

THE HIGH COURT - COURT 29

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 TUESDAY, 7th MARCH 2017 - DAY 16

16

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1 THE HEARING RESUMED AS FOLLOWS ON TUESDAY, 7TH MARCH
2 2017

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

5 **REGISTRAR:** Matter at hearing, Data Protection 11:04
6 Commissioner -v- Facebook Ireland Ltd. and another.

7
8 **SUBMISSION BY MR. GALLAGHER:**

9
10 **MR. GALLAGHER:** May it please you, Judge. Judge, we do 11:04
11 have that folder ready to hand into you shortly, there
12 is a change to be made to the index, but we'll have it
13 today for you that you can put the various documents
14 into.

15 **MS. JUSTICE COSTELLO:** Thank you. 11:05

16 **MR. GALLAGHER:** Judge, I was looking at the Privacy
17 Shield, and that was in Book 1 of 13 in my pagination,
18 and I'll also be referring to Book 2 of 13 during the
19 course of the morning. That's the agreed EU
20 authorities. 11:05

21 **MS. JUSTICE COSTELLO:** Oh the agreed EU authorities?

22 **MR. GALLAGHER:** Yes, sorry.

23 **MS. JUSTICE COSTELLO:** Privacy Shield, that's Tab 10,
24 is it?

25 **MR. GALLAGHER:** That's Tab -- 11:05

26 **MS. JUSTICE COSTELLO:** No.

27 **MR. GALLAGHER:** -- 13.

28 **MS. JUSTICE COSTELLO:** 13.

29 **MR. GALLAGHER:** And I was on page 32 paragraph 140 to

1 which I drew your attention.

2 **MS. JUSTICE COSTELLO:** Yes, I have that, thank you.

3 **MR. GALLAGHER:** And I would like to just briefly draw
4 your attention on page 33 to paragraph 145 and
5 following. This provides for the periodic review so 11:06
6 that it's apparent the nature of that review:

7
8 *"In the light of the fact that the level of protection
9 afforded by US legal order may be liable to change, the
10 Commission, following adoption of this decision, will 11:06
11 check periodically whether the findings relating to the
12 adequacy of the level of protection ensured by the
13 United States under the EU-US Privacy Shield are still
14 factually and legally justified. Such a check is
15 required in any event, when the Commission acquires any 11:06
16 information giving rise to a justified doubt in that
17 regard."*

18
19 And that of course follows from Schrems, that adequacy
20 may exist at a point in time but it needs to be 11:06
21 monitored to take account of changes in the legal
22 environment.

23
24 And 146: *"Therefore, the Commission will continuously
25 monitor the overall framework for the transfer of 11:06
26 personal data created by the Privacy Shield as well as
27 compliance by US authorities with the representations
28 and commitments contained in the documents attached to
29 this decision. To facilitate this process, the US has*

1 committed to inform the Commission of material
2 developments in US law when relevant to the Privacy
3 Shield in the field of data protection and the
4 limitations and safeguards applicable to access to
5 personal data by public authorities. Moreover, this 11:07
6 decision will be subject to an Annual Joint Review
7 which will cover all aspects of the functioning of the
8 EU-US Privacy Shield, including the operation of the
9 national security and law enforcement exceptions to the
10 Principles. In addition, since the adequacy finding 11:07
11 must also be influenced by legal developments in Union
12 law, the Commission will assess the level of protection
13 provided by the Privacy Shield following the entry into
14 application of the GDPR."

15 11:07
16 To which I referred on the last occasion. And you'll
17 see there are a number of features of that paragraph
18 that are important; the undertaking by the US to inform
19 the Commission of material developments in US law and
20 the limitations and safeguards applicable to access to 11:08
21 personal data. So that's an obligation solemnly
22 undertaken and it extends beyond US law. And the
23 relevance of the GDPR, that this in any event is going
24 to be further assessed in the context of the GDPR.

25 11:08
26 And 147: "To perform the annual review referred to in
27 Annexes I, II and VI, the Commission will meet with the
28 Department of Commerce and FTC, accompanied, if
29 appropriate, by other departments and agencies involved

1 *in the implementation of the Privacy Shield*
2 *arrangement, as well as, for matters pertaining to*
3 *national security, representatives of the ODNI, other*
4 *Intelligence Community elements and the Ombudsperson.*
5 *The participation in this meeting will be open for EU* 11:08
6 *DPAs and the representatives of the Article 29 Working*
7 *Party."*

8
9 So the review is obviously a very significant
10 formalised feature of the Privacy Shield that will 11:09
11 involve the input of all those interested, including
12 the EU DPAs, of which of course the Plaintiff is one,
13 and representatives of the Article 29 Working Party
14 which has that role that is identified in the
15 Directive. 11:09

16
17 And 148: "*In the framework of the Annual Joint Review,*
18 *the Commission will request that the Department of*
19 *Commerce provides comprehensive information on all*
20 *relevant aspects of the functioning of the EU-US* 11:09
21 *Privacy Shield, including referrals received by the*
22 *Department of Commerce from DPAs - that's obviously in*
23 *the context of the Ombudsperson procedure - and the*
24 *results of ex officio compliance reviews. The*
25 *Commission will also seek explanations concerning any* 11:09
26 *questions or matters concerning the Privacy Shield and*
27 *its operation arising from any information available,*
28 *including transparency reports allowed under the Act,*
29 *public reports by US national intelligence authorities,*

1 *the DPAs, privacy groups, media reports, or any other*
2 *possible source. Moreover, in order to facilitate the*
3 *Commission's task in this regard, the Member States*
4 *should inform the Commission of cases where the actions*
5 *of bodies responsible for ensuring compliance with the* 11:10
6 *Principles in the US fail to secure compliance and of*
7 *any indications that the actions of US public*
8 *authorities responsible for national security or the*
9 *prevention, investigation, direction or prosecution of*
10 *criminal offences do not ensure the required level of* 11:10
11 *protection."*

12
13 So again that amplifies on what is entailed in the
14 review and the extent of it and its significance, all
15 of which is going to occur imminently and is of great 11:10
16 significance in relation to the case generally, but
17 also this mootness and hypothetical assumed facts issue
18 that I addressed the court on on the last day.

19
20 The significance, therefore, of the manner in which the 11:11
21 Privacy Shield was arrived at, the nature of the
22 analysis that was undertaken in relation to the
23 adequacy of EU law and the provision for the further
24 review makes it all more difficult to understand, to
25 put it mildly, why the Director or, sorry, the DPC took 11:11
26 the view that she could not have regard to the Privacy
27 Shield decision in reaching the Draft Decision as the
28 same had not been implemented. It was clearly there in
29 draft form, there was no time limit for the decision

1 and it was of fundamental importance.

2 **MS. JUSTICE COSTELLO:** Mr. Gallagher, have I any
3 indication as to how draft the draft form was or how
4 close it was to the final version?

5 **MR. GALLAGHER:** Yes, I can give it to you. There are 11:12
6 some changes, there's no doubt about that. But the
7 analysis and the whole approach is precisely the same.
8 But there is a version, I think there's a version
9 showing the changes and I can let you have that.

10
11 I just didn't want to overload you, but the fact that
12 it was coming, the approach that was taken and that it
13 was imminent and that there was input, this came on the
14 26th July, I think, or 20th July, the decision, as you
15 know, was on 24th May -- 11:12

16 **MS. JUSTICE COSTELLO:** Hmm.

17 **MR. GALLAGHER:** -- but there was no time limit for the
18 decision. And to make the decision without awaiting
19 what was, on any view, an entirely different analysis,
20 both in methodology, in legal approach and in substance 11:12
21 of the adequacy made it in our view, as I say, very
22 surprising to put it mildly as to how it was thought
23 appropriate to even arrive at provisional conclusions
24 without this critical evidence in relation to adequacy.

25
26 And if I can then, before putting away this decision
27 for the moment, ask you to go back to page 2 of the
28 decision.

29 **MS. JUSTICE COSTELLO:** This is the Privacy shield 11:13

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decision?

MR. GALLAGHER: The Privacy shield decision. It's just in fact the first page, the inside of the first page.

MS. JUSTICE COSTELLO: Yes.

MR. GALLAGHER: And you'll see in recital 5: 11:13

"Pursuant to Article 25(2) of the Directive, the level of data protection afforded by a third country should be assessed in the light of all of the circumstances surrounding a data transfer operation or set of data transfer operations, including the rules of law, both general and sectoral, in force in third countries in question." 11:13

That's telling you how you approach this issue. It is entirely consistent with Schrems, as you will see, and follows the wording of Article 25(2) and its approach, an approach that was not adopted here, rather the novel approach is identified in the Draft Decision and, as explained by Mr. Collins, was that it was appropriate to look at one sector remedies, that that was a threshold decision or a threshold in examination, if it didn't pass muster in the remedies that was an end of it. That's not the way that you are entitled to conduct an adequacy assessment and that is clear from the decision. 11:14

Then if you look at paragraph 11, it is a reference back to paragraph 9 which refers to Schrems, and it

1 says:

2
3 *"The Court of Justice criticised the lack of sufficient*
4 *findings in the decision regarding the existence, in*
5 *the US, of rules adopted by the State to limit any* 11:15
6 *interference with the fundamental rights of the persons*
7 *whose data is transferred from the Union to the US,*
8 *interference which the State entities of that country*
9 *would be authorised to engage in when they pursue*
10 *legitimate objectives, such as national security, and* 11:15
11 *the existence of effective legal protection against*
12 *interference of that kind."*

13
14 So the Commission, noting what Schrems says
15 unambiguously, a lack of a sufficient finding in the 11:15
16 decision, which was the ratio of Schrems, as you know,
17 but the finding and what it should have been embraced
18 is of significance.

19
20 It was a finding in relation to the existence in the US 11:15
21 of *"rules adopted by the State intended to limit any*
22 *interference with the fundamental rights"*, not just the
23 remedies, but the rules intended to limit the
24 interference with the human rights and the existence of
25 effective legal protection against interference of that 11:16
26 kind.

27
28 And then in paragraph 13, the Commission noting what it
29 had done, it has:

1 *"Carefully analysed US law and practice, including*
2 *those official representations and commitments. Based*
3 *on the findings developed in recitals 136 to 140 - to*
4 *which I have referred you at the end of the day on*
5 *Friday - the Commission concludes that the US ensures* 11:16
6 *an adequate level of protection for personal data under*
7 *the EU-US Privacy Shield."*

8
9 And of course the process, which began, as I say, in
10 February with the publication of the draft, then 11:16
11 involved the interaction and commenting of various
12 bodies, including the Article 29 working Party, on that
13 draft before it reached its final form and was finally
14 approved, as you know, by Member States with a number,
15 a limited number of abstentions but no Member State 11:17
16 taking issue with it.

17
18 Judge, I want to put that aside for a moment and I do
19 want to then look at the decisions in relation to
20 national security, and if I could explain the position 11:17
21 in this way so that there is no misunderstanding.
22 I did indicate to you on Friday, and I think we have
23 made it clear in our opening submissions as well, that
24 nobody gainsays that the Directive doesn't have
25 application to the transfer, that is explicit in 11:17
26 Articles 25 and 26.

27
28 The question is how do you assess whether the
29 conditions are fulfilled, and in making that assessment

1 you need to recognise that the processing, which was
2 the subject of scrutiny by the DPC, is processing in a
3 national surveillance context, as she herself
4 identified, and national surveillance is outside the
5 scope of EU law obviously in the context of the Member 11:18
6 States, not just by virtue of Article 3(2) of the
7 Directive but by virtue of Article 4(2) of TEU,
8 Article 5 and also outside the scope of the Charter as
9 a result, Article 6 TEU, Article 51 of the Charter
10 which makes it clear the Charter doesn't extend the 11:18
11 scope of EU law.

12
13 So on any version that is something very important that
14 needs to be considered and it is not considered at all,
15 it's not taken into account in any way whatsoever. 11:18
16 That is, we say, a fundamental mistake in and of itself
17 and results in a number of errors which I will
18 highlight as I go through the cases.

19
20 Further, I did make the point that the Directive 11:19
21 imposes an obligation to introduce within the Member
22 States a national law that provides the protection for
23 the Directive, but, by definition, that national law
24 doesn't extend to controlling processing by national
25 security in Member States, because that's explicitly 11:19
26 outside the scope of the Directive and the Treaty.

27
28 And when the adequacy assessment is being made, it's an
29 adequacy assessment by reference to primarily in any

1 event the law of the Member States because that is
2 assumed to have implemented the Directive, and there's
3 no suggestion that any Member State has not implemented
4 the Directive. But the law of the Member State
5 excludes, as I said, national surveillance, national 11:20
6 security surveillance, and there is no comprehensive
7 law of the type referred to by the DPC by way of
8 criticism of the system in America dealing with
9 national surveillance in the Member States.

10
11 Indeed, it is clear from the evidence before the court
12 that there are significant variations in the national
13 legal systems in that regard and, as I said, on any
14 version the law of the US is as good as best in class
15 and perhaps better than any of them and is the 11:20
16 benchmark for that law. That critical aspect is
17 entirely ignored.

18
19 Judge, it is --

20 **MS. JUSTICE COSTELLO:** I just want to understand this 11:21
21 at an abstract level. You are saying the Directive
22 excludes national security for the Member States?

23 **MR. GALLAGHER:** Yes.

24 **MS. JUSTICE COSTELLO:** So when you're looking at
25 transfer to a third country, we won't say America. 11:21

26 **MR. GALLAGHER:** Yes, whatever country.

27 **MS. JUSTICE COSTELLO:** whatever country, and it could
28 be a country that's a very intolerant régime or it
29 could be a highly liberal protected régime.

1 **MR. GALLAGHER:** Yes.

2 **MS. JUSTICE COSTELLO:** It will have its own national
3 security laws which will permit it to a lesser or
4 greater extent to survey the intelligence, and are you
5 saying that there is no comparator to what occurs in 11:21
6 the third country within the Union because (a) it is
7 excluded from the Directive and (b) it is fragmentary
8 because it reflects the 29 or 28 different states or
9 whatever it may be.

10 **MR. GALLAGHER:** That's precisely it. And it's not only 11:21
11 excluded from the Directive, it's excluded from the
12 scope of EU law, so EU law --

13 **MS. JUSTICE COSTELLO:** And regardless of whether it's
14 in an oppressive régime or a liberal régime, if I can
15 use a parameter. 11:22

16 **MR. GALLAGHER:** Yes. I suppose if you take it in two
17 stages.

18 **MS. JUSTICE COSTELLO:** That's a matter of principle as
19 opposed to what happens in the third country.

20 **MR. GALLAGHER:** Yes, that's correct. Obviously any 11:22
21 assessment of adequacy will take account of the
22 features of the particular country in respect of which
23 the assessment is made. Similarly, as I explained when
24 you come to the SCCs, the features of the particular
25 country may be relevant, but I'll leave that aside for 11:22
26 the moment.

27

28 Within the EU there is one factor that you will be
29 aware of and that I have mentioned already; while the

1 national security law is outside the scope of EU law,
2 every Member State subscribes to the European
3 Convention on Human Rights. The European Convention of
4 Human Rights does impact on national security laws
5 within the Member States, it defines in a sense the 11:22
6 boundaries and the scope of those for the very,
7 I suppose, obvious reason, or the reasons certainly
8 articulated by the court, that it doesn't allow a
9 Member State to say 'I'm doing this in the name of
10 national security, I'm taking all your rights away' and 11:23
11 that would mean the Convention had no application.
12

13 So, as you will see, and as Ms. Hyland will elaborate
14 in terms of the cases, the ECHR *does* exercise a
15 jurisdiction with regard to the scope of national 11:23
16 security. That's part of the laws of the Member
17 States. But the national laws, which provide for
18 national security surveillance, are set out in the
19 domestic laws of each of the Member States in the
20 absence of a finding that they are inconsistent with 11:23
21 the ECHR, they are there and they are the laws of the
22 Member States.

23
24 I'll come and very briefly refer to them, Ms. Hyland
25 will deal with that in more detail, but I did, for 11:23
26 example, instance for you on Friday the example at
27 page 67 of the from a of the challenge before a federal
28 administrative court in Germany by an applicant who
29 said he was objecting to the surveillance carried out

1 by the BND, which is the organisation in Germany that
2 carries it out. They had used some dragnet search
3 operation or collection operation to collect 32 million
4 communications of which it transpired only 12 were
5 actually relevant to national security. The particular 11:24
6 plaintiff couldn't prove that his was one of those
7 32 million communications and his claim failed and the
8 court said 'it doesn't matter that you can't prove that
9 you were the subject of that, the fact is you cannot
10 prove it and your claim failed'. 11:24

11
12 So the laws in the Member States, obviously only some
13 Member States have developed national security
14 apparatus: Germany is one, France is another, Holland
15 is another, the UK is another, France [sic] is another, 11:25
16 Spain is another, Italy is another, the smaller Member
17 States would be less significant in terms of their
18 examination of communications in the context of
19 national security.

20 11:25
21 So that is the position in the Member States. It's a
22 position that derives from their own domestic laws
23 subject ultimately to the ECHR - I'll say the ECHR, the
24 Convention - and the limitations that it imposes on the
25 scope of national security. So that is the position, 11:25
26 but that derives, not from European law, but from the
27 domestic law and the Convention.

28
29 The European court initially followed that very easily

1 and very understandably in the European Parliament case
2 that I'll open in a minute. In more recent cases the
3 position is less clear in the context of the European
4 court decisions with regard to the precise boundaries
5 of the interaction between European law and national
6 surveillance law. 11:26

7
8 But one thing is very clear: If you adopt the
9 principles of Schrems, of Watson, of Digital Rights,
10 and of the approach taken by the Commission in the 11:26
11 Adequacy Decision, and even accepting that for the sake
12 of argument, which I do for the sake of the argument
13 I'm now going to make and develop.

14
15 The approach is an approach that merely examines 11:26
16 whether the régime of national security surveillance
17 that includes the substantive law, the limitations on
18 the safeguards and the remedies go no further than is
19 strictly necessary. That is very much analogous to the
20 approach taken by the ECHR when examining whether 11:27
21 something is exempted under national security law.

