ¶60: where the conduct of the undertaking goes beyond that which was subject to merger review, the conduct may be subject to scrutiny under Article 101 or 102 TFEU.

[77] ***České dráhy GCEU*** ¶119 et seq. The Applicants can therefore (notwithstanding their claims at Application ¶62) have had no legitimate expectation that only ICA would have investigated the conduct under Article 53 EEA: see ***České dráhy GCEU*** ¶¶151-156. Note that the Protocol 4 SCA mechanism is

48. Finally, contrary to Application ¶¶9 and 65, neither the Decision nor the actions of the Authority infringe the principle of *ne bis in idem*. The Applicants do not cite any case-law or particularise how they consider the principle to have been breached. In any event, the Authority recalls 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 (the '*bis*' condition); and (ii) the prior decision and the subsequent proceedings or decisions must concern the same conduct (the '*idem*' condition).[78] Neither of these conditions is met in the present case.

49. *Firstly*, as regards the '*bis*' condition, in order for a decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, it is necessary not only for that decision to have become final, but also for it to have been given after a determination has been made as to the merits of the case.[79] It appears to be undisputed between the parties to the national merger proceedings that those proceedings were not approved on the substance or merits (see footnote 69 above). In so far as the Applicants contend that ICA has also investigated or is investigating the same broader Article 53 EEA conduct that is now the subject of the Authority's investigation, any such ICA investigation has not reached the stage of a final decision, and so any *ne bis in idem claim* made on those grounds must necessarily fail.[80]

50. *Secondly*, the '*idem*' condition prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence. The relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts.[81] In the present case, the facts under investigation are not the same. The territory

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such that if the Authority formally initiates proceedings against the Applicants under Article 11(6) of Chapter II Protocol 4 SCA, this will have the effect of relieving ICA of its competence to apply Article 53 EEA. On this point, see Case T-589/22, *Silgan Holdings Inc* v *European Commission*, EU:T:2024:662 ¶¶41, 47, 60: the Commission was entitled to relieve the German national competition authority of its competence to apply Article 101 TFEU to a case, even at a relatively late stage of the national proceedings, in particular where this was necessary to ensure the effectiveness of Article 101 TFEU.

[78] See the summary of the case-law in the judgment of the CJEU (Grand Chamber) in Case C-151/20 *Bundeswettbewerbsbehörde* v *Nordzucker AG a.o.,* EU:C:2022: 203, ("***Nordzucker***"), ¶¶28-33. See also Case C-117/20 *bpost* v *Autorité belge de la concurrence,* EU:C:2022:202, ("**bpost**"), ¶¶ 22-28.

[79] *Nordzucker*, ¶34 and the case-law cited; *bpost*, ¶29 and the case-law cited.

[80] More generally, the Authority recalls that competition authorities of the EFTA States are not entitled to take decisions finding that Articles 53 or 54 EEA have not been infringed: see e.g. *Orange* ¶30. In so far as the Applicants' submissions can be seen as claiming that ICA has somehow found the suspected conduct not to have breached Article 53 EEA, a claim of *ne bis in idem* made on this basis must also necessarily fail.

[81] *Nordzucker*, ¶¶38, 41 and the case-law cited; *bpost*, ¶¶31, 33, 35-37 and the case-law cited.

and scope of ICA's merger proceedings and those which are the subject matter of the Decision are markedly different (see in particular paragraphs 44 and 46 above).

## 4 THIRD PLEA: SUFFICIENTLY SERIOUS INDICIA WERE PRESENT; NO BREACH OF THE PRINCIPLE OF PROPORTIONALITY

51. The Applicants' Third Plea alleges: (i) that the Authority did not objectively verify ("*fact check*", Application ¶75) the information on which the Decision was based, and thus did not have sufficiently serious indicia to justify an inspection; and (ii) that this also breaches the principle of proportionality, because the information could have been fact-checked and "*proven misguided, through less intrusive means*" (Application ¶76). These unfounded allegations are addressed respectively in Sections 4.2 and 4.3 below. Before doing so, the Authority sets out the relevant legal principles (Section [4.1]), as the summary of the case-law cited by the Applicants is incomplete.

