Doc. Dr. Iur. Mgr. Martin Husovec, Alvinczyho 26, 04001, Košice, Slovakia,
Attorney at law, Slovak Bar Registration 8283
Contact: martin@husovec.eu [redacted]

The Registrar
General Court
Court of Justice of the EU
Luxemburg

**FSFE's Statement in Intervention: *Apple v European Commission* (Case T-1080/23)**

## Table of Contents

A. Social function of interoperability in Article 6(7) of the DMA .......... 2
B. Article 6(7) of the DMA does not engage Article 17(2) of the EU Charter .......... 3
C. Article 6(7) DMA proportionately limits Article 16 of the EU Charter .......... 6
D. Apple's App Store is one CPS .......... 8
E. iMessage is undoubtedly a 'service' .......... 10
F. Order sought .......... 11

(1) In October 2022, the European Union legislature, relying on a democratic mandate given to it by citizens of Europe, made a choice. Seeing numerous failures of the market mechanism to discipline the abuses of private power, it adopted the DMA to weaken the ability of powerful companies to dictate the rules to individuals and other businesses. In the same month, the EU legislature created minimum binding trust and safety rules for the digital services in the DSA. Together, these two regulations aim to empower end and business users to counterbalance the unfairness created by some of the most powerful global economic actors. The true framing of the case is thus whether the decisions of the legislature to empower consumers and business users should now be narrowed down, or even invalidated.

(2) According to the long-standing case law of the Court, freedom to conduct a business and intellectual property rights are bound by their *social function*.[1] Legislatures give expressions to the social function in the legislative process. Article 6(7) of the DMA, the interoperability mandate, reflects the social function. Interoperability is a key building block of our societies. It assures our access to cultural heritage by connecting the past with the future, such as by keeping today's electronic documents accessible to future generations, but also by allowing a better future. If private companies build our physical and digital architectures, the public has a full right to demand that such infrastructure serves people's needs. If companies are not motivated to satisfy those needs, regulatory mandates are necessary. Simply objecting to such mandates due to the reduction of future profits cannot convince if such mandates can truly serve their social function.

(3) The FSFE will show that Apple is hardly getting 'expropriated' in any way. Instead, Apple is only becoming regulated in the public interest. *Any* regulation affects ways in which companies can make a profit on their investments. Apple's objections to interoperability only mask its worries about how intensified competition, coupled with the increased agency of consumers, will affect its market power. Apple profoundly confuses the protection of its profits with that of its property. The legislative changes might affect Apple's business plans or profit margins but those are not constitutionally protected as property. They are at best protected under the freedom to conduct business under Article 16 of the EU Charter.

(4) This intervention explains: (A) what is the social function of interoperability, (B) why Article 6(7) of the DMA is not subject to 17(2) of the EU Charter because the provision is not even engaged, (C) why interoperability is a proportionate limit on the freedom to conduct business, (C) why Apple cannot escape the interoperability mandates concerning App Store by arbitrarily slicing it, and (D) why interoperability must equally apply to free-of-charge services.

1 See consistently since *Metronome Musik*, Case C-200/96 at para. 21 ('those principles are not absolute but must be viewed in relation to their social function'); Case C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, Judgment of Nov. 24, 2011, para. 43. ('[t]here is, however, nothing whatsoever in the wording of [Article 17(2)] or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected.'). For freedom to conduct business, see *Sky*, C-283/11, para 45 ('the freedom to conduct a business is not absolute, but must be viewed in relation to its social function').

## A. Social function of interoperability in Article 6(7) of the DMA

(5) Article 6(7) of the DMA imposes an interoperability mandate upon providers of operating systems, such as iOS. The provision obliges gatekeepers to make hardware and software features of their operating systems interoperable with products of other companies. Article 6(4) imposes another such mandate on providers of app stores. Interoperability is central to the DMA. It is mentioned 38 times by the law. Interoperability is DMA's DNA. Interoperability serves the social function of enabling human cooperation. Businesses are naturally driven by higher profits, which can lead to ineffective barriers to human cooperation. The DMA recognises that the designated operating systems and app stores are central to modern societies.