22
23 And if I may call that for simplicity the *strictly*
24 *necessary* approach. And you will remember from the
25 passages of the Privacy Shield decision that I drew 11:27
26 your attention to on the last occasion, in particular
27 paragraphs 136 to 140 and paragraph 140 in particular,
28 the EU or the Commission decided that US law with
29 regard to national surveillance went no further than

1 was strictly necessary and therefore it met the
2 adequacy test. That happens to be similar, as I say,
3 to the approach, if not identical to the approach that
4 the ECHR would take in examining the laws of the Member
5 States.

11:28

6
7 what it did not do was examine Article 47 in the
8 abstract or in isolation and say 'we'll have a look at
9 the remedies and we'll have a big argument over the
10 remedies and the extent of them and if we don't think
11 those remedies are sufficient judged in the abstract
12 we'll say the law is inadequate'. It doesn't do that,
13 and one feature of the Adequacy Decision is it
14 identifies the limitations and the remedies that you
15 have heard, including the standing limitation. There's
16 an argument about the extent of those as you know, but,
17 leaving that aside for the moment, even taking the
18 DPC's evidence as its highest, this is something that
19 is taken into account by the Privacy Shield.

11:28

11:28

20
21 So it takes all that into account, it concludes that US
22 law goes no further than is strictly necessary and then
23 it concludes that it is adequate in terms of the public
24 law and that meets the requirements of Article 25
25 assuming that is the test.

11:28

11:29

26
27 That is *entirely* consistent with Schrems, it is
28 entirely consistent with Watson, it is entirely
29 consistent with Digital Rights, but it is entirely

1 *inconsistent* with the approach which the DPC took in
2 this case. It recognises that national security is in
3 a different category, that it is assessed differently,
4 that in looking at its remedies you're not looking at
5 the remedies provided by the Directive, you're not 11:29
6 looking at a wholesale entitlement to sue somebody
7 without limitation where there is some infringement of
8 a data right. It requires you to look at, not only the
9 protections laid down in law, but all of the
10 limitations that are in fact applied in practice, all 11:30
11 the matters that go to protecting the rights and in the
12 end the question is do the restrictions on the
13 protection of the rights, infringements if you wish to
14 call it that, but I think it's better to say
15 limitations or restrictions on the protection of data 11:30
16 protection rights or, sorry, of data rights go further
17 than is strictly necessary. And that's precisely how
18 it is approached and I hold that in up in entire
19 contradistinction to the DPC's approach and as a basis
20 for invalidating that approach. 11:30

21
22 So that's taking the law in terms of Schrems and in
23 terms of the Privacy Shield, though issues do arise
24 that haven't been fully canvassed in recent cases as to
25 whether even the EU can go that far in terms of its 11:31
26 analysis. That's a matter obviously for the European
27 court, if the matter should ever get there, and I want
28 to preserve those arguments. But I'm taking it at its
29 highest in terms of the existing law and dealing with

1 it that way and that's what I intend now to do, if
2 I may.

3
4 So the European - sorry, in my book it's the second of
5 the agreed authorities and the decision is in divide, 11:31
6 sorry, 26 and it is the European Parliament -v-
7 European Data Protection Supervisor.

8
9 So this reaffirms and establishes the points I make
10 which are Member States are not bound by their charter 11:31
11 when they are conducting or regulating national
12 security surveillance because this is an activity which
13 is expressly placed outside the purview of Union law
14 and beyond the competence of the CJEU and there is
15 nothing in any of the cases which undermines that 11:32
16 fundamental position.

17
18 If you go to the European Parliament, this was a
19 decision in which the European Parliament challenged a
20 decision of the Commission and the Council and it 11:32
21 sought their annulment. If you go to page 4798 and
22 paragraph 2 you will see - sorry, paragraphs 1 and 2 -
23 an annulment of a Council decision and an annulment of
24 a Commission decision relating to whether adequate
25 protection of personal data was contained in the 11:32
26 passenger name record of air passengers transferred to
27 the US Bureau of Customs and Border Protection, which
28 is referred to as CBP in the case, and passenger name
29 record is PNR. A decision was made following 2011 that

1 this information or this data could be transferred and
2 that it benefitted from adequate protection.

3
4 There's an analysis initially of the Directive that you
5 are concerned with and then there's a more detailed 11:33
6 analysis of the decision. If you go to 4811.

7 **MS. JUSTICE COSTELLO:** Yes.

8 **MR. GALLAGHER:** You will see in paragraph 21 the 11th
9 recital to the decision adopted by the Commission with
10 regard to adequacy states that: 11:33

11
12 *"The processing by CBP of personal data contained in*
13 *the PNR is governed by conditions set out in various*
14 *Undertakings and in United States domestic legislation*
15 *to the extent indicated in the undertakings."* 11:34

16
17 And an analysis of the type that was carried out by the
18 Commission in the Privacy Shield is then conducted in
19 relation to the various undertakings over the next ten
20 or so pages. And one doesn't need to deal with the 11:34
21 substance of that but go, if you would, to page 4822
22 and paragraph 33 and it explains the background to this
23 issue, the 2001 attack on the Twin Towers.

24
25 Then it describes the decisions of the Commission and 11:34
26 the Council, I don't think we need to delay on it, and
27 if you go to 4826 you will at paragraph 30 at the top
28 of the page.

29 **MS. JUSTICE COSTELLO:** I think that's 50.

1 **MR. GALLAGHER:** 50, sorry, 50 at the top of the page:
2 *"That the Parliament advances four pleas for annulment,*
3 *respectively ultra vires action, breach of fundamental*
4 *principles of the Directive, fundamental rights and*
5 *principles of proportionality."* 11:35

6
7 And in 52 it says: *"In the parliament's submission,*
8 *there is no doubt that the processing of PNR data after*
9 *transfer to the US authority covered by the decision on*
10 *adequacy is, and will be, carried out in the course of* 11:35
11 *activities of the State as referred to in paragraph 43*
12 *of the judgment."*

13
14 So it said this is ultra vires, EU law doesn't extend
15 this far, this is being transferred in the course of 11:35
16 activities of the State. And then you'll see 54:

17
18 *"The first indent of Article 3(2) of the Directive*
19 *excludes from the Directive's scope the processing of*
20 *personal data in the course of an activity which falls* 11:35
21 *outside the scope of Community law, such as activities*
22 *provided for by Titles V and VI of the Treaty on*
23 *European Union, and in any case processing operations*
24 *concerning public security, defence, state security,*
25 *activities of the State in the area of criminal law."* 11:36

26
27 And in 55: *"The decision on adequacy concerns only PNR*
28 *data transferred to CBP. It is apparent from the sixth*
29 *recital in the preamble to the decision that the*

1 requirements for that transfer are based on a statute
2 enacted by the US in November 2001 and on implementing
3 regulations adopted by CBP under that statute.

4 According to the seventh recital in the preamble, the
5 United States legislation in question concerns the 11:36
6 enhancement of security and the conditions under which
7 persons may enter and leave the country. The eighth
8 recital states that the Community is fully committed to
9 supporting the US in the fight against the terrorism
10 within the limits supposed by Community law. The 15th 11:36
11 recital states that PNR data will be used strictly for
12 purposes of preventing and combating terrorism and
13 related crimes, other serious criticisms, including
14 organised crime, that are transnational in nature, and
15 flight from warrants or custody for those crimes." 11:37

16
17 And over the page:

18
19 "56. It follows that the transfer of PNR data to CBP
20 constitutes processing operations concerning public 11:37
21 security and the activities of the State in areas of
22 criminal law.

23
24 57. While the view may rightly be taken that PNR data
25 are initially collected by airlines in the course of an 11:37
26 activity which falls within the scope of Community law,
27 namely sale of an aeroplane ticket which provides
28 entitlement to a supply of services, the data
29 processing which is taken into account in the decision

1 *on adequacy is, however, quite different in nature. As*
2 *pointed out in paragraph 55 of the present judgment*
3 *that decision concerns not data processing necessary*
4 *for a supply of services, but data processing regarded*
5 *as necessary for safeguarding public security and for* 11:38
6 *law enforcement purposes."*

7 **MS. JUSTICE COSTELLO:** Can I just, I want to get this
8 straight in my head. In this case Facebook Ireland
9 will transfer data to Facebook Inc. and the vast
10 majority of that has nothing to do with national 11:38
11 security and it's for what we have broadly described as
12 commercial purposes.

13 **MR. GALLAGHER:** Yes.

14 **MS. JUSTICE COSTELLO:** In this case the airlines were
15 taking a record of the, what's it called again, the 11:38
16 PNRs.

17 **MR. GALLAGHER:** Yes.

18 **MS. JUSTICE COSTELLO:** But that was initially for their
19 commercial purposes --

20 **MR. GALLAGHER:** Exactly. 11:38

21 **MS. JUSTICE COSTELLO:** -- within the airlines?

22 **MR. GALLAGHER:** Exactly.

23 **MS. JUSTICE COSTELLO:** But then were they obliged to
24 transfer it, the data that they had obtained for
25 themselves? 11:38

26 **MR. GALLAGHER:** To get into the US and to land in the
27 US they were obliged under US legislation to do it
28 because the US wasn't prepared to receive their --

29 **MS. JUSTICE COSTELLO:** That's a transfer that wouldn't

1 have occurred but for that?

2 **MR. GALLAGHER:** Oh, absolutely. And I'm going to draw
3 your attention, this is not an Article 25 transfer,
4 this is different. What is critical, however, is the
5 focus in paragraph 57 on the two stages. 11:39

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

7 **MR. GALLAGHER:** One, the initial collection, and in
8 this case of course the initial collection and the
9 transfer, and then the separate aspect which is the
10 data processing that subsequently takes place which is 11:39
11 done for national security purposes.

12 **MS. JUSTICE COSTELLO:** Yes.

13 **MR. GALLAGHER:** So the transfer there is a requirement,
14 if you want to, I suppose US law couldn't extend to
15 oblige them to do anything, but if commercially you 11:39
16 wanted to land your planes you had to do it, but there
17 is undoubtedly a distinction.

18

19 But the separate distinction, which is the one I want
20 to emphasise for the moment that is not detracted from 11:39
21 in any of the cases, and in fact this case is referred
22 to in the Digital Rights case without any suggestion
23 that it was wrongly decided or that the exception which
24 it recognises doesn't apply. There was then the
25 subsequent processing in the US which was part of 11:40
26 public security.

27

28 And then it goes on, 58:
29

1 "The court held in paragraph 43 of Lindqvist, which was
2 relied upon by the Commission in its defence, that the
3 activities mentioned by way of example in the first
4 indent of Article 3(2) of the Directive are, in any
5 event, activities of the State or of State authorities 11:40
6 and unrelated to the fields of activity of
7 individuals."

8
9 Those are the national security etc.: "However, this
10 does not mean that, because the PNR data has been 11:40
11 collected by private operators for commercial purposes
12 and it is they who arrange for their transfer to a
13 third country, the transfer in question is not covered
14 by the provision. The interest rate falls within a
15 framework established by the public authorities that 11:41
16 relates to public security."

17
18 So to explain that as I understand it, the transfer is
19 being done within a framework established by public
20 authorities that have agreed to this as a security 11:41
21 measure, so the transfer is on a different basis than
22 that with which we are concerned here.

23
24 But the processing which is being declared to be
25 adequate and which is the subject of the decision is a 11:41
26 processing as part of a State activity by a State
27 authority and the Directive does not apply to these
28 activities of the States and State authorities
29 unrelated to the fields of activity of individuals.

1 So when you come to look at what occurs subsequent to
2 the transfer, and the processing that is done in the
3 US, that is outside the scope of the Directive.

4 **MS. JUSTICE COSTELLO:** And you are saying that applies,
5 that includes a third country state? 11:42

6 **MR. GALLAGHER:** Exactly. And the US happens to be the
7 third country state here in this case and also in the
8 present case.

9
10 And 59: *"It follows from the foregoing considerations* 11:42
11 *that the decision on adequacy concerns processing of*
12 *personal data as referred to in the first indent."*

13
14 So the processing is the processing by the US, that is
15 by a state authority, so the decision concerns that and 11:42
16 the decision, therefore, does not fall within the scope
17 of the Directive.

18
19 So that is obviously a very important decision
20 highlighting the limit of the scope of EU law 11:42
21 consistent with the Directive and consistent with any
22 examination of the processing carried out by the US
23 authorities which of course was the subject of the
24 examination by the DPC in this case and of course the
25 subject of the examination by the Commission in the 11:43
26 Privacy shield.

27
28 And then it goes on, 60:
29

1 "Accordingly, the first limb of the first plea,
2 alleging that the first indemnity of Article 3(2) of
3 the Directive was infringed, is well founded.
4

5 61. The decision on adequacy must consequently be 11:43
6 annulled and it is not necessary to consider the other
7 limbs of the first plea or the other plea relied upon
8 by the Parliament."
9

10 So if the law related there you wouldn't look at this 11:43
11 law, the law doesn't stop there. There are later
12 decisions that the court of course must take account
13 of, but that decision in terms of the principle of the
14 different stages of the processing and the differences
15 between what you are looking at when you are looking at 11:43
16 processing within the EU and processing by the US state
17 in the field of national security have not been elided
18 in any of the decisions, in fact the distinction has
19 been respected, albeit the approach has been different.
20

21 Then if you go to the challenge by Ireland to the 2006
22 Directive in divide 30, the 2006 Directive which was
23 ultimately invalidated in **Digital Rights**, was
24 challenged on a different ground by Ireland and it's a
25 subject matter of this decision in 2009. Ireland had 11:44
26 challenged it on the basis that the legal basis for the
27 Directive was wrong, that Article 95, which dealt with
28 developing the single market, didn't provide an
29 appropriate legal basis for Directive 2006. It's a

1 narrow challenge that set out in the summary. The
2 second paragraph refers to the purpose of Article 95,
3 the third paragraph to the fact that there were
4 differences between the national rules adopted on the
5 retention of data relating to electronic communications 11:45
6 which were liable to have direct impact on the
7 functioning of the internal market, and it was
8 foreseeable that that impact would become more serious
9 within the passage of time.

10
11 And then it says: *"Furthermore, the Directive*
12 *regulates operations which are independent of the*
13 *implementation of any police and judicial cooperation*
14 *in criminal matters. It harmonises neither the issue*
15 *of access to data by the competent national law 11:45*
16 *enforcement authorities nor that relating to the use*
17 *and exchange of those data between those authorities.*
18 *Those matters, which fall, in principle, within the*
19 *area covered by Title VI of the EU Treaty have been*
20 *excluded from the provisions of the Directive. It 11:46*
21 *follows that the substantive content of the Directive*
22 *is directly essentially to the activities of service*
23 *providers in the relevant sector of the internal*
24 *market, to the exclusion of state activities coming*
25 *under Title VI of the EU Treaty, as it then was. In 11:46*
26 *light of that substantive content, it must be held the*
27 *Directive relates predominantly to the functioning of*
28 *the internal market."*

1 The Directive is summarised on page 3 and you will see,
2 perhaps over on page 2 an equivalent article, sorry it
3 refers to Article 3(2) of Directive 95/46, it then goes
4 on to this Directive, sorry to the e-privacy directive,
5 not this Directive, the 2002/58, which are the 11:46
6 substantive provisions relating to data protection.
7 And the Privacy Directive concerns the processing of
8 personal data, the protection of privacy in the
9 electronic communications sector with a view to
10 supplementing Directive 95/46. 11:47

11
12 And under Article 6(1) of that Directive certain
13 obligations are imposed. Article 15(1) says:

14
15 *"Member States may adopt legislative measures to 11:47*
16 *restrict the scope of the rights and obligations*
17 *provided by Articles 5 and 6 and those other Articles*
18 *when such restrictions constitutes a necessary,*
19 *appropriate and proportionate measure within a*
20 *democratic society to safeguard national security."* 11:47

21
22 That's similar to Article 13 of Directive 95/46 but
23 different in a way that I'll come back to later and the
24 various other provisions of that Directive are set out.

25 11:47
26
27 Then you come over the page to the paragraph, sorry
28 I think it begins on page 3, it begins just after my
29 reference to Article 15(1), Directive 2006/24 --

1 MS. JUSTICE COSTELLO: Hmm.

2 MR. GALLAGHER: -- which sets out what its provisions
3 are and over the following pages sets them out in more
4 detail.

5
6 And then you'll see in paragraph 23 on page 6, at
7 paragraph 24 excuse me: "*Ireland claims that the court
8 should annul the Directive on the ground that it was
9 not adopted on an appropriate legal basis.*"

10
11 Then you can go to page 11, if you would be kind
12 enough, and the bottom three paragraphs refers again to
13 the nature of the challenge. Paragraph 87, the second
14 last paragraph says:

15
16 "*In paragraph 68 of the judgment in Parliament -v-
17 Council and Commission, the Court held that the
18 agreement related to the same transfer of data as did
19 Commission Decision on the adequate protection of
20 personal data contained in the passenger name records.*"

21
22 And 88: "*The latter decision concerned the transfer of
23 passenger data from the reservation systems of air
24 carriers situated in the territory of the Member States
25 to the US Department of Homeland Security and the Court
26 held that the subject-matter of that decision was
27 data-processing which was not necessary for a supply of
28 services by the air carriers, but which was regarded as
29 necessary for safeguarding public security and for law*"

1 enforcement purposes. In paragraphs 57 to 59 of the
2 judgment in Parliament -v- Council Commission, the
3 Court held that such data-processing was covered by
4 Article 3(2) of the Directive, according to which that
5 Directive does not apply, in particular, to the 11:50
6 processing of personal data relating to public security
7 and the activities of the State in the areas of
8 criminal law. The Court accordingly concluded the
9 decision did not fall within the scope of the
10 Directive." 11:50

11
12 And 89: "Since the agreement which was the subject of
13 Directive 2004/496 related, in the same way as that
14 decision, to data-processing which was excluded from
15 the scope of Directive 95/46, the Court held the 11:50
16 decision could not have been validly adopted on the
17 basis of Article 95.