### 4.1 LEGAL PRINCIPLES

52. As noted above in paragraphs 27-29, inspections form part of the preliminary investigation stage.[82] It is therefore settled case-law that, to justify inspections, it is not necessary for the information in the Authority's possession to be of such a kind as to establish the *existence of an infringement*.[83] It is sufficient that the Authority is in possession of information and indicia providing "*reasonable grounds for suspecting an infringement*"[84] (also referred to as "*sufficiently serious indicia*"[85]). Further, the Authority is not required to inform the undertaking in its inspection decision of the information or indicia which justified the inspection. As the GCEU has held, the Commission is:

> "***under no obligation to indicate**, at the preliminary investigation stage* [when an inspection is ordered]*, apart from the suspicions of an infringement which it proposes to verify, **the indicia, that is to say, the material** that leads it to consider that there may have been an infringement of Article 101 TFEU, since such an obligation would upset the balance which the legislature and the Courts of the European Union have sought to establish between preserving the efficiency of the investigation and preserving the rights of defence of the undertaking concerned*."[86]

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[82] *Casino GCEU* ¶182. See generally *Orange* ¶¶77-78.
[83] *Casino GCEU* ¶221.
[84] ***České** dráhy GCEU* ¶66 (emphasis added); *Cementos* ¶43; *EGL* ¶149. See also *Casino GCEU* ¶230.
[85] See e.g. *Casino GCEU* ¶165 and the case-law cited. Application ¶77 refers to C-690/20 P, *Casino* v *Commission*, EU:C:2023:171, ¶82: this paragraph of the judgment sets out principles for legislative interpretation which are not relevant to the Third Plea.
[86] *Casino GCEU* ¶164 (emphasis added) and see also ¶91; ***České** dráhy GCEU* ¶45; *Orange* ¶81.

53. When the Court is called upon, as in the present case, to review an inspection decision for the purposes of ensuring that it is not arbitrary, it must therefore satisfy itself that "*there are reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned*."[87] Contrary to how matters are presented in Application ¶79 however, the Court may conclude that an inspection decision was not arbitrary without it being necessary to check and examine substantively the content of the Authority's indicia, *provided* that the facts the Authority wishes to investigate and the matters to which the inspection relates are defined sufficiently precisely in its Decision.[88] Thus, the Court may conclude (as the GCEU did in ***Orange***) that the statement of reasons alone is sufficient for it to presume that, on the date of adoption of the Decision, the Authority did indeed have reasonable grounds to suspect an infringement and order an inspection.[89]

### 4.2 EXISTENCE OF SUFFICIENTLY SERIOUS INDICIA

54. The Authority submits (paragraph 55 below) that the Decision sufficiently precisely stated the information required by case-law, namely showing that the Authority considered it was in possession of *serious indicia* of the existence of the suspected anti-competitive conduct.[90] In other words, the statement of reasons alone sufficiently disclosed that the Authority was in possession of information and indicia providing *reasonable grounds* for suspecting the infringement in question.[91] The Authority submits (paragraph 56 below) that the Applicants have failed to "*produce evidence casting doubt*" on whether the Authority had reasonable grounds for adopting its Decision, and that the Court is not therefore required to examine those grounds and determine whether they are reasonable.[92] The Authority accordingly submits (Section 5 below) that it is not necessary for the Court to adopt a measure of organisation of

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[87] *České dráhy GCEU* ¶48. See also *Nexans GCEU* ¶43; *Casino GCEU* ¶166.
[88] *České dráhy GCEU* ¶¶49-51; *Orange* ¶91.
[89] *Orange*, ¶¶91-93; *České dráhy GCEU* ¶¶49-51.
[90] *Casino GCEU* ¶114; *Deutsche Bahn GCEU* ¶172; *France Télécom* ¶60.
[91] *České dráhy GCEU* ¶¶49-51 ; *Orange* ¶¶87, 91-93.
[92] *Nexans GCEU* ¶72; *České dráhy GCEU* ¶49. See also *Orange* ¶88: "*Only when a request to that effect is brought before the Court and the undertakings to which a*[n] [inspection] *decision* […] *is addressed have put forward certain arguments liable to cast doubt on the reasonableness of the grounds on which the Commission relied in order to adopt that decision may the Court take the view that it is necessary to carry out such a* [review of the indicia and determination whether the Commission had reasonable grounds for suspecting an infringement]" Emphasis added, and see the case-law cited.

procedure to check the content of the Authority's indicia, as sought by the Applicants in Section F of their Application.