(6) The social function of interoperability is best encapsulated in the famous story of the Great Baltimore Fire from 1904.[2] After local fire-fighters failed to contain the rapidly spreading fire, other fire-fighters arrived from Philadelphia, Wilmington, Washington, and other cities, each unit bringing their equipment. However, firefighters soon discovered that their equipment would not fit into Baltimore's hydrants; as each city had different standards. Many of the firefighters could do nothing but stand and watch in horror. Competing products with no interoperability were responsible for the inability of firefighters to rescue the city. Digital infrastructures, such as operating systems or app stores, create similar roadblocks to cooperation. This is why interoperability is often mandated as a remedy to facilitate coordination and exchange of data or communications across different important private-developed infrastructures.

(7) The complexity of modern societies requires interoperability of urban architecture to protect people from fires, floods and other risks, transport architecture to protect their safety, and communication architectures to protect from risks and maximise opportunities. As societies grow in complexity, interoperability of privately owned assets is inevitable, and where market actors are unwilling to coordinate on such arrangements voluntarily, e.g., because lack of such interoperability is commercially beneficial to selected companies, the state must step in.

## B. Article 6(7) of the DMA does not engage Article 17(2) of the EU Charter

(8) Article 6(7) DMA undoubtedly limits Apple's ability to make money. However, contrary to what Apple claims, the DMA leaves untouched Apple's copyright protection of the software code, or patent protection of its technical solutions.

2 See https://rawhidefirehose.com/blog/great-baltimore-fire-setting-standards/

This is because *the DMA leaves Apple with a choice of how they implement the interoperability mandate***.** Apple can strip its interoperability implementations of any patents and copyrights, develop (alone or jointly with others) entirely new implementations, or use public domain or free and open-source solutions to achieve effective interoperability.

(9) The DMA does not target any specific *existing* intellectual property rights held by Apple. It only seeks an outcome in the public interest. Article 17(2) of the EU Charter is thus not even engaged. Article 6(7) DMA does not introduce any compulsory license to any existing intellectual property right held by Apple. It does not shorten any of its existing rights. *Apple conflates the limitations imposed on a product that embeds IP rights with the limitations imposed on pre-existing specific IP rights.*

(10) In constitutional scrutiny (see *Sky*, C-283/11, para 31-40), there is a big difference between interference with the freedom to conduct business (Article 16) and the right to property (Article 17). In constitutional scrutiny, unlike in statutory reading of competition law, the two situations cannot be conflated because they lead to substantially different assessments (e.g., on expropriation). Property protection under the EU Charter, or Convention, offers stronger protection to possessions (*Sky*, C-283/11, para 38) granted by the legislature than the freedom to conduct business whose interests must be balanced on an ongoing basis. Article 17 of the EU Charter only protects existing specific promises of rights and not vague business interests.

(11) In consequence, Article 6(7) DMA only limits how Apple's product must be designed, leaving it up to Apple how they continue to manage or embed IP rights. Article 17(2) of the EU Charter does not create a human right to have investments protected by legislature, only to have it respected once some protection is specifically promised to individuals. The same is true under Article 1 of the Protocol 1 of the Convention (A1P1). As explained by Harris and others, A1P1 'is not a right to be put into the possession of things one does not already have, however strong the individual's interest in this happening may be'.[3] In other words, both the Charter and Convention only force the governments to stick to their promises or justify when they deviate from them, but never to proactively give new ones.[4]

3 David Harris and others, *Law of the European Convention on Human Rights* 660 (2nd ed. 2009).

4 Martin Husovec, Intellectual Property Rights and Integration by Conflict: The Past, Present and Future, 18 *Cambridge Yearbook of European Legal Studies* 239 (2016).

(12) As regards *copyright*, the ideas are not protected, and CJEU previously held that 'neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive' (*SAS*, Case C-406/10, para 46). They form part of the public domain. Thus, Article 6(7) cannot limit Apple's copyright because Apple can never own any copyright-related exclusive rights over functionalities of features. Even more, according to copyright law, it cannot stop reverse-engineering of its products by others to achieve interoperability (see Article 6 of the Directive 2009/24/EC).