18
19 90. Such a line of argument cannot be transposed in
20 relation to this Directive." 11:50

21
22 And in 91: "Unlike the decisions which are under
23 challenge in Parliament -v- Council and Commission
24 which concerned a transfer of personal data within
25 framework instituted by public authorities in order to 11:50
26 ensure public security, the Directive covers the
27 activities of service providers in the internal market
28 and does not contain any rules governing the activities
29 of public authorities for law-enforcement purposes."

1 So it said this Directive 2006 related to activities of
2 electronic communications service providers within
3 Europe and therefore the Directive could be introduced
4 to harmonise the laws relating to that. It didn't
5 cover the activities of or didn't contain any rules 11:51
6 governing the activities of public authorities.

7
8 But no suggestion that Parliament -v- Council is in any
9 way wrongly decided with regard to its understanding as
10 to the scope of Article 3(2) of the Directive or the 11:51
11 distinction it draws between State processing in the
12 national surveillance sphere; however, it does draw the
13 distinction that the ultra vires of course depended
14 upon the fact that the transfer was being done by State
15 authorities and that was the ratio of that case. 11:52

16
17 Then, Judge, if you come to the Digital Rights case
18 which you'll find in divide 35 and if you would be kind
19 enough to go to the court's decision which is in the
20 same divide and it's about a little over half way 11:52
21 through. You'll see the judgment of the court on the
22 8th April 2014.

23
24 I don't know whether you have managed to find that,
25 Judge. They were joined cases, one relating to -- 11:52

26 **MS. JUSTICE COSTELLO:** I have internal divider so...

27 **MR. GALLAGHER:** Oh good.

28 **MS. JUSTICE COSTELLO:** Is it 8th April 2014?

29 **MR. GALLAGHER:** That's it, Judge, the report of the

1 case.

2 **MS. JUSTICE COSTELLO:** Yes.

3 **MR. GALLAGHER:** And there were two referrals, one,
4 I think, from Germany and one from Ireland. You'll see
5 on page 3 it sets out the legal connection of 94/46, 11:53
6 then again the EU Privacy Directive and sets out
7 various provisions of that which you have seen in the
8 other case and then Directive 2006/24. But could
9 I draw -- that's on page 5.

10 **MS. JUSTICE COSTELLO:** And which one was that one 11:53
11 again? The numbers I glaze over. EU privacy was 2002.

12 **MR. GALLAGHER:** 2002.

13 **MS. JUSTICE COSTELLO:** 2006 is which one?

14 **MR. GALLAGHER:** Is the one that we just looked at in
15 the context of Ireland's challenge. It was the measure 11:53
16 harmonising the retention provisions in the Member
17 States.

18 **MS. JUSTICE COSTELLO:** It's retention. I know it's the
19 one we just looked at, I am just trying to remember
20 what it was called. 11:53

21 **MR. GALLAGHER:** Yes, it is very confusing. And it may
22 assist, Judge, if I just go back for a moment to
23 Article 15, to paragraph 10 on page 5, which refers to
24 Article 15 of the EU Privacy Directive.

25 **MS. JUSTICE COSTELLO:** Yes. 11:54

26 **MR. GALLAGHER:** And I said that this was in similar
27 terms to Directive 95/46 --

28 **MS. JUSTICE COSTELLO:** Yes.

29 **MR. GALLAGHER:** -- to Article 13, but there is one

1 important difference that I want to draw your attention
2 to.

3
4 And it says: "*Member States may adopt legislative*
5 *measures to restricting the scope of the rights and* 11:54
6 *obligations provided by those Articles of the EU*
7 *Privacy Directive when such restrictions constitutes a*
8 *necessary, appropriate and proportionate measure within*
9 *a democratic society to safeguard national security,*
10 *(i.e. State security), defence, public security, and* 11:54
11 *the prevention, investigation, detection and*
12 *prosecution of criminal offences or of unauthorised use*
13 *of the electronic communication system, as referred to*
14 *in Article 13(1) of Directive 95/46. To this end,*
15 *Member States may, inter alia, adopt legislative* 11:55
16 *measures providing for the retention of data for a*
17 *limited period justified on the grounds laid down in*
18 *this paragraph. All the measures referred to in this*
19 *paragraph shall be in accordance with the general*
20 *principles of Community law, including those referred* 11:55
21 *to in Article 6(1) and (2) of the Treaty of European*
22 *Union."*

23
24 Article 6(1) and (2) of the Treaty on European Union
25 refer to the general principles of Community law and 11:55
26 the Charter. So this is a sentence that is missing
27 from Article 13 of 95/46. It is specifically limiting
28 the measures that may be introduced in terms of their
29 having to comply with this provision and this is

1 something that is obviously ultimately very relevant to
2 its assessment of the validity of Directive 2006 which
3 is the harmonising measure dealing with restrictions on
4 the scope and rights and obligations in the ePrivacy
5 Directive.

11:56

6
7 You'll see then it explains in 11 that the harmonising
8 Directive: *"After having launched a consultation with*
9 *representative law enforcement authorities, the*
10 *electronic communications industry and data protection*
11 *experts on 21 September 2005 the Commission presented*
12 *an impact assessment of policy options in relation to*
13 *the rules on the retention of traffic data ('the impact*
14 *assessment'). That assessment served as the basis for*
15 *the drawing up of the proposal for a directive of the*
16 *European Parliament and of the Council on the retention*
17 *of data [processed] in connection with the provision of*
18 *public electronic communication services and amending*
19 *Directive 2002/58."*

11:56

20
21 Then if you go to next paragraph 12: *"Recital 4 of the*
22 *preamble to the Directive says: Article 15(1) of*
23 *Directive 2002/58 sets out the conditions under which*
24 *Member States may restrict the scope of the rights and*
25 *obligations provided for in those Articles of the*
26 *Directive. Any such restrictions must be necessary,*
27 *appropriate and proportionate et cetera."*

11:57

28
29 You are familiar with that provision.

1 Then it goes on: "According to the first sentence of
2 the recital in the preamble to the Directive under
3 consideration 'several Member States have adopted
4 legislation providing for the retention of data by
5 service providers for the prevention, instigation, 11:57
6 detection and prosecution of criminal offences'."

7
8 And then the recitals go on to say: "The Conclusions
9 of Justice and Home Affairs Council of 19 December 2002
10 underline that, because of the significant growth in 11:57
11 the possibilities afforded by electronic
12 communications, data relating to the use of electronic
13 communications are particularly important and therefore
14 a valuable tool in investigation."

15
16 Etc. It goes on to refer to recital 16, 21 and 22 on
17 the next page. In paragraph or recital 21 I'd like to
18 refer to in particular, which is contained in paragraph
19 15 half way down the page.

20 **MS. JUSTICE COSTELLO:** I have it. 11:58

21 **MR. GALLAGHER:** "Since the objectives of this
22 Directive, namely to harmonise the obligations on
23 providers to retain certain data and to ensure that
24 those data are available for the purpose of the
25 investigation, detection and protection of serious 11:58
26 crime, as defined by each Member State in its national
27 law, cannot be sufficiently achieved by the Member
28 States and can therefore, by reason of the scale and
29 effects of this Directive, be better achieved at

1 *Community level, the Community may adopt measures, in*
2 *accordance with the principle of subsidiarity set out*
3 *in the Article 5 of the Treaty. In accordance with the*
4 *principle of proportionality, as set out in that*
5 *Article, this Directive does not go beyond what is* 11:58
6 *necessary in order to achieve that purpose."*

7
8 You'll be familiar with that concept. It was, as
9 I say, scrutinised in the challenge by Ireland to the
10 validity of the Directive as to whether the proper 11:59
11 legal basis was 95 and that it was contributing to the
12 integration of the single market. But one of the
13 constraints on the Community acting is of course where
14 something can be better done by individual Member
15 States it cannot act. All of those matters were 11:59
16 thrashed out, if I may use that perhaps inelegant
17 expression, in the Irish challenge and this is reciting
18 the fact that that legal basis for the Directive and
19 its ultimately relevant to how the court approaches the
20 matter. 11:59

21
22 And then in paragraph 16, the subject matter and scope
23 of the Directive, it aims to harmonise Member States
24 provisions in the manner to which I drew your attention
25 in the context of the recitals. 11:59

26
27 And I think we can move then to paragraph 34, Judge,
28 and on page, excuse me, it's 18.

29 **MS. JUSTICE COSTELLO:** I think it's 15 if it's 31.

1 **MR. GALLAGHER:** Sorry, it's 15, my sight is failing me,
2 I do apologise. It's 15 and paragraph 33:

3
4 *"To establish the existence of an interference with the*
5 *fundamental right to privacy, it does not matter* 12:00
6 *whether the information on the private lives concerned*
7 *is sensitive or whether the persons concerned have been*
8 *inconvenienced in any way."*

9
10 And it refers to those decisions, and I think the 12:00
11 stenographer wants to change.

12
13 Reiterating the principle that data, whether it's
14 sensitive or not, is obviously protected by the
15 Directive. Then 34: 12:01

16
17 *"As a result, the obligation imposed by Articles 3 and*
18 *6 of [the Directive] on providers of publicly available*
19 *electronic communications services or of public*
20 *communications networks to retain, for a certain*
21 *period, data relating to a person's private life and to*
22 *his communications, such as those referred to in*
23 *Article 5 of the directive, constitutes in itself an*
24 *interference with the rights guaranteed by Article 7 of*
25 *the Charter."*

26
27 Then if you go over the page, at 44 on page 17, having
28 reviewed the issue in the opposite page of the
29 justification of the interference with the rights

1 guaranteed by Article 7, the court concludes:

2
3 *"It must therefore be held that the retention of data*
4 *for the purpose of allowing the competent national*
5 *authorities to have possible access to those data, as*
6 *required by [the Directive], genuinely satisfies an*
7 *objective of general interest."*

8
9 So in principle it is valid, it satisfies an objective
10 general interest - in this case specifically criminal 12:02
11 law and enforcement of criminal law.

12
13 Then it says the next step, in paragraph 45, is it's
14 necessary to verify the proportionality of the
15 interference found to exist. And it refers in 12:02
16 paragraph 46 to the settled case law of the court that
17 the principle of proportionality requires *"that acts of*
18 *the EU institutions be appropriate for attaining the*
19 *legitimate objectives pursued by the legislation at*
20 *issue and do not exceed the limits of what is*
21 *appropriate and necessary in order to achieve those*
22 *objectives."*

23
24 Then in 47:

25
26 *"with regard to judicial review of compliance with*
27 *those conditions, where interferences with fundamental*
28 *rights are at issue, the extent of the EU legislature's*
29 *discretion may prove to be limited, depending on a*

1 *number of factors, including, in particular, the area*
2 *concerned, the nature of the right at issue guaranteed*
3 *by the Charter, the nature and seriousness of the*
4 *interference and the object pursued by the*
5 *interference."*

12:03

6
7 Then if you'd be kind enough to go to the next page and
8 paragraph 54. It says:

9
10 *"Consequently, the EU legislation in question must lay*
11 *down clear and precise rules governing the scope and*
12 *application of the measure in question and imposing*
13 *minimum safeguards so that the persons whose data have*
14 *been retained have sufficient guarantees to effectively*
15 *protect their personal data against the risk of abuse*
16 *and against any unlawful access and use of that data."*

17
18 Then 55:

19
20 *"The need for such safeguards is all the greater where,*
21 *as laid down in Directive 2006/24, personal data are*
22 *subjected to automatic processing and where there is a*
23 *significant risk of unlawful access to those data."*

24
25 Then 56:

12:04

26
27 *"As for the question of whether the interference caused*
28 *by [the Directive] is limited to what is strictly*
29 *necessary, it should be observed that, in accordance*

1 *with Article 3 read in conjunction with Article 5(1) of*
2 *that directive, the directive requires the retention of*
3 *all traffic data" - and that's very important -*
4 *"concerning fixed telephony, mobile telephony, Internet*
5 *access, Internet e-mail and Internet telephony."*

6
7 Right across the, I suppose, spectrum of electronic
8 communications.

9
10 *"It therefore applies to all means of electronic*
11 *communication, the use of which is very widespread and*
12 *of growing importance in people's everyday lives.*
13 *Furthermore, in accordance with Article 3 of [the*
14 *Directive], the directive covers all subscribers and*
15 *registered users. It therefore entails an interference*
16 *with the fundamental rights of practically the entire*
17 *European population."*

18
19 And that paragraph is significant in terms of the
20 court's conclusion as to what is strictly necessary. 12:05
21 And if you go on to 58:

22
23 *"[The Directive] affects, in a comprehensive manner,*
24 *all persons using electronic communications services,*
25 *but without the persons whose data are retained being,*
26 *even indirectly, in a situation which is liable to give*
27 *rise to criminal prosecutions. It therefore applies*
28 *even to persons for whom there is no evidence capable*
29 *of suggesting that their conduct might have a link,*

1 *even an indirect or remote one, with serious crime.*
2 *Furthermore, it does not provide for any exception,*
3 *with the result that it applies even to persons whose*
4 *communications are subject, according to rules of*
5 *national law, to the obligation of professional*
6 *secrecy."*

7
8 Then if you go on to 59:

9
10 *"Moreover, whilst seeking to contribute to the fight*
11 *against serious crime, [the Directive] does not require*
12 *any relationship between the data whose retention is*
13 *provided for and a threat to public security and, in*
14 *particular, it is not restricted to a retention in*
15 *relation (i) to data pertaining to a particular time*
16 *period and/or a particular geographical zone and/or to*
17 *a circle of particular persons likely to be involved,*
18 *in one way or another, in a serious crime, or (ii) to*
19 *persons who could, for other reasons, contribute, by*
20 *the retention of their data, to the prevention,*
21 *detection or prosecution of serious offences.*

22
23 *60. Secondly, not only is there a general absence of*
24 *limits in [the Directive] but [the Directive] also*
25 *fails to lay down any objective criterion by which to*
26 *determine the limits of the access of the competent*
27 *national authorities to the data and their subsequent*
28 *use for the purposes of prevention, detection or*
29 *criminal prosecutions concerning offences that, in view*

1 *of the extent and seriousness of the interference with*
2 *the fundamental rights enshrined in Articles 7 and 8 of*
3 *the Charter, may be considered to be sufficiently*
4 *serious to justify such an interference. On the*
5 *contrary, [the Directive] simply refers... in a general*
6 *manner to serious crime, as defined by each Member*
7 *State in its national law."*

8
9 If I can refer you to 62:

10
11 *"In particular, [the Directive] does not lay down any*
12 *objective criterion by which the number of persons*
13 *authorised to access and subsequently use the data*
14 *retained is limited to what is strictly necessary in*
15 *the light of the objective pursued. Above all, the*
16 *access by the competent national authorities to the*
17 *data retained is not made dependent on a prior review*
18 *carried out by a court or by an independent*
19 *administrative body whose decision seeks to limit*
20 *access to the data and their use to what is strictly*
21 *necessary for the purpose of attaining the objective*
22 *pursued and which intervenes following a reasoned*
23 *request of those authorities submitted within the*
24 *framework of procedures of prevention, detection or*
25 *criminal prosecutions. Nor does it lay down a specific*
26 *obligation on Member States designed to establish such*
27 *limits."*

28
29 And finally, if I may, 65:

1
2 *"It follows from the above that [the Directive] does*
3 *not lay down clear and precise rules governing the*
4 *extent of the interference with the fundamental rights*
5 *enshrined in Articles 7 and 8 of the Charter. It must*
6 *therefore be held that [the Directive] entails a*
7 *wide-ranging and particularly serious interference with*
8 *those fundamental rights in the legal order of the EU,*
9 *without such an interference being precisely*
10 *circumscribed by provisions to ensure that it is*
11 *actually limited to what is strictly necessary."*
12

13 Now, to then perhaps derive the principles that emerge
14 from that case and to see how the Commission has taken
15 them into account in its examination of the Privacy 12:08
16 Shield. First, of course, a critical distinction
17 recognised in the cases and in all of the analysis is
18 this concerned the criminal law and not national
19 security as such. And that does have an impact on the
20 nature of the limitations and safeguards and also 12:09
21 potentially on the remedies.

22
23 Secondly, the court held the objective was a legitimate
24 objective. And then it carried out an analysis as to
25 whether the obligations imposed were strictly necessary 12:09
26 to achieve the objective. That is the approach that
27 was taken by the Commission in the privacy decision,
28 but not taken by the DPC in this case.
29

1 Thirdly, the data retention was generalised, bulk by
2 its nature, it applied, as the paragraphs that I've
3 referred you to demonstrate, to practically the entire
4 European population and without any differentiation
5 and, therefore, even to those without any link to 12:09
6 serious crime. It made no exception in respect of
7 obligations of professional secrecy. The data to be
8 retained was not limited. There was no objective
9 criterion set which determined in respect of which
10 forms of serious crime national authorities could 12:10
11 retain the data. There were no substantive or
12 procedural conditions established to regulate national
13 authorities' access to and use of the retained data.
14 No objective criterion was laid down to limit the
15 number of persons authorised to access and use retained 12:10
16 data, and such access and use was not dependant on a
17 prior review carried out by a court or independent
18 administrative body. All data was to be retained for a
19 period of six months, regardless of the data in
20 question and its usefulness and, therefore, regardless 12:10
21 of its necessity. No safeguards were established or
22 required for the security and protection of the
23 retained data in the light of risks of abuse and
24 unlawful access and, to the contrary, service providers
25 seemed to determine the levels of security to be 12:11
26 applied having regard to economic considerations. And
27 there was no system of oversight.
28
29 These were all the factors taken into account in

1 determining that issue, in the context, as I emphasise,
2 of criminal law and in a context where the very terms
3 of this exception from the E-Privacy Directive provided
4 restrictions. And those restrictions are, as I
5 identified for you, in Article 15 of the E-Privacy 12:11
6 Directive, back on page five, paragraph ten, where the
7 measures referred to had to be in accordance with the
8 general principles, including those referred to in
9 Article 6.

10
11 There's no equivalent provision in 95/46 relating to
12 national security for very obvious reasons, that's
13 outside the scope of EU law. But here, the very
14 derogation by which Member States fixed their laws with
15 regard to retention and which the Community, as it then 12:12
16 was, was now legislating for through the Directive was
17 constrained in that express way. And of course, what
18 the court was pronouncing on, which it must always have
19 jurisdiction to do, was the validity of a Directive.

