

THE HIGH COURT

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON THURSDAY, 16th FEBRUARY 2017 - DAY 6

6

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1 THE HEARING RESUMED AS FOLLOWS ON THURSDAY, 16TH
2 FEBRUARY 2017

3
4 **MS. JUSTICE COSTELLO:** Good morning.

5 **REGISTRAR:** In the matter of Data Protection 11:04
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MR. MURRAY:** Judge, I was just dealing with the last of
8 the reports which is Mr. Richards' report, you'll find
9 it in Tab 6, and I had concluded at paragraph 79.

10 11:04
11 Judge, what I propose to do is, when I have finished
12 opening this report, which I don't think will take
13 terribly long, I will then try to gather together the
14 various points that Mr. Collins made last week and that
15 are reflected in our submissions to set out, in the 11:04
16 light of the evidence that you have just seen, the
17 essential structure of the case that we make having
18 regard to the authorities.

19
20 So, Judge, at paragraph 80 he moves to address the 11:05
21 specific issue of standing doctrine in the privacy
22 cases and he explains that standing doctrine:

23
24 *"Frequently implicates cases that bring claims in which*
25 *the legal wrongs sought to be remedied is new or 11:05*
26 *involves a remedy for intangible harm, particularly*
27 *where the harm alleges departs from traditional common*
28 *law notions of physical or pecuniary harm. It is thus*
29 *no surprise that earlier leading privacy cases drew*

1 heavily for environmental law in cases raising theories
2 of environmental or aesthetic harm with complex
3 causation, he gives examples of those, while newer ones
4 seem to increasingly involve privacy law, with their
5 emphasis on psychological or dignitary injuries. 11:05

6
7 81. In the lower court across the field of privacy
8 law, litigation of 'privacy harm' is an important issue
9 and numerous privacy claims have been dismissed for
10 wanting of standing. As Professor McGeeveran puts it 11:06
11 well discussing class action litigation against private
12 companies 'developments in privacy law, particularly
13 standing doctrine, have also increased the obstacles to
14 private suits, including class actions'. To be sure,
15 he says, standing doctrine is not a complete obstacle. 11:06
16 McGeeveran notes that 'privacy class action suits will
17 remain a significant legal threat to companies for the
18 foreseeable future', but standing doctrine remains a
19 real obstacle to privacy litigation by plaintiffs
20 across the board in the United States, whether they are 11:06
21 suing companies or the government."
22

23 I would obviously emphasise that description, "a real
24 obstacle to privacy litigation".

25 11:06
26 And then he moves to consider two Supreme Court cases,
27 the first you've heard many times, the Clapper -v-
28 Amnesty International case, but I will just open his
29 summary of it, Judge, at paragraph 82:

1 *"Lawyers, journalists, and human rights activists who*
2 *spoke frequently with non-US clients and contacts about*
3 *sensitive topics brought a challenge to Section 702 of*
4 *FISA. The plaintiffs argued that section 702 harmed*
5 *them by violating their First and Fourth Amendment*
6 *rights. The plaintiffs argued that because their*
7 *communications were with people that the government*
8 *considered suspicious, they reasonably believed that*
9 *those communications were being monitored. They also*
10 *claimed that in order to protect their privacy and*
11 *other fundamental rights, they had spent substantial*
12 *amounts of both time and money, including traveling out*
13 *of the United States to speak with their clients rather*
14 *than using telephones or emails that the government was*
15 *likely monitoring. Nevertheless, a majority of the*
16 *Supreme Court dismissed their claim on standing grounds*
17 *under the first prong of the analysis for failure to*
18 *allege a constitutionally-sufficient injury in fact.*
19 *After explaining the 'cases and controversies'*
20 *requirement that is rooted in the separation of powers,*
21 *and noting that 'we have often found a lack of standing*
22 *in cases in which the Judiciary has been requested to*
23 *review actions of the political branches in the fields*
24 *of intelligence gathering and foreign affairs', the*
25 *Court explained the governing test: 'To establish*
26 *Article III standing, an injury must be 'concrete,*
27 *particularized, and actual or imminent; fairly*
28 *traceable to the challenged action; and redressable by*
29 *a favorable ruling. Although imminence is concededly a*

1 somewhat elastic concept, it cannot be stretched beyond
2 its purpose, which is to ensure that the alleged injury
3 is not too speculative for Article III purposes - that
4 the injury is certainly impending. Thus, we have
5 repeatedly reiterated that threatened injury must be
6 certainly impending to constitute 'injury in fact', and
7 that [a]llegations of possible future injury are not
8 sufficient."

9
10 And then Mr. Richards says at paragraph 83:

11:08

11
12 "83. Applying this test, the Court concluded that the
13 plaintiffs had not alleged a
14 constitutionally-sufficient injury because it was
15 speculative about whether the government would
16 'imminently target' their communications under section
17 702, they had no actual knowledge of the government's
18 targeting practices, and that even if their being
19 targeted was imminent, they could not prove that the
20 targeting was being authorized by section 702 (which
21 they were challenging), rather than another of the
22 various methods of government surveillance (which they
23 were not). The Court also rejected the plaintiffs'
24 alternative argument that they had incurred costs to
25 avoid surveillance on the ground that they could not
26 'manufacture standing merely by inflicting harm on
27 themselves based on their fears of hypothetical future
28 harm that is not certainly impending. Any ongoing
29 injuries that respondents are suffering are not fairly

1 *traceable to section 702'. Because their injuries were*
2 *thus neither 'imminent' nor 'fairly traceable' to*
3 *section 702, they lacked an injury in fact that could*
4 *be redressed by a favourable ruling and thus standing*
5 *to challenge the government's surveillance programme."* 11:09

6
7 Judge, I mean you did at the end of yesterday fairly
8 allude to the, I suppose, complexity of the legal
9 matters that are before you, but, if I can respectfully
10 say so, what this issue presents is a question, the 11:09
11 component parts of which can be very simply identified
12 and their application to this court readily or to this
13 case readily expressed.

14
15 The plaintiffs in Clapper had a reasonable well founded 11:10
16 apprehension that their communications were amenable or
17 likely to be accessed under the régime that they were
18 challenging. The United States Supreme Court held that
19 that was not sufficient, that apprehension was not
20 sufficient to generate standing. Just if one stops 11:10
21 there.

22
23 That's the law of the United States, obviously, pending
24 another decision of the United States Supreme Court it
25 remains the law. So there is no dispute about that. 11:10
26

27 And bear in mind that the Plaintiffs in this case were,
28 as explained by Ms. Gorski in her evidence on Friday, a
29 range of persons who might reasonably themselves

1 believe that they were liable to have their
2 communications surveyed because of the nature of their
3 contacts abroad with journalists, NGOs and so forth.
4 So that's the law in the United States.

5
6 In our respectful submission that formulation of
7 standing does not provide an effective judicial remedy.
8 We say it doesn't provide an effective judicial remedy
9 for the purposes of the Article 47 of the Charter and
10 indeed, I might say in passing, there would appear to
11 be a substantial body of opinion that it doesn't
12 provide an effective judicial remedy in United States
13 law. But, insofar as you are concerned, the issue is:
14 Is that an effective remedy for the purposes of
15 Article 47 of the Charter?

16
17 Now it may be or it may not be, but what is absolutely
18 clear in our respectful submission is that the argument
19 that it is *not* an effective remedy, it cannot be
20 described as ill-founded, it is a well founded argument
21 which in its own terms is sufficient in our respectful
22 submission to generate the type of doubt referred to by
23 the Court of Justice in paragraph 66 of Schrems.

24
25 And when you look at the commentaries, they'll be dealt
26 with, I'm sure, in greater detail by the various
27 experts when they are being cross-examined, when you
28 look at the commentaries in United States law
29 addressing concerns expressed within the United States

1 itself in relation to the chilling effect of these
2 doctrines on litigation of this kind, I would venture
3 to suggest that the proposition that an argument that
4 Article 47's requirements are not met, that that
5 argument is so ill-founded as to not give rise to the 11:12
6 basis for a reference, which is necessarily the
7 argument, although it won't be expressed in those terms
8 I'm sure that Mr. Gallagher has to advance, that
9 argument is an untenable argument.

10
11 As I said at the end of the day it may be right or it
12 may be wrong but it is certainly a substantial issue
13 that presents itself. And when we look, as I will ask
14 you to do later this morning again, at how the Court of
15 Justice has defined 'harm' such as to give rise to an 11:13
16 entitlement to a judicial remedy, such as to give rise
17 to an entitlement in certain circumstances to
18 compensation, how the Court of Justice has defined
19 harm, the matter in our respectful submission clearly -
20 the requirements fixed by Article 47 clearly are not 11:13
21 met when a litigant is faced with this type of test.

22
23 And that of course is, stands on its own, but of course
24 it is exacerbated by the fact that there is no
25 obligation to notify that's generally applicable in US 11:13
26 law. There are certain circumstances in which there
27 may be such obligations, but as a matter of practice
28 the undisputed evidence, and she wasn't challenged on
29 this on Friday, Ms. Gorski, is that, certainly insofar

1 as FISA is concerned, most people who are surveyed who
2 are the subject of the surveillance never know that
3 fact.

4
5 Again we will see how that, combined with the very 11:14
6 stringent test of standing applicable in this type of
7 litigation which Clapper directs itself, in our
8 respectful submission renders the remedies in the
9 United States ineffective insofar as Article 47 is
10 concerned. The implication of that obviously is a 11:14
11 matter of dispute which I'll come back to later.

12
13 Mr. Richards continues:

14
15 *"84. One of the great ironies about Clapper is that*
16 *much of the speculation about the government's*
17 *targeting practices could have been resolved if the*
18 *government had disclosed (including confidentially to*
19 *the Court) whether the plaintiffs' communications were*
20 *being monitored, and what targeting or minimization*
21 *procedures were being used. This suggestion was*
22 *actually made to the Court at oral argument, but the*
23 *Court rejected it in its opinion on what were*
24 *apparently national security grounds. The Court*
25 *explained that it is not the Government's burden to*
26 *disprove standing by revealing details of its*
27 *surveillance priorities. Moreover, this type of*
28 *hypothetical disclosure proceeding would allow a*
29 *terrorist (or his attorney) to determine whether he is*

1 currently under U.S. surveillance simply by filing a
2 lawsuit challenging the Government's surveillance
3 program. Even if the terrorist's attorney were to
4 comply with a protective order prohibiting him from
5 sharing the Government's disclosures with his client,
6 the court's post-disclosure decision about whether to
7 dismiss the suit for lack of standing would surely
8 signal to the terrorist whether his name was on the
9 list of surveillance targets.

11:15

10
11 85. The second recent Supreme Court decision to
12 discuss standing doctrine in the privacy context is one
13 decided this past summer, Spokeo -v- Robins. Spokeo
14 involved a claim made by a consumer that a data broker
15 had violated the Fair Credit Reporting Act of 1970, a
16 federal consumer protection statute that imposes a data
17 protection regime on consumer reporting agencies. The
18 plaintiff consumer alleged that the data broker had
19 reported false information about him, but the data
20 broker had countered that because the false information
21 was favourable to the consumer, there was no injury and
22 thus no standing to sue. The Supreme Court held for
23 the data broker on standing grounds - specifically
24 under the rationale that the consumer had failed to
25 allege an injury in fact that was both 'concrete' and
26 'particularized'. The Court explained that '[f]or an
27 injury to be 'particularized', it must affect the
28 plaintiff in a personal and individual way.
29 Particularization is necessary to establish injury in

1 fact, but it is not sufficient. An injury in fact must
2 also be concrete. A 'concrete' injury must be 'de
3 facto'; that is, it must actually exist. When we have
4 used the adjective 'concrete', we have meant to convey
5 the usual meaning of the term 'real', and not
6 'abstract'. Concreteness, therefore, is quite
7 different from particularisation'.
8

9 86. The Court in Spokeo went on to explain what it
10 meant by the concept of 'concreteness'. In somewhat
11 confusing language, it explained that 'concrete' is
12 not, however, necessarily synonymous with 'tangible'.
13 Although tangible injuries are perhaps easier to
14 recognize, we have confirmed in many of our previous
15 cases that intangible injuries can nevertheless be
16 concrete. In determining whether an intangible harm
17 constitutes injury in fact, both history and the
18 judgment of Congress play important roles. Because the
19 doctrine of standing derives from the
20 case-or-controversy requirement, and because that
21 requirement in turn is grounded in historical practice,
22 it is instructive to consider whether an alleged
23 intangible harm has a close relationship to a harm that
24 has traditionally been regarded as providing a basis
25 for a lawsuit in English or American courts. In
26 addition, because Congress is well positioned to
27 identify intangible harms that meet minimum Article III
28 requirements, its judgment is also instructive and
29 important. Thus, we said in Lujan that Congress may

1 *'elevat[e] to the status of legally cognizable injuries*
2 *concrete, de facto injuries that were previously*
3 *inadequate in law'. Similarly, Justice Kennedy's*
4 *concurrence in that case explained that 'Congress has*
5 *the power to define injuries and articulate chains of*
6 *causation that will give rise to a case or controversy*
7 *where none existed'."*

8
9 Just to stop there. That observation, perhaps of some
10 significance, there's nothing, based on that, to 11:18
11 prevent the United States' legislature or the federal
12 legislature from creating cases or controversies within
13 the framework identified by Mr. Justice Kennedy. But
14 then the court said at paragraph 87:

15 11:18
16 *"Applying these two" -- sorry, then Mr. Richards says*
17 *at paragraph 87:*

18
19 *"Applying these new principles to the case at hand, the*
20 *court held that to satisfy the constitutional minimum*
21 *of standing, plaintiffs must have suffered concrete*
22 *harm and not a 'bare procedural violation', which would*
23 *be constitutionally insufficient to allow a remedy. As*
24 *the court explained, 'In the context of this particular*
25 *case, these general principles tell us two things: On*
26 *the one hand, Congress plainly sought to curb the*
27 *dissemination of false information by adopting*
28 *procedures designed to decrease that risk. On the*
29 *other hand, Robins cannot satisfy the demands of*

1 Article III by alleging a bare procedural violation. A
2 violation of one of the FCRA's procedural requirements
3 may result in no harm. For example, even if a consumer
4 reporting agency fails to provide the required notice
5 to a user of the agency's consumer information, that
6 information regardless may be entirely accurate. In
7 addition, not all inaccuracies cause harm or present
8 any material risk of harm. An example that comes
9 readily to mind is an incorrect zip code. It is
10 difficult to imagine how the dissemination of an
11 incorrect zip code, without more, could work any
12 concrete harm'."

13
14 And Mr. Richards continues: "Spokeo certainly made
15 standing doctrine stricter in general especially in 11:19
16 privacy cases, yet it was actually greeted with relief
17 by some advocates and academics among the US privacy
18 community. One of the great fears in the community was
19 there was a substantial risk the Supreme Court might
20 hold not only that Robins (the plaintiff) would lose, 11:20
21 but more broadly that standing doctrine might be
22 interpreted to substantially limit the ability of
23 Congress to authorise private rights of action to
24 remedy privacy wrongs."

25
26 That's the point I just made a few minutes ago.

27
28 "Because of this fear, several leading privacy law
29 scholars (including myself) filed an amicus curiae

1 *brief in the Supreme Court. Our brief did not take a*
2 *position on Mr. Robins' narrow dispute with Spokeo, but*
3 *addressed instead what we saw as the real threat to*
4 *privacy law that the case presented, the risk that*
5 *privacy causes of action might get limited through*
6 *standing doctrine across the board in ways analogous to*
7 *the way the Supreme Court recently read the Privacy Act*
8 *'actual damages' requirement so narrowly in Cooper. In*
9 *our brief, we argued that the Federal Fair Credit*
10 *Reporting Act's procedures were important to the*
11 *integrity of the consumer credit system, and that more*
12 *generally, the private rights of action in the FCRA and*
13 *other statutes were an important part of protecting*
14 *consumers and their information. I can recall teaching*
15 *privacy law while the case was pending last year, and*
16 *having to repeatedly tell my students that significant*
17 *chunks of the course material might be rendered*
18 *unconstitutional if the Court accepted all of Spokeo's*
19 *arguments in that case. As a result, when the Supreme*
20 *Court returned only a modest judgment for Spokeo, many*
21 *privacy scholars were pleased that the Supreme Court*
22 *had not gutted (figuratively speaking) US privacy law.*
23 *But the case shows how close the Supreme Court could*
24 *have come to placing even more substantial obstacles in*
25 *the path of plaintiffs seeking redress for nonpecuniary*
26 *privacy harms under American law. And the fact that*
27 *even a further, modest tightening of standing rules for*
28 *privacy plaintiffs was considered something of a*
29 *victory shows how substantial an obstacle standing*

1 really is to plaintiffs under US law.

2
3 89. Perhaps because it did not originate in the
4 national security context, I note that the other expert
5 reports in this case have not really addressed Spokeo.
6 (I believe that neither the Swire nor Vladeck reports
7 even cite the case, for example). However, because
8 standing doctrine applies to every lawsuit brought
9 before a federal court, the Court's tightening of
10 standing doctrine in Spokeo to make the concreteness
11 requirement stricter and to forbid Congress authorizing
12 'bare procedural violations' through private rights of
13 action represents a higher obstacle for US privacy
14 plaintiffs in general, whether they seek redress
15 against companies, the government or both." 11:22

16
17 He then asks at paragraph 90: "where do these
18 developments in standing law leave privacy litigation
19 in the United States? As explained previously the
20 classic definition of injury in fact under American 11:22
21 standing doctrine is that an injury must be both (1)
22 'concrete and particularized' as well as (2) 'actual
23 and imminent, not conjectural and hypothetical'. The
24 two most recent Supreme Court privacy standing cases
25 make each of these requirements more difficult for 11:22
26 claimants to satisfy. In Clapper, the Court tightened
27 up the 'actual and imminent' prong in a surveillance
28 case in which there may have been an injury to
29 fundamental civil liberties, but the government was not

1 required to tell, while in Spokeo, the Court tightened
2 up the 'concrete and particularized' prong in a data
3 protection case involving the processing of personal
4 data, which rejected 'procedural violations' as being
5 adequate to support a remedy in the absence of
6 demonstrable injury. As noted, Spokeo also seems to
7 reject Congress's ability to authorize private rights
8 of action that remedy a 'bare procedural violation' of
9 privacy or data protection standards. From this
10 perspective, the DPC's conclusion that standing
11 doctrine represents a general obstacle to data
12 protection claims brought by EU citizens seems
13 eminently correct."

14
15 And he then refers to the draft opinion where he 11:23
16 continues: "As I understand it the Schrems 1 court
17 seems to allow a substantially lower threshold for a
18 remediable injury than US standing doctrine does."

19
20 He then refers to the DPC draft opinion at 30 quoting 11:23
21 Schrems at 87. And 87, I'll come back to it later, the
22 court in Schrems said that to establish interference
23 with the right it didn't matter if the person had
24 suffered any adverse consequence.

25 11:23
26 He proceeds then, Judge, at paragraph 91:

27
28 "91. The Vladeck Report acknowledges that the Clapper
29 decision is substantively unsatisfying, but it suggests

1 that the DPC Draft opinion 'errs' in concluding that
2 'US law thereby requires a claimant to demonstrate that
3 a harm has in fact been suffered as a result of the
4 interference alleged'."

5
6 And he quotes that: "I do not think agree with this
7 critique. In my opinion the DPC draft opinion
8 correctly states this basic principle of standing law -
9 that the Constitution requires each federal court
10 plaintiff to demonstrate that an injury in fact (harm)
11 has been suffered that was caused by the defendant and
12 which can be redressed by a favourable decision of the
13 court. Moreover, in the case of a privacy violation,
14 the Spokeo decision makes clear that not all regulatory
15 'harms' will satisfy the constitutional minimum.
16 Spokeo requires that injuries must be concrete, which
17 in that case meant more than a 'bare procedural
18 violation'.

19
20 92. The Vladeck Report also cites a number of lower
21 court cases subsequent to Spokeo to suggest that
22 '[g]iven how much more is publicly known today about
23 U.S. government surveillance authorities - especially
24 Section 702 of FISA - it seems far more likely that an
25 EU citizen could demonstrate a 'substantial risk' that
26 his communications will be unlawfully collected by the
27 U.S. government today than it would have appeared to
28 the Supreme Court in Clapper'. I sincerely hope that
29 he is correct about this, but this conclusion is merely

1 *speculative. Those cases are in any event factually*
2 *distinguishable, and of course are not binding on the*
3 *Supreme Court.*

4
5 93. *The Vladeck Report notes further on this point*
6 *that some lower court cases have rejected challenges to*
7 *standing, but concludes that 'As these cases*
8 *illustrate, there is significant uncertainty in the*
9 *lower courts over exactly when Clapper does and does*
10 *not foreclose standing, and I do not mean to suggest*
11 *otherwise. The critical point for present purposes is*
12 *that this uncertainty is not nearly as categorically*
13 *hostile to standing as suggested in the DPC Draft*
14 *Decision, and instead is more reflective of the*
15 *case-specific vagaries of individual lawsuits. Thus,*
16 *based on the cases surveyed above, it is my view that,*
17 *where EU citizens can marshal plausible grounds from*
18 *which it is reasonable to believe that the U.S.*
19 *government has collected, will collect, and/or is*
20 *maintaining, records relating to them in a government*
21 *database, they will likely have standing to sue even in*
22 *light of the Supreme Court's **Clapper** decision."*

23
24 And that phrase there, you will recall Ms. Gorski
25 referred to it on Friday, Judge, "*plausible grounds*".

11:26

26
27 He then references that and he continues:

28
29 "*I would agree that there is great uncertainty on this*

1 point in the US Courts, but my reading of the DPC Draft
2 Decision is slightly different. I understand the DPC
3 to have concluded that standing law is a general
4 obstacle to EU citizens bringing suit, and that '[o]n
5 their terms, I consider that these requirements appear
6 to be incompatible with EU law in circumstances where,
7 as a matter of EU law, it is not necessary to
8 demonstrate an adverse consequence as a result of an
9 interference with Articles 7 and 8 of the Charter in
10 order to secure redress of a violation of the said
11 Articles'. In my opinion, the DPC is correct that
12 standing is a general obstacle to all litigants, and
13 particularly correct that American standing doctrine's
14 injury in fact requirement always requires the
15 demonstration of actual injury, particularly since
16 Spokeo's strengthening of the concreteness requirement
17 eliminates the possibility that 'bare procedural
18 violations' can produce the requisite level of
19 constitutional injury.

11:27

20
21 94. On the subject of lower-court cases, the Gorski
22 report notes the ACLU's litigation representing a group
23 of human rights and educational groups (including
24 Wikimedia, which runs the Wikipedia online
25 encyclopedia) challenging Section 702 'Upstream'
26 surveillance, and how that case was dismissed in
27 district court under the Supreme Court decision in
28 Clapper. I should note that I joined a brief with
29 other First Amendment Law Professors seeking to have

1 *the dismissal overturned on appeal. I agree with Ms.*
2 *Gorski both in the hope that this ruling will be*
3 *reversed on appeal, and that (in her words) 'the*
4 *district court's opinion illustrates the difficulties*
5 *that plaintiffs face in establishing standing, even at*
6 *the outset of a case, when a plaintiff's allegations*
7 *must merely be plausible'. I would amplify this point*
8 *by noting that if these difficulties are substantial*
9 *for one of the world's most popular websites*
10 *represented by the most famous civil liberties group in*
11 *the world, they would likely be even more pronounced*
12 *for ordinary EU citizens.*

13
14 95. *The Vladeck Report also takes issue with the*
15 *Serwin Memorandum's discussion of Rule 11. As the*
16 *Vladeck Report explains, Rule 11 is a requirement in*
17 *all civil litigation before federal courts requiring*
18 *essentially that litigants filing motions before the*
19 *court are not engaged in frivolous or vexatious*
20 *litigation. I do not see a material difference between*
21 *the Vladeck Report and the Serwin Memorandum on this*
22 *point. The DPC Draft Decision does conclude with the*
23 *statement that '[t]aken with the analysis adopted by*
24 *the Court in Clapper in connection with the making of*
25 *'speculative' claims regarding alleged violations of*
26 *data privacy rights, the Federal Rules of Procedure*
27 *would appear to preclude the bringing of precisely the*
28 *kind of complaint now before me'. Professor Vladeck is*
29 *correct that Rule 11 does not preclude claims, but*

1 *rather authorizes sanctions on the abuse of process.*
2 *Insofar as the statement in the DPC's Draft Decision*
3 *might be interpreted in isolation as suggesting that*
4 *Rule 11 would preclude bringing a speculative claim*
5 *identical to the one rejected in Clapper, such an*
6 *interpretation of US law would not be correct.*
7 *However, I do not believe that this is the best way to*
8 *read the DPC Draft Decision's interpretation of US law.*
9 *On the contrary, when one reads paragraph 56 of the*
10 *Draft Opinion in connection with the preceding 55, the*
11 *DPC's conclusion seems to be different and correct as a*
12 *matter of US law. Under this reading, substantive*
13 *standing doctrine can operate to bar speculative claims*
14 *alleging unlawful surveillance. On balance, I think*
15 *that this latter reading is a more faithful reading of*
16 *the DPC Draft Decision. Moreover, I could envision*
17 *that a claim that is more 'speculative' than Clapper*
18 *could not only be barred by the developments in the*
19 *recent privacy law standing cases, but could also run*
20 *the risk of Rule 11 sanctions as well. In any event,*
21 *even if this statement by the DPC could fairly be said*
22 *to be erroneous, it would be at most a misreading of*
23 *Serwin that I do not see as undermining the DPC's*
24 *overall US law argument.*

11:29

25
26 *The Swire report - he continues at paragraph 96 - also*
27 *considers the issue of standing. Professor Swire*
28 *agrees with the DPC's conclusion to the extent that*
29 *standing is a generally-applicable requirement for all*

1 litigants in federal court, but notes that Clapper
2 'should not, however, be read to create a per se ban on
3 cases involving US foreign intelligence or
4 counterterrorism programs' citing lower court cases
5 that have found litigants with standing to challenge
6 other surveillance programmes."