(13) Only the fact that Article 6(7) concerns a product that is written in computer code does not mean that the provision engages Article 17(2) of the EU Charter. As noted earlier, Apple can strip its interoperability implementations of any proprietary code, develop entirely new implementations, or use public domain, or free and open-source material to achieve effective interoperability. Article 6(7) DMA does not target any specific expression of computer programs for which the state has promised protection before the DMA entered into force.

(14) As regards *patents* that protect technical solutions, and thus ideas, even if Apple would have owned a patent on a specific feature, such as page-turning, Article 6(7) DMA does not force it to license it to anyone, including competitors. Apple is again given a choice to either implement such a feature into an operating system and then share it, or not implement it into an operating system and continue to freely exploit it as it sees fit.

(15) Thus, Apple effectively complains about the fact that it is now faced with this choice. However, intellectual property law, including patents, does not guarantee exploitation without state regulation, or unhindered access to markets on the company's terms. Many products have mechanisms that are patentable, yet they cannot be freely sold as businesses see fit and are subject to various product regulations. It is not unusual for a law to ask companies to conform their products to some functional specifications, such as interoperability (e.g., some medical devices or urban structures) or transparency (e.g., food, drugs, etc.). Article 6(7) DMA constrains space in which Apple can exploit its IP. The law sets the rules for doing business.

However, it does not take away the right, or even force its licensing. Article 17(2) of the EU Charter is not engaged.[5]

(16) Moreover, Article 17(2) protects only specific already-granted rights and not the IP system. It is not an immunity from legislative change. For prospective, as opposed to retrospective changes, the legislature is not constitutionally compelled to pick the most proportionate interventions into the system of IP protection; they can be unreasonable, and even wrong on the underlying policy.[6] The legislature must be proportionate only if it decides to undertake retrospective changes, such as when it shortens or shrinks the rights of existing patent owners. Therefore, even if the changes would directly affect future IP rights, Article 17(2) is not engaged concerning changes to the system of intellectual property rights as such. What the legislature gives, it can take away.

(17) Apple does not seem to understand this.

[I]t claims[7] that even asking Apple to develop and use alternative technology to achieve interoperability would mean interfering with its intellectual property. This clearly shows that Apple believes that whenever it is asked to do something, Article 17(2) is engaged because of its investments in products. As explained earlier, this is not how the scope of Article 17(2) of the EU Charter operates. It is not a right to be put into the possession of things one does not already have, however strong the individual's interest in this happening may be. If Apple was correct, even an obligation to publish a transparency report under Articles 15, 24 and 42 of the EU Digital Services Act would be an expropriation since Apple is forced to publish its copyrighted works (the same is true for data sharing according to Articles 6(9) and (10) DMA, and many other provisions). The argument is simply wrong on law, and untenable in consequences.

5 Article 17(2) of the EU Charter is increasingly used by companies as a tool to stop or slow down unfavourable product regulation. See Martin Husovec, "The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter." *German Law Journal* 20, no. 6 (2019): 840–63.

6 See in detail, Martin Husovec, A Human Right to Ever-Stronger Protection? *International Review of Intellectual Property and Competition (IIC)* 54, 1483–1486 (2023).

7

(18) As regards *trade secrets*, these are not typically understood as intellectual property.[8] For trade secrets, it is in their very nature that the legislature is constantly redrawing the boundaries of what can be kept secret. The protection is preconditioned on the possibility of factual secrecy of information on the market.[9] If such secrecy is not possible, the protection cannot arise. As stated by Article 1(2)(b) of the Trade Secrecy Directive, it shall not affect 'the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public (..)'. Thus, the law defers to other specific rules, such as the DMA. After all, any product regulation forcing disclosure of ingredients, or regulatory supervision, thus limits what can become or stay a trade secret. Any interference of a state must be tested under less protective Article 16 of the EU Charter, looking at the purpose of the disclosure. The trade secrecy adds no special dimension to the constitutional challenge of the interoperability mandate.