20
21 So that is the **Digital Rights**. It's undoubtedly of
22 importance. It doesn't decide the issue in this case,
23 but it is important in showing that even where those
24 other circumstances are concerned in terms of the
25 different wording of the relevant legislative 12:12
26 provision, the different subject matter, the strictly
27 necessary approach is adopted.

28
29 Then that approach is, you'll see, referred to in the

1 Schrems decision. And I'm very conscious the court has
2 looked at the Schrems decision, but there are some
3 other paragraphs that I think in the light of this
4 argument are perhaps relevant to refer the court to
5 which no emphasis has been laid already and perhaps one 12:13
6 or two just to mention again in this context to which
7 your attention has been drawn, but without, I hope,
8 repeating anything that has been said and I know the
9 court will ask me to move on if I unintentionally do
10 that. 12:13

11
12 You can go to, it's the next divide and you can go to
13 page 15 and paragraph 31. And something that's very
14 important to another matter that I'll come back to, and
15 I hope I won't forget to do so, but I'll do it in the 12:13
16 context of national security when I look at some of the
17 evidence, the important issue that you raised, Judge,
18 as to, for example, how Upstream works and the fact
19 that if it carries out a search of a wide body of data,
20 what is the significance of that, even if it is 12:14
21 targeted? And I'll come back to that and show how
22 Upstream, as it's explained in detail in pages 35 and
23 36 of the PCLOB report, is so wholly different to what
24 was envisaged by the court in Schrems that it will (A)
25 answer your question and (B) emphasise a very important 12:14
26 distinction that is, of course, embraced and
27 acknowledged in the Privacy Shield by the Commission,
28 and I'll refer you to those paragraphs as well.
29

1 But it's very important, we say with the greatest of
2 respect, that the facts set out by the High Court that
3 were the subject matter of the reference were on the
4 basis of newspaper reports which interpreted the
5 revelations of Mr. Snowden to mean that PRISM and other 12:15
6 programmes had enabled NSA to engage in bulk or
7 generalised collections. And that certainly is, of
8 course, a decisions, as Ms. Barrington's decisions
9 urged on the court -- and I think I forgot to, I
10 should've said I, of course, adopt all of 12:15
11 Ms. Barrington's decisions on behalf of the US, as I
12 think is already clear from the emphasis we place on
13 the Privacy Shield and the facts and law set out
14 therein.

15 12:15
16 But in paragraph 30, you will see that the High Court,
17 in the last sentence, the CJEU refers to the fact that
18 *"it added that the revelations made by Edward Snowden*
19 *had demonstrated a 'significant over-reach' on the part*
20 *of the NSA and other federal agencies."* 12:15

21
22 And 31:

23
24 *"According to the High Court, Union citizens have no*
25 *effective right to be heard. Oversight of the*
26 *intelligence services' actions is carried out within*
27 *the framework of an ex parte and secret procedure.*
28 *Once the personal data has been transferred to the*
29 *United States, it is capable of being accessed by the*

1 **MR. GALLAGHER:** It is. But it is --

2 **MS. JUSTICE COSTELLO:** And then -- so your issue is
3 with the indiscriminate surveillance and interception?

4 **MR. GALLAGHER:** Exactly. And interception. That is
5 the critical one. And also, if you go back - and I 12:17
6 don't want to delay the court - there's some references
7 to that in the Commission communication to Parliament
8 as well.

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

10 **MR. GALLAGHER:** But if you took that paragraph, while 12:17
11 some of the sentences are *literally* correct, they of
12 course don't disclose the process and they don't
13 disclose the nature of the protections. I mean, all
14 you're told is that the oversight is ex parte and a
15 secret procedure. There's no understanding of how the 12:18
16 court operates, the significance of the FISC court, nor
17 is there any understanding of the other oversights,
18 there is no understanding of all the evidence before
19 this court, not only by reference to the official
20 reports, but by the evidence of Mr. DeLong and 12:18
21 Prof. Clarke as to how these surveillance actually
22 operate and the limitations on it. And those are
23 matters that I will refer to.

24

25 But the impression created was of bulk indiscriminate 12:18
26 collection and interception. And the scale of it was,
27 of course, misdescribed; the US Government wasn't a
28 party, Facebook was not a party. And therefore, the
29 evidence that is *now* available to this court and the

1 evidence that was available and considered by the
2 Commission is obviously of a very different nature.

3
4 So I do make the point, and it's an important point,
5 you can, of course, refer to something in a way that's 12:19
6 *literally* correct but the substance is not properly
7 explained and it is misleading - not in any intentional
8 way; there could be no criticism, there wasn't the
9 evidence before the court, but the factual basis was
10 very different. 12:19

11 **MS. JUSTICE COSTELLO:** I just wanted to focus on, be
12 clear --

13 **MR. GALLAGHER:** No, and a very important --

14 **MS. JUSTICE COSTELLO:** -- as to where your issues were.

15 **MR. GALLAGHER:** -- a very important question, Judge. 12:19
16 And I'll come back to that in a little bit more detail.

17
18 If you look at 33:

19
20 *"The High Court held that the mass and undifferentiated*
21 *accessing of personal data is clearly contrary to the*
22 *principle."*

23
24 You'll see how the Commission deal with that and how
25 that is dealt with and I'll come to that in a moment. 12:19
26 That is not an accurate description of how the
27 surveillance is conducted. And then there is a
28 reference to the Irish Constitution.

1 Judge, could I just ask you, to make the point, as it
2 is an important point, to draw attention to the
3 different factual basis in the Adequacy Decision itself
4 and just give you the reference to a number of
5 paragraphs that are relevant in that context? 12:20

6 **MS. JUSTICE COSTELLO:** By this you mean the Privacy
7 Shield?

8 **MR. GALLAGHER:** The Privacy Shield Decision, which is,
9 in that first book, divide 13. It's so that you'll
10 have them. They've been referred to in a different 12:20
11 context, but I think it is important that you be given
12 them in this particular context.

13
14 Firstly, you'll remember paragraph 82 to which I've
15 already made reference, that's on page 18 of the 12:20
16 decision. Paragraph 88 to which I have made reference,
17 that's on page 19. I'd also refer you to the footnote
18 to paragraph -- at the bottom footnote on that page, I
19 can't -- sorry, it's actually to paragraph 89. But if
20 you look at the bottom footnote, it says: 12:21

21
22 *"The Court of Justice has clarified that national*
23 *security constitutes a legitimate policy objective.*
24 *See Schrems, paragraph 88. See also Digital Rights...*
25 *in which the Court of Justice considered that the fight*
26 *against serious crime, in particular organised crime*
27 *and terrorism, may depend to a large extent on the use*
28 *of modern investigation techniques. Moreover, unlike*
29 *for criminal investigations that typically concern the*

1 *retrospective determination of responsibility and guilt*
2 *for past conduct, intelligence activities often focus*
3 *on preventing threats to national security before harm*
4 *has occurred. Therefore, such investigations may often*
5 *have to cover a broader range of possible actors...*
6 *and a wider geographic area."*

7
8 And of course, that also has implications with regard
9 to this question of notification. And it refers to
10 ECHR cases in that context. 12:22

11
12 There is a footnote, another footnote that I won't
13 delay if I can't -- I had it marked, but like a lot of
14 these, one then loses where the marking is. Yes,
15 sorry, it is on page 26 and it's the first footnote, 12:22
16 just something, a detail perhaps but something that I
17 think *wasn't* emphasised, Judge, because you only very
18 briefly saw the rules of procedure. But you'll see
19 that:

20
21 "*Rule 13(b) of the FISC Rules of Procedure requires the*
22 *government to file a written notice with the Court*
23 *immediately upon discovering that any authority or*
24 *approval granted by the Court has been implemented in a*
25 *manner that does not comply with the Court's*
26 *authorisation or approval, or with applicable law. It*
27 *also requires the government to notify the Court in*
28 *writing of the facts and circumstances relevant to such*
29 *non-compliance. Typically, the government will file a*

1 *final Rule 13(a) notice once the relevant facts are*
2 *known and any unauthorized collection has been*
3 *destroyed."*
4

5 So that's the consequence of that. That's a limitation 12:23
6 that's regarded as important. And while it's a detail
7 in this context, before I forget it, I just want to
8 refer you to it.

9
10 Then, of course, this decision refers to the Litt 12:23
11 letter, which is on page 91. And that refers, on 91,
12 to the PPD-28, and the last full paragraph, that it
13 sets out principles and requirements that apply to all
14 US signals intelligence and for all people, regardless
15 of nationality or location. And it sets certain 12:24
16 requirements and procedures to address the collection,
17 retention and dissemination of personal information
18 about non-US persons acquired pursuant to US signals
19 intelligence.

20 12:24
21 Then if you look at the detail - and I'm not going to
22 delay on it - that's set out in pages 92, 93, 94 and 95
23 with regard to how this operates, it gives quite a
24 different description than one would glean from the
25 Schrems decision. Also, 97, pages 97 and 99. And 99 I 12:25
26 do want to draw your attention to, it's a statistic
27 that you've seen elsewhere. But at the very top of the
28 page, the paragraph that carries over from the previous
29 page, you will see that there's a reference to

1 information being provided which establishes, the first
2 line says --

3 **MS. JUSTICE COSTELLO:** Sorry, I'm just not quite there.
4 99?

5 **MR. GALLAGHER:** 99. And the very top paragraph, which 12:25
6 is a continuation from the previous page. And it's the
7 first full sentence on the first line:

8
9 *"The basis for selection of the target must be*
10 *documented, and the documentation for every selector is*
11 *subsequently reviewed by the Department of Justice.*
12 *The US Government has released information showing that*
13 *in 2014 there were approximately 90,000 individuals*
14 *targeted under Section 702, a miniscule fraction of the*
15 *over 3 billion internet users throughout the world."*

16
17 So that's under the Section 702 programme. That's very
18 different from the impression one would glean - and
19 it's a not a criticism of Hogan J -- but that one would
20 glean from the facts that engaged the court in Schrems, 12:26
21 because clearly it wasn't finding the facts.

22
23 Then in paragraph 45 of Schrems there is a reference to
24 Parliament -v- Council and paragraph 56 of that case.
25 And it says -- it defines processing of personal data. 12:26
26 It's more the fact that the decision is referred to
27 without any suggestion that it's incorrect in any way
28 or overruled in any way. And then the next paragraph,
29 46, is of some importance. It says:

1
2 "Recital 60 in the preamble to [the Directive] states
3 that transfers of personal data to third countries may
4 be effected" - and this is the important bit, Judge -
5 "only in full compliance with the provisions adopted by
6 the Member States pursuant to the directive."
7

8 So the comparator, the compliance is assessed by
9 reference to the provisions adopted by the Member
10 States in compliance, or pursuant to that Directive. 12:27

11 That's the point I made earlier this morning and
12 explicitly recognised in Schrems as the comparator; you
13 effect them only in full compliance with those
14 provisions. And:
15

16 "In that regard, Chapter IV of the directive, in which
17 Articles 25 and 26 appear, has set up a regime intended
18 to ensure that the Member States oversee transfers of
19 personal data to third countries. That regime is
20 complementary to the general regime set up by Chapter
21 II."
22

23 That's a reference to Lindqvist, which I'm not going to
24 open, you'll be glad to know. It's in book four of
25 five and I'll give you the reference later. But the 12:28
26 relevant principles are referred to in later cases and
27 it doesn't add anything to our knowledge of the
28 principles that are relevant here.
29

1 Then paragraph 51 is important in terms of the Privacy
2 Shield Decision. Apart from Section 11, that I
3 referred to in my brief opening and the significance
4 given to a decision in that context, indeed a
5 significance recognised in terms of decisions being 12:28
6 binding by the DPC but not followed through in having
7 regard to the privacy decision - recognised in her
8 draft decision that is, but not followed through -
9 you'll see paragraph 51 says - and this is independent
10 of anything in Section 11: 12:29

11
12 *"The Commission may adopt, on the basis of Article*
13 *25(6) of Directive... a decision finding that a third*
14 *country ensures an adequate level of protection. In*
15 *accordance with the second subparagraph of that*
16 *provision, such a decision is addressed to the Member*
17 *States, who must take the measures necessary to comply*
18 *with it. Pursuant to the fourth paragraph of Article*
19 *288 TFEU, it is binding on all the Member States to*
20 *which it is addressed and is therefore binding on all*
21 *their organs... in so far as it has the effect of*
22 *authorising transfers of personal data."*

23
24 So it's binding on the DPC, which is an organ in this
25 context, it's binding on the court, and that's quite 12:29
26 independently of Section 11. And 52:

27
28 *"Thus, until such time as the Commission decision is*
29 *declared invalid by the Court, the Member States and*

1 their organs, *which include their independent*
2 *supervisory authorities*" - that is the DPC -
3 "*admittedly cannot adopt measures contrary to that*
4 *decision, such as acts intended to determine with*
5 *binding effect that the third country covered by it*
6 *does not ensure an adequate level of protection.*"
7

8 That's very important. You can raise an issue with
9 *regard* to the decision which Schrems says must then be
10 investigated by the DPC, but that's not the position 12:30
11 here, that's not part of the claim put before this
12 court by the DPC, by any of the parties. The DPC, as
13 you know, in footnote 22 of her decision says she
14 wasn't taking into account the provisions of the
15 Privacy Shield. And more particularly, in paragraph 12:30
16 6(1) of the reply she says the same, that this is not
17 taken into account.

18
19 Now, that was something that, in truth --

20 **MS. JUSTICE COSTELLO:** wasn't she relying on its full 12:31
21 force meaning and effect?

22 **MR. GALLAGHER:** Exactly. And she does not in any way
23 challenge it, she says.

24
25 "*For the avoidance of doubt, the Commissioner could not* 12:31
26 *have had regard to the privacy decision in reaching the*
27 *draft decision, as same has not yet been implemented at*
28 *date of adoption and the Commissioner will refer to the*
29 *entirety of the Privacy Shield for its true meaning and*

1 *effect.*"

2
3 So there's no challenge to it. And *we* are referring to
4 it for its true meaning and its effect. Its effect is
5 *binding* as a matter of EU law. And that is binding on 12:31
6 her. So either she should have waited or she should
7 have revisited this in the context of a binding
8 decision. But what she can't do is put the matter
9 before the court, ask the court to ignore it, refer
10 something on a hypothesis to the EU and have the CJEU 12:31
11 saying 'How is this before us? There is a binding
12 decision here that hasn't been challenged in any way
13 and that determines this matter and is binding on the
14 DPC'. AS I said on Friday, that's the beginning and
15 the end of it. But I don't want to get distracted by 12:32
16 that. I've made that point. But those are very, very
17 important provisions.

18
19 I want to continue, if I'm wrong in that for any
20 reason, as to why the approach was substantively wrong. 12:32
21 In 55 and 56 you might just note the significant role
22 accorded to the supervisory authority in the Directive,
23 as recognised by the court. That's of relevance in
24 answering your question, which I will deal with later,
25 as to whether, if you had concerns independently of the 12:32
26 DPC, somehow that would fill the gap. It doesn't.
27 This is a procedure that is envisaged by the Directive
28 laid down in the statute and it's the DPC that fulfills
29 that role. But I'll come back to it - merely asking

1 you at the moment to look at 55 and 56. And in that
2 context, paragraph 60 will also be relevant.

3
4 But continuing with this theme, 63, 64 and 65 are also
5 relevant to that issue. And if I may, Judge, without 12:33
6 wearying you having to come back to it again, I'll draw
7 attention to them. I *will* come back to them, but it's
8 a separate issue and perhaps better dealt with
9 separately.

10
11 In the context of the points I'm now making, paragraph 12:33
12 76 is the next important paragraph. And it does
13 reflect -- or, sorry, it does, I suppose, anticipate
14 something, or articulates by way of anticipation
15 something that is reflected in the Privacy Shield but 12:33
16 derived from the Directive; that is:

17
18 *"... the fact that the level of protection ensured by a*
19 *third country is liable to change, it is incumbent upon*
20 *the Commission, after it has adopted a decision*
21 *pursuant to Article 25(6) of [the Directive], to check*
22 *periodically whether the finding relating to the*
23 *adequacy of the level of protection ensured by the*
24 *third country in question is still factually and*
25 *legally justified".* 12:34

26 **MS. JUSTICE COSTELLO:** I beg your pardon, which
27 paragraph is this now?

28 **MR. GALLAGHER:** I'm terribly sorry, it's 76 on page 22.

29 **MS. JUSTICE COSTELLO:** 76. I beg your pardon. Yes, I

1 have it highlighted, yes.

2 **MR. GALLAGHER:** And that is the obligation to check.
3 Then if you go to 88, which I suspect you may also have
4 highlighted, because it predicts the ultimate ratio.
5 The court notes that the decision, which is the Safe 12:34
6 Harbour decision, did not contain any finding regarding
7 the *existence* of rules adopted by the state, and this
8 is important:

9
10 *"Intended to limit any interference with the*
11 *fundamental rights of the persons whose data is*
12 *transferred from the European Union to the United*
13 *States, interference which the State entities of that*
14 *country would be authorised to engage in when they*
15 *pursue legitimate objectives."*

16
17 So a recognition, as would have to follow, because EU
18 law couldn't prevent non-EU countries having that as a
19 legitimate objective, it's a legitimate objective of
20 the EU, but the *criticism* of the decision is there's no 12:35
21 analysis of the *rules* adopted by the state intended to
22 limit any interference with the fundamental rights.
23 That, as I have said from the beginning this morning,
24 is the approach that you need to take in assessing
25 adequacy and recognised in Schrems. And the Commission 12:35
26 is implementing Schrems and Digital Rights in its
27 approach.