7
8 Citing ACLU -v- Clapper.

9
10 Finding, he says, that: "Standing existed to challenge 11:30
11 section 215 metadata programme where the bulk
12 collection necessarily included plaintiffs' phone
13 records."

14
15 Then he refers to Klayman -v- Obama and Shearson -v- 11:30
16 Holder which he observes: "Holding that individual had
17 standing to challenge her suspected placement on the
18 terrorist watch list, even though the court found 'it
19 is impossible for [her] to prove that her name remains
20 on that list', but where she had proven indicia of
21 being on the watch list. It is both correct and
22 encouraging that lower Courts after Clapper have
23 allowed civil liberties challenges to surveillance to
24 go forward. However, as I understand both the Swire
25 Report and the DPC Draft Opinion, there is no
26 disagreement that standing is an obstacle to relief,
27 particularly where there is no injury in fact. Under
28 EU law as I understand it, particularly as the CJEU
29 interpreted Article 47 in Schrems I, a stringent

1 requirement of injury in fact akin to that required by
2 the US Supreme Court in Clapper and Spokeo is not
3 always required. This could represent a bar to a
4 significant chunk of such claims by EU citizens that US
5 law would leave unredressed. This barrier seems
6 higher, as the Clapper court noted, in national
7 security cases. And it also would now have to satisfy
8 the more stringent 'concreteness' requirement for
9 injuries in fact after Spokeo. Thus, while standing
10 doctrine is not a complete bar to relief in
11 surveillance cases, it is still frequently a
12 substantial and frequently unsatisfying one. I agree
13 here with scholarly work by Professor Vladeck in which
14 he has argued that."

11:31

15
16 And the way he describes this I think is important,
17 Judge: "Perhaps the most important takeaway from
18 Clapper is the extent to which the Supreme Court's
19 Article III standing jurisprudence interposes
20 substantial obstacles to judicial review of secret
21 surveillance programmes (if not all secret government
22 conduct) on the merits."

11:31

23
24 And that Prof. Vladeck's comment and description,
25 substantial obstacle to judicial review of secret
26 surveillance programmes in an article that he has
27 published.

11:32

28
29 "Moreover, this is also how I read (and concur with)

1 the DPC Draft Decision's findings on US law - that
2 standing doctrine is a general obstacle to relief of
3 this sort that, while not necessarily fatal, is
4 nevertheless substantial and jurisdictional. In
5 conclusion regarding the potential remedies, it is my
6 opinion that EU citizens seeking legal relief to remedy
7 violations of their data protection and privacy rights
8 in the US face substantial obstacles at the specific
9 level of causes of action, and at the general levels of
10 standing doctrine and the practical difficulties in
11 learning about surveillance in the first place. The
12 other four experts on US law who have filed reports in
13 these Proceedings also take positions on this question.
14 The Swire Report is quite optimistic about the
15 availability of remedies in US legal proceedings. It
16 argues that the 'fragmentation' of US remedies is not a
17 vice but rather a virtue, and explains that there is a
18 lot of substance to US privacy law, contrary to the
19 belief of some foreign observers. The Swire report
20 offers five categories of remedies for privacy
21 violations under US law - (1) judicial remedies against
22 the government, (2) non-judicial remedies available
23 against US government surveillance, (3) individual
24 remedies against US companies, (4) privacy enforcement
25 and (5) standing.

11:33

26
27 99. I agree with the Swire Report that the US does
28 have real privacy law, and that there is a lot of it.
29 However, the fact that US privacy law is substantial is

1 not directly responsive, in my opinion, to the
2 questions I have been asked to address in this report,
3 such as the availability of judicial remedies to EU
4 citizens who wish to challenge unlawful data processing
5 by the US government once their data has been
6 transferred to the US. From the perspective of that
7 question, of the five categories of law described in
8 the Swire Report, only part of category (1) and
9 category (5) are relevant, as they are the only ones
10 that bear on legal redress against the United States
11 government for surveillance that violates EU
12 fundamental rights. With respect to category (2),
13 non-judicial remedies are by definition non-judicial.
14 Category (3) remedies against companies are not
15 remedies against the government. And privacy
16 enforcement under US state law, though it has been
17 overlooked by many until recently, does not provide
18 redress against the national government. As for
19 category (5), I have already explained at length above
20 why I believe that standing doctrine is a substantial
21 obstacle, and I will not repeat that discussion here.

22
23 100. This leaves category (1), which are 'US Civil
24 Judicial Remedies'. In this category, the Swire Report
25 includes some other remedies, such as those under the
26 'Umbrella Agreement', the Privacy Shield Ombudsperson
27 mechanism, standard contractual clauses, and Privacy
28 Shield alternative dispute resolution. I respectfully
29 disagree that these are judicial remedies, though I

1 address the potential and limitations of the
2 Ombudsperson mechanism in Part III, below. With
3 respect to Privacy Shield alternative dispute
4 resolution, which is separate from the Ombudsperson
5 mechanism, I do not see how a civil arbitration scheme
6 between a company and its customers could provide
7 relief for government privacy violations. Finally,
8 Litigation under the standard contractual clauses is a
9 judicial remedy, but I also do not see how it could
10 provide relief for government privacy violations.

11:34

11
12 101. The Swire Report also discusses under category
13 (1) 'US Criminal Judicial Remedies' brought by the US
14 Department of Justice against people (including
15 government officials) who violate ECPA, FISA, and the
16 Privacy Act. These criminal prosecutions could not of
17 course be brought by EU citizens, and although they
18 could certainly punish people who have violated federal
19 privacy law, to my mind this is not the same as the
20 redress of a violation of a fundamental right. The
21 Swire Report does discuss under category (1) the
22 Privacy Act/Judicial Redress Act, the Electronic
23 Communications Privacy Act, and FISA. I have already
24 discussed these causes of action and some of their
25 specific limitations above.

11:35

26
27 102. In contrast to the Swire Report, the Gorski and
28 Butler Reports are more pessimistic as to remedies.
29 The Butler Report explains that 'EU citizens whose

1 *personal data has been transferred to the U.S. have*
2 *limited remedies available where their claims arise*
3 *from access to, use of, or dissemination of their*
4 *private communications or other personal data. None of*
5 *these statutory remedies provide a means of redress for*
6 *bulk surveillance'. The Gorski report goes further,*
7 *concluding that 'U.. surveillance law is extremely*
8 *permissive, as the government claims broad authority to*
9 *acquire the communications and data of non-U.S. persons*
10 *located abroad. For the vast majority of individuals*
11 *subject to Section 702 and EO 12333 surveillance, there*
12 *has to date been no viable avenue to obtain meaningful*
13 *redress for the rights violations resulting from this*
14 *surveillance'. Indeed, earlier in her report, Ms.*
15 *Gorski explains that due to the obstacles facing*
16 *litigants, 'no civil lawsuit challenging Section 702 or*
17 *EO 12333 surveillance has ever produced a U.S. court*
18 *decision addressing the lawfulness of that*
19 *surveillance'.*

11:36

20
21 *103. In between these positions is the Vladeck Report,*
22 *which concedes some of the objections raised by the DPC*
23 *Draft Report, as well as some of those raised by the*
24 *Gorski Report, the Butler Report, and the Serwin*
25 *Memorandum - many of which I have already discussed in*
26 *this Report. At two points in his report, Professor*
27 *Vladeck notes that relief is problematic, but then*
28 *argues that it is not as problematic as the other*
29 *opinions on this question (with the exception of Prof.*

1 Swire) conclude. At paragraph 98 of his Report, he
2 states that 'although there are shortcomings in the
3 existing U.S. legal regime with regard to redress of
4 unlawful government data collection, I do not believe
5 that they are nearly as comprehensive - or that
6 standing is as categorical an obstacle - as the DPC
7 Draft Decision or the [Serwin] Memo suggest'. At
8 paragraph 103 of his Report, he concludes that in his
9 opinion the DPC Draft Decision's assessment of current
10 U.S. remedies for unlawful collection of EU citizens'
11 data from U.S. companies is significantly incomplete,
12 that its analysis of the obstacles posed by 'standing'
13 doctrine is substantially overstated.

14
15 104. It is my expert opinion that the DPC Draft
16 Decision does not significantly overstate the specific
17 or general difficulties faced by EU citizens seeking
18 relief for violations of their EU fundamental privacy
19 and data protection rights in US courts. For the
20 reasons given in this report, I thus respectfully
21 disagree with Professors Swire and Vladeck on this
22 point, and agree with the ultimate conclusions to the
23 contrary on this point reached by the Serwin
24 Memorandum, the Gorski Report, the Butler Report, and
25 the DPC Draft Decision."

11:37

26
27 He then proceeds, Judge, in the final section to
28 address the Privacy Shield framework. He says at
29 paragraph 105:

1 *"The Privacy Shield framework is a recently-negotiated*
2 *agreement designed to replace the Safe Harbour*
3 *Agreement invalidated by the CJEU in Schrems. After*
4 *negotiations between the government of the US, the*
5 *European Commission, and other interested parties, the*
6 *European Commission issued a decision on 12 July 2016*
7 *providing a derogation for adequate processing of*
8 *personal data pursuant to Article 25 for US companies*
9 *that satisfy the 'Privacy Shield' requirements and*
10 *follow its rules. Commission Implementing Decision of*
11 *12 July 2016, pursuant to Directive 95/46.*

12
13 *"Under the Privacy Shield framework" - he says on the*
14 *next paragraph: "Framework, as under the predecessor*
15 *Safe Harbour Agreement, US companies can self-certify*
16 *online to the Department of Commerce and publicly*
17 *commit to adhere to and comply with the Framework's*
18 *requirements.*

19
20 *107. The Privacy Shield Principles, like the*
21 *predecessor Safe Harbour principles, are derived from*
22 *Fair Information Practice Principles (FIPPs) common*
23 *throughout international privacy law.*

24
25 *108. The Recourse, Enforcement and Liability Principle*
26 *requires organizations under the Privacy Shield*
27 *Framework to provide recourse (including an effective*
28 *remedy) to the individuals whose data they hold under*
29 *the framework **in** cases of non-compliance with the other*

1 *principles. The Commission Implementing Decision*
2 *envisions seven different possible sources of recourse*
3 *for such individuals.*

4
5 *First, they can pursue cases of noncompliance directly*
6 *with the company that is self-certified to the Privacy*
7 *Shield Framework. Second, they can bring a complaint*
8 *to a company designated 'independent dispute resolution*
9 *body'. Third, they can bring their complaint to their*
10 *national Data Protection Authority. Fourth, they can*
11 *bring complaints to the US Department of Commerce.*
12 *Fifth, companies that self-certify to the Privacy*
13 *Shield Framework must also be subject to the Federal*
14 *Trade Commission's investigatory and enforcement*
15 *powers, including the ability to obtain consent decrees*
16 *in cases of alleged unfair and deceptive trade*
17 *practices. Sixth, there is the availability of binding*
18 *arbitration by a 'Privacy Shield Panel' of arbitrators*
19 *constituted under the Framework. Seventh, there is*
20 *always the possibility of individuals bringing legal*
21 *claims under US state law.*

22
23 *Based upon the seven possible avenues of redress*
24 *against Privacy Shield self-certifying companies, the*
25 *European Commission found in its implementing decision*
26 *that 'that the Principles issued by the U.S.*
27 *Department of Commerce as such ensure a level of*
28 *protection of personal data that is essentially*
29 *equivalent to the one guaranteed by the substantive*

1 *basic principles laid down in the Directive'.*
2 *Nevertheless, because the adequacy of Safe Harbor was*
3 *invalidated in Schrems on the basis of access to EU*
4 *personal data held in the US by the US government, the*
5 *Commission considered the state of US surveillance law*
6 *in light of the reforms that have been implemented in*
7 *the wake of the Snowden revelations. In negotiations*
8 *with the US government, the Commission received*
9 *detailed submissions from the US government about its*
10 *collection programmes and limitations. It also*
11 *received a commitment by the US government to create a*
12 *new 'Privacy Shield Ombudsperson', to be housed in the*
13 *Department of State.*

14
15 *111. The role of the Ombudsperson is set out in a*
16 *letter ('the Kerry Letter') from the US Secretary of*
17 *State to the European Commission, which was considered*
18 *by the Commission in its adequacy determinations for*
19 *the Privacy Shield. In the letter, Secretary of State*
20 *John Kerry designated Under Secretary of State*
21 *Catherine Novelli, the Under Secretary of States for*
22 *Economic Growth, Energy, and the Environment, to serve*
23 *as the Ombudsperson. He also stated that 'Under*
24 *Secretary Novelli is independent from the U.S.*
25 *intelligence community, and reports directly to me'.*
26 *The Kerry Letter sets out the Ombudsperson's mechanism*
27 *in a six-page Memorandum, which was attached to the*
28 *Letter as Annex A. This memorandum described the*
29 *Ombudsperson's role as follows:*

1 1. *The Privacy Shield Ombudsperson. The Senior*
2 *Coordinator will serve as the Privacy Shield*
3 *Ombudsperson and designate additional State Department*
4 *officials, as appropriate to assist in her performance*
5 *of the responsibilities detailed in this memorandum.*
6 *The Privacy Shield Ombudsperson will work closely with*
7 *appropriate officials from other departments and*
8 *agencies who are responsible for processing requests in*
9 *accordance with applicable United States law and*
10 *policy. The Ombudsperson is independent from the*
11 *Intelligence Community. The Ombudsperson reports*
12 *directly to the Secretary of State who will ensure that*
13 *the Ombudsperson carries out its function objectively*
14 *and free from improper influence that is liable to have*
15 *an effect on the response to be provided.*

16
17 2. *Effective Coordination. The Privacy Shield*
18 *Ombudsperson will be able to effectively use and*
19 *coordinate with the oversight bodies, described below,*
20 *in order to ensure that the Ombudsperson's response to*
21 *requests from the submitting EU individual complaint*
22 *handling body is based on the necessary information.*
23 *When the request relates to the compatibility of*
24 *surveillance with U.S. law, the Privacy Shield*
25 *Ombudsperson will be able to cooperate with one of the*
26 *independent oversight bodies with investigatory powers.*

27
28 A. *The Privacy Shield Ombudsperson will work closely*
29 *with other United States Government officials,*

1 *including appropriate independent oversight bodies, to*
2 *ensure that completed requests are processed and*
3 *resolved in accordance with applicable laws and*
4 *policies. In particular, the Privacy Shield*
5 *Ombudsperson will be able to coordinate closely with*
6 *the Office of the Director of National Intelligence,*
7 *the Department of Justice, and other departments and*
8 *agencies involved in United States national security as*
9 *appropriate, and Inspectors General, Freedom of*
10 *Information Act Officers, and Civil Liberties and*
11 *Privacy Officers.*

12
13 *B. The United States Government will rely on*
14 *mechanisms for coordinating and overseeing national*
15 *security matters across departments and agencies to*
16 *help ensure that the Privacy Shield Ombudsperson is*
17 *able to respond within the meaning of Section 4(e) to*
18 *completed requests.*

19
20 *C. The Privacy Shield Ombudsperson may refer matters*
21 *related to requests to the Privacy and Civil Liberties*
22 *Oversight Board for its consideration.*

23
24 *The Kerry Letter also provides a mechanism by which EU*
25 *citizens can submit requests to the Ombudsperson via*
26 *their National Data Protection Authorities, and through*
27 *the DPAs to an 'EU Individual Complaint Handling Body'*
28 *that will verify and standardize requests to the*
29 *Ombudsperson. Notably, in a departure from the*

1 *standing requirements that apply to private litigants*
2 *in US federal courts, the Kerry Letter provides that*
3 *'To be completed for purposes of further handling by*
4 *the Privacy Shield Ombudsperson under this memorandum,*
5 *the request need not demonstrate that the requester's*
6 *data has in fact been accessed by the United States*
7 *Government through signal intelligence activities'.*
8 *The Kerry Letter also provides a procedure for the*
9 *Ombudsperson's investigation. The Ombudsperson is*
10 *required to acknowledge receipt of the request to the*
11 *'EU Individual Complaint Handling Body', and conduct an*
12 *initial review to ensure completeness of the request*
13 *and see if more information is needed from the 'EU*
14 *Individual Complaint Handling Body', including having*
15 *it contact the complaining individual.*

16
17 *The Kerry Letter then provides three additional*
18 *requirements: Once a request has been completed as*
19 *described in Section 3 of this Memorandum, the Privacy*
20 *Shield Ombudsperson will provide in a timely manner an*
21 *appropriate response to the submitting EU individual*
22 *complaint handling body, subject to the continuing*
23 *obligation to protect information under applicable laws*
24 *and policies. The Privacy Shield Ombudsperson will*
25 *provide a response to the submitting EU individual*
26 *complaint handling body confirming (i) that the*
27 *complaint has been properly investigated, and (ii) that*
28 *the U.S. law, statutes, executives [sic] orders,*
29 *presidential directives, and agency policies, providing*

1 the limitations and safeguards described in the ODNI
2 letter, have been complied with, or, in the event of
3 noncompliance, such noncompliance has been remedied.
4 The Privacy Shield Ombudsperson will neither confirm
5 nor deny whether the individual has been the target of
6 surveillance nor will the Privacy Shield Ombudsperson
7 confirm the specific remedy that was applied. As
8 further explained in Section 5, FOIA requests will be
9 processed as provided under that statute and applicable
10 regulations.

11
12 F. The Privacy Shield Ombudsperson will communicate
13 directly with the EU individual complaint handling
14 body, who will in turn be responsible for communicating
15 with the individual submitting the request. If direct
16 communications are part of one of the underlying
17 processes described below, then those communications
18 will take place in accordance with existing procedures.

19
20 G. Commitments in this Memorandum will not apply to
21 general claims that the EU-U.S. Privacy Shield is
22 inconsistent with European Union data protection
23 requirements. The commitments in this Memorandum are
24 made based on the common understanding by the European
25 Commission and the U.S. government that given the scope
26 of commitments under this mechanism, there may be
27 resource constraints that arise, including with respect
28 to Freedom of Information Act (FOIA) requests. Should
29 the carrying-out of the Privacy Shield Ombudsperson's

1 *functions exceed reasonable resource constraints and*
2 *impede the fulfillment of these commitments, the U.S.*
3 *government will discuss with the European Commission*
4 *any adjustments that may be appropriate to address the*
5 *situation'.*

6
7 116. *Finally, the Privacy Shield Ombudsperson*
8 *procedures outlined in the Kerry Letter provide that 'A*
9 *request alleging violation of law or other misconduct*
10 *will be referred to the appropriate United States*
11 *Government body, including independent oversight*
12 *bodies, with the power to investigate the respective*
13 *request and address non-compliance'. This envisions*
14 *the involvement of two kinds of oversight officials:*
15 *(1) 'Inspectors General'. US agency officials whose*
16 *job it is to conduct internal investigations, audits,*
17 *and review, and also to recommend 'corrective action'*
18 *and (2) Privacy and Civil Liberties officers and*
19 *oversight boards.*

20
21 *Based upon its review of the procedures and commitments*
22 *outlined in the Kerry Letter, the European Commission*
23 *determined that 'the US ensures effective legal*
24 *protection against interferences by its intelligence*
25 *authorities with the fundamental rights of the persons*
26 *whose data are transferred from the Union to the United*
27 *States under the EU-U.S. Privacy Shield'. It also*
28 *determined that the objection of the CJEU in Schrems I*
29 *regarding effective remedies under Article 47 of the*

1 European Charter. It determined that this objection
2 had been satisfied, based upon a combination of both
3 the current remedies available under US law to EU
4 citizens and the new Ombudsperson mechanism, which it
5 deemed to provide 'for independent oversight with
6 investigatory powers'.
7

8 118. The European Commission proceeded from these
9 determinations to conclude that the Privacy Shield
10 provided an adequate level of legal protection under
11 Article 25.
12

13 119. I have been asked to consider 'The nature and
14 extent of the remedy (or remedies) that an EU citizen
15 may access in the US in the particular context at hand
16 in the light of the adoption of the Privacy Shield
17 mechanism'. Before I do this, I must make three
18 initial caveats. First, while the privacy principles
19 and redress mechanisms against private companies seem
20 stronger under Privacy Shield than under Safe Harbour,
21 I offer no firm opinion on this point because it seems
22 largely irrelevant to the question that produced the
23 judgment in Schrems I, law enforcement and intelligence
24 services access to EU personal data transferred to the
25 US.
26

27 Second, consistent with my instructions in this case
28 and my own expertise in US rather than EU privacy law,
29 I offer no determination about the correctness or not

1 of the European Commission's determination of Privacy
2 Shield's legal adequacy under the Directive. Third,
3 since the Ombudsperson mechanism is new and the Privacy
4 Shield Framework is still being built up, it is
5 difficult to draw any firm conclusions about how useful
6 the mechanism will be in practice. Any analysis at
7 this stage by anyone with knowledge of the mechanism
8 will be speculative by its very nature.

9
10 120. In my opinion, the Privacy Shield Ombudsperson
11 mechanism offers a potential opportunity for relief for
12 EU citizens who are concerned that their data
13 protection rights are not being observed through the
14 Privacy Shield enabled transfers of their data to the
15 US. The mechanism offers an opportunity to have a
16 government official investigate claims, and that
17 official seems to have access to a number of internal
18 investigators and civil liberties lawyers and
19 professionals within the US government intelligence
20 bureaucracies. By providing that a complaint can be
21 investigated without the complainant proving that their
22 data has been accessed by the US government, the
23 mechanism potentially side-steps the obstacle of
24 'injury in fact' that makes a litigation remedy in
25 federal court so difficult to achieve for many privacy
26 plaintiffs. The Ombudsperson is also, by reporting to
27 the Secretary of State, nominally independent from the
28 US intelligence apparatus. I note that both the Gorski
29 Report and the Robertson Report disagree with this

1 assertion on the grounds that the Department of State
2 is entangled in the US intelligence community.

3
4 121. Nevertheless, there are several features about
5 the Ombudsperson mechanism that strike me as very
6 different from a judicial remedy. First, the
7 Ombudsperson is not a disinterested judge, but a
8 political appointee who appears to serve at the
9 pleasure of another very senior political appointee,
10 the US Secretary of State. Second, even in cases in
11 which the Ombudsperson's investigation discovers a
12 violation, she has no formal power to order it to be
13 fixed. Third, even when a violation is discovered and
14 fixed internally, the Ombudsperson cannot tell the EU
15 citizen complainant whether or not they were a target
16 of unlawful surveillance or what if any problems were
17 fixed. Fourth, the Ombudsperson does not tell an EU
18 citizen complainant anything, as her role is insulated
19 from the complainant by two levels of DPA bureaucracy
20 at the European and national levels. And fifth, any
21 response given to the 'EU Individual Complaint Handling
22 Body' appears to be qualified both by being an
23 'appropriate response' and by remaining 'subject to the
24 continuing obligation to protect information under
25 applicable laws and policies'. These would seem to be
26 bureaucratic refuges that could be used to do very
27 little.

28
29 122. The Swire Report expresses optimism that the

1 *Privacy Ombudsperson mechanism envisioned by the*
2 *Privacy Shield Framework could represent an alternative*
3 *form of relief to EU citizens. The Swire Report makes*
4 *reference to the Ombudsperson mechanism in Chapter 7,*
5 *but I do not see anything in this report that causes me*
6 *to decide that the Ombudsperson mechanism solves the*
7 *difficulties faced by EU citizens who might desire a*
8 *legal remedy for privacy violations.*

9
10 *123. In connection with this debate about the*
11 *effectiveness of Ombuds mechanisms, I note that the*
12 *Robertson Report."*

13
14 I'm going to pass from that, Judge, as you know, Judge,
15 there is an issue around the admissibility of that
16 report.

11:50

17
18 Paragraph 124: *"In sum, while I believe that the*
19 *Privacy Ombudsperson mechanism has the potential to be*
20 *a useful reform, it looks to me far more like a*
21 *complaint resolution scheme than something approaching*
22 *a judicial remedy, at least as that notion is*
23 *understood within the US system with which I am expert.*
24 *This is not to denigrate the mechanism, which I see as*
25 *both a reform and an improvement, but the Privacy*
26 *Shield, in my mind, does not substantially change the*
27 *legal remedies available to EU citizens, at least not*
28 *in the way that legal remedies are typically understood*
29 *in the United States. I note that the Gorski report is*

1 *substantially in agreement with that interpretation.*

2
3 *125. In sum, it is my opinion that there is not only*
4 *substantial evidence to support the conclusions of the*
5 *DPC Draft Decision and the Serwin Memorandum that EU*
6 *citizens lack meaningful avenues of legal relief to*
7 *remedy violations of their data protection and privacy*
8 *rights in the US, but that I believe these conclusions*
9 *are correct interpretations of the state of US law at*
10 *present. US privacy remedies are indeed fragmentary*
11 *and suffer from individual deficiencies, as well as*
12 *having to surmount the general obstacle of standing*
13 *doctrine, which appears to be becoming more stringent,*
14 *especially in privacy cases. In addition, having*
15 *reviewed the Privacy Shield framework, particularly the*
16 *new Privacy Ombudsperson mechanism, I do not find that*
17 *this program provides a legal remedy that changes my*
18 *conclusion."*

19
20 So, Judge, what I'm going to do now, and I hope I can 11:51
21 do it relatively briefly, is try to gather together
22 some of the comments that were made by Mr. Collins last
23 week while he was opening the material and to relate
24 them to the evidence that you have seen in the legal
25 authorities. You are aware that we have delivered 11:51
26 written legal submissions, as of course have all of the
27 parties, and I'm going to refer to aspects of those.

28
29 But I am, Judge, going to ask you in the first

1 instance - sorry, Judge, I seem to have mislaid my
2 note - I'm going to ask you in the first instance to
3 look at the Schrems case. Again I know this was opened
4 to you by Mr. Collins and you'll find it.