## C. Article 6(7) DMA proportionately limits Article 16 of the EU Charter

(19) As correctly noted by the Commission, the proportionality test for the constitutionality of the legislation is much stricter than the one used for the interpretation of secondary EU legislation. The conflation of two types of proportionalities leads to the petrification of secondary law because it confuses the setting of the boundaries of what the legislature can do with an interpretation of a specific rule the legislature has adopted.[10]

(20) According to the Court, 'in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, *the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest*.' (*Sky*, C-283/11, para 46, emphasis ours).

8 See Lionel Bentley, Trade Secrets: "Intellectual Property" but not "Property?", in *Concepts of Property in Intellectual Property Law* 60 (Helena Howe & Jonathan Griffiths eds., 2013) (mapping the case law and arguing that trade secrets are predominantly being accepted as "intellectual property" but not "property").

9 See Article 2(1)(a) of the Directive (EU) 2016/943 (The Trade Secrecy Directive).

10 See Tuomas Mylly, 'The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property In The EU' in C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015), pp 127 (lock-in); Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future'. *Cambridge Yearbook of European Legal Studies* 18 (2016): 268 (petrification).

(21) The FSFE wishes to emphasize that Apple's argument about seeking to protect consumers through the security and privacy of its closed system is inherently flawed. Interoperability mandates are frequently adopted to increase security and safety. A recent report by the Irish Health Information and Quality Authority concludes that: 'The benefits of the use of interoperability standards in healthcare are well established, mainly due to the fact that many eHealth initiatives and benefits of ICT in general cannot be realised in the absence of interoperation between health information systems.'[11] Similarly, according to the FDA, '[a]s electronic medical devices become increasingly connected to each other and to other technologies, the ability of connected systems to safely, securely and effectively exchange and use the information becomes critical.'[12]

(22) The DMA similarly aims to open up certain infrastructure so that users benefit from alternative security and privacy tools, not just those offered by Apple. It expects Apple to compete on trustworthiness and not be blindly trusted just because it has the last word and can hide inconvenient incidents. Apple sells Mac laptops and desktops under significantly less restrictive policies, where many companies compete to offer privacy and security to consumers and business users (e.g., anti-virus systems, etc.). In MacOS, developers can sell their product directly to Mac users and users can directly install any software from any source. Despite this, Apple still assures consumers that Mac devices are secure. There is no reason why security around iPhones, iPads or other devices should be any different. Even theoretically, it is unclear why reliance on one company's decisions and solutions, instead of the market mechanism, should be a superior way to assure the best possible security and privacy of consumers.

(23) Unsurprisingly, there is strong evidence that reliance on one company exposes consumers to more risks because it presents a "single point of failure".[13] Apple's gatekeeper control over the App Store has already led to less cybersecurity for end-users. Apple has faced numerous documented security breaches that expose the inadequacies of its approach. For instance, Apple did not disclose a massive hack affecting 128 million iPhones.[14] Apple has been criticized for mishandling user privacy as highlighted in ongoing litigation in the

11 See https://www.hiqa.ie/sites/default/files/2017-01/Healthcare-Interoperability-Standards.pdf p. 9.

12 See https://www.fda.gov/medical-devices/digital-health-center-excellence/medical-device-interoperability

13 See https://en.wikipedia.org/wiki/Single_point_of_failure

14 See https://arstechnica.com/gadgets/2021/05/apple-brass-discussed-disclosing-128-million-iphone-hack-then-decided-not-to/

US courts.[15] Recent reports have exposed the presence of fake apps on the Apple App Store, such as a fraudulent version of the LastPass password manager.[16] In addition, Apple recently had to quietly release updates for iOS and iPadOS 17.4.1 to address a serious vulnerability (CVE-2024-1580) that allowed remote attackers to execute arbitrary code on affected devices.[17]

(24) Apple's claims about security are also heavily contested by its own practices. The company allows sideloading of Apple Music (in the form of the applemusic.apk file) on Android devices but does not permit similar direct sideloading on Apple devices (e.g., of the Spotify.ipa file).[18] This raises a significant question. If Apple is genuinely concerned about the privacy and security issues associated with sideloading, why would it expose its Apple Music users to these supposed risks on Android? Why protect consumers only on iOS? This inconsistency suggests that Apple's stringent controls on iOS may be less about protecting users and more about maintaining control over its ecosystem to extract higher rents from it.