28
29 Then if you go to paragraph 91. The court says:

1
2 *"As regards the level of protection of fundamental*
3 *rights and freedoms that is guaranteed within the*
4 *European Union, EU legislation involving interference*
5 *with the fundamental rights guaranteed by Articles 7*
6 *and 8 of the Charter must, according to the Court's*
7 *settled case-law, lay down clear and precise rules*
8 *governing the scope and application of a measure and*
9 *imposing minimum safeguards, so that the persons whose*
10 *personal data is concerned have sufficient guarantees*
11 *enabling their data to be effectively protected against*
12 *the risk of abuse and against any unlawful access and*
13 *use of that data. The need for such safeguards is all*
14 *the greater where personal data is subjected to*
15 *automatic processing and where there is a significant*
16 *risk of unlawful access."*

17
18 So a number of points of that is of importance; that
19 looking at the interference with the rights and the
20 limitations on those interference, the one thing that 12:36
21 is somewhat puzzling is the court's reference to the
22 rights guaranteed by Articles 7 and 8 of the Charter.
23 It's explicable in the sense that data privacy is a
24 right protected by Article 7. The court isn't applying
25 Article 7 and 8, but it's recognising this is a right, 12:37
26 and it's a fundamental right under the Charter. When
27 one comes to look at the processing that is conducted
28 by way of national surveillance or national security
29 surveillance, one must look not at the rights enshrined

1 in the Directive, one looks at the extent of the
2 interference and whether the interference goes further
3 than is strictly necessary.

4
5 I say it's slightly puzzling because the court doesn't 12:37
6 quite explain the precise context in which it's
7 referring to the Charter. The test it adumbrates is no
8 different to the test that was, in any event, applied
9 by the Commission in the privacy decision and it
10 represents the outer limits of what any EU body can do 12:37
11 in assessing the adequacy of the protection.

12
13 So even if you apply -- and as I said to the court, I,
14 of course, accept Schrems and Digital Rights and those
15 principles for the purposes of the argument before the 12:38
16 court. What the court is *explicitly* saying here is,
17 whether viewed by reference to the Charter or whether
18 viewed by reference to anything else, the inquiry
19 inadequacy is a look at the rules and the strictly
20 necessary. And that is clear from this paragraph and 12:38
21 paragraph 88 that I've just referred to.

22
23 Then if you look at paragraph 92:

24
25 "*Furthermore and above all, protection of the 12:38*
26 *fundamental right to respect for private life at EU*
27 *level requires derogations and limitations in relation*
28 *to the protection of personal data.*"
29

1 So data, personal data is protected within the EU from
2 the scope of EU law by Article 7 and 8, as it
3 recognises, of the Charter, but the protection does
4 require derogations and limitations even within the EU
5 legal scheme. And it refers to Digital Rights that I 12:39
6 drew your attention to

7
8 *"93. Legislation is not limited to what is strictly
9 necessary where it authorises, on a generalised basis,
10 storage of all the personal data of all the persons
11 whose data has been transferred from the European Union
12 to the United States."*

13
14 But of course, that's not *what* takes place. All of
15 that data is *not* stored by the US, that data is stored 12:39
16 by the electronic communications providers and targeted
17 access is allowed to that data. So that's a
18 fundamental difference in facts, misunderstanding of
19 the factual situation and deriving from those earlier
20 paragraphs, 31 in particular and 32, that I referred to 12:40
21 of the judgment. And --

22 **MS. JUSTICE COSTELLO:** I think Mr. Collins, when he was
23 opening this, laid emphasis on the fact that in these
24 paragraphs they keep referring to legislation and
25 they're saying, therefore, you have to look at the 12:40
26 laws, it's not sufficient to look at what might be
27 administrative decisions. And I don't know whether --

28 **MR. GALLAGHER:** Oh, well, he does, of course, say that.
29 And there it does refer to legislation. But all of the

1 comments that I've shown you demonstrate that you have
2 to look at Article 25(2) says that as well and that the
3 safeguards are absolutely critical. That's also clear
4 from ECHR law, but it's clear from this as well. And I
5 will develop that theme, if I may.

12:40

6
7 So obviously you look at legislation. But in assessing
8 legislation and the extent of the intrusion, you look
9 at all of the rules in respect of which it provides the
10 context or practice in which that legislation operates,
11 as well as the protections provided in the legislation.
12 And of course, something that *is* provided in the
13 legislation is targeting procedures. The details of
14 that are worked out administratively, but there are
15 obligations in that respect. So there is nothing here
16 which suggests that what is said in all of the passages
17 that I referred you to in **Digital Rights** and in this up
18 until now, that you don't look at all the safeguards
19 and limitations.

12:41

12:41

12:41

20
21 Then it goes on:

22
23 *"... storage of all the personal data of all the*
24 *persons whose data has been transferred... without any*
25 *differentiation, limitation or exception being made in*
26 *the light of the objective pursued and without an*
27 *objective criterion being laid down by which to*
28 *determine the limits of the access of the public*
29 *authorities to the data, and of its subsequent use, for*

1 *purposes which are specific, strictly restricted and*
2 *capable of justifying the interference which both*
3 *access to that data and its use entail (see, to this*
4 *effect, concerning [the Directive]... and... on the*
5 *retention of data generated or processed in connection*
6 *with the provision of publicly available electronic*
7 *communications...).*"

8
9 So again, as you now know, that's not true: "*without*
10 *any differentiation, limitation or exception being made* 12:42
11 *in the light of the objective pursued and without an*
12 *objective criterion being laid down by which to*
13 *determine the limits of the access.*"

14
15 And of course, you'll remember, Judge, that in this 12:42
16 case the DPC doesn't *look* at the substantive
17 limitations.

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

19 **MR. GALLAGHER:** Doesn't address them at all. Just
20 looks at remedies. But doesn't look even at the legal 12:43
21 structure and the extent -- they were looked at in this
22 court. But they are not looked at in the DPC decision.
23 And she says 'I am looking at the remedies' and the
24 provisions she *deals with* are the remedies, and she
25 doesn't look at the substantive provisions. So that is 12:43
26 obviously a very important -- of great importance.

27
28 And if you go on then to 94:
29

1 *"In particular, legislation permitting the public*
2 *authorities to have access on a generalised basis to*
3 *the content of electronic communications must be*
4 *regarded as compromising the essence of the fundamental*
5 *right."*

6
7 That's not the position here. That was in Digital
8 Rights and the factors that I've drawn your attention
9 to.

10
11 *"95... legislation not providing for any possibility*
12 *for an individual to pursue legal remedies in order to*
13 *have access to personal data relating to him, or to*
14 *obtain the rectification or erasure of such data, does*
15 *not respect the essence of the fundamental right to*
16 *effective judicial protection, as enshrined in Article*
17 *47."*

18
19 And the first paragraph of Article 47 of the Charter
20 requires everyone whose rights and freedoms are
21 guaranteed by the law of the European Union or violated
22 to have a right to an effective remedy before a
23 tribunal, in compliance with the conditions laid down
24 in that article. And the very existence of an
25 effective judicial review designed to ensure compliance
26 with provisions of the EU law is inherent in the
27 existence of the rule of law.

28
29 So the generalised access, which doesn't apply here,

1 the lack of *any* possibility of an individual pursuing
2 legal remedies doesn't apply here and, in terms of the
3 draft decision, is *acknowledged* not to apply. And that
4 is of importance, because in the context of the Charter
5 and the ECHR, if the *essence* of the right is destroyed 12:44
6 and not respected then you don't look at the
7 limitations. But the essence of the right is, *of*
8 *course*, respected here, but there are limitations, and
9 those limitations are judged by the strictly necessary
10 standard. And that is true whether you adopt the 12:45
11 approach that *seems* to be favoured by the court in
12 Schrems of looking at it in the context of Articles 7
13 and 8 and 47, without actually wrestling with the
14 fundamental limitations on the scope of those
15 protections, or whether you look at it in the context 12:45
16 of the ECHR.

17
18 Then the final ratio on paragraph 98 to which you've
19 already been referred.

20 12:45
21 So it's in that context and having regard to that
22 approach that the Commission looked at *everything* and
23 all of the safeguards and the limitations that apply
24 that are so much -- so important a part of the fabric
25 of the assessment. And I won't open it now, but you'll 12:46
26 remember, Judge, that in the Directive itself, in
27 Article 25(2), that the adequacy must be assessed in
28 the light of *all* of the circumstances surrounding a
29 data transfer operation or set of data transfer

1 operations.

2
3 *"Particular consideration shall be given to the nature*
4 *of data, the purpose and duration of the proposed*
5 *processing operation or operations, the country of* 12:46
6 *origin, the country of final destination, rules of law*
7 *both general and material in force in the country in*
8 *question and the professional rules and security*
9 *measures which are complied with in that country."*

10
11 And of course one thing that is ignored completely, in
12 fact isn't mentioned at all but is of importance is the
13 suite of protections that derive from the role played
14 by the electronic communications providers - you have
15 the evidence of the measures taken by Facebook to 12:47
16 ensure the law is complied with - their rights to
17 challenge directives and their rights to invoke the
18 Constitution, as was done by Yahoo and others. They're
19 all part of the examination that is mandated by those
20 cases. 12:47

21
22 And that brings me to Watson, which is, in my book,
23 sorry, it's the next divide, I think, it's divide 37, I
24 believe.

25 **MS. JUSTICE COSTELLO:** Yes, Tele2 Sverige. 12:47

26 **MR. GALLAGHER:** Yes. Watson then deals with a sort of
27 a further development of this Retention Directive. I
28 hope you have the divider in yours, but there's the
29 Advocate General's decision and then there's the

1 decision of the court of 21st December 2016. And there
2 is reference to the Advocate General's opinion in the
3 submissions of Facebook, and indeed I think in other
4 submissions. The court adopts a somewhat different
5 approach and it's obviously to the court's decision, 12:48
6 therefore, that I will pay attention.

7 **MS. JUSTICE COSTELLO:** So should I slightly replace
8 what you're going to say now to me in relation to
9 Watson with what is in the written submissions?

10 **MR. GALLAGHER:** I think it would be better to do that, 12:48
11 Judge. It would be better to do that. I can't say
12 I'll double-check that every comment is otiose, but
13 certainly it's safer to proceed in that acknowledgment.

14
15 You'll see then this is another variation of this 12:49
16 E-Privacy Directive and the permission it allows for
17 Member States to intervene and impose -- or, sorry,
18 restrict the application of the protections. And in
19 order to understand the case, one might go, if I might
20 suggest, to paragraph 11 of the decision, which is on 12:49
21 page four.

22 **MS. JUSTICE COSTELLO:** Yes.

23 **MR. GALLAGHER:** "*Like Directive 95/46 of the*" -- it's
24 not actually paragraph 11 of the decision, it's
25 paragraph three of the decision, but it's paragraph 11 12:49
26 of the recitals, sorry.

27 **MS. JUSTICE COSTELLO:** Oh, sorry.

28 **MR. GALLAGHER:** So it's on page four, excuse me, and
29 it's paragraph 11. I was slightly confused by my own

1 note. It's quoting from the recitals to the Directive
2 and it says:

3
4 *"Like Directive 95/46/... this Directive does not*
5 *address issues of protection of fundamental rights and*
6 *freedoms related to activities which are not governed*
7 *by Community law."*

8
9 And that's what I've been saying in the context of
10 95/46 - it just doesn't affect those issues.

12:50

11
12 *"Therefore it does not alter the existing balance*
13 *between the individual's right to privacy and the*
14 *possibility for Member States to take the measures*
15 *referred to in Article 15(1) of this Directive,*
16 *necessary for the protection of public security,*
17 *defence, state security (including the economic*
18 *well-being of the state when the activities relate to*
19 *state security matters) and the enforcement of criminal*
20 *law. Consequently, this Directive does not affect the*
21 *ability of Member States to carry out lawful*
22 *interception of electronic communications, or take*
23 *other measures, if necessary for any of these purposes*
24 *and" - and this is important - "in accordance with the*
25 *European Convention... Such measures must be*
26 *appropriate [and strictly] necessary."*

27
28 So by Watson, the court is specifically identifying
29 that when it comes to Member States carrying out

1 surveillance activities, (A) it's not covered by the
2 Directive and the Directive doesn't affect how they do
3 that, but in recognition that all of these Member
4 States are members of the ECHR, they say the Convention
5 governs. And the measures -- 12:51

6 **MS. JUSTICE COSTELLO:** I'm possibly getting a little
7 confused at this stage, but why is it the Convention
8 and not the Charter?

9 **MR. GALLAGHER:** Well, the court doesn't actually --

10 **MS. JUSTICE COSTELLO:** Oh, is that because this is a 12:51
11 recital before the -- no, it's not.

12 **MR. GALLAGHER:** Sorry? Yes, it is.

13 **MS. JUSTICE COSTELLO:** It's not the date of the
14 Charter, it was before --

15 **MR. GALLAGHER:** It is. It's recitals to the Directive. 12:52

16 **MS. JUSTICE COSTELLO:** Yes, but is that pre the Charter
17 coming into effect?

18 **MR. GALLAGHER:** It is pre the Charter coming into
19 effect. But the Charter was there as soft law and was
20 part of the general principles of European law. And 12:52
21 I'm going to --

22 **MS. JUSTICE COSTELLO:** I was just wondering why it was
23 referring to the Convention rather than the Charter.

24 **MR. GALLAGHER:** Yeah. That's why, the recitals are
25 referring to it. And I'm going to show you how that 12:52
26 develops.

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

28 **MR. GALLAGHER:** But it's just to the point that I made
29 earlier that it's saying this is governed by Member

1 State law, the Charter doesn't extend *beyond* the scope
2 of European law, Member State law in this area is
3 *outside* European law, but it *is* governed by the
4 Convention. So in respect of that aspect, that's
5 correct before and after the Charter.

12:52

6
7 The separate issue is the extent to which the Charter
8 applies in the adequacy assessment carried out after
9 the Charter comes into force. But the Charter does not
10 extend to the area which is declared to be outside the
11 scope of EU law, because as I drew your attention to,
12 Article 6(1) of the TEU and Article 51 of the Charter
13 expressly provides it only applies within the scope of
14 EU law.

12:52

15
16 So this is absolutely correct, Judge, that it predates
17 the Charter - the Charter was soft law then, general
18 principles applied - but I think it's a slightly
19 separate point and it is relevant to the operation of
20 Member State law, to which I have referred.

12:53

21
22 Then you'll see, Judge, Article 15 of the Directive,
23 which is on page seven and to which I've already drawn
24 your attention. And that last sentence in, it's
25 paragraph 11 of the decision, page seven and a little
26 over halfway down you'll see Article 15 quoted again.

12:53

27 **MS. JUSTICE COSTELLO:** Yes.

28 **MR. GALLAGHER:** And I've drawn your attention to the
29 last sentence, which isn't part of Article 14.

1 MS. JUSTICE COSTELLO: 13, is it?

2 MR. GALLAGHER: It's paragraph 13. Sorry, excuse me.
3 13, you're absolutely right. And then, Judge, you will
4 see that there's a reference to Swedish law in
5 paragraph 24, because there was a reference from 12:54
6 Sweden. And then the reference in paragraph 29 to the
7 UK law, referred to as DRIPA. But we needn't delay on
8 any of that.

9
10 If you go to the question referred by the Stockholm 12:54
11 court, you'll see that's on paragraph 51, page 16 and
12 referring to the extent of the obligation which was
13 imposed by Swedish law to retain traffic data covering
14 *all* persons, *all* means of electronic communications,
15 *all* traffic data without any distinction, limitations 12:54
16 or exceptions, for the purposes of combating crime.

17
18 That's very much in the terms of the 2006 Directive
19 which had been invalidated in Digital Rights. What
20 happened in Sweden after the invalidation was the 12:55
21 Swedish Government asked an expert to look at their
22 laws and say 'Do we need to change our laws in the
23 light of the Digital Rights decision?' And the expert
24 says 'No, you don't. Notwithstanding the decision,
25 they're still fine'. But even from the way the court 12:55
26 phrases the question, you see echoes of what had been
27 held *not* to be fine in Digital Rights.

28
29 Then in the UK case, you'll see in paragraph 52, it was

1 a case before the High Court. And in paragraph 53 it's
2 of just some importance to note that:

3
4 *"By its judgment" - and this is important - "the High*
5 *Court... held that the Digital Rights judgment laid*
6 *down 'mandatory requirements of EU law' applicable to*
7 *the legislation of Member States on the retention of*
8 *communications data and access to such data. According*
9 *to the High Court... since the Court, in that judgment,*
10 *held that Directive 2006/24 was incompatible with the*
11 *principle of proportionality, national legislation*
12 *containing the same provisions as that directive could,*
13 *equally, not be compatible with that principle. It*
14 *follows from the underlying logic of the Digital Rights*
15 *judgment that legislation that establishes a general*
16 *body of rules for the retention of communications data*
17 *is in breach of the rights guaranteed in Articles 7 and*
18 *8 of the Charter, unless that legislation is*
19 *complemented by a body of rules for access to the data,*
20 *defined by national law, which provides sufficient*
21 *safeguards to protect those rights. Accordingly,*
22 *Section 1 of DRIPA is not compatible with Articles 7*
23 *and 8 of the Charter."*

24
25 So the judge in the UK *did* compare it with the Charter. 12:57
26 Notwithstanding the recitals in the Directive about it
27 being outside the scope of EU law, the court proceeds
28 to assess it in that context. But what's important to
29 remember is the High Court had said 'Actually,

1 following Digital Rights, our domestic law is invalid'.
2 So this is, in a sense, just looking at Digital Rights
3 again and seeing whether two laws within the legal
4 systems relating to the prevention of crime are
5 consistent with the court's ruling in Digital Rights. 12:57
6 And the court ultimately holds they're not. But the
7 basis on which it holds it is of some importance.
8

9 Then if you go, Judge, to the scope of the Directive,
10 you might look at paragraph 71. And it refers to 12:57
11 Article 15 - it's on page 20 - and it says the
12 Directive states that Member States *may* adopt, subject
13 to the conditions laid down, those legislative
14 measures. So the basis on which *these* laws were
15 invoked was on foot of the Directive, they were given a 12:58
16 discretion to adopt them.
17

18 And in paragraph 73 the court says:

19
20 "*... having regard to the general structure of [the*
21 *Directive], the factors identified in the preceding*
22 *paragraph of this judgment do not permit the conclusion*
23 *that the legislative measures referred to in Article*
24 *15(1)... are excluded from the scope of that directive,*
25 *for otherwise that provision would be deprived of any*
26 *purpose. Indeed, Article 15(1) necessarily presupposes*
27 *that the national measures referred to therein, such as*
28 *those relating to the retention of data for the purpose*
29 *of combating crime, fall within the scope of that*

1 *directive, since it expressly authorises the Member*
2 *States to adopt them only if the conditions laid down*
3 *in the directive are met."*
4

5 So one of the issues that was raised is: Is this within 12:59
6 the scope of the Directive at all? The court answered
7 that fairly simply; it said 'well, Article 15 allows
8 you to adopt, it gives you a discretion. You have done
9 so. Looked at that article and the structure, we think
10 this is within the scope of EU law'. It would've been 12:59
11 surprising, in truth, if it had come to a different
12 decision, because the court had already decided in
13 **Digital Rights** and in the Irish challenge that,
14 firstly, the Community, as it then was, could legislate
15 in that area, as it did in 2006 in the 2006 Directive, 12:59
16 and that it had jurisdiction to look at the validity of
17 the Directive. So if it had jurisdiction to look at
18 the validity of the Directive, which purported to
19 *regulate* retention by Member States, it's not
20 *surprising* that it followed the logic of that through 12:59
21 in the context of **watson** and said 'well, we now
22 actually look at the laws of the Member States which
23 the invalid Directive purported to harmonise, but which
24 itself was inconsistent with the protection that is
25 required to be given to data privacy'. 13:00
26

27 So this is the follow-through, but it's in the area of
28 combating crime. And as indicated to the court, crime
29 is now the subject of the TEU, it was part of the

1 Treaty, the European Union Treaty and the subject of
2 framework decisions in the pre-Lisbon. But the
3 position with regard to national security is that it
4 has always been wholly outside the Treaty and remains
5 so. So anything said in Watson must be carefully
6 considered in the context in which it's said. And the
7 court is very adamant at stressing that context and
8 stressing that these were measures to combat crime.
9 And after lunch I'll take you through as to how they
10 dealt with that, if I may.