5 **MS. JUSTICE COSTELLO:** which book is it in again? 11:52

6 **MR. MURRAY:** Yes, it's in Book 3.

7 **MS. JUSTICE COSTELLO:** Now is this of the trial books
8 or the authorities?

9 **MR. MURRAY:** Book 3 of the agreed authorities.

10 **MS. JUSTICE COSTELLO:** Thank you. 11:52

11 **MR. MURRAY:** And you'll find it at Tab 36A.

12 **MS. JUSTICE COSTELLO:** Yes, thank you.

13 **MR. MURRAY:** Just a number of aspects of this which
14 I would like to relate back to what you now see in the
15 material before the court. 11:53

16
17 If I can ask you first to turn to paragraph 63, page
18 20, and here we come back to just, I have mentioned
19 this a number of times so I'll pass from it, I hope,
20 briefly, but here we come back to how it is you, Judge, 11:53
21 are hearing this application and what is the standard
22 that you are to bring to bear on the request by the
23 Commissioner for a reference. At paragraph 63 the
24 court said this, he said:

25
26 *"63. where a person whose personal data has been or*
27 *could be transferred to a third country which has been*
28 *the subject of Commission decision pursuant to Article*
29 *25(6) lodges with the national supervisory authority a*

1 *claim concerning the protection of his rights and*
2 *freedoms in regard to the processing of that data and*
3 *contests, in bringing that claim, as in the main*
4 *proceedings, the compatibility of that decision with*
5 *the protection of the privacy and of the fundamental* 11:54
6 *rights and freedoms of individuals, it is incumbent on*
7 *the national supervisory authority - that's the*
8 *Commission of course - to examine the claim with all*
9 *due diligence.*

10
11 64. *In a situation where the national supervisory*
12 *authority comes to the conclusion that the arguments*
13 *put forward in support of such a claim are unfounded -*
14 *that it's not invalid - and therefore rejects it, the*
15 *person who lodged the claim must, as is apparent from* 11:54
16 *the second subparagraph Article 28(3) of the Directive,*
17 *read in the light of Article 47, have access to*
18 *judicial remedies enabling him to challenge such a*
19 *decision adversely affecting him before the national*
20 *courts. Having regard to the case-law cited in* 11:54
21 *paragraphs 61 and 62 of the present of the present*
22 *judgment, those courts must stay proceedings and make a*
23 *reference to the Court of Justice for a preliminary*
24 *ruling on validity where they consider that one or more*
25 *grounds for invalidity put forward by the parties or,* 11:55
26 *as the case may be, raised by them of their own motion*
27 *are well founded."*

28
29 So if the national supervisory authority rejects the

1 claim of invalidity, you have an entitlement to go for
2 a judicial remedy in accordance with Article 47. And
3 the court then, if it decides that the grounds for
4 invalidity are well founded, the Commissioner having
5 founded that they are not, then it must proceed to make 11:55
6 a reference. And it can do that of its own motion, and
7 I'll come back to that in a moment.

8
9 *"In the converse situation", at paragraph 65: "where*
10 *the national supervisory authority considers that the* 11:55
11 *objections advanced by the person who has lodged with*
12 *it a claim concerning the protection of his rights and*
13 *freedoms in regard to the processing of his personal*
14 *data are well founded - which is the situation here -*
15 *that authority must, in accordance with the third* 11:55
16 *indent in the first subparagraph of Article 28(3), be*
17 *able to engage in legal proceedings. It is incumbent*
18 *on the national legislature to provide for legal*
19 *remedies enabling the national supervisory authority*
20 *concerned to put forward the objections which it* 11:56
21 *considers well founded before the national courts in*
22 *order for them, if they share its doubts as to the*
23 *validity of the Commission decision, make a reference."*

24
25 Now it seems to us, you could read that perhaps one of 11:56
26 two ways. I can submit the correct way is that it
27 reflects a deference to the view of the national
28 supervisory authority. If it has come to or formed the
29 opinion that the objection is well founded, then the

1 court, if it shares that doubt, then proceeds to refer.
2 And slightly different language is used, the court
3 itself must be satisfied that the complaint is well
4 founded where the national supervisory authority has
5 rejected it. It may be a distinction without a
6 difference. 11:57

7
8 In this case in our respectful submission, whether you
9 look for a doubt or seek to have the complaint
10 identified or ascertained that it is well founded, that 11:57
11 burden is met.

12
13 Just to, I suppose, re-emphasise some points that we
14 make in our written submission. The manner in which
15 those paragraphs are framed of course reflects the role 11:57
16 of the Court of Justice in determining and being best
17 positioned to rule on the validity of Union acts. The
18 court should not apply an unduly stringent test before
19 deciding whether the court should be called upon to
20 determine an issue of validity where a matter comes 11:57
21 before it in the way envisaged in those paragraphs.

22
23 Secondly, the plaintiff is the national supervisory
24 authority, given the functions that she has under the
25 legislation and indeed in European law, in our 11:58
26 respectful submission the court should afford some
27 deference to the view that she has formulated.

28
29 And, thirdly, in making your decision as to whether the

1 evidence discloses a basis for a reference having
2 regard to the applicable legal principles, you should
3 in our respectful submission have regard to the
4 overriding objective of the Directive, which of course
5 is to ensure a high level of protection for privacy 11:58
6 rights with respect to the processing of personal data.
7 And you should exercise that power bearing in mind and
8 guided by the principles of effectiveness and the
9 obligation to ensure sufficient remedies to give effect
10 to those legal rights. 11:59

11
12 And just while on that, there is a point that's made by
13 Mr. Schrems where he suggests that he hasn't actually
14 made a complaint that the SCCs are invalid. I think
15 Mr. Collins referred to this in our submission when the 11:59
16 court looks to the complaint that was in fact made by
17 him. We find it difficult to see how he can say that
18 he wasn't attacking the validity of the SCCs in
19 substance if not in form. In fact in his own
20 submissions to this court, paragraph 9, he accepts that 11:59
21 one of his complaints was that Facebook could not rely
22 on the SCCs due to the inadequacy of protections
23 afforded to him under US surveillance law. So he
24 himself prayed in aid the underlying or the objection
25 that underlies the Commissioner's concern. 12:00

26
27 But whether he did or didn't in our respectful
28 submission is neither here nor there. The Commissioner
29 must have the power of her own motion, as the court

1 acknowledges the court has the power of its own motion,
2 that if she feels, in the course of determining the
3 complaint, that this issue has presented itself as to
4 the validity of the SCCs and that she has a
5 well-founded concern as to their validity she must have 12:00
6 the entitlement to proceed to court, as she has done
7 here, whether or not a complaint in those terms was
8 made. And I don't believe there is anything in the
9 judgment that would displace that entitlement, Judge.

10 **MS. JUSTICE COSTELLO:** well you are not saying she 12:00
11 could do it for a moot?

12 **MR. MURRAY:** No, absolutely not. But clearly in
13 circumstances where Mr. Schrems himself, as I said he
14 acknowledges in paragraph 9, was complaining or one of
15 the complaints he made was that Facebook couldn't rely 12:00
16 on the SCCs due to the inadequacy of protections
17 afforded under US surveillance law, given that that was
18 part, as it were, of the matrix that the Commissioner
19 had to deal with, then it certainly was not a moot.

20 12:01
21 So the, I suppose, first point of relevance of the
22 decision is insofar as it defines and identifies the
23 nature of the court's jurisdiction and what it is the
24 court, as it were, is going to have to determine in
25 deciding whether to make a reference. 12:01

26
27 The second point, if I could ask you to go forward to
28 paragraph 73, where, dealing with the word "adequate"
29 in Article 25(6), the court said the following:

1
2 *"The word 'adequate' in Article 25(6) of Directive*
3 *95/46 admittedly signifies that a third country cannot*
4 *be required to ensure a level of protection identical*
5 *to that guaranteed in the EU legal order. However, as*
6 *the Advocate General has observed in point 141 of his*
7 *Opinion, the term 'adequate level of protection' must*
8 *be understood as requiring the third country in fact to*
9 *ensure, by reason of its domestic law or its*
10 *international commitments, a level of protection of*
11 *fundamental rights and freedoms that is essentially*
12 *equivalent to that guaranteed within the European Union*
13 *by virtue of Directive 95/46 read in the light of the*
14 *Charter. If there were no such requirement, the*
15 *objective referred to in the previous paragraph of the*
16 *present judgment would be disregarded. Furthermore,*
17 *the high level of protection guaranteed by Directive*
18 *95/46 read in the light of the Charter could easily be*
19 *circumvented by transfers of personal data from the*
20 *European Union to third countries for the purpose of*
21 *being processed in those countries."*

22
23 Judge, this is an important paragraph. Obviously it
24 confirms that the third country - in this case,
25 obviously, the United States - doesn't have to have
26 protections that are identical, but the manner in which
27 the court frames what it is the third country must have
28 is significant. First of all, the test is of essential
29 equivalence. But secondly, what it has to be

12:03

1 equivalent to is *not* the individual protections that
2 particular Member States have in fact implemented in
3 their domestic laws. The standard is *not* defined by
4 looking through the laws of Poland or France or the UK
5 and saying 'well, aha, the US law actually provides 12:04
6 *more* protection'. It is something quite different, and
7 deliberately so. What it is is essentially equivalent
8 to that guaranteed within the European Union, but by
9 virtue of the Directive, viewed -- sorry, read in the
10 light of the Charter. 12:04

11
12 This is the standard that is defined by the Charter as
13 interpreted by the court. And it is for that reason
14 that what you, Judge, are concerned with is the proper
15 meaning of Article 47, in this case as interpreted by 12:05
16 the court, not with what individual Member States may
17 or may not or should or should not have done in their
18 own laws.

19
20 And it is for that reason that we say that a large 12:05
21 amount of the evidence - and this is a central part of
22 the Facebook case, that no, we really should be looking
23 at the laws of the individual states and because we can
24 show that the laws of the individual states are in some
25 respect different or do not have the same level of 12:05
26 protection, as some of the evidence suggests, as the
27 US, well therefore, there is and can be no difficulty
28 with the SCCs.

29

1 And in that regard, Judge, we just think it's perhaps
2 important to observe this: The fact of the matter is
3 that for this reason, the laws of the Member States do,
4 in some respects, lag behind the law as defined by the
5 Court of Justice as the law evolves. This all began 12:06
6 when a Directive addressing data retention, which was
7 implemented, given effect to in all of the Member
8 States and then in the **Digital Rights** case the Court of
9 Justice declared the Directive to be invalid, resulting
10 in a situation where many Member States had implemented 12:06
11 laws which corresponded with the Directive which was
12 now invalid.

13
14 You'll see a dramatic example of that in **Watson**, the
15 decision of the Court of Justice of 21st December, 12:06
16 where many, I don't know if all, but certainly many
17 Member States had mandatory data retention laws as a
18 result of the Directive - which had been struck down in
19 **Digital Rights** - and they were indiscriminate retention
20 laws, effectively requiring telecommunications 12:07
21 companies and internet service providers to maintain
22 data for an identified period of time, irrespective.
23 And many states had such laws. But in **Watson**, the
24 Court of Justice declared those laws to be inconsistent
25 with the Charter because they were indiscriminate and 12:07
26 didn't distinguish between, or were not -- retention
27 didn't occur based on targeting, as it were.

28
29 So the focus, as it were, under that paragraph,

1 paragraph 73, is clearly, and deliberately so, that of
2 the Charter. And perhaps suggests that it would be
3 very strange were the position otherwise, because it is
4 the interpretation of the Charter by the court, not the
5 practice of Member States in how they go about 12:08
6 implementing their obligations or their perception of
7 it that is critical to the ultimate protection of the
8 rights in question.

9 **MS. JUSTICE COSTELLO:** When you say "by the court", do
10 you mean a national court or the CJEU? 12:08

11 **MR. MURRAY:** No, I mean the Court of Justice.
12 Now, if you continue, Judge, just to go through
13 paragraph 74:

14
15 *"It is clear", the court continues, "from the express*
16 *wording of Article 25(6) of Directive 95/46 that it is*
17 *the legal order of the third country covered by the*
18 *Commission decision that must ensure an adequate level*
19 *of protection. Even though the means to which that*
20 *third country has recourse, in this connection, for the*
21 *purpose of ensuring such a level of protection may*
22 *differ from those employed within the European Union in*
23 *order to ensure that the requirements stemming from*
24 *Directive 95/46 read in the light of the Charter are*
25 *complied with, those means must nevertheless prove, in*
26 *practice, effective in order to ensure protection*
27 *essentially equivalent to that guaranteed within the*
28 *[legal order]."*
29

1 And that latter part of that sentence defines part of
2 your inquiry; do the US laws prove in practice
3 effective to ensure protection that is essentially
4 equivalent to that guaranteed within the Union? And
5 here we are, as I've said, concerned specifically with 12:09
6 Article 47.

7
8 *"75. Accordingly, when examining the level of*
9 *protection afforded by a third country, the Commission*
10 *is obliged to assess the content of the applicable*
11 *rules in that country resulting from its domestic law*
12 *or international commitments and the practice designed*
13 *to ensure compliance with those rules, since it must,*
14 *under Article 25(2)... take account of all the*
15 *circumstances surrounding a transfer of personal data*
16 *to a third country."*

17
18 If you then turn, Judge, to paragraph 84, the
19 difficulties which presented themselves with safe
20 harbour, with which the court was obviously concerned, 12:10
21 were considered, or at least some of them were
22 addressed:

23
24 *"In addition, under the fourth paragraph of Annex I to*
25 *Decision 2000/520, the applicability of the safe*
26 *harbour principles may be limited, in particular, 'to*
27 *the extent necessary to meet national security, public*
28 *interest, or law enforcement requirements' and 'by*
29 *statute, government regulation, or case-law that create*

1 *conflicting obligations or explicit authorisations,*
2 *provided that, in exercising any such authorisation, an*
3 *organisation can demonstrate that its non-compliance*
4 *with the Principles is limited to the extent necessary*
5 *to meet the overriding legitimate interests...*

6
7 *85. In this connection, Decision 2000/520 states...*
8 *with regard to the limits to which the safe harbour*
9 *principles' applicability is subject, that, '[c]learly,*
10 *where US law imposes a conflicting obligation, US*
11 *organisations whether in the safe harbour or not must*
12 *comply with the law'.*

13
14 *86. Thus, Decision 2000/520 lays down that 'national*
15 *security, public interest, or law enforcement*
16 *requirements' have primacy over the safe harbour*
17 *principles, primacy pursuant to which self-certified*
18 *United States organisations receiving personal data*
19 *from the European Union are bound to disregard those*
20 *principles without limitation where they conflict with*
21 *those requirements and therefore prove incompatible*
22 *with them."*

23
24 They then say this:

25
26 *"In the light of the general nature of the derogation*
27 *set out in the fourth paragraph of Annex I to Decision*
28 *2000/520, that decision thus enables interference,*
29 *founded on national security and public interest*

1 *requirements or on domestic legislation of the United*
2 *States, with the fundamental rights of the persons*
3 *whose personal data is or could be transferred from the*
4 *European Union to the United States. To establish the*
5 *existence of an interference with the fundamental right*
6 *to respect for private life, it does not matter whether*
7 *the information in question relating to private life is*
8 *sensitive or whether the persons concerned have*
9 *suffered any adverse consequences on account of that*
10 *interference."*

11
12 And refers then to the **Digital Rights** case. And that
13 paragraph, I think, is referred to in a number of the
14 reports in the context of the definitions under EU law
15 for the purposes of the Charter of when there is an 12:11
16 interference with rights. And I think Mr. Collins
17 alluded to this; **Digital Rights**, of course, was a case
18 that came on a reference from the High Court here and
19 McKechnie J. made the reference. And there, Digital
20 Rights' standing to challenge the data regime operated 12:12
21 at the time the case was initiated and subsequently
22 changed was based on the fact that it was the owner of
23 a mobile telephone. The State challenged that as a
24 basis for locus standi and McKechnie J. held that no,
25 that indeed was sufficient in the context of the type 12:12
26 of alleged interferences which were being complained
27 of, that was sufficient to justify, or to grant locus
28 standi.
29

1 Now, if you move forward then, Judge, to paragraph 95,
2 the critical function of remedies is addressed by the
3 court. And what it says at the bottom of page 24,
4 paragraph 95, is this:

5
6 *"... legislation not providing for any possibility for*
7 *an individual to pursue legal remedies in order to have*
8 *access to personal data relating to him, or to obtain*
9 *the rectification or erasure of such data, does not*
10 *respect the essence of the fundamental right to*
11 *effective judicial protection, as enshrined in Article*
12 *47... The first paragraph of Article 47 of the Charter*
13 *requires everyone whose rights and freedoms guaranteed*
14 *by the law of the European Union are violated to have*
15 *the right to an effective remedy before a tribunal in*
16 *compliance with the conditions laid down in that*
17 *article. The very existence of effective judicial*
18 *review" - and it's judicial review - "designed to*
19 *ensure compliance with provisions of EU law is inherent*
20 *in the existence of the rule of law."*

21
22 Again that very short statement of principle disposes
23 of another aspect on which Facebook has adduced a very
24 large volume of evidence, which is the plethora of
25 *non-judicial* remedies upon which it relies by way of 12:14
26 context. I think Prof. Swire appears to have believed
27 himself or been instructed to prepare a record
28 effectively for the Court of Justice, in the event that
29 this case goes there, and his report addresses the

1 remedies afforded by Congressional Oversight
2 Committees, by the free press, by the availability of a
3 plethora of non-governmental organisations and so
4 forth. But while interesting, in our respectful
5 submission, none of that is in fact germane to the 12:15
6 specific question presented by the Commissioner's
7 concerns here and as referred to in this paragraph of
8 the ruling, which are directed exclusively to judicial
9 remedies.

10 **MS. JUSTICE COSTELLO:** So you're saying "tribunal" must 12:15
11 mean a court of some sense?

12 **MR. MURRAY:** Of some sense. And I will come
13 back in relation to that to just address you briefly on
14 the legal authorities regarding what that means. But
15 certainly we are talking about *judicial review*, not 12:15
16 necessarily a court as the Constitution of *this*
17 jurisdiction might prescribe it, but certainly judicial
18 review, not a Congressional Oversight Committee.

19
20 But it also, Judge, brings into focus again the point 12:15
21 arising from the earlier paragraphs I've opened to you
22 - the essence of the fundamental right to effective
23 judicial protection. Because certainly as one reads
24 this, the court is envisaging that the right to
25 judicial protection arising from Article 47 has an 12:16
26 essence and that essence cannot be derogated from and
27 in particular the essence is not respected by
28 legislation that doesn't provide for any possibility
29 for an individual to pursue legal remedies in order to

1 have access to personal data related to him or to
2 obtain rectification of the data. And that obviously
3 is where the operation and effect of US standing laws
4 comes into play - obviously there are judicial remedies
5 and they are addressed at some length in the various 12:17
6 reports.

7
8 But the question which concerns the Commissioner and
9 the critical issue presented by the reference is
10 whether the consequence of the restriction on those 12:17
11 various remedies, which I'll come back to shortly, is
12 in effect to mean that for EU residency, EU citizens
13 whose data is exported to the United States, where it
14 is liable to be accessed in accordance with the legal
15 regime that you've seen described, whether those 12:17
16 persons have, or have been deprived of, a possibility
17 to pursue legal remedies to have access to the various
18 reliefs that are envisaged and, we say, required by
19 European law.

20 12:17
21 Some of those themes are repeated in the Watson case
22 that I referred to, which is perhaps useful simply
23 because it is such a recent restatement of the law.
24 And I've explained to you a few moments ago how this
25 arose; it was a challenge to the retention regimes in 12:18
26 two jurisdictions, the UK and Sweden - there were two
27 references made. And I just want to draw your
28 attention to one paragraph in the Advocate General's
29 ruling --

1 **MS. JUSTICE COSTELLO:** Sorry, where do I find this
2 decision?

3 **MR. MURRAY:** I'm terribly sorry, Judge, it's
4 the next tab, tab 37(a). Sorry, it's not actually the
5 next tab, it's tab 37(a) 12:18

6 **MS. JUSTICE COSTELLO:** Thank you.

7 **MR. MURRAY:** If you turn to paragraph 132.

8 **MS. JUSTICE COSTELLO:** Now, the first one, is that the
9 Advocate General?

10 **MR. MURRAY:** That is the Advocate General's. 12:18

11 **MS. JUSTICE COSTELLO:** And 132?

12 **MR. MURRAY:** Yes, Judge.

13 **MS. JUSTICE COSTELLO:** Yes?

14 **MR. MURRAY:** I just want to draw your
15 attention to this paragraph, because it does summarise 12:19
16 the method of analysis which the court uses. In
17 paragraph 132 it says:

18

19 *"Together, these two provisions" - and it's referring*
20 *to particular provisions in the directives in question* 12:19
21 *- "establish six requirements that must be satisfied in*
22 *order for the interference caused by a general data*
23 *retention obligation to be justified:*

24 *- the retention obligation must have a legal basis;*
25 *- it must observe the essence of the rights enshrined*
26 *in the Charter;*
27 *- it must pursue an objective of general interest;*
28 *- it must be appropriate...;*
29 *- it must be necessary...;*

1 - *it must be proportionate...*"

2
3 And unsurprisingly and indeed as in Irish
4 constitutional law, what that envisages is that of
5 course you can have limitations and restrictions on 12:19
6 fundamental rights where those limitations and
7 restrictions are justified by a legitimate object of
8 protecting the rights of others or public order or
9 whatever, that restriction must be proportionate in,
10 bear a reasonable relationship to and go no further 12:20
11 than necessary to obtain that objective. But - *but* -
12 there is an essence of the right which *cannot* be
13 impaired. And that again reflects the analysis in
14 domestic constitutional law; the circumstances in which
15 people are precluded outright, for example, from ever 12:20
16 bringing a case in court are, if nothing, exceptional.

17
18 So that essence is part of the focus of the
19 Commissioner's application to the extent that, going
20 back to the comments that I've just opened to you in 12:21
21 **Digital Rights**, she contends that you are concerned
22 with whether there is, in the United States, a
23 protection of the essence of the Article 47 right - and
24 the various limitations in the remedies which she has
25 identified, in our submission, suggest not - but that 12:21
26 actually, issues of national security or other
27 exigencies of the public interest - the general
28 agreement on tariffs and trade or economic
29 considerations - are really not relevant insofar as the

1 court will be looking at this very narrow issue of
2 whether the essence of the right has been impaired.

3
4 So that it may well be the Court of Justice believes
5 the various and very considerable evidence that has 12:22
6 been adduced as to justifications for constraints on
7 judicial remedy are well placed or justify negating the
8 right, but certainly it's not apparent to us, on the
9 basis of the law, that that is so. And for that
10 reason, the Commissioner has not engaged in that 12:22
11 debate.

12
13 Can I ask you then to move to --

14 **MS. JUSTICE COSTELLO:** So you're saying I'm not
15 concerned with the justification -- 12:22

16 **MR. MURRAY:** Precisely.

17 **MS. JUSTICE COSTELLO:** -- for the laws in the United
18 States, I'm only concerned with the effect of the laws?

19 **MR. MURRAY:** If it is the case, if it *be* the
20 case that under United States law EU citizens whose 12:22
21 data is exported to the United States have no effective
22 legal remedy as envisaged by Article 47 in respect of
23 that interference with their data privacy rights, if
24 they have *no* effective remedy, then in our respectful
25 submission, those various issues of justification, the, 12:23
26 to use a very general term, public interest
27 considerations which Facebook say and their experts say
28 would justify never telling you that your data has been
29 accessed, not having delayed notification, having a

1 standing requirement which presents the significant
2 obstacles that it does, having a rule whereby the
3 Fourth Amendment and its freestanding claim for damages
4 relief is not available to EU citizens, having a rule
5 whereby the NSA or the CIA are exempted from 12:23
6 obligations imposed under the Privacy Act or the
7 Judicial -- sorry, more accurately, the Judicial
8 Redress Act, having those rules, if it is the case that
9 alone or in combination they mean that EU citizens do
10 not have an effective remedy as envisaged by Article 12:24
11 47, then yes, in our respectful submission, the court
12 is not concerned with those issues.

13
14 But again, what you are in fact being asked to do is to
15 accept, based on our evidence and submission, that our 12:24
16 concern that there is no such remedy is well founded or
17 that there is a doubt and to ask the Court of Justice
18 then, if it wishes to engage in this proportionality
19 analysis, to do so.

20 12:24
21 But Watson again is very interesting in that regard.
22 The decision in Watson went *beyond* the case that had
23 been argued by any of the parties before the court.
24 Because the parties before the court accepted that
25 there could be *general* retention regimes in particular 12:25
26 circumstances - the idea, as you'll be aware, that if
27 the police know that all telecommunications service
28 providers, all internet companies are mandatorily
29 retaining their data for a year or two years, well

1 then, if a situation presents itself where they have
2 to, for the purpose of a criminal investigation, track
3 somebody, see what their movements were, they will be
4 able to go and obtain that information.

5
6 And what the Court of Justice said was that no,
7 retention itself is an impairment of the privacy right
8 because - and I suppose this touches on another issue
9 which presents itself here - because, as it were, that
10 the possibility exists that someone can find out 12:25
11 matters such as your movements or who you've been
12 speaking to and that, therefore, there should only be
13 retention of persons who the State can establish are
14 persons of, to use the phrase, of interest or
15 particular areas or location where a crime may be about 12:26
16 to be committed.

17
18 If I can ask you to turn to paragraph 120 -- sorry, of
19 the court decision, which you'll find at tab (b). The
20 court addressed this issue of remedy. And at paragraph 12:26
21 120 it said this:

22
23 *"In order to ensure, in practice, that those*
24 *conditions"* - and after its consideration of the
25 various authorities on data privacy - *"are fully* 12:26
26 *respected, it is essential that access of the*
27 *competent national authorities to retained data"* --

28
29 So it's dealing here now, you know, on the assumption

1 that data is retained, when can it be accessed? And I
2 should say that it's my understanding that in the
3 United States, certainly I don't believe there's any
4 federal law that has mandatory retention. So you're
5 not concerned with retention. But here the court moves 12:27
6 on to access by the relevant authorities.