55. First, the Decision sufficiently precisely specified that the Authority was in possession of information (indicia) in relation to all essential elements of the suspected infringement,[93] and therefore that the Authority had *reasonable grounds* for suspecting the infringement in question. The Decision describes the information as follows:

(i) Recital 2 (nature of suspected conduct and relevant market) states that the Authority had "*information in its possession indicating that*" the Applicants may have been and may still be participating in anti-competitive agreements and/or concerted practices related to coordination of their conduct with SKEL on the Icelandic retail pharmacy market;

(ii) Recital 3 (further details of suspected conduct) states that "*according to information in the Authority's possession*" Toska and SKEL eliminated direct competition between each other using traditional walk-in pharmacies, and explains how "[a]*ccording to that information*" Lyf og heilsa benefits from Lyfjaval's conduct, and Lyfjaval concentrates on drive-through pharmacies while Lyf og heilsa does not enter that segment. Sub-paragraphs (a)-(c) of the Recital further explain how the suspected practices may have been implemented, by reference *inter alia* to "*an asset swap agreement of 26 April 2022*";

(iii) Recital 4 (geographical area of suspected conduct) states that "[a]*ccording to the information available to the Authority*" the involved undertakings operate pharmacy chains within and outside the Reykjavík capital area. It states that this capital area "*represents almost 70% of all retail sales of pharmaceuticals in Iceland*" and that the suspected conduct therefore covers a significant part of the Icelandic market;

(iv) Recital 5 (possible temporal scope of suspected conduct) states that "[a]*ccording to the information available to the Authority*", the alleged anticompetitive conduct may have started at least in May 2021 and could still be ongoing.

[93] See in particular paragraph 26, and paragraphs 27-29 and 31-36 above.

Thus, in these Recitals of the Decision, the Authority disclosed in detail that it considered that it had in its possession serious information/indicia that led it to suspect the anticompetitive conduct at issue.[94]

56. Second, nothing raised by the Applicants calls the sufficiency of these indicia (i.e. whether the Authority had reasonable grounds for ordering the inspection) into question. The Application (¶80) alleges that the Decision was based on a "*serious misrepresentation of the actual facts* [,]" but entirely fails to show in the following ¶¶81-82, or indeed anywhere else in the Application, why this is the case. In particular:
    (i) Application ¶81a repeats a timing point which was addressed in paragraph 39 above;
    (ii) Recital 3.a of the Decision refers to: "*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*." Application ¶81b is correct that the asset swap agreement of 26 April 2022 was concluded between Faxar ehf. and Lyfjaval, not *Lyf og heilsa* and Lyfjaval. However, the date and other described characteristics of the agreement were clearly sufficiently precise for the Applicants to understand which agreement the Decision intended to refer to: indeed, they have made extensive submissions in relation to that agreement throughout the Application. Further, the Decision's (Recital 1) description of Faxar ehf. as an indirect subsidiary of Toska ehf. "*whose main activity is holding the real estate properties used by Lyf og heilsa* […] *for Lyf og heilsa's daily operations as a pharmacy chain*" is uncontested: the Authority clearly understood the role played by Faxar ehf. in the Toska group. The Application does not allege that the use of Lyf og heilsa rather than Faxar ehf. in Recital 3.a led to any broader misunderstanding by the Authority of the facts. Thus, the Applicants' complaint (made also at Application ¶¶15 and 54) is merely formalistic in nature and incapable of casting doubt on whether the Authority had reasonable grounds for adopting the Decision;
    (iii) Application ¶81c and d repeat a point addressed at paragraph 41 above: the existence of a drive-through window (or not) can be a factor of competition. Further and in any event, the Authority is not required to define the relevant

[94] Such indicia must be assessed not in isolation but as a whole, and they may reinforce each other: *Casino GCEU* ¶223 and case-law cited.

market, or market segment, at the inspection stage (paragraph 28 above), while any such market definition must necessarily be made by the Authority *itself*, rather than by another authority (paragraph 19 and the related footnote 43 above);

(iv) The point raised at Application ¶81e has been addressed extensively under the Second Plea (Section 3.3 above). More generally, the Applicants themselves note at ¶87 that, in its merger SO, ICA made the preliminary assessment that certain conduct under the asset swap agreement "*could perhaps infringe Art. 53 of the EEA Agreement*."[95] The Authority wonders how the Applicants can acknowledge this while simultaneously maintaining in ¶81e that "*ESA cannot have had any indicia that* [the asset swap] *constituted an infringement of Article 53*" ;[96]

(v) The point raised at Application ¶81f has been addressed extensively under the First Plea (see in particular paragraphs 17-19 above);