13:01

13:01

11 **MS. JUSTICE COSTELLO:** Okay, thank you. Two o'clock.

12
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(LUNCHEON ADJOURNMENT)

13:01

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

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

5 **REGISTRAR:** In the matter of Data Protection 14:03
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MR. GALLAGHER:** We were on the Watson decision, Judge,
8 if that's convenient, at page 20. And I think I had
9 opened paragraph --

10 **MR. MURRAY:** I wonder could Mr. Gallagher refer to the 14:03
11 paragraphs because unfortunately we are all on
12 different versions of it.

13 **MR. GALLAGHER:** Oh, I will. I had just finished
14 referring to paragraph 73 and I was going to move to
15 paragraph 74, to give you an opportunity to get it, 14:03
16 Judge.

17 **MS. JUSTICE COSTELLO:** I have it, thank you.

18 **MR. GALLAGHER:** Thank you. 74:

19
20 *"Further, the legislative measures referred to in 14:03*
21 *Article 15(1) of the Directive govern, for the purposes*
22 *mentioned in that provision, the activity of providers*
23 *of electronic communications services. Accordingly,*
24 *Article 15(1), read together with Article 3 of that*
25 *Directive, must be interpreted as meaning that 14:04*
26 *legislative measures fall within the scope of that*
27 *Directive."*

28
29 Sorry, I may in fact have read that earlier. And

1 that's because, as I say, the provisions particularly
2 directed to altering the régime, so far as electronic
3 communications providers was concerned, they were the
4 subject of Article 15. Article 15 invoked the Charter
5 and the laws which the Member States introduced through 14:04
6 the derogation provided in Article 15 dealt with these
7 issues. So that's fixing that the court *has*
8 jurisdiction.

9
10 And then if you move to paragraph 80 on the opposite 14:04
11 page, they say: "*That interpretation is confirmed by*
12 *Article 15(1b) of the Directive - to which I actually*
13 *haven't drawn your attention but it is stated here what*
14 *it is - which provides that providers are to establish*
15 *internal procedures for responding to requests for 14:05*
16 *access to users' personal data, based on provisions of*
17 *national law pursuant to Article 15(1)."*

18
19 Then paragraph 86 at the bottom of the page:
20 "*Accordingly, as confirmed by recitals 22 and 26 of the 14:05*
21 *Directive, under Article 6 of that directive, the*
22 *processing and storage of traffic data are permitted*
23 *only to the extent necessary and for the time necessary*
24 *for the billing of marketing of services and the*
25 *provision of value added services. As regards, in 14:05*
26 *particular, the billing of services, that processing is*
27 *permitted only up to the end of the period during which*
28 *the bill may be lawfully challenged or legal*
29 *proceedings brought to obtain payment. Once that*

1 *period has elapsed, the data processed and stored must*
2 *be erased or made anonymous. As regards location data*
3 *other than traffic data, Article 9(1) of that directive*
4 *provides that that data may be processed only subject*
5 *to certain conditions and after it has been made* 14:06
6 *anonymous."*

7
8 I have drawn attention to that provision because that's
9 the provision which lays down the general rule for the
10 service providers. That general rule may be *restricted* 14:06
11 pursuant to legislation introduced by Article 15 and,
12 for the reasons which I have outlined, the court says
13 that actually gives us jurisdiction in this case to
14 look at the legislation because it is specifically
15 dealing with something that is provided for in the 14:06
16 Directive, to which the Directive applies, the
17 retention of data, and it is a restriction of a
18 protection in the Directive, namely Article 6, which
19 deals with that issue and the legislation is brought
20 about through a derogation from the Directive. 14:06

21
22 So it's quite a different situation from the one we're
23 dealing with here, it certainly raises different
24 issues. That's not to say that it's of no relevance,
25 it clearly is, and I'll just continue with the 14:07
26 analysis.

27
28 Paragraph 90: *"It must, in that regard, be observed*
29 *that the first sentence of Article 15(1) of the*

1 *Directive provides that the objective pursued by the*
2 *legislative measures that it covers, which derogate*
3 *from the principle of confidentiality of communications*
4 *and related traffic data, must be 'to safeguard*
5 *national security' - that is, State security - defence, 14:07*
6 *public security et cetera, and the detection and*
7 *prosecution of criminal offences or of unauthorised use*
8 *of electronic communications system', or one of the*
9 *other objectives specified in Article 13(1) of*
10 *Directive 95/46."* 14:07

11
12 Then it goes on: *"That list of objectives is*
13 *exhaustive, as is apparent from the second sentence of*
14 *Article 15(1) of the Directive which states the*
15 *legislative measures must be justified on 'the grounds 14:07*
16 *laid down' in the first sentence of that Article."*

17
18 And then 91: *"Further, the third sentence of*
19 *Article 15(1) of the Directive provides that 'all the*
20 *measures referred to in the Article shall be in 14:08*
21 *accordance with the general principles of [EU] law,*
22 *including those referred to in articles 6(1) and (2)'*
23 *which include the general principles and fundamental*
24 *rights now guaranteed by the Charter. Article 15(1) of*
25 *the Directive must, therefore, be interpreted in the 14:08*
26 *light of fundamental rights guaranteed by the Charter."*

27
28 So that is the ratio with regard to the application and
29 why it applies in that case and one can see the

1 distinctions with the present case.

2
3 Then over the page in paragraph 94: *"In that regard,*
4 *it must be recalled that under Article 52(1) of the*
5 *Charter, any limitation on the exercise of rights and* 14:08
6 *freedoms recognised by the Charter must be provided for*
7 *by law and must respect the essence of those rights and*
8 *freedoms. With due regard to the principle of*
9 *proportionality, limitations may be imposed on the*
10 *exercise of those rights and freedoms only if they are* 14:09
11 *necessary and if they genuinely meet objectives of*
12 *general interest required by European law."*

13
14 And then if you go to paragraph 97: *"As regards*
15 *whether national legislation, such as that at issue in* 14:09
16 *that case, satisfies those conditions, it must be*
17 *observed that that legislation provides for a general*
18 *and indiscriminate retention of all traffic and*
19 *location data of all subscribers and registered users*
20 *relating to all means of electronic communication, and* 14:09
21 *that it imposes on providers of electronic*
22 *communications services an obligation to retain that*
23 *data systematically and continuously with no*
24 *exceptions."*

25
26 That's a reprise of what was held in the Digital Rights
27 to make the EU Directive invalid.

28 **MS. JUSTICE COSTELLO:** But the case he is referring to,
29 is that the?

1 *provides for the retention of traffic and location*
2 *data, only the objective of fighting serious crime is*
3 *capable of justifying such a measure in relation to the*
4 *Directive."*

14:11

5
6 So again identifying what is capable of justifying a
7 measure. In this case it's all about fighting crime
8 and it is serious crime, not just any crime, it has to
9 be serious crime.

14:11

10
11 And 103: "*Furthermore, while the effectiveness of the*
12 *fight against serious crime, in particular organised*
13 *crime and terrorism, may depend to a great extent on*
14 *the use of modern of investigation techniques, such an*
15 *objective of general interest, however fundamental it*
16 *may be, cannot in itself justify that national*
17 *legislation providing for the general and*
18 *indiscriminate retention of all traffic and location*
19 *data should be considered to be necessary."*

14:11

14:11

20
21 Again back to what was held to be invalid in **Digital**
22 **Rights**.

23
24 And 105: "*second, national legislation such as that at*
25 *issue in the main proceedings, which covers, in a*
26 *generalised manner, all subscribers and registered*
27 *users and all means of electronic communication as well*
28 *as all traffic data, provides for no differentiation,*
29 *limitation or exception according to the objective*

14:11

1 *pursued. It is comprehensive in that it affects all*
2 *persons using electronic communications services, even*
3 *though those persons are not, even indirectly, in a*
4 *situation that is liable to give rise to criminal*
5 *proceedings. It therefore applies even to persons for* 14:12
6 *whom there is no evidence capable of suggesting that*
7 *their conduct might have a link, even an indirect or*
8 *remote one, with serious criminal offences. Further,*
9 *it does not provide for any exception, and consequently*
10 *it applies even to persons whose communications are* 14:12
11 *subject, according to rules of national law, to the*
12 *obligation of professional secrecy."*

13
14 Again **Digital Rights**.

15
16 106: "*such legislation does not require there to be*
17 *any relationship between the data which must be*
18 *retained and a threat to public security. In*
19 *particular, it is not restricted to retention in*
20 *relation to (i) data pertaining to a particular time* 14:12
21 *period and/or geographical area and/or a group of*
22 *persons likely to be involved, in any way or another,*
23 *in a serious crime or (ii) persons who could for other*
24 *reasons contribute through their data being retained to*
25 *fighting crime."* 14:13

26
27 Again the **Digital** case. And then:

28
29 "107. *National legislation such as that at issue in*

1 *the main proceedings therefore exceeds the limits of*
2 *what is strictly necessary and cannot be considered to*
3 *be justified, within a democratic society, as required*
4 *by those provisions."*

14:13

5
6 Judge, just one point I may have misstated yesterday.
7 I think you asked me is public security the same as
8 national security and I may have said 'yes'. What
9 I should have said is public security and national
10 security are legitimate objectives. I think public
11 security is used in the cases in the context of crime
12 as opposed to national security which is the --

14:13

13 **MS. JUSTICE COSTELLO:** It's a term I'm not familiar
14 with.

15 **MR. GALLAGHER:** Yes, but they all talk about it,
16 protecting public security, but it's in terms of the
17 order of society.

14:13

18 **MS. JUSTICE COSTELLO:** So it's not like crowd control
19 coming out from...

20 **MR. GALLAGHER:** Well, it's a bit more than that,
21 I think.

14:13

22 **MS. JUSTICE COSTELLO:** I was just wondering what was
23 it.

24 **MR. GALLAGHER:** Yes. It extends to terrorist crimes
25 and that, so it's fairly broad. But it's a European
26 term "*public security*", but that is used in distinction
27 to national security.

14:13

28
29 Sorry, in fact maybe I am making a correction that

1 I don't owe to the court. Ms. Hyland thinks you might
2 have --

3 **MS. JUSTICE COSTELLO:** Getting your retaliation in
4 first.

5 **MR. GALLAGHER:** Yes. Ms. Hyland thinks that you might 14:14
6 have been asking me about state security which is the
7 same as national security, but it does no harm to
8 distinguish between public security and national
9 security in any event.

10 14:14

11 And then if I can move to, 107 I have drawn your
12 attention to. 108:

13

14 *"However, Article 15(1) of the Directive, read in the*
15 *light of those Articles of the Charter, does not* 14:14
16 *prevent a Member State from adopting legislation*
17 *permitting, as a preventative measure, the targeted*
18 *retention of traffic and location data, for the purpose*
19 *of fighting serious crime, provided the retention of*
20 *data is limited with respect to the categories of data* 14:14
21 *to be retained, the means of communication affected,*
22 *the persons concerned and the retention period adopted*
23 *to what is strictly necessary."*

24

25 And 109: *"In order to satisfy the requirements set out* 14:15
26 *in the preceding paragraph of the present judgment,*
27 *that national legislation must, first, lay down clear*
28 *and precise rules governing the scope and application*
29 *of such a data measure and imposing minimum safeguards,*

1 so that the persons whose data has been retained have
2 sufficient guarantees of the effective protection of
3 their personal data against the risk of misuse. That
4 legislation must, in particular, indicate in what
5 circumstances and under which conditions a data 14:15
6 retention measure may, as a preventive measure, be
7 adopted, thereby ensuring such a measure is limited to
8 what is strictly necessary".

9
10 And then 110: "Second, as regards the substantive 14:15
11 conditions which must be satisfied by national
12 legislation that authorises, in the context of fighting
13 crime, the retention, as a preventive measure, of
14 traffic and location data, if it is to be ensured that
15 data retention is limited to what is strictly 14:15
16 necessary, it must be observed that, while those
17 conditions may vary according to the nature of the
18 measures taken for the purposes of prevention,
19 investigation, detection and prosecution of serious
20 crime, the retention of data must continue nonetheless 14:16
21 to meet objective criteria, that establish a connection
22 between the data to be retained and the objective
23 pursued. In particular, such conditions must be shown
24 to be such as actually to circumscribe in practice the
25 extent of that measure and, thus, the public affected." 14:16
26

27 And paragraph 111:

28
29 "As regard the setting of limits on such a measure with

1 *respect to the public and the situations that may*
2 *potentially be affected, the national legislation must*
3 *be based on objective evidence which makes it possible*
4 *to identify a public whose data is likely to reveal a*
5 *link, at least an indirect one, with serious criminal* 14:16
6 *offences, and to contribute in one way or another to*
7 *fighting serious crime or to preventing a serious risk*
8 *to public security. Such limits may be set by using a*
9 *geographical where the competent national authorities*
10 *consider, on the basis of objective evidence, that* 14:16
11 *there exists in one or more geographical areas a high*
12 *risk of preparation for or commission of such*
13 *offences."*

14
15 And 112: "*Having regard to all of the foregoing, the* 14:17
16 *answer to the first question in the Swedish case is a*
17 *that Article 15(1) of the Directive, read in the light*
18 *of the provisions of the Charter, must be interpreted*
19 *as precluding national legislation which, for the*
20 *purposes of fighting crime, provides for the general* 14:17
21 *and indiscriminate retention of all traffic and*
22 *location data."*

23
24 So again the strictly necessary approach. And it goes
25 on to answer the second question, and if you go to 14:17
26 paragraph 118 on page 26:

27
28 "*In order to ensure that access of the competent*
29 *national authorities to retained data is limited to*

1 *what is strictly necessary, it is, indeed, for national*
2 *law to determine the conditions under which the*
3 *providers of electronic communications services must*
4 *grant such access. However, the national legislation*
5 *concerned cannot be limited to requiring that access* 14:17
6 *should be for one of the objectives referred to in*
7 *Article 15(1) of the directive, even if that objective*
8 *is to fight serious crime. That national legislation*
9 *must also lay down the substantive and procedural*
10 *conditions governing the access of the competent* 14:18
11 *national authorities to the retained data."*

12
13 And 119: "*Accordingly, and since general access to all*
14 *retained data, regardless of whether there is any link,*
15 *at least indirect, with the intended purpose, cannot be* 14:18
16 *regarded as limited to what is strictly necessary, the*
17 *national legislation concerned must be based on*
18 *objective criteria in order to define the circumstances*
19 *and conditions under which the competent national*
20 *authorities are to be granted access to the data of* 14:18
21 *subscribers or registered users. In that regard,*
22 *access can, as a general rule, be granted in relation*
23 *to the objective of fighting crime, only to the data of*
24 *individuals suspected of planning, committing or having*
25 *committed a serious crime and of being implicated one* 14:18
26 *way or the other in the crime."*

27
28 And it refers to some ECHR case law. And then it goes
29 on to say:

1 *"However, in particular situations, where, for example,*
2 *vital national security, defence or public security*
3 *interests are threatened by terrorist activities,*
4 *access to the data of other persons might also be*
5 *granted where there is objective evidence in which it* 14:19
6 *can be deduced that the data might, in a specific case,*
7 *making an effective contribution to combatting such*
8 *activities."*

9
10 And again the distinction between serious crime and 14:19
11 national security and public security. And in
12 paragraph 120:

13
14 *"In order to ensure, in practice, that those conditions*
15 *are fully respected, it is essential that access of the* 14:19
16 *competent national authorities to retained data should,*
17 *as a general rule, except in cases of validly*
18 *established urgency be subject to or prior review*
19 *carried out either by a court or by an independent*
20 *administrative body, and that the decision of the court* 14:19
21 *or body should be made following a reasoned prevention,*
22 *detection or prosecution of crime."*

23
24 Sorry. And again that's focussed on the criminal
25 aspect and the previous paragraph acknowledgment of 14:20
26 differences which all the case acknowledge with
27 national security:

28
29 *"121. Likewise, the competent national authorities to*

1 *whom access to the retained data has been granted must*
2 *notify the persons affected, under the applicable*
3 *national procedures, as soon as that notification is no*
4 *longer liable to jeopardise the investigations being*
5 *undertaken by those authorities. That notification is,* 14:20
6 *in fact, necessary to enable the persons affected to*
7 *exercise, inter alia, their right of a legal remedy*
8 *provided for in Article 15(2)."*
9

10 And again that is clearly in the context of the fight 14:20
11 against serious crime, and you have already heard as to
12 the distinction between notification in that context
13 and in the context of national security and the
14 different rules acknowledged by the Commission in the
15 privacy decision itself and in the cases. 14:20
16

17 123: *"In any event, the Member States must ensure a*
18 *view, by an independent authority, of compliance with*
19 *the level of protection guaranteed by EU law with*
20 *respect to the protection of individuals in relation to* 14:21
21 *the processing of personal data, that control being*
22 *expressly requested by Article 8(3) of the Charter and*
23 *constituting in accordance with the Court's settled*
24 *case-law, an essential element of respect for the*
25 *protection of individuals in relation to the processing* 14:21
26 *of personal data. If that were not so, persons*
27 *whose personal data was retained would be deprived of*
28 *the right, guaranteed in Article 8(1) and (3) of*
29 *the Charter, to lodge with the national supervisory*

1 *authorities a claim for the protection of their data."*

2
3 And over the page, finally, at 125: "*Having regard to*
4 *to all of the foregoing, the answer to the second*
5 *question in one case and the first question in the* 14:21
6 *other is that Article 15 of the Directive, read in the*
7 *light of Articles 7, 8 and 11 of the Charter, must be*
8 *interpreted as precluding national legislation*
9 *governing the protection and security of traffic and*
10 *location data and, in particular, access to the* 14:22
11 *competent national authorities to the retained data,*
12 *where the objective pursued by that access, in the*
13 *context of fighting crime, is not restricted solely to*
14 *fighting serious crime."*

15
16 And, as you will see, it's in large part a repeat of
17 the rationale or the ratio of the **Digital Rights** case
18 and lack of protections in the context of fighting
19 serious crime and this general obligation that applied
20 without distinction to all data. 14:22

21
22 And, Judge, I then want to move, before perhaps coming
23 back and finalising the position on national security,
24 draw your attention to something that is very relevant
25 which you have only been referred to in the most 14:22
26 general terms previously and that is the evidence in
27 this case to be found first in Book 4 of the evidence
28 and expert reports, Book 4 of the books before the
29 court. (Short pause)

1 And maybe to identify for you where you will find a
2 document to which constant reference has been made,
3 that is the from a Report, is in divide 11 of that and
4 there's a page I'll come back to later, but I have
5 referred you on a number of occasions to page 67 of 14:23
6 that report and the judgment of the Federal
7 Administrative Court in Germany dealt with in the
8 left-hand column. So that's just something you might
9 wish to note at this stage.