7
8 *"In order to ensure, in practice, that those conditions*
9 *are fully respected, it is essential that access of the*
10 *competent national authorities to retained data should,*
11 *as a general rule, except in cases of validly*
12 *established urgency, be subject to a prior review*
13 *carried out either by a court or by an independent*
14 *administrative body, and that the decision of that*
15 *court or body should be made following a reasoned*
16 *request by those authorities submitted, inter alia,*
17 *within the framework of procedures for the prevention,*
18 *detection or prosecution of crime."*

19
20 Then in the next paragraph they say this: 12:27

21
22 *"Likewise, the competent national authorities to whom*
23 *access to the retained data has been granted must*
24 *notify the persons affected, under the applicable*
25 *national procedures, as soon as that notification is no*
26 *longer liable to jeopardise the investigations being*
27 *undertaken by those authorities. That notification is,*
28 *in fact, necessary to enable the persons affected to*
29 *exercise, inter alia, their right to a legal remedy."*

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26
27
28
29

And --

MS. JUSTICE COSTELLO: So it could be two months or it could be 20 years?

MR. MURRAY: A delayed notification. But there must be a mandatory notification. Because clearly there will be circumstances in which, I don't think anyone would dispute, that contemporaneous notification could prejudice the purposes of access in the first place.

Now, can I suggest, Judge, just a number of conclusions that, in our respectful submission, the court should draw from that very short consideration of the cases: First, the court should, in our respectful submission, refer if it shares the Commissioner's doubts as to the validity of the SCCs; secondly, in making the decision as to validity, the key question, in our respectful submission, is whether US law provides protections that are essentially equivalent to those provided under the Charter; thirdly, essential equivalence mandates an effective remedy within the meaning of Article 47; fourthly, in considering that question - effective remedy - the issue is the protection afforded by the Charter, not by the law of individual Member States; fifth, the concern is with a remedy that is judicial, not an extrajudicial remedy; sixth, in making that assessment, the question is whether there's been an interference with the essence of the right under

1 Article 47 - matters of proportionality arise only if
2 that essence is protected; seventhly, European law
3 mandates a remedy which arises where there has been an
4 interference; and eight, as you've seen, it requires
5 notification on the conditions that you've just
6 identified, Judge.

12:30

7
8 So that is the context in which, in our respectful
9 submission, you will now come to address the US law.
10 And there are a number of issues that present
11 themselves in that regard. I've already referred
12 earlier this morning while looking at Prof. Richards'
13 report to the question of standing. The United States
14 Supreme Court has clearly and indisputably held that
15 lawyers, journalists, human rights activists who speak
16 to non-US clients about sensitive topics with people
17 the government considered suspicious do not have
18 standing to challenge section 702; even though they
19 reasonably believed their communications were being
20 monitored, the court held there was no standing because
21 the claim that their communications would be targeted
22 was speculative. And in our respectful submission,
23 that sets a bar which is beyond that which is
24 permissible under Article 47.

12:31

12:31

12:31

12:32

25
26 Judge, if I can ask you just to take out our written
27 submission. And the written submissions of the parties
28 are in book 12. And if I can ask you to go please to
29 paragraphs 85 and 86.

1 MS. JUSTICE COSTELLO: Sorry, you're at tab...

2 MR. MURRAY: It is tab three, Judge, yes.

3 MS. JUSTICE COSTELLO: Three. And 85 and 86?

4 MR. MURRAY: Yes.

5 MS. JUSTICE COSTELLO: Thank you, I have it. 12:32

6 MR. MURRAY: what we have done here, it's

7 just perhaps easier than going back through the cases,

8 is, in relation to standing, we explain in paragraph 85

9 the general position under EU law:

10

11 *"National rules of procedure must grant standing to*

12 *persons who fall within the scope ratione personae of a*

13 *directly effective provision of EU law... where*

14 *compliance with the principle of effective judicial*

15 *protection militates in favour of giving access to the*

16 *court to persons having an interest in the correct*

17 *application of an EU provision, those persons must*

18 *enjoy locus standi."*

19

20 And in the particular context of data protection then, 12:33

21 we observe the entitlement to institute proceedings as

22 being broad: All forms of processing may give rise to

23 an interference, including a retention obligation,

24 provision for the processing of data and access to

25 data, no adverse consequences are required. And we 12:33

26 quote from Schrems:

27

28 *"To establish the existence of an interference with the*

29 *fundamental right to respect for private life, it does*

1 *not matter whether the information in question relating*
2 *to private life is sensitive or whether the persons*
3 *concerned have suffered any adverse consequences on*
4 *account of that interference."*

5
6 Thirdly, there's no requirement for the individual to
7 have been inconvenienced in any way. And we reference
8 authority in relation to that at footnote 105. And
9 indeed, even the creation of a feeling will suffice to
10 give rise to an interference in **Digital Rights**. 12:34

11
12 *"CJEU endorsed view of Advocate General that the fact*
13 *that data retained and subsequently without subscriber*
14 *or registered user being informed was likely to*
15 *generate in minds of persons concerned the feeling,* 12:34
16 *that their private lives were the subject of constant*
17 *surveillance."*

18
19 The standing issue goes beyond the specific concern
20 arising from the **Clapper** case, where the belief of the 12:34
21 plaintiffs that their communications may have been
22 intercepted was speculative, there's the second issue
23 arising from the decision in **Spokeo** which Prof.
24 Richards has identified or emphasised - the holding
25 that procedural violations don't constitute concrete 12:35
26 and particularised harm and the difficulty, or the
27 particular difficulty that that presents in the context
28 of privacy, of data protection violation claims.
29

1 I've referred already to the issue of notification; the
2 evidence given by Ms. Gorski that most people whose
3 data is accessed in the United States - she was
4 referring, I should say, to FISA - have never been told
5 of that fact. There are some provisions in US law, 12:35
6 notably under the ECPA, which provide for notification
7 in certain circumstances, but not all do so. And
8 indeed the Microsoft case, which was the subject of a
9 decision from the Federal District Court in Washington
10 State on, I think, 6th or 8th February this year, was 12:35
11 one in which it was in fact being argued by Microsoft,
12 although they weren't ultimately permitted to make this
13 argument, that the Fourth Amendment entailed an
14 obligation to notify after there had been a search of
15 or access to information in the cloud. But those 12:36
16 remain certainly not -- sorry, the practical situation,
17 as expressed by Ms. Gorski and indeed as referred to in
18 her report was not challenged.

19
20 Then there's a number, Judge, of particular issues with 12:36
21 particular remedies provided for under the Constitution
22 or under legislation that are perhaps difficult to
23 piece together because of the, admittedly fragmentary,
24 nature of US privacy law. But we have gathered
25 together some of the principal questions in our 12:36
26 submission. If I ask you to look at paragraph 99, it
27 might be perhaps easier just to direct you to where
28 they're gathered together here.

1 So what we explain at paragraph 99 is that - this is on
2 page 34 of our submission - the legal remedies that are
3 available, we say, are not complete and, first of all,
4 that even where a remedial scheme is available in
5 principle, there may be broad exemptions. For example, 12:37
6 the Privacy Act's general rule of nondisclosure is
7 subject to 12 statutory exceptions, with the routine
8 use exemption in particular having the potential to be
9 the proverbial exception that swallows the rule. And
10 that was a comment made by Mr. Richards in the context 12:37
11 of those, I don't think it's denied, very, very broadly
12 drawn exceptions in the legislation.

13
14 The Judicial Redress Act is likely to have limited
15 impact, given that many of the records potentially at 12:38
16 interest in the proceedings have been exempted by
17 administrative process from its coverage, while the
18 protection in the legislation extends to EU citizens
19 will depend on how the terms "covered record" and
20 "covered country" are interpreted. 12:38

21
22 Moreover - and contrary to the criticism made of the
23 fact that the draft decision did not consider the
24 Administrative Procedure Act - the APA is a remedy of
25 limited availability, it only arises in circumstances 12:38
26 in which there's no alternative available framework.
27 And indeed, as I think I said yesterday and I think is
28 correct, I don't believe it's referred to at all by
29 even Prof. Swire. And in addition then, we observe

1 that the EU data subjects without substantial
2 connections are most likely unable to bring a Fourth
3 Amendment Bivens challenge. And that, as I understand
4 it, certainly from Prof. Vladeck's report, is not
5 disputed. 12:39

6
7 Then we deal with certain immunities. Sovereign
8 immunity operates as an impediment at a number of
9 levels. The FISA provides the possibility for
10 individuals to sue US government officials for damages 12:39
11 where there's been unauthorised electronic surveillance
12 or where information obtained by unauthorised
13 electronic surveillance has been disclosed. The Ninth
14 Circuit has held that Section 1810 does *not* operate as
15 waiver of sovereign immunity to the effect that the US 12:39
16 cannot be held liable. Some US courts have held that
17 federal government agencies and officials are immune
18 from suit under the Computer Fraud Abuse Act. In
19 addition, under the Wire Tap Act, there's uncertainty
20 in the statutory language that the government entities 12:39
21 can be held liable for violations because the
22 definition of "person" doesn't include governmental
23 entities.

24
25 Then, Judge, over the page we deal with the collection 12:39
26 of remedies which impose what we describe as an
27 excessively difficult burden. In paragraph 106:

28
29 "*A number of remedies are limited by reference to*

1 *intentionality and wilfulness, rendering the remedies*
2 *excessively difficult, if not practically impossible,*
3 *to secure:*

4
5 (1) *FISA provides the possibility for individuals to*
6 *bring a civil cause of action for money damages*
7 *pursuant to FISA against the US when information about*
8 *them has been unlawfully and wilfully used or*
9 *disclosed. However, this creates substantial*
10 *'procedural disadvantages' - requiring proof not only*
11 *that use or disclosure of information was unlawful, but*
12 *that it was also 'wilful' in the sense that it was*
13 *knowing or reckless.*

14
15 (2) *Similarly, the Electronic Communications Privacy*
16 *Act - which, as you know, includes the wiretap Act and*
17 *the SCA - "but the provisions of these Acts are*
18 *focussed on intentional unauthorised access to*
19 *electronic communications, with the wiretap Act*
20 *applying to communications that are intercepted while*
21 *in transmission, and the SCA applying to the*
22 *unauthorised access of stored communications.*

23
24 (3) *The Judicial Redress Act also uses concepts of*
25 *intention and wilfulness, with for example, a remedy*
26 *being created by 552a(g)(1)(D) in respect of*
27 *disclosures, but only 'with respect to disclosures*
28 *intentionally or wilfully made'...*
29

1 *107. Case law applying the Privacy Act in the US*
2 *suggests that 'pecuniary harm' - rather than dignitary*
3 *harm as will more likely arise in this context - must*
4 *be shown in order to for damages relief to be ordered."*

5
6 And that's a reference to the **Cooper** case. Then
7 there's a heading which we direct the proposition you
8 will have seen in some of the Defendant's evidence
9 that, well, there *is* a remedy if you're prosecuted,
10 because you may be able to rely upon an illegality of a 12:41
11 search as a basis for excluding evidence. And we just
12 make the, I suppose, unsurprising comment there in
13 paragraph 108 that the fact that you have those rights
14 is not an effective remedy - a classic example that
15 operates by requiring individuals to "*test the law by* 12:41
16 *breaking it.*"

17
18 We then observe that there'll be no guarantee of access
19 to an independent authority even after implementation
20 of the Privacy Shield. 12:41

21
22 "*... even if Facebook is correct that Article 47 - as*
23 *distinct from Article 6... does not require access to a*
24 *court, it fails to recognise that access to an*
25 *independent authority is a pre-requisite to the*
26 *definition of a 'court or tribunal' in Union law."*

27
28 And we refer there to a case of **Denuit**.

29

1 *"This requirement is not fulfilled by the Privacy*
2 *Ombudsperson, who, as Professor Richards puts it, is*
3 *'not a disinterested person, but a political appointee*
4 *who appears to serve at the pleasure of another very*
5 *senior political appointee, the US Secretary of State."*

6
7 Heading eight, I deal with notification. I've
8 mentioned that already. And then we address the
9 question of standing, which I've outlined to you. And
10 we urge, Judge, at heading nine, paragraph 120 on page 12:42
11 39 the Commissioner's provisional view as set out in
12 the draft decision that that host of frailties is such
13 that the law, US law, impairs the essence of Article 47
14 and even if the Commissioner is wrong and the essence
15 of Article 47 remains intact, such is the extent of the 12:42
16 encroachment on Article 47 rights, that it cannot be
17 justified by reference to the countervailing factors.

18
19 Just on two other perhaps significant constraints,
20 Judge, which are not listed in that summary. FISA, 12:43
21 Section 1806(a) and 1825 --

22 **MS. JUSTICE COSTELLO:** Just a moment. 1806, little a,
23 isn't it?

24 **MR. MURRAY:** Yes.

25 **MS. JUSTICE COSTELLO:** And then one-eight? 12:43

26 **MR. MURRAY:** Then 1825. Provide that
27 information acquired under FISA may only be used and
28 disclosed in accordance with minimisation procedures.
29 Those procedures only apply to information relating to

1 a US person. EU citizens are not able to bring a claim
2 under Section 2712 -- Title 18, Section 2712, for
3 noncompliance. Mr. Serwin will explain that when he
4 gives evidence.

5
6 And the Judicial Redress Act does not authorise a civil
7 action for violation of Title 5, Section 552a(d)(1)(c).
8 In other words, you can't bring a civil action where
9 the agency fails to adequately maintain records
10 concerning an individual as is necessary to ensure 12:44
11 fairness in the determination.

12
13 So there are, I suppose, reflecting the fragmented
14 nature of the remedies, an equally fragmented, but
15 nonetheless -- an equally fragmented set of 12:44
16 difficulties with them, but they do come together to
17 create, in our respectful submission, for the reasons
18 we've identified, a significant impairment of Article
19 47, to the extent that the very basis of the
20 entitlement is not effective. 12:45

21
22 So that, Judge, is the essence of the argument that we
23 present under the heading of why it is that we claim
24 that the inadequacies in US law are such as to generate
25 a doubt or create a well founded concern, however you 12:45
26 express it, of the kind envisaged by paragraphs 65 and
27 66 of Schrems. But there are a series of, I describe
28 them as technical objections, and I don't mean by that
29 to diminish them, but there are a series of legal

1 objections that are raised by the parties, but in
2 particular to Facebook -- in particular *by* Facebook
3 that I want to address just briefly so that the court,
4 as it were, has a complete account of what we're
5 saying. Many of these have been already discussed by 12:45
6 Mr. Collins, but it's just, as it were, to gather them
7 together.

8
9 The first issue is this - and this *was* addressed by
10 Mr. Collins - and it relates to the relationship 12:46
11 between Article 25 and Article 26. And if you go back
12 to our submission at page 18, you will see the -- I'm
13 sorry, Judge, I've given you the wrong reference. Yes,
14 sorry, if you go back to page 11, paragraph 34, you'll
15 see how this issue arises. Essentially, Judge, 12:46
16 Facebook says the Commissioner erred in determining as
17 she did that in looking at the validity of the SCCs,
18 the first question, she said, is whether the US ensured
19 adequate protections. And the second then is to move
20 to look and see if the SCCs did so. And her reasoning 12:47
21 was that you couldn't look at the second of those, the
22 effect of the SCCs, without first considering and
23 identifying what the inadequacy of the third country
24 was and what the inadequacy in its legal protection
25 was. 12:47

26
27 Facebook criticise that and what they say is that
28 Article 26 enabling the SCCs is a derogation from
29 Article 25 and the stipulation of adequacy that's there

1 and that because it's a derogation, effectively the
2 adequacy test shouldn't have arisen at all. And if you
3 look at paragraph 34 - Mr. Collins opened the text of
4 the articles to you, but I will, Judge, just refer to
5 our summary of the relevant provisions at page 11,
6 paragraph 34:

12:48

7
8 *"(1) Article 25(1) of the Directive establishes a*
9 *general rule prohibiting the transfer of personal data*
10 *outside the European Economic Area unless the country*
11 *to which the data is transferred 'ensures an adequate*
12 *level of protection' for the data protection rights of*
13 *those data subjects to whom the transferred data*
14 *relates.*

15
16 *(2) Article 25(2) identifies the criteria by reference*
17 *to which the adequacy of the level of protection*
18 *available in a third country is to be assessed.*

19
20 *(3) Schrems [identified or defined] 'adequate level of*
21 *protection'."*

22
23 I've already, obviously, opened that to you. And
24 Articles 25 and 26 then provide methods by which
25 transfers can occur, notwithstanding an *inadequate*
26 *level of protection or absence of essential*
27 *equivalence. The Article 25 method of facilitating*
28 *transfers involves the adoption of an adequacy decision*
29 *by the Commission. Meanwhile, Article 26 sets out six*

12:48

1 specific circumstances in which data transfers to a
2 third country may be permissible, even though the third
3 country in question doesn't ensure an adequate level of
4 protection. Then Article 26(2) provides that:

5
6 *"without prejudice to Article 26(1), a Member State may*
7 *authorise a transfer or a set of transfers of personal*
8 *data to a third country which does not ensure an*
9 *adequate level of protection... 'where the controller*
10 *adduces adequate safeguards with respect to the*
11 *protection... '."*

12
13 Then Article 26(4) says that, in accordance with the
14 with procedure in Article 31, the Commission may decide
15 that certain contractual clauses offer sufficient
16 safeguards. 12:49

17
18 Then, Judge, at paragraph 35 we outline how the
19 Commissioner analysed these. She said:

20
21 *"(1) It is not disputed that data transfers made*
22 *pursuant to Article 26 - including the SCC Decisions*
23 *adopted pursuant to Article 26(4) - are made on the*
24 *assumption that the third country does not provide 'an*
25 *adequate level of protection'."*

26
27 That's fully recognised in the draft decision. That
28 does *not* mean that the question of whether the third
29 country offers an adequate level of protection falls

1 away. Rather, where a data transfer is made pursuant
2 to the SCC decisions, it's based on the premise that
3 the SCCs provide sufficient safeguards within the
4 meaning of Article 26(4). The safeguards provided by
5 the SCCs must be, in turn, be such as to enable the 12:50
6 controller to adduce adequate safeguards within the
7 meaning of Article 26(1). So if adequate protection
8 *cannot* be provided by the third country, it will *have*
9 to be supplied by the controller, including by way of
10 adherence to the SCCs. The underlying premise is, 12:50
11 therefore, unequivocal; if the third country does *not*
12 provide adequate protection, the SCC has to match --
13 sorry, remedy the inadequacy.

14
15 Just to stop there. And that's why, in the 12:50
16 Commissioner's submission, you have to begin by
17 identifying what the inadequacy is, because it's only
18 when you have done that that you can proceed to
19 consider the extent to which it is addressed by the
20 SCC -- 12:51

21 **MS. JUSTICE COSTELLO:** If there's a gap and it says
22 'Plug the gap'.

23 **MR. MURRAY:** Exactly. Otherwise you're
24 looking at the SCC divorced from its actual purpose and
25 intention. 12:51

26
27 Logically, therefore, she says at seven, there's no way
28 of knowing whether the SCC provides sufficient
29 safeguards to enable the controller to adduce adequate

1 safeguards without understanding the extent and nature
2 of any inadequacy in the level of protection offered by
3 the third country. In other words, it's *not* possible
4 to ascertain whether the SCCs provide sufficient
5 safeguards without examining the extent to which, the 12:51
6 way in which the relevant third country fails to
7 provide an adequate level of protection.

8
9 So the conclusion being that the adequate level of
10 protection, which of course has been the focus of our 12:51
11 submission and the evidence to you, remains, in our
12 submission, central and integral to Article 26 and,
13 accordingly, the validity of the SCCs.

14
15 So there you see the two questions the Commissioner 12:52
16 directed herself to: Does the US ensure adequate
17 protection? And if so -- sorry, if not, do the SCC
18 decisions *in fact* offer adequate safeguards?

19
20 Now, we outline, Judge, over the next few pages *why* we 12:52
21 say that's the correct interpretation. And at
22 paragraph 40 we say that this is the purpose of Article
23 25 and 26 is usefully illustrated by the Schrems
24 ruling:

25
26 "(1) *The CJEU observed that 'Chapter IV of the*
27 *Directive, in which articles 25 and 26 appear, has set*
28 *up a regime intended to ensure that the Member States*
29 *oversee transfers of personal data to third countries',*

1 with the national supervisory authority 'vested with
2 the power to check whether a transfer of personal data
3 from its own member state to a third country complies
4 with the requirements' of the Directive.

5
6 (2) Advocate General Bot noted that, 'transfers of
7 personal data to third countries should not be given a
8 lower level of protection than processing within the
9 European Union'.

10
11 (3) He also noted that 'the fact that the Commission
12 has adopted an adequacy Decision cannot have the effect
13 of reducing the protection of citizens of the EU with
14 regard to the processing of their data when that data
15 is transferred to a third country by comparison with
16 the level of protection which those persons would enjoy
17 if their data were processed within the European
18 Union'.

19
20 (4) For the Advocate General, it followed from this
21 that national supervisory authorities must be in a
22 position to intervene notwithstanding a European
23 Commission decision, as '[w]ere that not so, citizens
24 of the European Union would be less well protected than
25 they would be if their data were processed within the
26 European Union.

27
28 (5) He also observed of Article 25 that while the CJEU
29 had previously described this provision as setting up a

1 *'special regime', 'that does not mean... that such*
2 *a regime must afford less protection'.*

3
4 *(6) He added that 'the point is not the creation of a*
5 *special system of exceptions that offers less*
6 *protection for citizens of the European Union by*
7 *comparison with the general system provided for in that*
8 *Directive for the processing of data within the*
9 *European Union'."*

10
11 So we say that the interpretation doesn't just follow
12 from the text of the provisions and their intended
13 effect, but is supported by those observations. At
14 paragraph 43 and over the page, the Facebook
15 interpretation is summarised. What they say is that, 12:54
16 in paragraph 44, the decision *wrongly* applies the
17 adequacy test contained in Article 25 to a measure
18 adopted under Article 26 and repeatedly suggests
19 Article 26 is a derogation from the general rule. So
20 they're saying that once transfers are -- sorry, the 12:54
21 transfers under Article 26 are *premised* on the country
22 not providing an adequate level, therefore that simply
23 falls away from the analysis. And we summarise there,
24 and I've said it really already, why, in our
25 submission, that's a mistaken proposition. 12:54

26
27 And this issue, Judge, becomes relevant for a second,
28 related reason. The Commissioner conducts the analysis
29 of identifying the inadequacy issue, as she perceives

1 it, and then comes to see, well, does the SCC remedy
2 that - is that inadequacy addressed sufficiently in the
3 SCC? And that presents another, what is another
4 important aspect of the Facebook case. Because - and
5 you will have seen in the evidence which I opened 12:55
6 yesterday, and indeed Mr. Collins referred to this in
7 the course of his opening - Facebook places a great
8 deal of reliance on the safeguards within the SCCs
9 themselves and in particular the obligations imposed on
10 the data importer and exporter and the availability of 12:55
11 a damages remedy against the exporter, and in default,
12 in certain circumstances, the importer of the
13 information in breach of the SCCs. And Facebook's case
14 is 'well, the SCCs themselves provide an adequate or
15 sufficient remedy in all of those circumstances'. 12:56

16
17 Now, that was addressed and it was addressed with some
18 brevity and, we submit, correctly so by the
19 Commissioner. And that brevity itself is criticised by
20 Facebook. But it's addressed by the Commissioner in 12:56
21 her decision. If I can ask you to turn to it, it's in
22 book one, tab 18.

23 **MS. JUSTICE COSTELLO:** That's trial book one, isn't it?

24 **MR. MURRAY:** Trial book one, yes. If you go,
25 Judge, to page 29, at paragraph 60 she, having 12:57
26 identified the difficulties that we have been
27 considering with the US system, she says:

28
29 "*For all of the reasons outlined above, therefore, I*

1 *have formed the view, subject to consideration of such*
2 *submissions as may be submitted in due course by the*
3 *Complainant and FB-I that, at least on the question of*
4 *redress, the objections raised by the CJEU in its*
5 *judgment in Schrems have not yet been answered."*
6

7 So that's the inadequacy that she has identified as
8 part, or as the first part of her analysis. And she
9 then says:

10
11 *"It is also my view that the safeguards purportedly*
12 *constituted by the standard contract clauses set out in*
13 *the Annexes to the SCC Decisions do not address the*
14 *CJEU's objections concerning the absence of an*
15 *effective remedy compatible with the requirements of*
16 *Article 47 of the Charter, as outlined in Schrems."*
17

18 Now, just perhaps to stop there, Judge. I mean, there
19 will, of course, be inadequacies that are or that may
20 present themselves in third countries that can be 12:58
21 resolved by appropriate provision in an SCC - the
22 making available of claims and perhaps compensation is
23 one of them - which may not be available within the
24 State, or other deficiencies in entitlements to
25 notification or rectification. You can perhaps 12:58
26 envisage circumstances in which they would occur.