(25) Apple itself undoubtedly benefits from interoperability in its business. The Internet is built around interoperability. Apple already has much broader interoperability policies related to its operating system for laptops (MacOS) in comparison to its operating system for smartphones (iOS). In MacOS, third-party developers have broader access to the hardware and software functions of the device. However, on iOS, there are numerous roadblocks for developers. For instance, Just-In-Time (JIT) compiler is crucial for web performance on iOS, but Apple restricts its use to its own browser through strict codesigning requirements, only granting the necessary exceptions to Safari.[19] While Apple's Safari uses a sophisticated multi-process architecture for security, third-party browsers are forced to adopt Apple's WebKit model,[20] limiting their flexibility in applying their own security measures. This way, Apple reduces the privacy protections of its users. Thus to be clear, interoperability *improves* the security

---

15 In re: Apple Data Privacy Litigation, 5:2022-cv-07069, United States District Court, Northern District of California; The United States of America vs Apple Inc. Case 2:24-cv-04055, United States District Court, District of New Jersey, Paras 141 to 147.

16 See https://www.bleepingcomputer.com/news/security/fake-lastpass-password-manager-spotted-on-apples-app-store/

17 See https://www.darkreading.com/endpoint-security/apple-security-bug-opens-iphone-ipad-rce

18 See https://www.apple.com/lae/apple-music/android-download/ The .apk file is a format used by the Android operating system for the distribution and installation of mobile apps and middleware. Just as Windows PC software uses an .EXE file for installing software. For iOS it is .IPA file format.

19 See https://developer.apple.com/documentation/browserenginekit/protecting-code-compiled-just-in-time?language=objc

20 See https://developer.apple.com/documentation/browserenginekit?language=objc

of consumers whose interests are better protected under Article 38 of the EU Charter. In addition, it can further support any other rights, such as the right to private life, data protection, freedom of expression and right to security.

## D. Apple's App Store is one CPS

(26) Apple makes several arguments about why it operates five and not one App Store. Its approach, unlike Google's, is allegedly 'device-specific'. The FSFE considers it important to recall what the business and user experience really look like. Figure 1 shows that app developers use the same interference to submit apps. They only need to pick different boxes which then might lead to further device adjustments. The process is streamlined into a single business user experience for app developers. The device-specificity is initially reduced to the ticking of boxes.

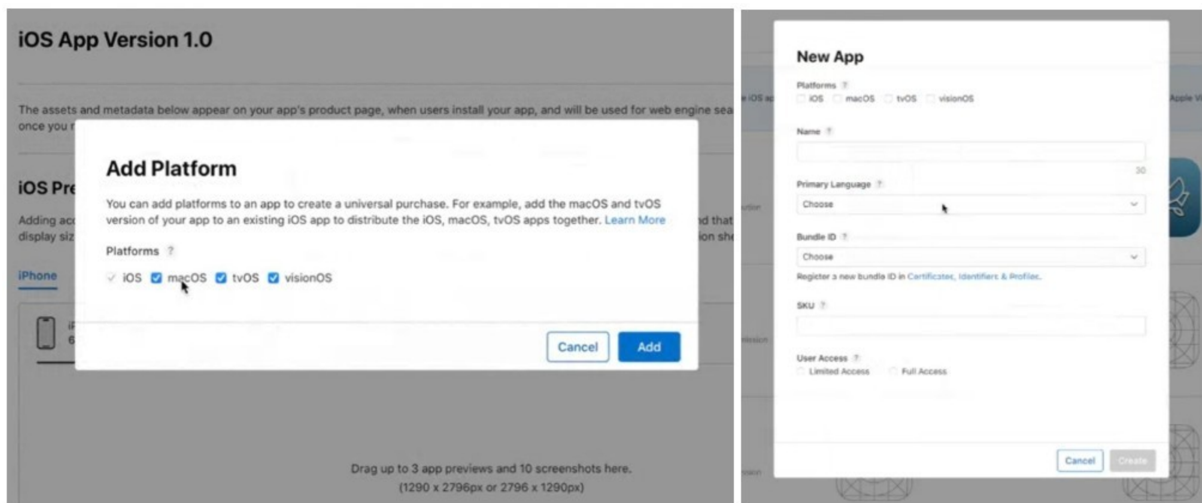


**Figure 1**

(27) Business users encounter one streamlined app submission and distribution experience: end-users who pay for an app on one device can use the app on another type of device; end-users transact with business users under one single identity, using the same payment systems and one library of purchased apps. Thus, as a gateway, the App Store is a single service that might only lead to different predominant use cases across devices, some of which overlap, while others do not.