10
11 And then the evidence of Mr. DeLong, which is to be
12 found in divide 14. And you will remember, as is
13 evident from page 1 of his background and
14 qualifications, he is a Director of Compliance or,
15 sorry, was a Director of Compliance for the National 14:24
16 Security Agency throughout the relevant period, 2009 to
17 2014, and responsible for the NSA's compliance
18 programmes covering signals intelligence and worked
19 alongside the NSA general counsel and NSA intelligence
20 activities [sic]. Then from 2014 to 2016 he served as 14:24
21 a Director of Commercial Solutions Center at the NSA
22 and was a member of the core leadership team, senior
23 official responsible for NSA's interactions with
24 corporations.

25
26 He sets out his role in paragraph 4 what it involved in
27 terms of compliance which included, but was not limited
28 to, dealing with FISC, the US Congress, the PCLOB and
29 the Presidential Review Group, which Prof. Swire was a

1 member, and the NSA Inspector General.

2
3 And in 5 he resigned from the NSA in May 2016 and is a
4 fellow at the Berkman Klein centre for Internet &
5 Society at Harvard University for that academic year, 14:25
6 and he sets out his degrees, both in physics and
7 mathematics and in law in paragraph 6.

8
9 And, Judge, I cannot overemphasise the importance of
10 this evidence in the context of the principles that 14:25
11 have been identified both in the privacy decision and
12 in the cases in assessing what is strictly necessary
13 and in giving focussed attention to how in practice the
14 whole system operates. And of course the practice is,
15 as is clear from Schrems and paragraph 75 and clear 14:26
16 from the privacy decision, vital. I don't want to
17 delay you, but I will refer you to, if I may, the
18 important paragraphs taking account of the fact that
19 it's something the court will read on its own.

20 14:26
21 Paragraph 23 on page 7 just describes signals
22 intelligence, which is what all this is about, and he
23 says:

24
25 *"It serves a critical role in protecting the US, its 14:26
26 allies and partners around the world. In signals
27 intelligence, pertinent information in signals and
28 information systems is extracted, analysed and provided
29 in regulated pathways, to senior officials across the*

1 *US and allied governments in order to protect military*
2 *troops, fight terrorism, combat international crime and*
3 *narcotics, support diplomatic negotiations,*
4 *and advance many other important national objectives.*
5 *Signals intelligence is focussed on refinement at each* 14:27
6 *stage of the process."*

7
8 This is important: *"Only part of what is targeted is*
9 *often actually collected; only part of what is*
10 *collected is ultimately analysed; only part of what is* 14:27
11 *analysed is ultimately shared through those regulated*
12 *pathways with senior officials, military personnel and*
13 *other personnel focussed on the safety and security of*
14 *the US and its allies."*

15 14:27
16 Over the page in paragraph 26, he says:

17
18 *"It is the nature of the communicative process - what*
19 *is said and what is not said, what is responded to and*
20 *what is not, who is added to the discussion and who is* 14:27
21 *not, what is said to one person and not said to another*
22 *- that provides value and insight that comes uniquely*
23 *from signals intelligence and also what uniquely*
24 *impacts liberties such as privacy. This nature is*
25 *precisely the reason for added protection above and* 14:28
26 *beyond other intelligence areas to be sure that*
27 *information is specifically evaluated for relevant*
28 *knowledge at each stage and also minimises extraneous*
29 *information of anyone - not just United States persons*

1 - in relation to the foreign intelligence focus of the
2 activity."

3
4 And 28: "The United States takes an
5 all-of-considerations approach to signals 14:28
6 intelligence - evaluating protections for safeguarding
7 liberties, reviewing programs for efficacy and
8 efficiency, allocating resources, discussing economic
9 impacts when applying risk management, and focusing on
10 least intrusiveness. This is, again, necessitated by
11 the goal of achieving all aims laid out in the United
12 States Government's fundamental charter (its
13 Constitution) which contemplates the possibility of
14 assessing one goal (individual privacy) alongside
15 another (collective security and safety). This
16 comprehensive approach provides for the inclusion of
17 all proper considerations to the exclusion of none, at
18 the core of proportionality."

19
20 Over the page, Judge, at the last paragraph on that 14:28
21 page he says that:

22
23 "Each agency's adherence to its targeting and
24 minimisation procedures is subject to extensive
25 oversight within the executive branch, including 14:29
26 internal oversight within individual agencies as well
27 as regular reviews conducted by the Department of
28 Justice and the ODNI. The Section 702 programme is
29 also subject to the FISA court, including during the

1 *annual certification process and when compliance*
2 *incidents are reported to the court. Information about*
3 *the operation of the programme is reported to*
4 *congressional committees. Although there have been*
5 *various compliance incidents over the years, many of* 14:29
6 *these incidents have involved technical issues*
7 *resulting from the complexity of the program, and the*
8 *Board has any not seen any evidence of bad faith or*
9 *misconduct."*

10
11 At 31 --

12 **MS. JUSTICE COSTELLO:** When it says "*the board*", is
13 that a quote?

14 **MR. GALLAGHER:** The board is the PCLOB board. Yes, it
15 is a quote. 14:29

16 **MS. JUSTICE COSTELLO:** Is that a quote from the PCLOB?

17 **MR. GALLAGHER:** It is, Judge. And in fact it begins on
18 paragraph 29 and it is saying what the board found and
19 it is giving you the page of the report.

20
21 Then at 31: "*The term foreign intelligence is defined*
22 *in various parts of United States law. NSA generally*
23 *applies the definition in Executive Order 12333, as*
24 *amended, as 'information relating to the capabilities,*
25 *intentions or activities of foreign governments or* 14:30
26 *elements thereof, foreign organisations, foreign*
27 *persons or international terrorists'. In my*
28 *experience, the inclusion of the phrase 'foreign*
29 *persons' tends to be misinterpreted to mean 'ordinary*

1 *persons'. In practice, the inclusion of the term*
2 *'foreign persons' serves to catch, for example,*
3 *sub-government actors - who are involved in specific,*
4 *predefined issues - such as weapons proliferation or*
5 *cyber interpretation - that do not at first impression* 14:30
6 *fit into a tight definition of 'foreign governments' or*
7 *'foreign organisations'.*

8
9 32. *Even from a purely resource and effectiveness*
10 *viewpoint, there is little license for and no tolerance* 14:31
11 *of NSA of intrusions into ordinary matters of people*
12 *that do not involve foreign intelligence. During my*
13 *time at NSA my various supervisors held me accountable*
14 *to the production of useful foreign intelligence*
15 *performance reviews. There was no benefit to focus* 14:31
16 *anywhere else - and in fact there was a well known*
17 *substantial cost to focussing elsewhere.*

18
19 33. *NSA personnel who deviate from this core purpose*
20 *are held accountable."* 14:31

21
22 And it gives examples in that respect.

23
24 35: *"The PCLOB, an independent oversight body, noted*
25 *in a detailed review of the 702 programme that 'the* 14:31
26 *limitations do not permit unrestricted collection of*
27 *information about foreigners'. The regulation, value,*
28 *purpose, and additional safeguards around the 702*
29 *programme have been widely reviewed and discussed."*

1 And he refers to the report.

2
3 And if you would be find enough to move to page 13 and
4 paragraph 40. He says:

5
6 *"As the President's Review Group noted: 'Intelligence*
7 *is designed not only to protect against threats but*
8 *also to safeguard a wide range of national security and*
9 *foreign policy interests, including*
10 *counterintelligence, counteracting the international*
11 *elements of organized crime, and preventing drug*
12 *trafficking, human trafficking, and mass atrocities'.*
13 *And as the President of the United States noted*
14 *directly in a speech on signals intelligence, 'We*
15 *cannot prevent terrorist attacks or cyber threats*
16 *without some capability to penetrate digital*
17 *communications, whether it's to unravel a terrorist*
18 *plot, to intercept malware that targets a stock*
19 *exchange, to make sure air traffic control systems are*
20 *not compromised or to ensure that hackers do not empty*
21 *your bank accounts.*

14:32

14:32

22
23 *41. In addition to the direct safety and security of*
24 *both people and systems, the United States intelligence*
25 *community is asked to provide information and insight*
26 *across a range of issues. While there is of course a*
27 *heightened focus on protection from terrorism and other*
28 *issues like cyber security, there are a number of*
29 *additional areas where intelligence adds significant*

1 value. For example, the United States National
2 Intelligence Council's list of unclassified reports
3 covers a diverse range of critical issues, many of
4 which - if not addressed smartly in an informed manner
5 - have the capacity to substantially interfere with
6 human liberty and human flourishing across the globe.
7

8 42. While the span of these issues is sometimes
9 surprising, as it covers issues not normally discussed
10 such as terrorism or cyber security, such information 14:33
11 leads to better, more informed, policy making and
12 mutual security among and within nations, even beyond
13 that of a particular intelligence service. It does not
14 follow, however, that every intelligence need
15 of the United States and its allies can or should be 14:33
16 satisfied through signals intelligence.
17

18 43. In the US, these needs for information are
19 expressed, in practice, in a framework of requirements
20 named the National Intelligence Priorities Framework. 14:33
21 And, not surprisingly, the theoretical demand routinely
22 outpaces the realistic supply - both in terms
23 of capability and resources. So, the priorities are
24 further refined and allocated among the different
25 intelligence options. In certain cases, signals
26 intelligence is the last method one would use to gain
27 information, often because it may be too costly, too
28 imperfect, too risky in terms of diplomatic blowback or
29 creates a substantial risk to life."

1 MS. JUSTICE COSTELLO: Diplomatic blowback, what does
2 that translation mean?

3 MR. GALLAGHER: Obviously an Americanism. I think
4 diplomatic ruckus, I suppose, if you put it in our
5 terms or kerfuffle. 14:34

6 MS. JUSTICE COSTELLO: What the British might call an
7 incident.

8 MR. GALLAGHER: An incident, exactly. Then 45, Judge:

9
10 *"with respect to signals intelligence the US has* 14:34
11 *focused the span of entities that can conduct such*
12 *activities in the first place and further limited the*
13 *degree to which it can be shared outside of that tight*
14 *set of organizations. This makes it easier, from a*
15 *view across the Atlantic, to understand and to know who*
16 *can make such assertions. In addition to limiting the*
17 *span of entities that can conduct signals intelligence*
18 *activities, US law and policy further restricts the use*
19 *of the digital information obtained through such*
20 *activities.*

21
22 *46. Signals intelligence information must be handled*
23 *in accordance with procedures that are approved by the*
24 *Attorney General of the United States. Not even the*
25 *Director of the NSA has the discretion to set the hard*
26 *limits and specific procedures that regulate the NSA.*
27 *Such procedures - including specific limits and*
28 *requirements for targeting, collection, retention, data*
29 *protection, and use of signals intelligence information*

1 - are approved by the highest-ranking attorney in the
2 US Government, and are additionally reviewed and
3 approved by FISC when required by FISA.
4

5 47. Signals intelligence is not just valuable in 14:35
6 theory; it has demonstrated its value consistently over
7 time. For example, PCLOB noted that 'over a quarter of
8 the NSA's reports concerning international terrorism
9 [many of which are shared among international partners]
10 include information based in whole or in part on 14:36
11 Section 702'."

12
13 And at 48 he refers to an example identified by the
14 board following a full review of the 702 programme as
15 to how a terrorist atrocity was avoided. I don't 14:36
16 intend to read it out.

17
18 "49. In my experience and knowledge, this is just one
19 of many similar outcomes not just from 702 collection,
20 but also from the range of signals intelligence 14:36
21 activities conducted by the NSA. In that same vein,
22 although drawn from a UK report, the public case
23 studies referenced in the David Anderson QC report
24 regarding UK signals intelligence activities - those
25 include protecting Northern Ireland, catching a 14:36
26 prosecuting attackers, and thwarting mass casualty
27 attacks against aviation - are essentially equivalent
28 (in type of outcome if not in exact type of collection
29 or substance) to those worked every day by US signals

1 *intelligence personnel."*

2
3 David Anderson was, I think prior to the new Act that
4 was passed in November, he was the person who reviewed
5 the activities of the intelligence activities GCHQ in 14:37
6 the UK. He is a QC and he was the independent
7 overseer, and he has produced a very detailed report as
8 to how it operates and the justification for this
9 intelligence, including bulk collection, and Ms. Hyland
10 will refer you briefly to his findings. 14:37

11
12 *"50. And in many situations, demonstrated outcomes of*
13 *signals intelligence provide safety and security far*
14 *outside the borders of the United States. When*
15 *reviewing examples involving 702 collection, the*
16 *Privacy and Civil Liberties Oversight Board noted that*
17 *approximately fifteen of the cases we reviewed involved*
18 *some connection to the United States, such as the site*
19 *of a planned attack or the location of operatives,*
20 *while approximately forty cases exclusively involved*
21 *operatives and plots in foreign countries. In short,*
22 *the vast majority - almost three quarters - of the*
23 *counter-terrorism outcomes from US signals intelligence*
24 *activities, in particular the 702 program, directly*
25 *benefited the United States' allies, including a 14:38*
26 *substantial number in the European --"*

27 **MS. JUSTICE COSTELLO:** I think that's US allies.

28 **MR. GALLAGHER:** "Allies, excuse me, including a
29 *substantial number in the European Union."*

1 Then in 51: *"Before diving too deeply into the*
2 *specifics of intelligence activities, it is worth*
3 *highlighting again the substantial partnership between*
4 *US and European Union intelligence functions for mutual*
5 *purposes (which are at times greater in sum than the*
6 *individual nation-state focused purposes). While at*
7 *times in public there appears to be confrontation,*
8 *there is far more collaboration than not. And while*
9 *not discussed often in order to not belabor an obvious*
10 *point, there is a material difference in the size of US*
11 *and European Union state intelligence activities. If*
12 *the US was not in a position to help the European Union*
13 *and its individual states with a range of their*
14 *national security and mutual security priorities, such*
15 *as the provision of lead information in*
16 *counter-terrorism, it would be challenging for the*
17 *European Union and its member states to provide an*
18 *adequate level of security and safety. There is no*
19 *question that European Union members and the safety of*
20 *their citizens benefit from intelligence."*

14:39

21
22 And at 52: *"NSA has over 30 direct partnerships with*
23 *other signals intelligence services around the globe*
24 *and the partnership partnerships are mutual."*

14:39

25
26 And he describes that. At 54:

27
28 *"The partnerships are far more regulated than might be*
29 *imagined"* and he explains that.