27
28 But here the problem which was identified by the
29 Commission - namely, the inadequacy defined by the US

1 law's failure to provide the essentials of a legal
2 remedy under Article 47 - is not something that *could*
3 be remedied by the SCC; it is a deficiency in the
4 remedial system in the United States itself. And
5 that's why the Commissioner said in the next sentence:

12:59

6
7 *"... concerning the absence of an effective remedy*
8 *compatible with the requirements of Article 47 of the*
9 *Charter, as outlined in Schrems. Nor could they. On*
10 *their terms, the standard contract clauses in question*
11 *do no more than establish a right in contract, in*
12 *favour of data subjects, to a remedy against either or*
13 *both of the data exporter and importer. Importantly*
14 *for current purposes, there is no question but that the*
15 *SCC Decisions are not binding on any US government*
16 *agency or other US public body; nor do they purport to*
17 *be so binding. It follows that they make no provision*
18 *whatsoever for a right in favour of data subjects to*
19 *access an effective remedy in the event that their data*
20 *is (or may be) the subject of interference by a US*
21 *public authority, whether acting on national security*
22 *grounds, or otherwise. On this basis, I have formed*
23 *the view, subject to consideration of such further*
24 *submissions as may be filed... that the protections*
25 *purportedly provided by the standard contract clauses*
26 *contained in the Annexes... are limited in their extent*
27 *and in their application. So far as the question of*
28 *access to an effective remedy is concerned, it is my*
29 *view that they cannot be said to ensure adequate*

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*safeguards for the protection of the privacy and
fundamental rights and freedoms of EU citizens whose
data is transferred to the US".*

MS. JUSTICE COSTELLO: Perhaps we'll take it up then at
two o'clock.

13:00

MR. MURRAY: Certainly, Judge.

(LUNCHEON ADJOURNMENT)

13:00

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

3
4 **MS. JUSTICE COSTELLO:** Good afternoon.

5 **MR. GALLAGHER:** Afternoon, Judge. 14:06

6 **REGISTRAR:** Matter of Data Protection Commissioner -v-
7 Facebook Ireland Ltd. and another.

8 **MR. MURRAY:** Judge, I was just referring to or I had
9 finished referring to the Commissioner's Draft Decision
10 at paragraph 61 and I think had recorded her comment 14:06

11 that the nature of the inadequacy which she had
12 identified with US law was such, as she said herself,
13 that the SCCs simply could not remedy. And that's
14 correct, in my respectful submission it is

15 self-evidently so, how could they? The SCCs don't bind 14:06
16 the US government, they don't create any cause of

17 action against the US government, they don't resolve
18 the difficulty as to how a Facebook customer, who
19 doesn't know if their data has been accessed, can bring
20 any claim against anyone for damages. They don't 14:07

21 resolve the difficulties arising from establishing
22 standing in proceedings against the US government in
23 which a EU citizen seeks to assert their data
24 protection rights of rectification, rights of access.

25 14:07
26 So the SCCs, insofar as they confer or provide for a
27 claim for damages for breach of contract, and that's
28 what it is, against the data exporter in the first
29 instance I suppose, that does not in fact address the

1 fundamental difficulty identified by the Commissioner,
2 and for that reason the second stage of the analysis
3 which she undertook does not provide an answer that
4 allows the validity to stand, if it is the case, for
5 them to stand as valid if it is the case that she is 14:07
6 correct in the inadequacy that she identified.

7
8 One does wonder how the SCCs in this situation and
9 having regard to this inadequacy can function properly
10 at all. I mean I have referred already to the 14:08
11 difficulty arising from the customer who doesn't know
12 whether their information has been accessed. I would
13 just draw your attention to the fact, I won't open it,
14 but it's in Clause 5(d)(i).

15 **MS. JUSTICE COSTELLO:** Is that a big D or a small D. 14:08

16 **MR. MURRAY:** It's a small D because this is, not the US
17 legislation, but the actual decision itself with the
18 standard contractual terms. It states, unsurprisingly,
19 that the data exporter won't be required to tell the
20 data importer of requests for access to information if 14:08
21 it is the case that the --

22 **MS. JUSTICE COSTELLO:** Did you say exporter or
23 importer.

24 **MR. MURRAY:** The data - I am terribly sorry, you are
25 quite correct - the data importer will not be required 14:09
26 to advise the *exporter* if the third party law prevents
27 it from doing so.

28
29 And just to make this observation. One also wonders

1 what sort of damages can be claimed in this action for
2 breach of contract. Normally, as you know, damages for
3 distress or inconvenience, and indeed the violation of
4 a right of the nature in issue, here would not fit
5 within a claim for breach of contract. They wouldn't 14:09
6 be known. The Supreme Court here decided only a couple
7 of weeks ago you can't get damages for breach of
8 contract for distress or inconvenience. That's a minor
9 point, but the more fundamental one is the
10 Commissioner's conclusion, which we say is correct, 14:09
11 that the inadequacy which she had identified was one
12 which simply could not be corrected, as it were, by the
13 standard contractual clauses.

14
15 Now, there are three other issues that I want to 14:10
16 address briefly. One -- and the first is the question
17 of national security which, as you know, Facebook say
18 operates in this case to oust EU law entirely and the
19 Charter. What they say, and there's a summary of it,
20 I won't open it, but just quote it to you. There's a 14:10
21 summary at paragraph 5 of their submission where they
22 say:

23
24 *"The EU Treaties expressly provide that EU law,*
25 *including the Charter, does not apply to what they* 14:10
26 *describe as national security activities."*

27
28 That contention is as surprising as it is misconceived,
29 surprising because if it's correct it means that both

1 the CJEU and the Advocate General in Schrems, and
2 indeed the court in Watson but particularly the CJEU in
3 Schrems, overlooked a fundamental jurisdictional issue.
4 It's misconceived because in fact the data is not
5 transferred for a national security objective. It's 14:11
6 undertaken, it's transferred for commercial purposes
7 and for that reason the national security exemption,
8 for the want of a better term, upon which Facebook rely
9 is simply inapplicable.

10
11 We address this, Judge, in our submission at paragraph
12 142, page 46. At paragraph 142 we introduce the issue
13 and at paragraph 144 we explain that:

14
15 *"What is in issue here is the transfer of data from the 14:12*
16 *EU to the US. The data is not transferred for a*
17 *national security objective as the submissions of*
18 *Facebook and BSA in particular seem to emphasise. The*
19 *transfer is undertaken for commercial purposes."*

20
21 And that's correct and in the undisputed evidence it is 14:12
22 correct. The commercial transfer clearly falls within
23 European law for the purpose of the Directive, as we
24 say at paragraph 145, and indeed for the purposes of
25 the Charter. It is well established, we say, that once 14:13
26 the matter falls within the scope of Union law, even if
27 a Member State subsequently seeks to derogate, it is
28 bound by the fundamental rights standards.
29

1 Then if you turn over the page there are some
2 quotations from the Advocate General and the court in
3 Schrems which in our respectful submission clearly
4 support the position adopted by the Commission in
5 relation to jurisdiction. The Advocate General 14:13
6 observed that:

7
8 *"There is nothing to suggest that arrangements for the*
9 *transfer of personal data to third countries are*
10 *excluded from the substantive scope of Article 8(3) of* 14:13
11 *the Charter, which enshrines at the highest level of*
12 *the hierarchy of rules in EU law the importance of*
13 *control by an independent authority of compliance with*
14 *the rules on the protection of personal data."*

15 14:13
16 And then he added: *"The access enjoyed by the US*
17 *intelligence services."*

18
19 So it's not as if the Advocate General was not aware
20 that this was a matter related to US intelligence 14:14
21 service activity: *"The access enjoyed by the United*
22 *States intelligence services to the transferred data*
23 *therefore also constitutes an interference with the*
24 *fundamental right to protection of personal data*
25 *guaranteed in Article 8, since such access constitutes* 14:14
26 *processing."*

27
28 And the CJEU then we quote on the next paragraph:
29

1 *"The operation consisting of having the personal data*
2 *transferred from a Member State to a third country*
3 *constitutes in itself processing of personal data*
4 *within the meaning of Articles 2(b) of the Directive."*

14:14

5
6 we similarly say, Judge, at the following paragraph how
7 that is supported by the position adopted by the
8 Article 29 Working Party: *"which has observed that the*
9 *fact that the national security activities of the*
10 *Member States are excluded from the scope of*
11 *application of EU law does not mean that EU law ceases*
12 *to apply where data subject to EU data protection law*
13 *is accessed by third countries in the name of the*
14 *national security."*

14:14

15
16 And Article 29 Working Group observed that Article 4
17 TEU: *"Attempt to define the competences of the Union*
18 *vis-à-vis the Member States. This, however, is*
19 *different from the obligation to comply with EU data*
20 *protection law weighing on controllers even where they*
21 *are subject to national security legislation of a third*
22 *country."*

14:15

14:15

23
24 So we have addressed that issue -- sorry, just perhaps
25 also to ask the following question: That if this is
26 ousted from EU law in the manner alleged, it does beg
27 the question as to how the Privacy Shield could have
28 come into being at all. Because the same logic would
29 appear to apply to the data, and it is almost a

14:15

1 collateral attack on the Privacy Shield inherent in
2 that argument because, if it's correct, it's outside
3 the competence of EU law entirely. But it isn't
4 correct for that reason.

5
6 Judge, our submission deals with that issue very
7 briefly. One could analyse the question a lot more,
8 and we're not entirely certain to what extent this is
9 being pressed by Facebook. But what we have done, on
10 reviewing our own submission and perhaps thinking it 14:16
11 could be dealt with in more detail, is that we prepared
12 a very, well it's not a short, we prepared a speaking
13 note which, unusual amongst speaking notes, I'm not
14 going to speak to, but I am going to hand into the
15 court and to Mr. Gallagher. So that, rather than spend 14:16
16 further time on the issue, he will be aware of the
17 arguments we're advancing in a little bit more detail
18 so that when he or Ms. Hyland next week or whenever
19 they get to make their full submissions, if they
20 consider that they wish to address the Privacy Shield 14:16
21 argument they will have our case outlined in
22 considerable detail there and I can reply as
23 appropriate. But the essence of it, Judge, is outlined
24 in our original submission.

25 **MR. GALLAGHER:** This is a very surprising -- 14:17

26 **MS. JUSTICE COSTELLO:** This is a nearly the length of
27 your own original written submission.

28 **MR. GALLAGHER:** It is. And there was strict word
29 limits to it and it is entirely unsatisfactory that day

1 seven of the trial that this is handed to us - day six
2 I think, is it - that this is handed to us and I'm
3 going to be on my feet shortly responding and setting
4 out our case. It is entirely unsatisfactory, Judge.
5 I can't stop Mr. Murray making whatever submission he 14:17
6 wants in relation to the matter, but I do think this is
7 wholly unfair. And, if I am to address it, I'm going
8 to need a little bit longer than the court has
9 allocated me in terms of the opening because I can't
10 deal with this issue on the blind without knowing what 14:17
11 the case is. The whole idea was that I would respond
12 to the case and to get it now, now at 14:17.
13 **MS. JUSTICE COSTELLO:** well the whole idea - there is
14 two points there, Mr. Gallagher. The whole idea was
15 that you were allowed to put up what your case is. 14:17
16 **MR. GALLAGHER:** Exactly.
17 **MS. JUSTICE COSTELLO:** He is putting in his defence to
18 your case.
19 **MR. GALLAGHER:** Yes.
20 **MS. JUSTICE COSTELLO:** It is not quite the same thing 14:18
21 as you responding to his case. You will, when you, if
22 you like, get your full --
23 **MR. GALLAGHER:** Yes.
24 **MS. JUSTICE COSTELLO:** -- go as opposed to your
25 truncated go obviously be able to deal with it. Where 14:18
26 is the difficulty in dealing with *your* position if you
27 are unaware of what his answer to your position is?
28 **MR. GALLAGHER:** Because they have asserted a
29 jurisdiction, I am responding and saying there is *no*

1 jurisdiction in respect of the matter.

2 **MS. JUSTICE COSTELLO:** Okay.

3 **MR. GALLAGHER:** So I am responding and setting out and
4 the whole idea was that it would be helpful to you to
5 know what our position is. 14:18

6 **MS. JUSTICE COSTELLO:** I understand that.

7 **MR. GALLAGHER:** This is entirely new as part of, they
8 dismissed it, they dealt with it and they have dealt
9 with it, so that's part of what I will be responding
10 to, the national security contention. They had a 14:18
11 significant advantage in this case, they put in their
12 submissions after all of ours for procedural reasons,
13 the oddity of this procedure. They put it in and, as
14 part of my response, I was going to, I have outlined to
15 you what the position was, and will still do obviously, 14:19
16 in terms of national security. I am just saying it is
17 highly unsatisfactory to get it now.

18 **MS. JUSTICE COSTELLO:** Hmm.

19 **MR. GALLAGHER:** They have had our submissions before
20 they had their own submissions. They've been opening 14:19
21 the case for six days and we now get it. I'm not going
22 to deprive you of any material that you ultimately find
23 helpful, but I do make the point this is a most unfair
24 way. The first notice we had was literally when it was
25 handed in to you now. 14:19

26 **MR. MURRAY:** Judge, it is another play by Mr. Gallagher
27 to get a longer opening. He will have an opportunity
28 to respond to this, it will be the end of next week or
29 the following week. He knows what our case is on

1 national security, it's in our submissions, that's the
2 primary document I opened.

3
4 Now we can do this one of two ways. I can go through
5 the document I have just handed you up, I will ask you 14:19
6 to take it back, take it back from Mr. Gallagher and
7 I will go through everything in it now or I can do, as
8 I have done, which is an attempt to try and save
9 everybody's time dealing with matters at a level of
10 detail that may not be necessary. Mr. Gallagher does 14:20
11 not need to address this argument in his short opening
12 provided as a matter of concession in a context where
13 his full opening will be in a week or ten days time.

14 **MS. JUSTICE COSTELLO:** In relation to these documents,
15 can you give me a rough outline of what's in it? In 14:20
16 sense of what are we talking about, are there new
17 arguments are there more authorities, what's in it.

18 **MR. MURRAY:** well there are some more authorities but
19 it is an elaboration in far more detail, on what we
20 have set out there and it also responds to some of the 14:20
21 arguments that are in the case, Judge. But in my
22 respectful submission the objection is misconceived.
23 Mr. Gallagher will have a long, long time to consider
24 it in detail. The essence of our argument is in our
25 submission and that's what I have primarily relied upon 14:20
26 for the purpose of my opening.

27 **MR. GALLAGHER:** well when we refers to response to our
28 document, I assume he is talking about the submissions
29 which have already been responded to, I assume.

1 **MR. MURRAY:** Yes. Our response to Mr. Gallagher's
2 20,000 word submissions, which we did in considerably
3 less space in an attempt to try and provide the court
4 with a succinct summary of the issues. Judge, I'm in
5 the court's hands as to how you would like me to 14:21
6 progress the issue, but, as I said, the essential
7 argument is as outlined in the submission which
8 Mr. Gallagher has had for some time.

9 **MS. JUSTICE COSTELLO:** Refresh my memory, is it
10 Mr. Schrems who is going to be speaking before Facebook 14:21
11 or Facebook before Mr. Schrems.

12 **MR. GALLAGHER:** Mr. Schrems.

13 **MR. MURRAY:** Mr. Schrems is first.

14 **MS. JUSTICE COSTELLO:** So it seems to me that we are
15 going to have a position anyway where this isn't going 14:21
16 to be concluded today.

17 **MR. GALLAGHER:** No, that is correct, Judge.

18 **MS. JUSTICE COSTELLO:** We can both have a little look
19 at this overnight and see where we are going and I will
20 defer any ruling in relation to that, I'll take it in 14:21
21 de bene esse at the moment and look at it overnight.

22 **MR. GALLAGHER:** That's fine, Judge.

23 **MS. JUSTICE COSTELLO:** Because I'm just looking at the
24 time.

25 **MR. MURRAY:** Thank you, Judge. Judge, in relation to 14:21
26 the Privacy Shield, which is the second last issue
27 I want to address, again I'll be very brief on this.
28 Everything we have to say is, everything we have to say
29 on this has been outlined in the course of the evidence

1 that you have seen.

2
3 But the Privacy Shield itself, insofar as it intrudes
4 into the SCCs, and of course Facebook rely primarily
5 upon the SCCs for their data transfers. But the 14:22
6 Ombudsman issue, the Ombudsman is not established by
7 law in the sense in which that term is used in Article
8 47, he doesn't have compulsory jurisdiction, he doesn't
9 make or she doesn't make decisions of a judicial
10 nature, doesn't give reasons, but most critically of 14:22
11 all is not independent of the administration. That is
12 a key indicia of a court or tribunal for the purpose of
13 Article 47. As with any court or tribunal Article 6,
14 or indeed for the purposes of the provisions dealing
15 with references. This is not an independent body and 14:22
16 it is not a judicial remedy and in our respectful
17 submission the matter doesn't have to be put any
18 further than that.

19
20 The last issue is not an issue raised by Facebook, it's 14:23
21 an issue raised by Mr. Schrems and an issue which in
22 our respectful submission does not in truth arise from
23 these proceedings but I do just want to address it very
24 briefly and it relates to Article 4.

25 14:23
26 Perhaps the best way of looking at this, Judge, if
27 I ask you to go back to the Book of Pleadings Tab 24
28 where you will see the second affidavit of Mr. O'Dwyer.
29 I don't believe this was opened to you, Judge, by

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Mr. Collins.

MS. JUSTICE COSTELLO: No, I don't think any of Mr. O'Dwyer's affidavit was opened.

MR. MURRAY: And if I can ask you to go to Tab 24 and paragraph 19 where he just notes this question over a number of pages.

14:24

He is picking up a point made by Mr. Schrems in his affidavit where: *"At paragraphs 17 and 19 of his affidavit, Mr. Schrems suggest the Commissioner did not have any or any adequate regard to the provisions of Article 4 of the Decision, which confers on the Commissioner the power to prohibit or suspend data flows to third countries (such as the US) in order to protect individuals in regard to the processing of their personal data."*

14:24

14:24

I say that this doesn't arise in these proceedings because it's not apparent to us how, whether the Commissioner should or should not have exercised that discretionary power under Article 4, how that affects in any way the entitlement of the Commissioner to seek the relief which is being sought here. It seems to be an entirely extraneous consideration insofar as the exercise of your power is concerned.

14:24

14:25

But just to address and explain the Commissioner's position on it, Judge. In paragraph 20:

1 *"The prohibition or suspension of data flows*
2 *contemplated by Article 4(1)(a) of each of the SCC*
3 *Decisions is called for where two decisions are*
4 *fulfilled: Firstly where it is established 'that the*
5 *law to which the data importer is subject imposes on* 14:25
6 *him requirements to derogate from the relevant data*
7 *protection rules which go beyond the restrictions*
8 *necessary in a democratic society'; second 'where those*
9 *requirements are likely to have a substantial adverse*
10 *effect on the guarantees provided by the standard* 14:25
11 *contractual clauses'."*

12
13 And the suggestion seems to have been that the
14 Commissioner ought to have exercised this discretionary
15 power vis-à-vis Facebook so as to prevent data 14:25
16 transfers.

17
18 And in paragraph 22, he says: *"The Commissioner did*
19 *not refer to Article 4 in the Draft Decision and it is*
20 *not relevant to the within application. Mr. Schrems'* 14:25
21 *attempt to invoke it involves an attempt on his part to*
22 *expand the scope of the proceedings.*

23
24 23. *The Commissioner does not agree with Mr. Schrems'*
25 *belief that the Commissioner has concluded that the* 14:26
26 *circumstances contemplated by Article 4(1) are met.*

27
28 24. *Contrary to the premise of Mr. Schrems' averments,*
29 *Article 4(1) is not expressed in mandatory terms. A*

1 *decision on whether or not to avail of the mechanism is*
2 *a matter for the discretion of the national supervisory*
3 *authority."*

4
5 And he then refers to provisions and recitals which he 14:26
6 says supports that.

7
8 He then explains that Article 4 is not engaged at
9 paragraph 25. I don't think I need open those
10 paragraphs because they explain what you already well 14:26
11 know in terms of what it was the Commission was
12 concerned with.

13
14 In paragraph 28 he says: "*At least insofar as the*
15 *question of access to an effective remedy is*
16 *concerned, there is no guarantee contained in the SCC*
17 *Decisions that can be said to be the subject of a*
18 *'substantial adverse effect' as a result of the*
19 *requirements of any US law that is incompatible with*
20 *Articles 7, 8 or 47 of the Charter. On this basis,*
21 *Article 4 of the SCC Decisions is not engaged in the*
22 *current context.*

23
24 29. *In addition, the inadequacies the Commissioner*
25 *identified on a preliminary basis revealed a problem 14:27*
26 *that is systemic in nature, such as to render*
27 *inappropriate resort to Article 4. It follows that any*
28 *solution to such inadequacies must likewise target the*
29 *underlying systemic problem, namely, the fact that a*

1 legal remedy compatible with Article 47 is not
2 available in the US to EU citizens whose data is
3 transferred to that jurisdiction where it may be at
4 risk of being accessed and processed.

5
6 30. In that regard, by analogy with the analysis set
7 out in Hogan J Request for a Preliminary Ruling, the
8 complaint here concerns the terms of the SCC Decision
9 and not the manner of their application."

10
11 "In its decision", he notes at paragraph 31: "In the
12 CJEU ruling in Schrems, the CJEU identified systemic
13 deficiencies in the US legal order in relation to the
14 protection of EU citizens' data protection rights, and
15 concluded that, as a matter of EU law, the Safe Harbour 14:27
16 Decision did not provide safeguards sufficient to
17 address such deficiencies. I say it is necessary and
18 appropriate that the sec Decisions likewise be examined
19 by the CJEU on a systemic basis to determine whether
20 those decisions are capable. Pending such an
21 examination by this Honourable Court and by the CJEU,
22 it would not have been appropriate to single out data
23 flows between individual data exporters and importers
24 and prohibit or suspend those flows in isolation."

25
26 In other words obviously --

27 **MS. JUSTICE COSTELLO:** Facebook but not.

28 **MR. MURRAY:** Exactly, and that's, in our respectful
29 submission in the context of a discretionary power, a

1 legitimate and proper consideration for the
2 Commissioner to take into account in deciding whether
3 to exercise or not to exercise the powers. But we just
4 don't see whether she did or did not do that properly
5 is a matter that arises before you in any event, but 14:28
6 that, as it were, is the reason that the Commissioner
7 adopted the position that she did.

8
9 we also just note over the page, and I think that this
10 came in developments since this affidavit was sworn. 14:28
11 Yes. She just notes that there was an issue as to the
12 validity of Article 4(1) of the decision in any event
13 after the Schrems ruling because in Schrems the CJEU
14 had concluded that: "*The particular form of suspension*
15 *mechanism provided --*" 14:29

16 **MS. JUSTICE COSTELLO:** Sorry, which paragraph are you
17 reading from.

18 **MR. MURRAY:** Paragraph 35, Judge, excuse me. She just
19 observes that: "*Paragraphs 99 to 106 of the ruling in*
20 *Schrems actually cast a question mark over the validity* 14:29
21 *of Article 4(1) because the CJEU had concluded that the*
22 *particular form of suspension mechanism provided for in*
23 *the Safe Harbour Decision had the effect of imposing*
24 *restrictions on the exercise by national supervisory*
25 *authorities of the powers they had under Article 28 of* 14:29
26 *the Directive to suspend. In circumstances in*
27 *which the Commission lacked the power to impose any*
28 *such restriction, the Court concluded that the*
29 *Commission had acted in excess of its powers."*

1 Now I just draw that to your attention because it's a
2 useful introduction to this, that in December last
3 year, I think it was 16th December, the Commission took
4 out Article 4(1) of the decision as it originally stood
5 and replaced it with a new Article 4 and they express 14:30
6 in their --

7 **MS. JUSTICE COSTELLO:** Article 4(1) is in which
8 decision now, are we talking about the Privacy Shield
9 decision or the one of the SCC.

10 **MR. MURRAY:** This is in the SCC, yes. 14:30

11 **MS. JUSTICE COSTELLO:** SCC decision, because there is
12 three of them. But it's the 2010 decision.

13 **MR. MURRAY:** Yes.

14 **MS. JUSTICE COSTELLO:** Thank you.

15 **MR. MURRAY:** Yes, exactly. I think it's in each of 14:30
16 them in fact. So certainly it mightn't have been
17 called Article 4 in all of them -- it is, yes. In the
18 event that has now been replaced because the Commission
19 shared that concern as to validity, there may not have
20 been an Article 4 in place at all at the relevant time. 14:30
21 So you will see, Judge, there, I think we address that
22 again briefly in the concluding paragraphs of our
23 submissions, but I don't propose to open those to you.

24
25 So, Judge, subject to the court, those are our 14:30
26 submissions in the opening. Thank you.

27 **MS. JUSTICE COSTELLO:** well thank you. So,
28 Mr. McCullough, Mr. Doherty had estimated that you
29 would take half an hour, I'm not quite sure if you

1 agree with his estimate.

2 **MR. McCULLOUGH:** I will try and do that, Judge.

3
4 Judge, we agree with the DPC on the issues that you
5 have heard agitated over the last five days. So we 14:31
6 agree on the necessity for effective equivalence; we
7 agree on the requirement as a matter of EU law that an
8 effective judicial remedy should be provided; and we
9 agree that US law imposes requirements that don't
10 permit that EU law standard to be met. We agree that 14:31
11 that is so both because of the US laws relating to
12 standing and because such remedies as do exist in US
13 law are subject to the wide exceptions, immunities and
14 barriers that have been explained to you.

15 14:31
16 I don't intend - we have some material, Judge, and in
17 due course we will add to that, but I don't intend to
18 use the exceptional opportunity that you have given to
19 me today to advance a case with which I fundamentally
20 agree. I don't think that would be a useful use of 14:32
21 this time. What would be useful I think, Judge, is to
22 explain to the court the respect in which our case
23 differs from that of the DPC.

24
25 It differs in this respect, Judge: That we say that it 14:32
26 is not appropriate to make a reference. The starting
27 point, Judge, is to look at the basis upon which a
28 reference can be made by a court. The text of
29 Article 267 itself, Judge, is clear on that. The court

1 will find that at Book 1 of the authorities, Tab 2.

2 **MS. JUSTICE COSTELLO:** 267; is that right?

3 **MR. MCCULLOUGH:** 267, Judge, yes.

4 **MS. JUSTICE COSTELLO:** Yes, I have it. Thank you.