(vi) Application ¶81g criticises the 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 or why.[97] The Applicants were party to each merger and must therefore have the relevant information available to them: there is no justification for their failure to specify and/or annex such information. This part of the Third Plea should therefore be rejected as inadmissible. In any event (and contrary also to Application ¶82), 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 (even if it existed, which is not admitted). At this preliminary stage of the investigation, the Authority is not required to have assessed all exculpatory evidence, let alone to disclose it in its inspection decision. This is confirmed by case-law of the CJEU, which has held that the Commission "*cannot be required to assess equally all evidence pointing in the opposite direction*."[98] Such case-law is relevant here: even more so since

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[95] More precisely, ICA's merger SO (¶101, **Annex A.9A**) makes the preliminary assessment that the harm to competition under the asset swap purchase agreement (described in its ¶100) "*may entail that the purchase agreement provides for unlawful market sharing within the meaning of Article 10 of the Competition Act and, where applicable, Article 53 of the EEA Agreement*."

[96] More generally, Application ¶81e appears to wrongly proceed on the basis that the Authority must have indicia proving an *infringement* of Article 53 EEA. As set out at paragraph 52 above, the Authority must rather be in possession of information and indicia providing "*reasonable grounds for suspecting an infringement*."

[97] Further references elsewhere in the Application to the merger proceedings are not necessarily of an exculpatory nature: see e.g. Application ¶¶22, 60, 62, 87 and the discussion in paragraph 56(iv) above.

[98] *České dráhy CJEU* ¶64, and see ¶52 for context.

exculpatory evidence, if any, may be put forward by the Applicant in the context of its defence in any further *inter partes* administrative stage of the proceedings.[99]

57. In short, as set out in paragraph 55 above, the Decision disclosed the existence of sufficiently serious indicia of suspected collusion between Toska and its competitor SKEL. None of the arguments made by the Applicants cast doubt on such indicia: rather, the Applicants merely reiterate their arguments made in connection with the First and Second Pleas.

### 4.3 NO BREACH OF THE PROPORTIONALITY PRINCPLE

58. Application ¶¶83-89 allege that the inspection was disproportionate, because the Authority had (or should have had) from ICA all the necessary information to assess the allegedly unlawful conduct. The Applicants refer to the Article 53 EEA concerns expressed by ICA in its merger SO, and infer (Application ¶87) that ICA must therefore have had "*all the relevant information at its disposal*" to be able to conclude on an infringement of Article 53 EEA. The implication of this appears to be that the Authority should have been able to obtain such information from ICA or that solely ICA should have investigated the suspected infringement (thus avoiding the need for an inspection by the Authority). For the following reasons, these claims must be rejected.

59. First, it is settled case-law that, as regards the assessment of the proportionality of an inspection measure, it is for the Authority, in principle, to assess whether information is necessary in order to be able to detect an infringement of the competition rules. Even if it already has indications or even evidence of the existence of an infringement, the Authority may therefore legitimately consider it necessary to order additional investigations to gain a better understanding of the infringement, its duration, or the group of undertakings involved.[100]

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[99] It is not until this stage that the undertaking concerned is informed, by notification of a statement of objections ("**SO**"), of all the essential evidence on which the Authority relies at that stage of the procedure and that that undertaking has a right of access to the file to ensure that its rights of defence are effectively exercised: *České dráhy GCEU* ¶46; *Orange* ¶78 and the case-law cited. As the GCEU has held, if those rights were extended to the period preceding the notification of the SO, the effectiveness of the Authority's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Authority, hence the information that could still be concealed from it: *Casino GCEU* ¶87-88; *Orange* ¶78 and the case-law cited.

[100] *České dráhy CJEU* ¶63; *České dráhy GCEU* ¶115; and the case-law cited.

60. Second, while the Authority did receive information from ICA from its merger investigation, and carefully assessed such information, such information was however:
    (i) primarily related to the asset swap agreement which, for the reasons explained above at paragraph 18 above, was of a different nature and temporal and geographic scope than the matters under investigation in the Decision.[101] It was thus, contrary to Application ¶¶86, 87, not information related to the "*same conduct*" and was therefore not complete or comprehensive with respect to the subject matter and purpose of the inspection;
    (ii) provided *voluntarily* by the Applicants and their competitor SKEL. As the EU Courts have recognised, in such circumstances, examination of the file in a national competition authority's possession cannot be an alternative to an inspection, since the national authority has not carried out an inspection and its information is therefore limited to that provided voluntarily by the undertaking in question.[102]

61. Third, Recital 9 of the Decision refers to this difference in nature between information provided voluntarily or not, and explains the necessity of an unannounced inspection in the present case: "*As restrictive agreements and concerted practices constitute an infringement of the EEA competition rules, possibly giving rise to serious financial penalties, there is a risk that if the information were collected by request for information or if the inspection were announced beforehand, relevant information might be compromised or destroyed. That would apply to all information relating to the suspected coordination of Toska's and SKEL's behaviour on the Icelandic retail pharmacy market*."