(28) The FSFE was not able to review the facts provided by Apple in this regard because they were redacted from the file [redacted]. It is therefore

unable to engage with the evidence that was put forward. However, Apple's distinctions appear untenable. The criteria proposed by Apple would mean that even 'Amazon.es' would have to be separated as a distinct marketplace from 'Amazon.de'. After all, each has a different product catalogue, attracts different sellers, offers tailored products, and partly different business user experience [redacted].

(29) App stores, similar to browsers, are pieces of software meant to run on an operating system or systems across devices. The fact alone that technological adjustments must be made to accommodate different operating systems does not change the single purpose of the service for either of them. App stores distribute apps from app developers to end users. Browsers facilitate access to the web, even though some websites might not be adjusted for specific devices.

(30) Apple's reliance on Annex D.2.B does not challenge the Commission's findings. The distinction between 'category' and 'purpose' does not imply that this delimitation is drawn around devices. If the word 'purpose' were to mean a difference in catalogues of goods or services, video-sharing platforms, social media services, or marketplaces, could easily escape the threshold by claiming different purposes amongst their users. Recital 14 of the DMA emphasizes technology neutrality and the inclusion of services provided on various devices. It is device agnostic. It does not matter from which device the App Store is accessed, as long as the purpose of the App Store is online intermediation, it shall be considered as one single CPS.

## E. iMessage is undoubtedly a 'service'

(31) The argument about iMessage is partly theoretical given the lack of designation. However, if Apple is successful, it could be damaging for the DMA. Apple makes a far-fetched argument that its core technology is not a 'service' according to the EU acquis to avoid the potential interoperability obligations. This allegation is incredibly consequential. If Apple were correct, most free digital products would not be regulated by the DMA and DSA (and other pieces of EU legislation, such as audio-visual media, etc.). Yet, even services like Wikipedia, provided by non-profits, are listed as VLOPs under the DSA. Apple is clearly wrong. The FSFE considers it important that the Court dismisses the argument forcefully.

(32) The original reason for the language 'normally provided for remuneration' is the EU primary law (Article 57 TFEU). As pointed out by the Commission, this has been interpreted very broadly as any activity having an economic character.

More explicitly, CJEU held in *EC v Hungary* not only that this means that 'the activity must not be provided for nothing' but also that 'there is no need in that regard for the person providing the service to be seeking to make a profit'.[21] Thus, CJEU case law clearly states that only de minimis activities will be considered non-economic. Profit-making motive is irrelevant. Even if an organisation, for profit or not, does not charge for the asset, or derive any monetary value from it, the activity of operating it can be still economic.

(33) The key question should be if an entity operates an activity that generates economic value for others that could be potentially monetized. The service is provided for nothing *only if* such potential value is de minimis. It is not important whether that value is also converted into money, as this can change anytime in the future. Otherwise, the DMA or DSA create a loophole. The predictability of this is visible from Apple's attempt to paint its primary asset as a non-economic activity.

(34) Any for-profit company that operates a suite of services, not to mention multi-sided platforms, always decides carefully how to price its products and whom to charge to extract the most profit. It is not unusual that various demand-side considerations suggest that instead of monetising one group or category of services, the company should be monetising another service or product (e.g., a device). For a company, this is simply a decision about *where* to shift profit-making. The service or product then cross-subsidises other parts of the business of the company. Accepting Apple's logic would make EU law inapplicable to a significant amount of market activities.

## F. Order sought

(35) Based on the above, the Free Software Foundation Europe (FSFE) supports the European Commission in its request to the General Court to dismiss Apple's action in its entirety.

11-9-2024
Košice, Slovakia

Kind Regards

Martin Husovec, attorney at law

21 *European Commission v Hungary*, Case C-179/14, para 154.