5 **MR. MCCULLOUGH:** Thank you, Judge. You will see, 14:33
6 Judge, Article 267 provides:

7
8 *"The Court of Justice of the European Union shall have*
9 *jurisdiction to give preliminary rulings concerning the*
10 *interpretation of the Treaties; and the validity and 14:33*
11 *interpretation of acts of the institutions, bodies,*
12 *offices or agencies of the Union; where such a question*
13 *is raised before any court or tribunal of a Member*
14 *State, that court or tribunal may, if it considers that*
15 *a decision on the question is necessary to enable it to 14:33*
16 *give judgment, request the Court to give a ruling*
17 *thereon."*

18
19 So the question must be properly raised before the
20 national court and it must be a question whose 14:34
21 resolution is necessary to allow the national court to
22 give judgment in relation to the issue raised before
23 it.

24
25 There's a number of authorities dealing with that, 14:34
26 Judge. I'm not sure at this stage the extent to which
27 what I say on this matter will be a subject matter of
28 controversy, so I will just refer to court to one at
29 this stage, the well known decision of CILFIT which the

1 court will find at Book 2 of the authorities, I hope,
2 Tab 21. If the court could move to paragraphs 9 to 11
3 of that judgment the court will see the relevant text.

4 **MS. JUSTICE COSTELLO:** That's Book 2 of authorities and
5 it's tab? 14:35

6 **MR. MCCULLOUGH:** 21, I hope, Judge.

7 **MS. JUSTICE COSTELLO:** Thank you. Paragraph 9.

8 **MR. MCCULLOUGH:** Paragraphs 9 to 11, Judge, are the
9 relevant paragraphs.

10 **MS. JUSTICE COSTELLO:** Yes. 14:35

11 **MR. MCCULLOUGH:** The court said: "*In this regard it*
12 *must in the first place be pointed out that Article 177*
13 *does not constitute a means of redress available to the*
14 *parties to a case pending before a national court or*
15 *tribunal. Therefore the mere fact a party contends a* 14:35
16 *dispute gives rise to a question concerning the*
17 *interpretation of Community law does not mean that a*
18 *court or tribunal concerned is compelled to consider*
19 *has been raised within the meaning of Article 177. On*
20 *the other hand, a national court or tribunal may, in an* 14:35
21 *appropriate case, refer a matter to the Court of*
22 *Justice of its own motion.*

23
24 *10. Secondly, it follows from the relationship between*
25 *the third and third paragraphs of Article 177 that the* 14:35
26 *court or tribunal as referred to in the third paragraph*
27 *have the same discretion as any other national court or*
28 *tribunal to ascertain whether a decision on a question*
29 *of community law is necessary to enable them to give*

1 *judgment."*

2
3 And that's the important point, Judge: "Accordingly,
4 *those courts or tribunals are not obliged to refer to*
5 *the court of justice a question concerning the* 14:36
6 *interpretation of community law raised before them if*
7 *that question is not relevant, that is to say, if the*
8 *answer to that question, regardless of what it may be,*
9 *can in no way affect the outcome of the case.*

10 14:36
11 *11. If, however, those courts or tribunals consider*
12 *that recourse to community law is necessary to enable*
13 *them to decide a case, Article 177 imposes an*
14 *obligation on them to refer to the court of justice any*
15 *question of interpretation that may arise."* 14:36

16
17 Now as the court is aware there's a difference between
18 the rules that apply to a Court of First Instance and a
19 final court in this respect. But in either event,
20 Judge, the requirement is that the reference must be 14:36
21 necessary.

22
23 And it's important just to reflect on that for a
24 moment, Judge. The question of necessity doesn't arise
25 to be determined in the context just of the proceedings 14:36
26 before *this* court. The DPC can't, if you like, simply
27 by bringing this question only before the court then
28 make it necessary for this court to refer the question
29 that the DPC has brought before this court to the Court

1 of Justice. The lis between the parties arises from
2 Mr. Schrems' complaint, that's the matter that the DPC
3 is investigating.

4
5 This matter comes before this court only because the 14:37
6 DPC has found an issue in that case that she wants to
7 refer to the court. But the question of necessity
8 falls to be determined in the context of Mr. Schrems'
9 complaint and the investigation into it, and that's a
10 crucial point, Judge. 14:37

11 **MS. JUSTICE COSTELLO:** Can you just explain to me --

12 **MR. MCCULLOUGH:** Yes, Judge.

13 **MS. JUSTICE COSTELLO:** -- how that arises. Because
14 obviously the complaint has to be dealt with by the
15 Commission. 14:37

16 **MR. MCCULLOUGH:** Yes.

17 **MS. JUSTICE COSTELLO:** I don't have a function at all
18 in relation to the merits of that complaint.

19 **MR. MCCULLOUGH:** No.

20 **MS. JUSTICE COSTELLO:** That's for the national 14:37
21 authority, in this case the Commissioner.

22 **MR. MCCULLOUGH:** To put it in practical terms, Judge.

23 **MS. JUSTICE COSTELLO:** Hmm.

24 **MR. MCCULLOUGH:** If it is not necessary for the
25 Commissioner in order to resolve the complaint made by 14:38
26 Mr. Schrems to refer this court, to refer this question
27 to the Court of Justice, well then the reference is not
28 necessary. To put it in the positive sense, Judge, if
29 the DPC can resolve Mr. Schrems' complaint without a

1 reference to the Court of Justice then the reference
2 isn't necessary.

3 **MS. JUSTICE COSTELLO:** well I understand what you are
4 saying in relation to your complaint before the DPC.

5 **MR. MCCULLOUGH:** Yes. 14:38

6 **MS. JUSTICE COSTELLO:** But what about these
7 proceedings, I mean the two reliefs sought in these
8 proceedings.

9 **MR. MCCULLOUGH:** There are, Judge, but it would be
10 entirely self-fulfilling of the necessity requirement 14:38
11 if necessity fell to be determined in these proceedings
12 only. The DPC could create that necessity by saying
13 well these are the only questions that I am bringing
14 before the court and therefore, because these are the
15 only questions before the court, it's necessary for 14:38
16 this court to refer those questions to the Court of
17 Justice.

18
19 whereas in fact the proper perspective --

20 **MS. JUSTICE COSTELLO:** You are saying you can't 14:39
21 artificially create necessity.

22 **MR. MCCULLOUGH:** Exactly, Judge. You can't
23 artificially create necessity. The DPC can't hive off
24 one question and say 'now having hived off this one
25 question it's now necessary for the court to refer this 14:39
26 question to the Court of Justice'. The issue is
27 whether, in order to resolve Mr. Schrems' complaint and
28 the investigation that follows into it, it is necessary
29 that there should be a reference.

1 The starting point, Judge, is the decision itself, the
2 decision 2010. I would ask the court to look at that.
3 We were looking at it just a moment ago with
4 Mr. Murray. You'll find that, Judge, at book --

5 **MS. JUSTICE COSTELLO:** This is the third of the 14:39
6 Commission's decision in relation to the SCCs.

7 **MR. MCCULLOUGH:** Yes, exactly, Judge.

8 **MS. JUSTICE COSTELLO:** It is just there are so many
9 decisions around the place I have to make sure which
10 one we're talking about. 14:40

11 **MR. MCCULLOUGH:** There are. I suppose there are really
12 two on one level, Judge. There is one amended decision
13 and this is the second decision, the 2010 decision.

14 **MS. JUSTICE COSTELLO:** And where do I find that now
15 again. 14:40

16 **MR. MCCULLOUGH:** You'll find that in Book 1, Judge, of
17 the authorities Tab 10.

18 **MS. JUSTICE COSTELLO:** Thank you.

19 **MR. MCCULLOUGH:** (Short pause) If you look, Judge, at
20 Article 1: 14:40

21
22 *"The standard contractual clauses set out in the annex*
23 *are considered as offering adequate safeguards with*
24 *respect to the protection of the privacy and*
25 *fundamental rights and freedoms of individuals and as* 14:41
26 *regards the exercise of the corresponding rights as*
27 *required by [Article] 26(2) of Directive 95/46."*

28
29 So the court will recall Article 26 of the Directive

1 sets up certain permitted derogations from the overall
2 principle, and this decision provides that the standard
3 contractual clauses offer adequate safeguards in order
4 to overcome the difficulty that would otherwise be
5 created by the lack of adequate safeguards in US law. 14:41

6 **MS. JUSTICE COSTELLO:** By failing the Article 25 test?

7 **MR. MCCULLOUGH:** Exactly, Judge, yes. And indeed you
8 don't come within Article 26 at all unless you fail the
9 Article 25 test, so the premise of being within
10 Article 26 at all is if you fail the Article 25 test. 14:41

11 And, as Mr. Murray has explained, the point of the SCCs
12 is to bring you back into compliance with the test that
13 you have failed under Article 25.

14
15 If the court then just looks at one definition in 14:42
16 Article 3.

17 **MS. JUSTICE COSTELLO:** Yes.

18 **MR. MCCULLOUGH:** It is "*applicable data protection law*"
19 means: "*The legislation protecting the fundamental*
20 *rights and freedoms of individuals and in particular* 14:42
21 *their right to privacy with respect to the processing*
22 *of personal data.*"

23 **MS. JUSTICE COSTELLO:** Sorry, yes.

24 **MR. MCCULLOUGH:** It's (f), Judge.

25 **MS. JUSTICE COSTELLO:** Yes. 14:42

26 **MR. MCCULLOUGH:** "*And in particular their right to*
27 *privacy with respect to the processing of personal data*
28 *applicable to a data controller in the Member State in*
29 *which the exporter is established.*"

1 And Article 4, Judge, is the most important part of
2 this: *"without prejudice to their powers to take*
3 *action to ensure compliance with national provisions*
4 *adopted pursuant to various chapters of Directive*
5 *95/46, the competent authority in the Member State they* 14:42
6 *may exercise their existing powers to prohibit or*
7 *suspend data flows to third countries in order to*
8 *protect individuals with regard to the*
9 *processing of their personal data in cases where."*

10
11 And then three possibilities are set out, it's the
12 first we're looking at here:

13
14 *"It is established that the law to which the data*
15 *importer or a sub-processor is subject imposes upon him* 14:42
16 *requirements to derogate from the applicable data*
17 *protection law which go beyond the restrictions*
18 *necessary in a democratic society as provided for in*
19 *Article 13 of Directive 95/46/EC where those*
20 *requirements are likely to have a substantial adverse*
21 *effect on the guarantees provided by the applicable*
22 *data protection law and the standard contractual*
23 *clauses."*

24
25 And there's a notification obligation, Judge, at 5(3). 14:43
26

27 So if I can sum up, Judge, what the short decision
28 states. First it states that one isn't entitled to a
29 derogation under Article 26 unless your agreement is in

1 compliance with the SCC decision. That's what
2 Article 1 provides.

3 **MS. JUSTICE COSTELLO:** Mm hmm.

4 **MR. MCCULLOUGH:** If you are in compliance with the SCC
5 decisions, if the contract pursuant to which you 14:43
6 transfer material is in compliance with the SCC
7 decision, you are entitled to obtained the benefit of
8 the derogation for which this decision provides. Of
9 course the corollary of that is if your contract is not
10 in compliance with the SCC decisions well then you're 14:43
11 not entitled to rely on this decision at all, you don't
12 have a derogation.

13 **MS. JUSTICE COSTELLO:** Hmm.

14 **MR. MCCULLOUGH:** Then Article 4 provides for what is to
15 happen if the DPC ascertains that the law in the 14:44
16 country to which the data is being transferred imposes
17 requirements to derogate from applicable data
18 protection law which go beyond the restrictions
19 necessary in a democratic society.

20
21 And in essence, Judge, that means that Article 4 kicks
22 in where US law, in this case, imposes requirements to
23 derogate from EU data protection law that go beyond
24 those that could be justified to safeguard national
25 security as a matter of EU law interpretation, and I'll 14:44
26 come back, Judge, to Article 13 of 95/46 in due course.

27
28 So Article 4 kicks in, Judge, when US law, or the law
29 of the country to which the material is being

1 transferred, imposes additional requirements that go
2 beyond what would be justified in EU law.

3
4 And then the second condition in Article 4 is that
5 those requirements, in this case the requirements of US 14:45
6 law, are likely to have a substantial adverse effect on
7 the guarantees provided by the applicable data
8 protection law or the standard contractual clauses.

9
10 So the second question is do the requirements in this 14:45
11 case of US law have a substantial adverse effect on the
12 guarantees that are provided by EU data protection law
13 and the SCCs?

14
15 And the structure of the decision is as follows, Judge: 14:45
16 That if the DPC or the national commissioner, in this
17 case the DPC, come to the view that the conditions in
18 Article 4 are not met well then it's her obligation to
19 suspend data flows to that country. The conditions,
20 Judge, that are set out in Article 4 are for practical 14:46
21 purposes, the same as the adequate level of protection
22 or effective equivalence requirements that you find
23 between Article 25 and 26. They are not expressed in
24 exactly the same way, Judge, but in practical terms
25 they are the same. 14:46

26
27 To put it, Judge, at colloquial level: If US law
28 doesn't provide for effective protection, if it imposes
29 requirements that mean that you can't abide by the

1 safeguards that are otherwise provided by the SCCs,
2 such that those requirements of foreign law have a
3 substantial adverse effect on the guarantees that the
4 SCCs are meant to provide, well then the DPC has a job
5 to do. 14:47

6 **MS. JUSTICE COSTELLO:** They sort of nullify the SCCs in
7 effect.

8 **MR. MCCULLOUGH:** I beg your pardon?

9 **MS. JUSTICE COSTELLO:** You are saying, if you like they
10 nullify the SCCs role of filling in the otherwise 14:47
11 inadequacy.

12 **MR. MCCULLOUGH:** Insofar as that country is concerned.

13 **MS. JUSTICE COSTELLO:** Mm hmm.

14 **MR. MCCULLOUGH:** Of course the SCC decision applies
15 worldwide. 14:47

16 **MS. JUSTICE COSTELLO:** Mm hmm.

17 **MR. MCCULLOUGH:** And the discovery that the laws of a
18 particular country have the effect as described in
19 Article 4 won't apply across the world, it will apply
20 only to the country in which one ascertains that about 14:47
21 the loss. So that's the job that is provided for the
22 DPC under Article 4.

23
24 The court can see the internal structure then of the
25 decision. It says you can't transfer unless you are in 14:47
26 compliance with the SCCs. And then it says, if the DPC
27 ascertains that US law for practical purposes has the
28 effect that the guarantees provided by the data
29 protection laws in the SCCs cannot be met, well then

1 she must suspend data flows. That is one of the
2 fundamental points made by Mr. Schrems here, Judge,
3 that that's what the DPC should be doing if she comes
4 to the view that the conditions of Article 4 are met,
5 that there is a remedy provided in Article 4 to meet 14:48
6 precisely the circumstances that are said to arise in
7 this case before you and that it is wrong to ask that
8 the SCC decision should be nullified as a whole.
9 Rather, it would be it would be correct to use the
10 remedy for which the decision itself provides, that is 14:48
11 to suspend data flows.

12
13 Can I move then, Judge -- and Mr. Murray says correctly
14 that Article 4 has subsequently been altered, Judge,
15 and you will find the altered version, I think, in the 14:48
16 2016 decision at Tab 14 of the same book. I just bring
17 it to your attention, Judge, instead of opening it now,
18 but I don't think I need to open it at this stage.

19
20 Can I move then, Judge, to the reformulated complaint 14:49
21 in order to see what are the issues that Mr. Schrems
22 raised and therefore what are the issues that the DPC
23 should be investigating. You'll find that, Judge, at
24 Book 1, not of the authorities, Book 1 of the --
25 **MS. JUSTICE COSTELLO:** Trial book. 14:49

26 **MR. MCCULLOUGH:** -- the trial book, Judge, exactly, at
27 Tab 17, I think, Judge. Mr. Schrems's complaint can be
28 described compendiously in the following way, Judge.
29

1 He complained that his data was being transferred in
2 breach of his rights as an EU citizen, but he broke
3 that down into a number of different complaints,
4 different issues that he raised. First, Judge, as is
5 clear from the text when I take you to it that he 14:50
6 didn't limit his complaint to the SCCs. He said that
7 he knew about the SCCs because Facebook had given him a
8 redacted version of their data transfer agreement, but
9 he made it clear that his complaint wasn't limited to
10 those and that there may well be other means by which 14:50
11 Facebook Ireland transfers its data to the US and those
12 two should be the subject matter of the investigation,
13 that's the first point.

14
15 The second point that he raised was this, Judge: In 14:51
16 respect of the SCCs specifically, he raised a
17 particular complaint. He said that the Facebook Data
18 Transfer and Processing Agreement, that's the phrase
19 that's used, the Data Transfer and Processing
20 Agreement, doesn't comply with and isn't in the form 14:51
21 permitted by the SCCs. The court will recall Article 1
22 of the SCCs; unless you are in accordance with the
23 format set out in the annex, you're not entitled to use
24 the derogation at all. And that was Mr. Schrems' basic
25 complaint in relation to the SCCs. He says well they 14:51
26 are not in compliance with Article 1 and therefore they
27 are not entitled to use the derogation at all.

28
29 Then, thirdly, he said, Judge, as a subsidiary point,

1 that if there is compliance on the part of Facebook
2 with Article 1 of the decision, it was nevertheless the
3 case that the transfer by Facebook to the US was in
4 breach of the principles of EU law but that the
5 appropriate remedy under those circumstances was to 14:52
6 apply Article 4. And he raises it very specifically.
7

8 Mr. Schrems, Judge, did not ask the DPC to pursue the
9 invalidity of the decisions, rather he raised these
10 specific points. He said it's only one of the issues, 14:53
11 it's one of the means by which there may be transfer,
12 you should investigate the others; secondly, in
13 particular he said about the SCC decisions they are
14 just not in compliance with them; and then, thirdly, he
15 said, if I'm wrong about that, it's not that I am 14:53
16 asking you to invalidate the SCCs, rather I am asking
17 you to operate Article 4, making the point that that's
18 precisely what the decision provides for. It provides
19 internally for a method to enforce its provision..

20 14:53
21 Now if we just take a moment, Judge, to look through
22 some of the content of the reformulated complaint,
23 Judge. I think it's at Tab 16, Judge - sorry, Tab 17,
24 Judge. It's not the first --

25 **MS. JUSTICE COSTELLO:** No, I'm in it. I am just trying 14:54
26 to work where into it.

27 **MR. MCCULLOUGH:** It's a few pages into it, Judge.
28 There's a couple of letters.

29 **MS. JUSTICE COSTELLO:** Yes, complaint, I have it.

1 I have the complaint, yes.

2 **MR. MCCULLOUGH:** It's dated 1st December 2015.

3 **MS. JUSTICE COSTELLO:** Hmm.

4 **MR. MCCULLOUGH:** I'll just bring the court to parts of
5 it. In the second paragraph on page 1, Judge, he
6 refers to the discussions that he's been having with
7 Facebook and he says:

14:54

8
9 *"As a preliminary point my solicitors wrote to Facebook
10 Ireland Limited on 12th October 2015 requesting details
11 of all legal basis that they were relying on to
12 transfer my data to the US. Furthermore, I requested a
13 copy of any contract that they purported to rely on.
14 Unfortunately, Facebook Ireland Ltd has only responded
15 to my request on Friday, 27th November 2015 at the
16 end of the business day. The response from Facebook
17 Ireland Limited's solicitors attached an Agreement
18 dated 20th November 2015 between 'Facebook Ireland Ltd'
19 and 'Facebook Inc'."*

14:54

20
21 And you'll find that, Judge, at Tab 23 at this book,
22 you'll find the data transfer agreement itself.

23
24 You'll find it there in redacted version, Judge.

25 **MS. JUSTICE COSTELLO:** Mm hmm.

14:55

26 **MR. MCCULLOUGH:** You actually had it opened to you
27 yesterday, an unredacted version, in the affidavit of
28 Ms. Cunnane and you'll find it at Book 5 Tab 29 as
29 well. I'll come to it in just a moment.

1 **MS. JUSTICE COSTELLO:** Mm hmm.

2 **MR. MCCULLOUGH:** *"The request to identify any other*
3 *legal basis for transfers between Ireland and the*
4 *United States of America has not been comprehensively*
5 *answered by Facebook Ireland Ltd. Instead, they state* 14:55
6 *'in addition to the agreement, Facebook Ireland relies*
7 *on a number of additional legal means to transfer user*
8 *data to the US'."*

9

10 That's I suppose the first of the points I raise, 14:55
11 Judge. Mr. Schrems is saying well I know about the
12 SCCs but it's not just that that I am concerned about.
13 I have asked what else they rely on, they won't give me
14 the details of it, but they have said that they rely on
15 *"additional legal means to transfer data to the US".* 14:55
16

17 Can I ask you, Judge, to turn forward to, he sets out
18 the facts, Judge, then on pages 2 through to 6 and
19 we'll just pause on page 6 for a moment.

20 **MS. JUSTICE COSTELLO:** Mm hmm. 14:56

21 **MR. MCCULLOUGH:** You see he returns to this point about
22 other legal grounds at item 8 on that page.

23 **MS. JUSTICE COSTELLO:** Yes.

24 **MR. MCCULLOUGH:** He says: *"Facebook Ireland does not*
25 *identify other legal grounds for a data transfer. My* 14:56
26 *solicitors wrote to Facebook Ireland on 12th October*
27 *2015 and requested the following:*
28
29 *'Therefore, we require you to identify, by close of*

1 *business on Friday 16th October 2015, all legal basis*
2 *that you are relying to transfer our client's data to*
3 *the US. When replying, we call upon you to forward us*
4 *a copy of any contract relied on by you'.*

5
6 *In their reply dated 27th November 2015 'Facebook*
7 *Ireland Ltd' has refused to identify all legal*
8 *bases that it uses to transfer data to the US. This*
9 *fact is especially relevant given the duties to inform*
10 *data subjects (actively, but at least upon request)*
11 *about these grounds under the law. The fact that*
12 *'Facebook Ireland Ltd' has refused such information*
13 *upon request may render any of these grounds invalid in*
14 *any event."*

15
16 The important point, Judge, is that he is not confining
17 his point to the SCCs. As I say that's the one he
18 knows about.

19
20 Then over the page, Judge, on page 7 he engages on his 14:57
21 legal analysis. Most of that I don't need to look at,
22 Judge. At paragraph 1 he deals with the definition of
23 processing and he makes the point, Judge, that
24 Mr. Collins and Mr. Murray have included at the third
25 paragraph that: "*Processing includes making* 14:57
26 *available"*, that goes to the substance of the matter,
27 Judge, but it's an important point.

28
29 Then at 2 he deals with the Charter of Fundamental

1 Rights, 3 Irish Constitutional law. At 4 he makes some
2 general remarks on the transfer to a third country
3 under the Directive. And then if I can ask you to
4 look, Judge, at item 5 on the next page.

5 **MS. JUSTICE COSTELLO:** Mm hmm. 14:57

6 **MR. MCCULLOUGH:** Under the heading: "*Specific*
7 *justifications under Directive 95/46/EC.*

8
9 *In the letter of 27th November 2015 Facebook Ireland*
10 *Limited has denied any comment on the methods used to* 14:58
11 *transfer data to the US other than an 'Agreement' based*
12 *on decision 2010/87 and a 'number of other additional*
13 *legal means' that they apparently intend to address 'as*
14 *part of the now ongoing investigation'."*

15 14:58
16 It's the same point again: "*Given this clearly*
17 *defensive and unhelpful response by 'Facebook Ireland*
18 *Ltd' I am unfortunately not in a position to make any*
19 *final comment on the legal basis 'Facebook Ireland*
20 *Ltd' may argue in the course of these proceedings,*
21 *which could have led to a fast decision. However,*
22 *there are a number of options 'Facebook Ireland Ltd'*
23 *will likely try to argue. In the interest of a swift*
24 *procedure I would therefore comment on the following*
25 *options in advance."* 14:58

26
27 And the court is familiar, that there are a number of
28 organisations, different derogations in particular
29 under Article 26, not just the SCCs, but he deals in

1 particular with the SCCs. He deals with that at (a):

2
3 *"According to the letter from 27th November 2015*
4 *Facebook claims to rely on standard contractual*
5 *clauses, in the version of Commission decisions*
6 *2010/87/EU."*

14:58

7
8 And then he makes his specific complaint about that:

9 *"Validity of the arrangement provided. Application of*
10 *SCCs significantly limited by undisclosed additional*
11 *agreements.*

14:58

12
13 *The clauses used by Facebook Ireland Limited and*
14 *Facebook Inc. significantly differ from the*
15 *ANNEX to Decision 2010/87/EU, most notably:*

16
17 ** The contract provided is giving priority to some*
18 *blacked out arrangement named in Clause 2.3 over the*
19 *ANNEX to Decision 2010/87/EU. Unless this legal basis*
20 *is disclosed, 'Facebook Ireland Ltd' cannot possibly*
21 *rely on Decision 2010/87/EU if the ANNEX is altered in*
22 *a way that it is overruled by some non-disclosed*
23 *element."*

24
25 I'll bring the court to the Facebook agreement in a
26 moment, Judge. He had only a redacted version, but he
27 is making the point that the Facebook data transfer
28 agreement appears on its face to be subject to some
29 other agreement and he is saying that means that it's

14:59

1 not in compliance with article - with the 2010
2 decision.

3 **MS. JUSTICE COSTELLO:** Mm hmm.

4 **MR. MCCULLOUGH:** He may be right or he may be wrong
5 about that, Judge, of course, but that's the complaint 14:59
6 that he is making.