62. The Authority's inspection Decision was therefore justified and proportionate. The Authority diligently discharged its investigatory duties by consulting ICA before the Decision was adopted, as required by Article 20(4) of Chapter II Protocol 4 SCA, and by cooperating and exchanging information with that authority as foreseen under Chapter II Protocol 4 SCA. The Applicants' claims under this part of the Third Plea must be rejected.

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[101] While ICA's merger SO identified potential market-sharing concerns under Article 53 EEA, the SO (**Annex A.9A**) makes plain (see e.g. ¶¶100-101) that this is in relation to the asset swap agreement.
[102] *České dráhy GCEU* ¶123; *Orange* ¶56.

## 5 REQUEST FOR A MEASURE OF ORGANISATION OF PROCEDURE

63. In respect of the Applicants' request for a measure of organisation of procedure (Application ¶¶90-93), the Authority submits that such a measure is unnecessary.

64. First, as submitted at paragraphs 53-57 above, the Decision's statement of reasons sufficiently disclosed that the Authority was in possession of information and indicia providing *reasonable grounds* for suspecting the infringement in question, and the Applicants have failed to "*produce evidence casting doubt*" on whether the Authority had reasonable grounds for adopting its Decision. Accordingly, and in line with settled case-law,[103] the Court may conclude that there is no need for it to order the further disclosure of such information and indicia.

65. Second and in any event, the Authority refers to the additional explanations and indicia provided, in Section 1.2.1 above, in the interests of the expeditious execution of these proceedings, and to assist the Court. The Authority respectfully submits that these explanations and indicia sufficiently enable the Court to determine, without the need for a measure of organisation of procedure, that the Authority possessed sufficiently serious indicia justifying the adoption of the Decision.

66. Should the Court nevertheless consider that a measure of organisation of procedure (or of inquiry) is necessary, the Authority: (i) recalls that certain documents in its possession emanate from Toska's competitor SKEL, and will therefore require confidential treatment; (ii) submits that the scope of such measure should be limited to verifying whether the Authority was in possession of information and indicia providing reasonable grounds for suspecting the infringement described in the Decision.

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[103] *Nexans GCEU* ¶72; *České dráhy GCEU* ¶49; *Orange* ¶88: "*Only when a request to that effect is brought before the Court and the undertakings to which a*[n] [inspection] decision […] *is addressed have put forward certain arguments liable to cast doubt on the reasonableness of the grounds on which the Commission relied in order to adopt that decision may the Court take the view that it is necessary to carry out such a* [review of the indicia and determination whether the Commission had reasonable grounds for suspecting an infringement]." Emphasis added, and see the case-law cited. Contrary to how matters are presented under Application ¶¶79 and 91, it is therefore not the case that the EFTA Court "*must*" review the Authority's information and indicia, in order to assess whether it had reasonable grounds for its decision.

## 6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to:

1. Dismiss the Application in its entirety; and

2. Order the Applicants to pay the costs of the present proceedings.

Claire Simpson Daniel Vasbeck

Sigrún Ingibjörg Gísladóttir Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority

## 7 SCHEDULE OF ANNEXES

| Annex No | Description | Where Mentioned in Defence | Number of pages |
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| **B.5** | Newspaper article of 24 February 2023 published in Víkurfréttir – *Translation* | Fn. 23, p. 6 | 3 |
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| **B.7** | SKEL investor presentation for the second half of 2023 – *English original* | Fn. 28, p. 6 | 45 |
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| **B.9** | European Federation of Pharmaceutical Industries and Associations, *The Pharmaceutical Industry in Figures*, Key Data 2022 – *English original* | Fn. 37, p. 8 | 28 |
| **B.10** | European Federation of Pharmaceutical Industries and Associations, *The Pharmaceutical Industry in Figures*, Key Data 2023 – *English original* | Fn. 37, p. 8 | 28 |
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