7
8 Then he continues: *"The contract provided is giving*
9 *priority to some blacked out arrangement named in*
10 *Clause 2.3 over the ANNEX to Decision 2010/87/EU.*
11 *Unless this legal basis is disclosed, "Facebook*
12 *Ireland Ltd" cannot possibly rely on Decision*
13 *2010/87/EU if the ANNEX is altered in a way*
14 *that it is overruled by some non-disclosed 'intragroup*
15 *agreements'.*

16
17 *As Commission Decision 2010/87 only applies to*
18 *'standard contractual clauses set out the*
19 *Annex' according to Article 1 of the Decision,*
20 *'Facebook Ireland Ltd' cannot claim the benefits of*
21 *Decision 2010/87 when using an altered contract that*
22 *allows other undisclosed elements to*
23 *overrule the agreement. The nature of 'Standard*
24 *Contractual Clauses' is that a controller cannot*
25 *independently overrule these standards. Accordingly*
26 *Clause 10 of the ANNEX to Decision 2010/87/EU states*
27 *that:*

28
29 *'The parties undertake not to vary or modify the*

1 *Clauses. This does not preclude the parties from*
2 *adding clauses on business related issues when required*
3 *as long as they do not contradict the clauses."*

4
5 And that, as I say, Judge, is the fundamental point 15:00
6 that he makes. I will just pause for a moment, Judge,
7 to change.

8
9 Then, Judge, in the next heading he continues:

10
11 *"Contracts covering Sub-Processors missing*
12 *As known to your office, 'Facebook Ireland Ltd' and/or*
13 *'Facebook Inc' use a large number of sub-processors to*
14 *provide its services... The relevant contracts have to*
15 *be disclosed under Clause 4(h) of the Agreement, which*
16 *'Facebook Ireland Ltd' has failed to do. It is*
17 *therefore not possible to assess the legal protection*
18 *of my personal data if my data is processed by the*
19 *various sub-processors."*

20
21 Then he makes a number of other different complaints,
22 Judge, but they're all related to the same point; he
23 says that they all have the same effect, to a greater
24 or lesser degree, that the Facebook Data Transfer
25 Agreement is not in accordance with the 2010 decision. 15:01

26
27 If we turn over the page, Judge, to where he summarises
28 his views on the validity of the SCCs used. He says:
29

1 *"In summary, 'Facebook Ireland Ltd' cannot possibly*
2 *rely on Decision 2010/87 on the basis that it does not*
3 *even fulfil the most basic formal requirements: It does*
4 *not cover all processing operations by 'Facebook Inc',*
5 *it does not include the necessary arrangements with*
6 *sub-processors, it is not even signed in a verifiable*
7 *way and obviously only applies to transfers within the*
8 *last week.*

9
10 *Most notably 'Facebook Ireland Ltd' has chosen to*
11 *depart from the text in the ANNEX to the decision.*
12 *Accordingly, the DPC is not at all 'bound' (let alone*
13 *'absolutely bound') by Decision 2010/87, Article 26(4)*
14 *of Directive 95/46 and/or 11(2) of the Irish Data*
15 *Protection Act. At the same time the DPC is bound by*
16 *the judgments of the CJEU... and the High Court in*
17 *Schrems... and the CFR as well as the Irish*
18 *Constitution, which clearly prohibit a transfer in this*
19 *situation, as set out above".*

20 **MS. JUSTICE COSTELLO:** CFR, what's that a short for
21 again? 15:02

22 **MR. MCCULLOUGH:** The Fundamental Rights Charter,
23 Judge.

24 **MS. JUSTICE COSTELLO:** The Charter.

25 **MR. MCCULLOUGH:** The Charter. So as I say, 15:02
26 Judge, it's clear that's the fundamental point. He
27 says 'Just not in accordance with the SCCs.

28
29 The next paragraph, Judge, and the paragraph after that

1 are the two paragraphs that are selected by the DPC to
2 use in the draft determination and they're repeated
3 indeed in the pleadings. And it's said, if you like,
4 either stated expressly, or at least inferred, that the
5 next two paragraphs are, if you like, at the heart of 15:03
6 the complaint. I'll just read them out, Judge. He
7 certainly *makes* those complaints, Judge, but in fact
8 you have to see them in context.

9
10 He says: 15:03

11
12 *"'Facebook Ireland Ltd' has not proven that the*
13 *alternative agreement was authorised by the DPC under*
14 *Section 10(4)(ix) DPA. Even if it would be, such an*
15 *authorization would be invalid (and void in the light*
16 *of the judgements... Schrems... and therefore*
17 *irrelevant in this procedure."*

18
19 Then the next paragraph, Judge: *"Even if the current"*
20 -- and the next paragraph is also quoted by the DPC in 15:03
21 the draft determination.

22
23 *"Even if the current and all previous agreements*
24 *between 'Facebook Ireland Ltd' and 'Facebook Inc' would*
25 *not suffer from the countless formal insufficiencies*
26 *above and would be binding for the DPC (which it is*
27 *not), 'Facebook Ireland Ltd' could still not rely on*
28 *them in the given situation of factual 'mass*
29 *surveillance' and applicable US laws that violate Art*

1 *of Art 7 and 47 CFR was clearly established by the CJEU*
2 *and is binding on the DPC."*

3
4 Now, just leave that for a moment, Judge, and look at
5 the foot of the page. He raises consent under b. NOW, 15:05
6 consent, Judge, is a reference back to one of the
7 permitted derogations under Article 26. It's another
8 possibility. It's --

9 **MS. JUSTICE COSTELLO:** If 6(2) wasn't one of the six
10 points? 15:05

11 **MR. MCCULLOUGH:** It is, Judge, exactly. So this
12 is another possible derogation on which Facebook may be
13 relying and Mr. Schrems is saying 'well, of course' --

14 **MS. JUSTICE COSTELLO:** He's speculating as to what
15 the -- 15:05

16 **MR. MCCULLOUGH:** He's speculating and saying 'I
17 don't know, but this is something you have to
18 investigate'.

19
20 *"Consent* 15:05

21 *It is very much disputed that the rights under Art 7*
22 *and 47 CFR can be 'waived' through consent. In*
23 *addition 'consent' to be freely given requires that a*
24 *user has the free choice between different options.*
25 *Given that 'Facebook Ireland Ltd' has basically become*
26 *a utility and users cannot choose between having their*
27 *data transferred to the United States or not, the user*
28 *is not in any situation that would allow for a 'freely*
29 *given consent'. I therefore submit that consent is*

1 not a legal basis for any data usage that violates
2 fundamental rights..."

3
4 Then he says, Judge, even if they can be waived, he
5 says consent has to be freely given. Then, Judge, 15:06
6 under c, at the foot of page, he says "Any Other Legal
7 Basis".

8 **MS. JUSTICE COSTELLO:** Mm hmm.

9 **MR. MCCULLOUGH:** "Any other derogation under
10 Article 26(1) of Directive... that 'Facebook Ireland
11 Ltd' may argue must again fail on the basis that the
12 CJEU has been very clear that transfers that lead to
13 the use of such data for 'mass surveillance' are a
14 violation of Art 7, 8 and 47."

15
16 So he's making it clear, Judge, as I say, that he's not
17 limiting himself to the SCCs.

18
19 Then finally, Judge, if I can turn to page 15 of the
20 complaint, where he sets out his requests. He says 15:06
21 this is what he wants. He wants the DPC --

22
23 *"Suspension of all data transfers*
24 *Based on the facts and legal arguments above - and any*
25 *other legal or factual basis - I therefore request that*
26 *the DPC issues a prohibition notice under section 11(7)*
27 *to (15) DPA, an enforcement notice under section 10(2)*
28 *to (9) DPA and/or any other appropriate step to suspend*
29 *all data flows from 'Facebook Ireland Ltd' to 'Facebook*

1 *Inc'.*"

2
3 I'll come to Section 11 in just a moment, Judge, but it
4 provides the means in Irish law whereby orders such as
5 those for which Article IV of the decision can be made. 15:07

6
7 So as I say, Judge, you'll find the unredacted version
8 of the Facebook agreement, Judge, in a number of
9 places, but the version I think that you were looking
10 at yesterday is in book five, tab 29. 15:07

11 **MS. JUSTICE COSTELLO:** 29?

12 **MR. MCCULLOUGH:** Yes, Judge. And if you'd just
13 look at clause 2. It's really a very short extract.
14 These are the two paragraphs to which Mr. Schrems was
15 referring in particular, although as I say, he had them 15:07
16 in redacted version. So it's clause 2, subclauses 2
17 and 3 to which he was referring.

18
19 *"2. For the avoidance of doubt, nothing in this clause*
20 *2 shall impact on or affect other intragroup agreements*
21 *in the Facebook group of companies save for those which*
22 *have, as their primary object or effect the*
23 *international transfer and processing of data.*

24
25 *3. In particular, and without prejudice to the*
26 *generality of the foregoing, this Agreement shall not*
27 *impact upon the Data Hosting Services Agreement between*
28 *the parties dated September 15, 2010."*

1 And he makes the complaint on that basis, but on the
2 other basis set out in the reformulated complaint that
3 this agreement isn't in compliance with the SCCs. As I
4 say, Judge, he may be right or he may be wrong, but
5 that's what the complaint was. 15:08

6
7 So, Judge, having seen the complaint, I think one can
8 summarise it in the following way. The primary focus
9 is on the contention that the contract didn't comply.
10 Secondly, Judge, it's pointed out that the SCC 15:08
11 decisions are only one of numerous different types of
12 entitlements upon which Facebook may rely - he was
13 making it clear that they all require to be
14 investigated as part of his overall complaint. And
15 then thirdly, Judge, he's saying, as a contingent issue 15:09
16 only arising from his first complaint in relation to
17 the SCCs, he's saying that *even if* this agreement is in
18 compliance with the SCCs, Facebook can't rely on it
19 anyway due to the inadequacy of protection, but he's
20 making it clear that the correct course and the course 15:09
21 that he's asking the DPC to follow is to use the powers
22 under Article IV.

23
24 I said, Judge, that I'd bring you to section 11 of the
25 Act and I'll do that very briefly just to show the 15:09
26 Irish...

27 **MS. JUSTICE COSTELLO:** I'll do it on the tablet thing
28 here.

29 **MR. MCCULLOUGH:** Yes, Judge. You'll find that,

1 Judge, in book two, tab 17. And it's Section 11,
2 Judge. Perhaps I'll just bring your attention to it,
3 Judge, in the interests of saving time.

4 **MS. JUSTICE COSTELLO:** Where is it? On the books, book
5 seven? 15:10

6 **MR. MCCULLOUGH:** It's book...

7 **MS. JUSTICE COSTELLO:** I'm just, I'm in your pad and
8 there's...

9 **MR. MCCULLOUGH:** Book two, Judge, tab -- no,
10 sorry, on the pad. Let me find it in a different way 15:10
11 then.

12 **MS. JUSTICE COSTELLO:** Maybe the pages.

13 **MR. MCCULLOUGH:** Yes, certainly, Judge. A13,
14 Judge, tab 17. On the tablet, Judge, it's --

15 **MS. JUSTICE COSTELLO:** Yes, thank you. Agreed EU/Irish 15:10
16 authorities and it's...

17 **MR. MCCULLOUGH:** Tab 17, Judge.

18 **MS. JUSTICE COSTELLO:** Do you have a page? This isn't
19 speeding me up at all.

20 **MR. MCCULLOUGH:** It's page 48, Judge. 15:11

21 **MS. JUSTICE COSTELLO:** Oh, God. No, it's eight of
22 three thousand and something. We'll go back the old
23 way.

24 **MR. MCCULLOUGH:** It may be easier to go back the
25 old way, Judge, I'm sorry. 15:11

26 **MS. JUSTICE COSTELLO:** What was it again? Okay, I did
27 try. Where were you in old money, Mr. McCullough?

28 **MR. MCCULLOUGH:** Book B2, Judge, tab 17.

29 **MS. JUSTICE COSTELLO:** Yes, thank you.

1 **MR. MCCULLOUGH:** And Section 11, Judge. I hope
2 that *is* the Act, Judge, that you're...

3 **MS. JUSTICE COSTELLO:** This is in the prohibition on
4 and transfer of personal data outside the State?

5 **MR. MCCULLOUGH:** Yes, Judge, exactly. 15:12

6 **MS. JUSTICE COSTELLO:** It's F32 then, is that --

7 **MR. MCCULLOUGH:** F32, Judge, yes. That's just a
8 footnote I think. And then Section 11. So it
9 provides:

10

11 *"The transfer of personal data to a country or*
12 *territory outside the European Economic Area may not*
13 *take place unless that country or territory ensures an*
14 *adequate level of protection for the privacy and the*
15 *fundamental rights and freedoms of data subjects in*
16 *relation to the processing of personal data having*
17 *regard to all the circumstances surrounding the*
18 *transfer and, in particular, but without prejudice to*
19 *the generality of the foregoing."*

20

21 Then it sets out a number of criteria, Judge, that the
22 DPC should consider, including the nature of the data,
23 the purpose for which, the period the data is intended
24 to be transferred and so on.

25

26 Then over the page at subsection 3, Judge, it mirrors,
27 I suppose, the requirement of the decision, that the
28 Commissioner shall inform the Commission and the
29 supervisory authorities of the Member States in any

15:12

1 case in which he or she considers a country outside the
2 EEA does not ensure the adequate level of protection
3 referred to in subsection 1 of this section.
4

5 There is a similar provision, Judge, in the Directive 15:13
6 itself that I'll bring you to in book one, tab four,
7 Judge.

8 **MS. JUSTICE COSTELLO:** I'm assuming that's authorities,
9 not trial book?

10 **MR. MCCULLOUGH:** It *is* authorities, Judge, yes. 15:13

11 **MS. JUSTICE COSTELLO:** I'm sorry, you did tell me the
12 tab.

13 **MR. MCCULLOUGH:** Tab four, Judge.

14 **MS. JUSTICE COSTELLO:** Thank you.

15 **MR. MCCULLOUGH:** And Article 28, Judge, 15:14
16 sub-article 3.

17 **MS. JUSTICE COSTELLO:** Yes, I think Mr. Collins opened
18 it.

19 **MR. MCCULLOUGH:** Yes. Very good, Judge. Well,
20 then I won't open it again, Judge -- 15:14

21 **MS. JUSTICE COSTELLO:** No, no, it's all right. Do,
22 yes.

23 **MR. MCCULLOUGH:** It's the second indent, Judge:
24

25 *"Each authority shall in particular be endowed with:*

26
27 *- effective powers of intervention, such as, for*
28 *example, that of delivering opinions before processing*
29 *operations are carried out... ensuring appropriate*

1 *publication of such opinions" - and then this is the*
2 *important bit - "of ordering the blocking, erasure or*
3 *destruction of data, of imposing a temporary or*
4 *definitive ban on processing, of warning or admonishing*
5 *the controller."*

6
7 And so on, Judge. So that ties in with Section 11. So
8 those are the three issues, Judge, that he raised.
9 Then can I bring you very briefly, Judge, to the draft
10 decision itself and just show you, Judge, how they were 15:15
11 addressed. You'll find that, Judge, at book one, tab
12 18. And the, if you like, Judge, the fundamental
13 difficulty that we have with the draft determination is
14 that it doesn't really address the points to which I've
15 been bringing the court's attention, and those are all 15:15
16 points that need to be addressed before it can be said
17 that a reference on *this* point, which is not really a
18 point raised by Mr. Schrems at all, can be said to be
19 necessary.

20
21 So I'll open just very short parts of this, Judge. If
22 you look at paragraph 36.

23 **MS. JUSTICE COSTELLO:** "*Strand 1 of the Investigation*"?

24 **MR. MCCULLOUGH:** Sorry, Judge, maybe paragraph 33
25 onwards at page 15 of the draft determination. The 15:16
26 Commissioner sets out her post-litigation investigation
27 of the complainant's complaint. At paragraph 33 she
28 says - she's talking about what happened immediately
29 after the Schrems decision came back from Europe and

1 Judge Hogan's decision was made - she says:

2
3 *"Immediately thereafter, my office opened its*
4 *investigation into the Complainant's complaint.*
5 *In circumstances where there was by now no question but*
6 *that EU/US transfers of Facebook subscriber data could*
7 *no longer be undertaken under the safe harbour*
8 *arrangements, the investigation has sought to establish*
9 *whether, following the demise of the Safe Harbour*
10 *Decision, the transfer of personal data relating to its*
11 *European subscribers by FB-I to Facebook Inc. is*
12 *lawful."*

13
14 And that in itself, Judge, is a perfectly reasonable
15 description of what she should've been doing. If I can 15:17
16 continue then, Judge, to paragraph 34:

17
18 *"In practical terms, my investigation has proceeded in*
19 *two distinct strands, running in parallel. Strand 1*
20 *has comprised a factual investigation focused on*
21 *establishing whether FB-I has continued to transfer*
22 *subscribers' personal data to the US subsequent to the*
23 *CJEU Judgment of 6 October 2015. If and to the extent*
24 *that it does, my investigation has also sought to*
25 *examine the legal bases on which such transfers are*
26 *effected."*

27
28 And that in itself, Judge, again, if you like, is
29 not -- none of that is unreasonable. Then at paragraph

1 35, Judge, she refers to the fact that her office
2 notified the FBI of the commencement of the
3 investigation, it invited Mr. Schrems to reformulate
4 his complaint and it says that Mr. Schrems duly
5 submitted his reformulated complaint on 1st December. 15:18
6 And the court has seen all that. I'll just continue,
7 Judge, after the words "1st December".

8 **MS. JUSTICE COSTELLO:** Yes.

9 **MR. McCULLOUGH:** *"Having secured access in the*
10 *interim to one or more of the data processing*
11 *agreements to which FB-I and Facebook Inc. are party,*
12 *that complaint referred to the nature and extent of*
13 *those parties' reliance on the SCC Decisions. (A copy*
14 *of the complaint is contained at Annex 1...).* In
15 *particular, Mr Schrems made the following complaints."*
16

17 Then, Judge, there are two paragraphs quoted. And I
18 suppose, Judge, taken in isolation, they *do* look as if
19 Mr. Schrems has, as his fundamental problem, a
20 complaint about the validity of the SCC decisions. But 15:18
21 in fact the court has seen that wasn't the point of the
22 reformulated complaint at all.

23
24 Then having set out those two paragraphs, Judge, from
25 Mr. Schrems' reformulated complaint, the DPC continues 15:18
26 under "strand 1", paragraph 36:

27
28 *"In the course of exchanges between FB-I and this*
29 *Office in relation to Strand 1, FB-I has acknowledged*

1 *that it continues to transfer personal data relating to*
2 *Facebook subscribers resident in the European Union to*
3 *its US-established parent and, further, that it does*
4 *so, in large part" - I'd ask the court to note "in*
5 *large part" - "on the basis of its contention that - by*
6 *means of the deployment of the form of standard*
7 *contractual clauses set out in the Annexes to the SCC*
8 *Decisions - the company ensures adequate safeguards for*
9 *the purposes of Article 26(2) of the Directive with*
10 *respect to the protection of the privacy and*
11 *fundamental rights and freedoms of EU-resident*
12 *subscribers to the Facebook platform and as regards the*
13 *exercise by such subscribers of their corresponding*
14 *rights."*

15
16 And you'll see, Judge, when we go through this, there
17 is in fact no investigation of two matters: One, the
18 SCCs are the *only* derogation that are investigated in
19 the draft decision, the determination, there is in fact
20 no investigation of the other derogations of the; and 15:19
21 secondly, Judge, there is in fact no investigation,
22 certainly no determination of Mr. Schrems' fundamental
23 point, which is to question whether the Facebook
24 agreement was in compliance with the 2010 decision.

25
26 So at Strand 2, Judge, she sets out what she embarks
27 upon on that. The court has already seen that, Judge,
28 I won't open that. Then, Judge, the DPC goes on to set
29 out in some detail her findings as to the defects -- or

1 I should say as to the absence of sufficient protection
2 in US law. The court has seen those, Judge, and I
3 don't think I need to open them again in detail. I
4 should say, Judge, we agree with the *entire* of it.
5 Everything she says about US law, Judge, we're in 15:21
6 entire agreement with. We agree with her both about
7 the requirements of EU law and the differences between
8 what can be supplied, or what should be supplied under
9 European Union law on the one hand and what *is*
10 available pursuant to the requirements of US law on the 15:21
11 other hand.

12
13 Judge, if you turn then just to paragraph 60, you'll
14 see her conclusions on all of these matters.

15 **MS. JUSTICE COSTELLO:** Yes. 15:21

16 **MR. MCCULLOUGH:** *"For all of the reasons outlined*
17 *above, therefore, I have formed the view, subject to*
18 *consideration of such submissions as may be submitted*
19 *in due course by the Complainant and FB-I that, at*
20 *least on the question of redress, the objections raised*
21 *by the CJEU in its judgment in Schrems have not yet*
22 *been answered.*

23
24 *61. It is also my view that the safeguards purportedly*
25 *constituted by the standard contract clauses set out in*
26 *the Annexes to the SCC Decisions do not address the*
27 *CJEU's objections concerning the absence of an*
28 *effective remedy compatible with the requirements of*
29 *Article 47 of the Charter, as outlined in Schrems."*

1
2 Now, the point is this, Judge: If the DPC relies on
3 this material as material upon which she brings this
4 application before the court asking this court to refer
5 a question as to the validity of the SCCs, we say, 15:22
6 Judge, that this same material leads inexorably to a
7 decision that Article IV is engaged and, therefore,
8 according to the proper scheme of the decision, ought
9 to lead to a suspension of data transfers pursuant to
10 Article IV of the 2010 decision. 15:22

11
12 That's perhaps more evident, Judge, at paragraph 62,
13 where she says:

14
15 *"Accordingly, I consider that the SCC Decisions are*
16 *likely to offend against Article 47 of the Charter*
17 *insofar as they purport to legitimise the transfer of*
18 *the personal data of EU citizens to the US in the*
19 *absence in many cases of any possibility for any such*
20 *citizen to pursue effective legal remedies in the US in*
21 *the event of any contravention by a US public authority*
22 *of their rights under Articles 7 and/or 8 of the*
23 *Charter. That being the case, I consider that the*
24 *Complainant's contention that SCC Decisions cannot be*
25 *relied on to legitimise the transfer of the personal*
26 *data of EU citizens to the US in such circumstances is*
27 *well founded."*

28
29 And of course, he *did* say, Judge, that they can't be

1 relied upon, but he made it clear that that does *not*
2 lead to the conclusion that the SCCs are invalid,
3 rather it leads to the conclusion that data transfers
4 should be suspended pursuant to Article IV.

15:23

5
6 Then, Judge, at paragraph 64 she sets out her overall
7 conclusions, conclusions which, in my respectful
8 submission, Judge, are apt to engage Article IV.

9
10 So, Judge, in my respectful submission, the consequence
11 of all of that, if you look at the Strand 1 comments,
12 which are very short, the Strand 1 comments demonstrate
13 that there *is* no investigation of the other methods of
14 transfer. It's certainly said in large part that
15 Facebook relies on the SCCs, but that in itself as a
16 phrase necessarily means that it has other means by
17 which it achieves transfers. And there is simply no
18 investigation of the primary issue, that's to say the
19 issue that I said was Mr. Schrems' major complaint, the
20 question of compliance with the decisions. Those
21 points, Judge, aren't addressed.

15:23

15:23

15:24

22
23 And in my respectful submission, Judge, the consequence
24 of that is that this reference is not necessary, or at
25 least is premature. Because the primary complaint
26 needs to be investigated first. If that complaint is
27 resolved in favour of Mr. Schrems, well, then it
28 follows that there can be no need to seek to invalidate
29 the SCCs. Facebook's particular transfer mechanism

15:24

1 would have been struck down or prohibited by the DPC,
2 but there can be no question under those circumstances
3 of seeking to invalidate the decisions themselves.
4 That's why I say, Judge, it's unnecessary, or at least
5 premature. 15:24

6
7 The same thing applies, Judge, to the failure to
8 investigate the other methods of transfer, the other
9 derogations. Those haven't been examined yet. And it
10 is undesirable, Judge, and I say premature and 15:25
11 unnecessary that there should be a reference to the
12 CJEU on *this* point when it may well be that there will
13 be other issues lying behind this which in turn may
14 lead to further references to the CJEU. From
15 Mr. Schrems' point view of, Judge, he's already been 15:25
16 there once. It's now proposed he will go there twice.
17 It follows from what Facebook are saying that there may
18 be other methods which will lead to yet a third
19 reference. And in my respectful submission, Judge,
20 that renders *this* reference, this proposed reference, 15:25
21 of necessity, at least premature.

22
23 The same thing applies, Judge, to the Strand 2
24 comments. You can see, Judge, that there is simply, on
25 the DPC's part, a conclusion - with which we *don't* 15:25
26 disagree if it comes to it - that the decisions are
27 invalid. But we say that it couldn't and shouldn't
28 come to it, because we say that Article IV is engaged
29 and that the appropriate response here is to make the

1 order pursuant to Article IV.

2
3 The court was brought to the DPC's affidavit, Judge,
4 and a number of points are made in that as to why
5 that's wrong. In the interests of time, Judge, I'm not 15:26
6 going to go over the various reasons why Mr. Schrems
7 says that *that's* wrong. But you'll see those reasons
8 analysed, Judge, in our submissions. And you'll find
9 that material, Judge, at book 12, tab one. And at
10 paragraph 54 of those submissions, Judge, each of 15:26
11 Mr. O'Dwyer's reasons are analysed. He says in his
12 affidavit that there are various reasons why it
13 *wouldn't* be appropriate to rely on Article IV, and each
14 of those is answered there.

15 15:27
16 Could I just, I suppose, look very briefly at three of
17 the major points that are raised, both here and in
18 their submissions? It's said first of all, Judge, that
19 the DPC doesn't accept that Article IV is engaged. And
20 I say, Judge, that's wrong, because a close analysis of 15:27
21 the draft determination makes it clear that the DPC has
22 formed the view that there are requirements of US law
23 that have the effect for which Article IV provides. I
24 can return to this in more detail in due course, Judge,
25 and I don't think I need to do it now. But I say, 15:28
26 Judge, that the net effect of the findings of the DPC
27 in her draft determination are such as to make it clear
28 that the conditions for Article IV are met.

1 Secondly, Judge, it's said that, well, it would be
2 disproportionate to make an order under Article IV.
3 And I say, Judge, that's wrong as well. Article IV is
4 there, it should be used, the scheme of the decision is
5 precisely to provide *for* its use. Judge, if you 15:28
6 reflect on relative proportionality here, an order made
7 by the DPC under Article IV might have an effect on the
8 transfer of data between the EU and the US - only, of
9 course, insofar as that data is transferred in reliance
10 on the SCCs. But that's the maximum effect that it 15:29
11 would have. But the issue that the court is being
12 asked to refer to the CJEU and the preliminary view
13 reached by the DPC will lead to the invalidation of the
14 entire decision, which has a worldwide impact, because
15 the decisions, of course, don't relate to the US only. 15:29
16 Unlike safe Harbour, say, or Privacy Shield, which are
17 specifically EU/US, it's proposed that the *entire* of
18 the SCCs would be struck down. So if you look at
19 relative proportionality, Judge - the SCCs decisions
20 would be struck down - relative proportionality, Judge, 15:29
21 in my respectful submission, the proper approach is to
22 do what Mr. Schrems asked the DPC to do.

23
24 Then finally, Judge, it's said that the point *can't* be
25 raised, because it doesn't arise from the draft 15:30
26 determination itself. It's said in particular that the
27 Article IV point doesn't arise from the draft
28 determination itself. Well, that's, if you like,
29 circular and self-probative, Judge. It doesn't arise

1 from the draft determination only because the DPC
2 didn't put it in, only because the DPC didn't reach a
3 determination on it and didn't put it in as an issue
4 into those in respect of which proceedings were issued
5 before this court. It *cannot* be said, Judge, that it 15:30
6 doesn't arise as an issue in the complaint. It quite
7 clearly does. And as I've suggested to the court, the
8 questions of necessity must be determined in the
9 context of the complaint as a whole.

10
11 You'll have seen in our submissions, Judge, that we say 15:31
12 that in fact, on the basis of Article IV, but on that
13 narrow basis only, the SCC decisions *aren't* invalid -
14 I'll just spend one second on that, Judge - precisely
15 because Article IV provides for this safety valve, 15:31
16 precisely because Article IV allows for the suspension
17 of data flows under circumstances where the Article IV
18 conditions are met and there are inadequate safeguards.

19 **MS. JUSTICE COSTELLO:** In other words, if you comply
20 with the regime correctly, it's fine. But if you 15:31
21 breach it then you'll have to be suspended, is that
22 what --

23 **MR. MCCULLOUGH:** You have to be suspended, Judge,
24 yes. And that is what Article IV provides for. And on
25 that narrow basis, Judge, if we're correct about that, 15:31
26 well then we say there's no invalidity in the
27 decisions, precisely because they contemplate exactly
28 the sort of circumstance that is now said to arise.
29 And it can't be correct, Judge, we say, to rely upon

1 arguments that could lead validly and should lead
2 validly to the suspension of data flow pursuant to the
3 decision and rely upon those same points to seek to
4 invalidate the decision as a whole.

15:32

5
6 If one contemplates an Act, Judge, an Act of the
7 Oireachtas which permitted a judge to make an
8 injunction to restrain a breach of privacy, how could
9 it be said that the Act was invalid because it, if you
10 like, inevitably infringed upon privacy? And that's the
11 essence, Judge, of what has happened here.

15:32

12
13 So that's why, Judge, in my respectful submission, we
14 say, Judge, that it's *not* appropriate to make the
15 complaint, it's premature and unnecessary in accordance
16 with the way in which that matter is approached in the
17 European decision.

15:32

18
19 I do emphasise, Judge, that notwithstanding that, we
20 agree with everything that the DPC says as to the
21 essential inadequacy of the safeguards that are in
22 place. We say that should lead to Article IV
23 activation. Of course, if I'm wrong about that and it
24 doesn't lead to Article IV activation, well then of
25 course it should lead to the invalidity of the SCCs,
26 and that's the very final position, Judge, that I
27 advocate. But it is, if you like, after each of the
28 other positions that I put forward to the court. And
29 I'm sorry I've taken somewhat more than my half an

15:32

15:33

1 hour, Judge. May it please the court.

2 **MS. JUSTICE COSTELLO:** Thank you.

3 **MR. GALLAGHER:** May it please you, Judge. I've
4 a, I think, more structured idea of time than
5 Mr. McCullough -- 15:33

6 **MR. MCCULLOUGH:** We shall see.

7 **MR. GALLAGHER:** -- so I'll try and keep to the
8 time allowed, with maybe just a little bit of latitude.

9 **MR. MCCULLOUGH:** I see.

10 **MR. GALLAGHER:** I've looked at the speaking 15:33
11 note, so-called, handed in by Mr. Murphy at twenty five
12 past two on the sixth day of, I think, as long as his
13 original submissions. I can deal with it, but I would
14 ask that we have an opportunity of just putting our
15 response in writing. It should've been part of their 15:33
16 submissions. They elected to keep their submissions to
17 initially 10,000, they got an extra thousand. As we
18 were putting them in first and had to set out the
19 position in US law, clearly our submissions were going
20 to take somewhat longer. But I'll move on from that, 15:34
21 because whatever assists the court --

22 **MS. JUSTICE COSTELLO:** Certainly you can respond to
23 that as you see fit.

24 **MR. GALLAGHER:** Thank you, Judge.

25 **MS. JUSTICE COSTELLO:** In terms of your timing, to some 15:34
26 extent I'll leave it to yourself, but obviously before
27 the -- they have to reply.

28 **MR. GALLAGHER:** Oh, yes. And we'll get it in,
29 I'm sure we *won't* leave it to the last minute.

1 **MS. JUSTICE COSTELLO:** We don't want too much pressure
2 on Mr. Kieran.

3 **MR. GALLAGHER:** No. Thank you, Judge. I'm sure
4 he'll be very grateful for that.

5
6 I suppose just to put this in context, Judge, I'm going
7 to focus on what Mr. Murray, on behalf of the DPC, says
8 and not on what Mr. McCullough says. That's not
9 because I agree with what he says, but I think the time
10 is best utilised in going to the substance. I mean,
11 Mr. McCullough's client has made it clear he doesn't
12 want data transferred to the US. It's, of course, his
13 legal entitlement to argue that. The consequences of
14 what he is seeking are quite extraordinary.

15
16 The uncontested evidence before the court in
17 Prof. Meltzer's report, a portion not referred to by
18 Mr. Murray - I make no criticism of it - but if data
19 which he describes as being an *integral* part of trade -
20 it happens to be Facebook that's before the court - but
21 he has described the range of entities within the EU
22 that transfer data as an integral part of their trade,
23 including small enterprises transferring to the cloud,
24 people in all sorts of transactions, and Prof. Meltzer
25 says that to prohibit the transfer from the EU would
26 lead to an annual reduction in the GDP of the European
27 Union of 0.8 to 1.3% and EU services exports could
28 decline by 4.6 to 6.7. So there are very serious
29 issues involved in this case.

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My client is in the position that it is the entity against whom the complaint was made, but the ramifications extend to all of those other entities and many of whom that perhaps don't have different and alternative legal bases to make a transfer, as my client would have.

15:36

The oddity about the claim put forward by the DPC is that her decision ignores some very important issues. And let it be said that Facebook respects the tremendous work that's done by the DPC in protecting the rights of data subjects. Facebook itself, as you will have seen from the affidavits, is an organisation that is fiercely protective of the data which it holds. And that's not only a matter of public record, but outlined in detail in the affidavits. Nevertheless, it finds itself here, unfortunately, disagreeing with the DPC and it does so because the DPC's provisional decision, as it's called, is fundamentally defective in a number of significant respects.

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15:37

You will have noticed a number of oddities, as I say, about the decision, some of which Mr. Murray has manfully tried to cure retrospectively, including with now addressing really for the first time the issue of national security and its exclusion from the scope of EU law, not in a satisfactory way or in an answer to what we say. But these are matters on which the

15:38

1 decision is entirely silent. He also sought to address
2 briefly today the interaction between Articles 25 and
3 26. And you won't find any mention of 26 in the
4 decision, the analysis is based on the Article 25 test.

15:38

5
6 Perhaps the most significant matter that is expressly
7 omitted from the decision is any consideration of the
8 Privacy Shield. In footnote 22 of the decision, the
9 Data Protection Commissioner says that she has not
10 considered the Privacy Shield because its
11 implementation postdated the decision, the decision
12 being 24th May 2016 and the Privacy Shield being
13 finally introduced in July of 2016, but it was
14 initially announced and circulated in draft form in
15 *February* of 2016.

15:39

15:39

16
17 Mr. Collins, with consummate skill, skirted through the
18 privacy decision and Mr. Murray, with equal skill
19 today, touched on it very briefly. But of course, the
20 one thing that the privacy decision -- or the Privacy
21 Shield, I should say, and more particularly the
22 Adequacy Decision, which forms part of it, says that is
23 of the utmost relevant to this court is that US law
24 does provide adequate protection. And in the second
25 day of the opening, you were treated to a day's
26 analysis of US law and it's alleged deficiencies,
27 supplemented by Mr. Murray's arguments today. But *no*
28 consideration has been given by the DPC to what is the
29 authoritative and actually binding assessment of the

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1 adequacy of the protections provided by US law and this
2 court is asked to come to a contrary conclusion.

3
4 The Commission began its interaction with the US
5 authorities in early 2014, having previously, in 2013, 15:40
6 in its communication to the Parliament identified
7 itself its concerns with the then position under US
8 law. Over a period of two years at the highest level,
9 it engaged in the most detailed interaction with the US
10 authorities and arrived at a very carefully considered 15:40
11 conclusion, published in draft form, considered
12 comments on it and then set out in great detail the
13 reason why US law is to be regarded as providing
14 adequate protection.

15 **MS. JUSTICE COSTELLO:** Can you address me when you come 15:41
16 to it as to the distinction that could be made, or if
17 there's no distinction, between the Commission decision
18 in relation to Privacy Shield and the Commission
19 decision in relation to safe harbour? I mean, I
20 understand that they're both binding on national 15:41
21 authorities, be it a data protection investigator or a
22 national court, but obviously in Schrems 1 the Court of
23 Justice says you've got to look at these things anyway.

24 **MR. GALLAGHER:** Absolutely.

25 **MS. JUSTICE COSTELLO:** So I'd like some help in that 15:41
26 regard.

27 **MR. GALLAGHER:** Absolutely. And that's a
28 critical decision. You focussed on a very important
29 point and the answer is simply this, Judge: In Schrems,

1 the issue before the Commissioner was the adequacy --
2 or was the validity of the safe harbour; that's what
3 the court said - just because the safe harbour is
4 there, if a complaint is raised that raises an issue
5 with regard to it then there is a procedure because the 15:42
6 Commissioner, or the DPC cannot declare this Commission
7 decision to be invalid, can refer it to Europe.

8
9 But the obvious difference that will have occurred to
10 you and is obvious from the decision is there is no 15:42
11 *challenge* here to the Privacy Shield - not by the DPC,
12 not by Mr. Schrems. There is no *complaint* before the
13 DPC which involves any such challenge. And in those
14 circumstances, it's quite clear as a matter of law, and
15 in particular Section 11 of the Data Protection Act as 15:42
16 amended, in the context of Article 31 of the directive,
17 that there is a decision that is binding on everybody.

18
19 But of course, what is even more remarkable in the six
20 days of submissions and in all of the consideration 15:43
21 given by the DPC to this matter is that, as I said, the
22 analysis has been done by reference to Article 25 when
23 we're concerned with Article 26, which in its express
24 terms is a derogation; it says "where the adequate
25 protection does not exist", it provides an alternative. 15:43
26 And you're treated to an analysis of why there is not
27 adequate protection, which is the Article 25 standard,
28 but nobody on behalf of the DPC says 'well, actually,
29 the position has changed since we considered this in

1 May 2016, there is now a decision which, even if we are
2 correct with regard to the *standard* that is applicable'
3 - which we say they're not - 'actually is not only
4 relevant, but is decisive'.

15:44

5
6 And that leads to just one fundamental matter you
7 raised yourself this morning; there's no necessity to
8 make a reference if something is a moot. And the
9 proper course in this case -- there was no requirement
10 that the decision be issued by 24th May 2015. There
11 was no surprise about the Commission's position with
12 regard to the position under US law. And what
13 should've been done if adequacy of protection was the
14 correct standard was that should've been considered.
15 But what we have instead is a moot; it is asking you to
16 make a reference on the basis of assumed facts, which
17 is the one thing you *cannot* do. And the Supreme Court
18 authority in the Löffingen case establishes that, and
19 I'll be opening that to you.

15:44

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20
21 You can't assume facts that are not the case. And this
22 decision does *not* take into account the Adequacy
23 Decision of the Commission in its analysis of the
24 Privacy shield. And you're being asked to second-guess
25 that.

15:45

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26
27 The other remarkable feature - and I'll come back to
28 expand on that in a moment - that you'll have noticed
29 is that this is all about the SCC decisions. And they

1 are actually not dealt with in the decision, they are
2 sidelined on what seems like intuitively at the
3 beginning might seem to be like a valid point that the
4 contracts don't bind the State and, therefore, they're
5 irrelevant. well, on closer examination, one might ask 15:46
6 the question: How does Article 26 of the Directive,
7 which is not challenged, envisage that adequate
8 safeguards - which is the wording of Article 26 - can
9 be provided through contracts? And Article 26(2) and
10 26(4) *expressly* understand that. The European 15:46
11 legislature, in introducing the Directive, didn't think
12 that Facebook or the small/medium sized enterprise or
13 anybody else who is using it is going to ring up the US
14 Government and say 'Enter into a contract so that I can
15 transfer this data'. It was never envisaged as *doing* 15:47
16 that. So to say, when an issue arises in relation to
17 it, that you won't consider it because the contract
18 doesn't bind the State raises a very fundamental
19 question.

20
21 And of course, the answer at its most basic is that
22 this is relevant, this is very important and how could
23 you have a well founded concern about the protections
24 that are available without having looked at it, taken
25 it into account and seen its significance - something 15:48
26 that has not been done in the last six days; brief
27 references to it, as if it was of no significance? And
28 it's of the *utmost* significance and provides remedies
29 of a very important type that in some ways go further

1 than the remedies considered as part of the Privacy
2 Shield in terms of the arbitration model and other
3 models.

4
5 Then, of course, as I say, you have, instead of that, 15:48
6 what purports to be a conclusion that US law doesn't
7 provide adequate protection - again done by, I say,
8 Article 25. But they don't carry out that exercise by
9 reference to the criteria specified in Article 25(2),
10 or indeed in Schrems, as to how you go about that 15:49
11 exercise. What they do is they look at the remedies,
12 which is a *novel* methodology - a methodology not
13 adopted by the Commission in the Privacy Shield, not
14 adopted anywhere - but you just look at the remedies,
15 you ignore the substantive law, you ignore practice. 15:49
16 Indeed, in Schrems, as I will be showing you, the court
17 says the effective means don't have to be the same as
18 the means that exist in Europe, but they have to
19 provide a remedy in practice.

20 15:49
21 But the whole practice here has been *completely*
22 dismissed. And you have been told repeatedly that you
23 shouldn't even *look at* the elaborate oversight
24 mechanisms and other protections that exist, even
25 though that's something that the Commission did and is 15:50
26 something that is clearly relevant.

27
28 So in short, we say there should be no reference,
29 because the DPC's decision has been overtaken by

1 events. I say it with sympathy for the position of the
2 DPC, but the decision is deeply flawed as a matter of
3 law and as a matter of methodology and it doesn't at
4 all provide a basis on which this court could share any
5 doubt. As you identified, this process is one that is 15:50
6 set out in the statute involving the DPC in the first
7 instance taking the particular assessment, or making
8 the particular assessment of the complaint. That's
9 what the statute provides for.

10
11 And it's important, I think, to remember the context,
12 that this is a complaint made to the DPC on which she
13 has arrived at a provisional conclusion and she asks
14 the court to share that conclusion when her assessment
15 is wrong and it's one that the court should not share. 15:51
16 She seeks deference in respect of it. With the
17 greatest of respect, the deference doesn't arise.
18 These are all matters of law and to seek deference with
19 regard to the position under US law, when she
20 acknowledges she has no competence in the area, is a 15:51
21 surprising proposition.

22
23 But really the significance of what the court is being
24 asked to do, under a presentation that presents it as,
25 in a sense, the attractive solution to this; the DPC is 15:52
26 defending rights, the court doesn't really have to
27 worry about the difficult issues and doesn't have to
28 really resolve issues of US law, because all you have
29 to do, as Mr. Collins said and Mr. Murray in his eight

1 point collusion this morning, having reviewed the
2 materials, all you have to do is share the
3 Commissioner's doubts.
4

5 But in fact the consequences of a reference are quite 15:52
6 portentous and have enormous implications, casting
7 doubt collaterally on the Privacy Shield, which is to
8 be reviewed *in any event* this July. So that if the
9 alleged deficiencies exist, the Commission, with all
10 its expertise, the input from the working party, input 15:52
11 from Parliament, input from everybody will be able to
12 arrive that conclusion. But there is *no way* in which
13 you can make a reference without collaterally
14 animadverting on the Privacy Shield. And that is
15 something this court should *not* engage in. The Privacy 15:53
16 Shield is not part of this application. There is no
17 challenge to it. It *cannot* be the subject of a
18 reference. But yet *you're* being asked to make a
19 reference on the basis of doubts as to the adequacy of
20 protection, which of course underlie the Privacy 15:53
21 Shield.
22

23 And you perceptively asked Mr. Collins last Friday when
24 he was opening Prof. Swire's evidence when Prof. Swire
25 just said there could be implications for other means 15:53
26 of data transfer, mentioned the Privacy Shield and
27 other factors. Because while this is an Article 26
28 case and should've been treated by the DPC as an
29 Article 26 case, she in fact has treated it as an

1 Article 25 case. The standard she has posited is the
2 adequacy of protection, which is the Article 25
3 standard and that standard does have implications for
4 other methods of data transfer, including the Privacy
5 Shield.

15:54

6
7 The other matter that you will have noticed that is
8 missing from the analysis - and it's of considerable
9 significance - is the whole issue of the extent to
10 which national security is within the scope of EU law. 15:54
11 And that's important, because Article 4(2) of the TEU
12 expressly excludes it from the scope of EU law. And a
13 number of attempts have been made to answer that point
14 by mischaracterising our submission on it. We do not
15 say that EU law cannot prohibit the transfer of data. 15:55
16 That's clear from Articles 25 and 26; you can *only*
17 transfer the data if you're not prohibited, and you're
18 not prohibited if you comply with either or one or the
19 other. So that's *not* the point.

15:55

20
21 But the point is that when looking at the issues that
22 have been raised by the DPC of the adequacy of
23 protection and the remedies, you cannot leave out of
24 the assessment the fact that what is occurring in the
25 US - and which is objected to - is processing in the 15:55
26 context of national security. Article III of the
27 Directive excludes Member States processing for the
28 purpose of national security. So you have an exclusion
29 in the Treaty, which of course is definitive *and* an

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1 exclusion in the Directive. And really what is said is
2 you leave out national security from your analysis
3 entirely. That can't be done and I'll explain and
4 elaborate why.

5
6 And of course, it leads to the fairly absurd position
7 that you cannot transfer data because there is
8 inadequate protection in the US, not because of any
9 inadequate protection in the private sphere - this
10 decision is all about national security - we're not
11 told on what basis the national security is *actually*
12 being evaluated by the DPC, but it seems to be
13 evaluated on the basis that somehow the protections in
14 the Data Protection Directive applies - that's unclear
15 - even though those protections don't apply to Member
16 States. So in the case of Ireland, in the case of each
17 of the other 27 Member States, the protections in the
18 Data Protection Directive just don't apply to national
19 security processing.

20
21 So Mr. Murray says it's entirely irrelevant what Member
22 States does. Well, it's not and it's a
23 misunderstanding of our point. Firstly, the relevant
24 law that is referred to in the SCC decisions is the
25 applicable data protection law. The applicable data
26 protection law is the Member State law. But leave that
27 aside. Is it seriously to be said that you omit
28 entirely from any evaluation of the adequacy of the
29 protection, from any consideration of whether

1 objectives are well founded that the processing to
2 which objection is made is processing for national
3 security purposes on the basis that sending the data to
4 the US will result in less protection than in Europe
5 and you *ignore* the fact that in Europe there *is* no 15:58
6 equivalent protection in *any* of the Member States?
7

8 So you leave it in Europe because of concerns about
9 processing for national security, when the FRA report
10 to which Mr. Robertson refers, but which as you know is 15:58
11 a report from --

12 **MS. JUSTICE COSTELLO:** I haven't read his affidavit.

13 **MR. GALLAGHER:** Oh, no, I appreciate that. And
14 I'm only looking at the report at the moment, I'm not
15 commenting on what he says. The report is part of the 15:58
16 institutional structure. The FRA fundamental rights
17 agency is a European agency, specifically set up to
18 guide the institutions with regard to fundamental
19 rights. And a consideration of that report would show
20 that actually the level of transparency, the level of 15:59
21 legal basis and the variety of protections both under
22 the law and of an oversight nature match anything in
23 Europe and, it's apparent, exceed anything in Europe,
24 but certainly match anything in Europe.

25
26 So all of that is left out of the consideration. 15:59
27 Intuitively, it seems to be wrong and I hope to
28 demonstrate why, legally, it is absolutely and utterly
29 wrong.

1
2 Judge, then it is put that really if you've *any* doubts,
3 you should refer it. That, of course, is not the test;
4 you've to share the well founded concerns, that you
5 consider the concerns are well founded. In fact, 16:00
6 Advocate General Bot, on whom they rely for so many
7 matters, in the Schrems decision referred to having
8 serious doubts. But we would respectfully say that
9 there is *no* basis for having serious doubts or
10 believing that the DPC's concerns are well founded, in 16:00
11 circumstances where an examination of the decision
12 demonstrates very significant failures on the part of
13 the DPC.

14
15 Tomorrow morning I'm going to address the issues to 16:00
16 assist you and to perhaps put focus on where the
17 disputes between the parties are under the following
18 headings: It *will* be necessary to look at the Directive
19 in a little bit more detail than it's been looked at;
20 the interaction between Articles 25 and 26 are very 16:00
21 important; the SCC decisions, which as I say, have been
22 largely ignored, ignored by the DPC and largely ignored
23 here; the Privacy Shield itself, to which you have been
24 taken through to a large extent by Mr. Collins, but
25 there are some very important aspects of it; the 16:01
26 incorrect comparator in terms of apparently assessing
27 it not clearly, but assessing it, it would appear, by
28 reference to rights under the Data Protection
29 Directive; a contention not made by the DPC, but made

1 in submission that the essence of the right, the data
2 protection rights, have been infringed, so there's no
3 room for anybody to consider a balancing of rights or
4 the necessity of the measures that exist - not
5 something that the DPC concluded and they cannot now, 16:01
6 in their submissions, seek to support her decision by
7 recasting her findings and putting them on a different
8 basis.

9
10 And we will take you through then an analysis of the 16:02
11 national security exception. As we say, it's not that
12 EU law has no say on this matter, as I say, in relation
13 to the transfer, but it is relevant. And we'll look
14 very briefly at the adequacy of protection under US law
15 - briefly, obviously, because I want to manage my time, 16:02
16 but secondly, because in a sense we say you *don't* have
17 to go there because of the Privacy Shield. But not
18 briefly because we accept that there are, even on the
19 DPC's characterisation of the limits to US law, that
20 there is something which, in effect, undermines Article 16:02
21 47 or indeed Articles 7 and 8 when properly understood
22 in context.

23
24 So that's the framework and I'll continue with that
25 tomorrow if I may, Judge? 16:03

26 **MS. JUSTICE COSTELLO:** Thank you.

27 **MR. O'DWYER:** Judge, perhaps just before you
28 rise, can I just ask you about -- you may remember that
29 at the beginning of the case you had indicated that you

1 might consider whether or not the affidavits submitted
2 by various amici will be admitted. And the reason I
3 mention it is because in our particular case there is
4 not so much an objection, but an application to
5 cross-examine the man, Mr. Butler, or Prof. Butler, who 16:03
6 was the deponent in the affidavit, and that would
7 naturally follow, obviously, the expert witnesses. So
8 I'm just wondering could the court indicate, because
9 obviously certainly from our point of view we need to
10 know whether he will in fact be cross-examined -- 16:03
11 **MS. JUSTICE COSTELLO:** well, perhaps after
12 Mr. Gallagher -- I thought we'd agreed there was going
13 to be -- maybe I hadn't --
14 **MR. GALLAGHER:** You did.
15 **MR. O'DWYER:** I think it was after the 16:03
16 openings.
17 **MS. JUSTICE COSTELLO:** After Mr. Gallagher has made his
18 opening remark, then I'll hear the parties' submissions
19 in relation to that matter.
20 **MR. GALLAGHER:** Exactly. But I want to make 16:03
21 clear one thing. It was made *quite* clear that our
22 position is we object to any evidence from the amici.
23 what we did, because we had to do it to preserve our
24 position pending a resolution of that, is served a
25 notice of cross-examination *entirely* without prejudice 16:04
26 to that contention, because, of course, we had to do
27 that.
28 **MR. O'DWYER:** of course, yeah, I accept that,
29 Judge. But that will probably be tomorrow, I suppose,

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is the --

MS. JUSTICE COSTELLO: I'm hoping Mr. Gallagher will be finished by lunchtime.

MR. GALLAGHER: I will, Judge. I'll certainly do that.

16:04

MS. JUSTICE COSTELLO: So we'll probably start on that point at that stage.

MR. O'DWYER: I'll notify my colleagues that are for the other amici.

MS. JUSTICE COSTELLO: Thank you.

16:04

MR. O'DWYER: Thank you.

**THE HEARING WAS THEN ADJOURNED UNTIL FRIDAY, 17TH
FEBRUARY AT 11:00**

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 '[f]or [1] - 13:26
 '[g]iven [1] - 20:22
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