1 Then over the page at 58 he deals with the scope and
2 scale of signals intelligence. And he says:

3
4 *"58. For example, in 2014 - and you have these*
5 *figures - and that is an effective rate of 0.000031 of* 14:39
6 *the internet users, the 3 billion internet users.*
7 *Using the same visual analogy - I'm not sure it will*
8 *help everybody in court - (albeit applied in just the*
9 *702 program context), this impact would fit within one*
10 *of the small one-meter quarter circles at the corners* 14:40
11 *of the football pitch."*

12
13 And that's an American football pitch. And: *"Even if*
14 *one views impacts as not just including that of the*
15 *properly targeted individual but also others that* 14:40
16 *communicate with that targeted individual, perhaps*
17 *adding a factor of ten the impact is still limited.*
18 *That tenfold increased impact would still fit within*
19 *the space taken by all four small quarter circles at*
20 *the corners on the football pitch."* 14:40

21
22 Over the page at 62 he explains the targeting and bulk
23 collection in practice:

24
25 *"62. Up to this point this report has not* 14:40
26 *distinguished between target collection and bulk*
27 *collection because the safeguards discussed thus far*
28 *apply generally to signals intelligence activities,*
29 *regardless of the label one chooses to assign. No*

1 *matter where one draws the lines around those labels,*
2 *there is no authority in the NSA of a generalised basis*
3 *for access to and use of information. In that vein,*
4 *I agree with David Anderson, as stated in his review of*
5 *certain UK intelligence activity, that any 'legal* 14:41
6 *system worth its name will incorporate limitations and*
7 *safeguards designed precisely to ensure that access to*
8 *stores of sensitive data is not given on an*
9 *indiscriminate or unjustified basis'.*

10
11 63. *In addition, given the totality of the limitations*
12 *and overlapping safeguards in place, and the limited*
13 *scope and scale of NSA collection, the 'bulk*
14 *collection' of signals intelligence is not*
15 *'indiscriminate' and not appropriately labeled as 'mass* 14:41
16 *surveillance'. Executive Order 12,333 and Presidential*
17 *Policy Directive 28 specifically require that signals*
18 *intelligence activities use the least intrusive*
19 *methods."*

20
21 And he refers to the particular provision which you
22 have already seen.

23
24 "64. *This focus on using the least intrusive means is*
25 *not just a theoretical matter. It is implemented in* 14:41
26 *practice. In 2011, the NSA ceased on its own*
27 *initiative a major bulk collection program related to*
28 *electronic communications metadata. (To avoid*
29 *confusion, this bulk program had been previously shut*

1 down for non-compliance reasons but was then restarted
2 on a firmer footing.) I was one of the officials
3 directly involved in that decision-making process and
4 believe it is a sound example of the practical
5 application of the overlapping requirements of
6 Executive Order 12,333, FISA, and recently reiterated
7 in PPD-28. Signals intelligence activities are carried
8 out in the least intrusive way possible, taking into
9 account a range of a factors involved in
10 proportionality, which sometimes simply means not
11 continuing a program anymore. NSA made and defended
12 this decision to cease the program to its various
13 overseers in 2011, when there was no public or
14 international pressure to do so; it was simply the
15 right decision to make based on an informed analysis of 14:42
16 a variety of factors."
17

18 He continues in 65 that I'll skip.

19 **MS. JUSTICE COSTELLO:** Is that the programme that was
20 referred to as the 215 programme? 14:43

21 **MR. GALLAGHER:** No. That was abandoned in, with the...

22 **MS. JUSTICE COSTELLO:** That was struck down, wasn't it?

23 **MR. GALLAGHER:** Yes. That exceeded the provisions of
24 the PATRIOT Act and was discontinued by the USA FREEDOM
25 Act. You will remember in 2011 there was a problem at 14:43
26 that stage with the MCTs and Judge Bates' decision and
27 he held that he hadn't got all of the information and
28 stopped that programme.
29

1 So I think it was an aspect of that, it wasn't the MCTS
2 which continued, but it is separate from the 215
3 programme, it was a separate programme, and that was
4 stopped.

5 **MS. JUSTICE COSTELLO:** So, I just want to get it 14:43
6 straight in my head, so then there are four programmes
7 we know about: There is Upstream, PRISM, 215 and then
8 this other one, it stopped?

9 **MR. GALLAGHER:** Which was discontinued in 2011.

10 **MS. JUSTICE COSTELLO:** Yes. Thank you. 14:43

11 **MR. GALLAGHER:** *"NSA constantly adjusts its activities*
12 *in light of new architectural changes."*

13
14 Sorry I was just directing you to that.

15 **MS. JUSTICE COSTELLO:** Yes. 14:43

16 **MR. GALLAGHER:** *"69. while there is naturally a lot of*
17 *focus on section 702, an equally important set of*
18 *safeguards (and not as often referenced in discussions*
19 *about governmental access to information) apply to*
20 *certain companies in the US."* 14:44

21
22 Refers to 18 USC 2702: *"which specifically regulates*
23 *the type of company involved here - an electronic*
24 *communication service provider - provides for numerous*
25 *limitations on interaction with the government. It is*
26 *quite notable that in a section of United States law*
27 *titled 'voluntary disclosure of customer communications*
28 *or records' the first section of legal text starts with*
29 *a prohibition on sharing content with any entity*

1 *subject to specific exceptions."*

2
3 Refers to 2703 and the other provisions which you are
4 familiar. That I should have said is in a context of
5 corporate and governmental interaction and restrictions 14:44
6 on the companies itself.

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

8 **MR. GALLAGHER:** And he says that's an important part of
9 the system as is recognised in the Privacy Shield. And
10 at 76, he says: 14:44

11
12 *"Furthermore, US companies play an important role in*
13 *ensuring that compelled production of customer data or*
14 *information is conducted according to lawful process.*
15 *This role of the private sector can be net privacy 14:45*
16 *protecting, as it inserts additional checks and*
17 *balances that might not be available if a government*
18 *were to directly collect against a targeted individual.*
19 *In my experience, many companies act in the best*
20 *interests of all of their customers, not just those 14:45*
21 *with a particular region or those with a particular*
22 *nationality. Beyond safeguards and incentives found in*
23 *rules and oversight, companies have taken a number of*
24 *steps to increase technical security through*
25 *architectures, cyber security best practices, and other 14:45*
26 *added security efforts.*

27
28 *Internal NSA Privacy, Civil Liberties and compliance.*
29

1 79. Persons, regardless of nationality or location,
2 are protected by NSA's core focus on 'foreign
3 intelligence'. In addition, NSA follows specific
4 safeguards in Attorney General approved minimization
5 procedures and PPD-28. NSA now has a dedicated Civil
6 Liberties and Privacy Office which focuses on the
7 protection of fundamental liberties and transparency.
8 This office, in addition to providing sound privacy and
9 data protection inputs internal to NSA, has published
10 three detailed, public reports over the last two years, 14:46
11 which have been widely recognised and used in numerous
12 forums" and he identifies those.

13
14 "80. Internally, the NSA has a substantial compliance
15 program focused on keeping NSA signals intelligence
16 activities verifiably consistent with the laws and
17 policies designed to protect privacy, including PPD-28.
18 This compliance program's workforce numbers over three
19 hundred people. NSA has a Director of Compliance which
20 was established in 2009 and, as required by statute, is
21 appointed by the NSA Director. As such, the position
22 is itself a safeguard established in law."

23
24 At paragraph 85 on page 26 he identifies: "specific
25 instances of compliance adjudication have been 14:47
26 misunderstood in the public discussion. For example, a
27 so-called 'compliance audit' reported on in late 2013
28 revealed 2776 'incidents' had been dutifully recorded,
29 addressed and reported. A full three quarters of those

1 instances, however, were examples of NSA acting in
2 compliance with the law, not the alleged
3 non-compliance. Those recorded reflected NSA's
4 meticulous attention to (and recordkeeping about)
5 turning off collection under the 702 Program when a
6 specifically and properly targeted individual travelled
7 into the United States. Those instances were not
8 examples of incorrect collection. Instead, they were
9 instances of the compliance system working - a target
10 that was lawfully collected under 702 appeared to enter
11 the US, and therefore the collection was terminated
12 because new legal requirements were triggered."

13
14 There is a provision in the Act you were referred to
15 but you couldn't, I think, possibly remember it there 14:47
16 were so many provisions. You can use 702 in respect of
17 a foreign person, but when a foreign person enters the
18 US you turn off the 702. This is what he is referring
19 to here. These are incidents where it is turned off
20 but it was turned off in compliance with the law and 14:48
21 for legal reasons.

22
23 On page 27 he deals with minimisation procedures and
24 the scope of protection, retention limitations and data
25 protection. And he says that: 14:48
26

27 "87. while a comprehensive accounting of how all of
28 the safeguards in law and policy are applied in
29 practice and further reinforced by the internal

1 *compliance programme is beyond the scope and length of*
2 *the report, there are two particular safeguards."*

3
4 To which he draws attention.

5
6 88: *"First, the actual protections, in practice, for*
7 *all persons of greater than one might extract from the*
8 *individual rules that in many cases focus on US persons*
9 *and people within the US. While certain minimisation*
10 *procedures have been written with US persons in mind,* 14:48
11 *and now with all persons in mind due to PPD-28, once*
12 *written the oversight and compliance processes focus on*
13 *the totality of the procedures and, for example, in*
14 *practice non-US persons also benefit from access and*
15 *retention restrictions."* 14:49

16
17 That's a reference to the PCLOB report, a point you
18 have already heard.

19
20 *"The focussing effect of 'foreign intelligence' on the* 14:49
21 *relevant material provides substantial protections for*
22 *all persons who do not fall in the narrow intersection*
23 *of the overlapping safeguards. Furthermore,*
24 *non-compliance is addressed, corrected and reported*
25 *across the board for all persons, and no external* 14:49
26 *request - either from an oversight body or even the*
27 *affected individual - is required or needed to correct*
28 *non-compliant activity. While PPD-28 is extremely*
29 *notable for its elevation of many de facto protections*

1 *into de jure protections, protections for all people*
2 *have been put in place more than has been widely*
3 *understood or accepted or even adequately described to*
4 *the public. Even with that reality, it is very*
5 *meaningful that the new top-level policy directive* 14:49
6 *(which has the effective force of, if not ultimately*
7 *the full stature of, a Congressional law) specifically*
8 *covers signals intelligence. This means there are no*
9 *general or specific 'signals intelligence' exemptions*
10 *available, as could be imagine in a régime with a* 14:50
11 *general directive for privacy and data protection that*
12 *does not specifically mention - and specifically*
13 *regulate - signals intelligence and activities*
14 *directly.*

15
16 89. *Second, access restrictions and retention*
17 *limitations are at the core of signals intelligence*
18 *activities. Each and every piece of information in a*
19 *database comes with a default legally applicable*
20 *retention requirement. Access to specific databases is*
21 *limited to personnel who have both the required*
22 *training (and testing), the required knowledge and*
23 *experience, and the need to actually access such*
24 *information to conduct their specific foreign*
25 *intelligence responsibilities. In many cases the data*
26 *retention limit is up to five years and in other cases,*
27 *for example, based on the sensitivity of that*
28 *information, it is two years or even one year. while*
29 *those are the standard outer-limits of default*

1 *retention periods, it would be incorrect to assume that*
2 *all data is kept up to those limits, as based on*
3 *priorities and resource allocations the practical*
4 *limits are often tighter than even those provided by*
5 *law.*

14:51

6
7 90. *At first impression, five years can seem a longer*
8 *time than might be expected to retain signals*
9 *intelligence information, but the purpose of*
10 *intelligence is to uncover and produce useful knowledge*
11 *about plots, about plans, and about networks that may*
12 *evolve over many years. What might seem unimportant*
13 *today (or to one analyst) may very well be critically*
14 *important in two years (or to a different analyst even*
15 *today). The modern communication environment does not*
16 *alphabetize or put perfectly in time-order the*
17 *communications that move around it, and as stated*
18 *before the NSA's reach into that space is objectively*
19 *very small. As such, analysts must conduct their*
20 *efforts - piecing together a specific terrorist*
21 *network, or finding the pathways used by human*
22 *traffickers, or predicting the evasive actions of an*
23 *un-principled state seeking to sabotage a coalition of*
24 *principled nations with a set of incomplete and*
25 *unordered set of information.*

14:52

26
27 91. *It's a bit like having a small subset of puzzle*
28 *pieces from hundreds of different puzzles, without*
29 *always knowing upfront which pieces go with which*

1 *puzzle in the first place. And this reality is the*
2 *same for targeted and bulk collection. As such,*
3 *substantial access and use restrictions on the retained*
4 *information provide the safeguards necessary to*
5 *properly balance the intrusion into liberties of some,* 14:52
6 *for the provision of safety and security for all.*

7
8 *92. The NSA Office of General Counsel is also involved*
9 *in conducting oversight and reviewing compliance with*
10 *laws and policy, as are operational level management.* 14:52
11 *Compliance is, in essence, built into the process of*
12 *targeting, collecting, analyzing and disseminating*
13 *foreign intelligence information.*

14
15 *93. In addition to these components within NSA,* 14:52
16 *I specifically wish to highlight the role of the NSA*
17 *Inspector General. The Inspector General has*
18 *substantial authority, resources and investigative*
19 *abilities. In my experience, the Inspector General*
20 *provides a strong and effective blend of both internal* 14:52
21 *and external oversight in a single entity. The*
22 *Inspector General has an independent budget, broad*
23 *power to order and compel the production of documents,*
24 *and reports to the head of NSA and to Congress."*

25
26 And 94: "*In that sense the NSA Inspector General is*
27 *very responsive to the concern expressed by the*
28 *Article 29 Working Party that 'some knowledge and*
29 *understanding of the workings of the intelligence*

1 *community seems to be required in order to effectively*
2 *fulfil the Ombudsperson's role, while at the same time*
3 *indeed sufficient distance from the intelligence*
4 *community is required to be able to act independent'.*
5 *The Inspector General is one of a network of Executive* 14:53
6 *Branch Inspector Generals that provide a pre-existing*
7 *and interacting set of oversight bodies. The NSA*
8 *Inspector General is able to receive, and as*
9 *appropriate act on, complaints and allegations from any*
10 *person."* 14:53

11
12 And of course the comments of the working party, the
13 DPC is a member of the Article 29 working Party
14 comprised of the DPCs and they did comment on the
15 draft, as you know, of the Privacy Shield and knew, as 14:53
16 I say, what was coming.

17
18 96: *"Aside from DOJ and ODNI there are outside*
19 *oversight bodies."*

20 14:54
21 You have been referred to those. 97:

22
23 *"Outside the Executive Branch", it refers to the FISC.*
24 *And moving then to 32, page 32, paragraph 101, dealing*
25 *with individual remedies and mechanisms in practice:* 14:54
26

27 *"The United States has provided various redress*
28 *opportunities and remedies, in particular in the*
29 *context of an actual or suspected incident of*

1 non-compliance. These remedies and redress mechanisms
2 seek to integrate a number of procedural and
3 substantive concerns that stem from the practical
4 considerations mentioned in this report, and they
5 reflect realities and lessons learned that have been
6 developed and adjusted over time.

7
8 102. while it sounds tautological, what was
9 communicated is simply what was communicated, so the
10 concept of 'correcting' information in a signals 14:54
11 intelligence repository is not as applicable as it
12 might be in a regulatory framework or voluntary
13 framework where an individual has submitted information
14 and, perhaps, there is an updated set of information
15 from that information in the course of a government
16 directly providing some service to the individual, on
17 an individualized level. At times, the most important
18 signals intelligence information is that which exposes
19 differences of action and word, or involves the
20 evolution of and changes in plans over time, or
21 involves different aspects of a person than might be
22 otherwise presented to the public or to other people.
23 In fact, the core purpose of intelligence runs counter
24 to the idea that information should be 'corrected' or
25 'erased' - outside the context of clear non-compliance 14:55
26 or technical error -as the integrity of collected
27 information is apparent."

28
29 That's an important point obviously which

1 differentiates it from other public authorities that
2 might hold information about you that's incorrect or
3 that's not up to date. What you are collecting is the
4 communications that the person made and the differences
5 of later communications etc. can in and of itself be of 14:56
6 huge importance has been identified here.

7
8 103: *"Furthermore, the question of whether an agency
9 like the NSA generally 'has information on' a specific
10 person is not dispositive or directly answerable in 14:56
11 full, even on top of valid classification and other
12 prudential reasons not to answer such questions."*

13
14 This is dealing also with an aspect of notification
15 which hasn't received highlighting and it's a 14:56
16 particularly important paragraph. He says:

17
18 *"Sometimes information about a person is collected
19 because it was contained in a communication that was
20 collected for a different valid reason. In some cases, 14:56
21 a third country may be the potential target of hostile
22 actions by the targeted parties in communication and in
23 that case the intelligence may be shared and used, if
24 permitted by law, to protect that third person from
25 harm. In some cases that third person bears no 14:56
26 importance to a foreign intelligence purpose in which
27 case that third individual is not focussed on due to
28 rules-based safeguards, resource limitations, and the
29 focus of those conducting the intelligence activities*

1 *on the highest foreign intelligence priorities.*

2
3 *104. Taking all of the above into account, a*
4 *comprehensive analysis of whether NSA, for example, has*
5 *information on an individual would require that* 14:57
6 *individual to provide NSA with all other e-mail*
7 *addresses, telephone numbers et cetera in order to even*
8 *attempt to comprehensively look into NSA's databases.*
9 *Such as an inquiry would itself generate substantial*
10 *additional records across the US government.* 14:57

11
12 *105. Such specifics allow the inquiry to be scoped*
13 *appropriately to provide a focussed analysis and then*
14 *redress, as necessary. Generalised and*
15 *non-particularised claims of impact are not able to be* 14:57
16 *redressed in a way a regulatory agency might be able to*
17 *move quickly look into a fully organised database,*
18 *perhaps by name or known identifier, and provide a*
19 *response. The modem communications environment does*
20 *not alphabetize or organize the information it* 14:57
21 *transmits into neat personal files prepared for every*
22 *external redress or remedy without a particularized*
23 *instance and scope.*

24
25 *106. And, incidents of non-compliance are proactively* 14:58
26 *addressed and corrected internally, subject to external*
27 *oversight, often in advance of any external request.*
28 *Again, this is not to say that such internal proactive*
29 *correction is a full substitute for external oversight,*

1 *only that the existing intelligence oversight and*
2 *compliance mechanisms provide substantial remedies,*
3 *such as the proactive deletion of non-compliant data*
4 *above and beyond what is found with only independent*
5 *external oversight. In particular, non-compliant* 14:58
6 *collection of (or even querying of) information on a*
7 *person is remedied even in advance of any external*
8 *inquiry, whether from a government or private*
9 *individual.*

10
11 107. *During my prior time at the NSA, I was generally*
12 *aware of the developing Ombudsperson role, but I was*
13 *not involved in any specifics of the role or its*
14 *functioning. Therefore, my comments in the paragraphs*
15 *that follow are based on my understanding of the role*
16 *from public documents, informed by prior experiences in*
17 *interacting with oversight entities. For example, when*
18 *the Privacy and Civil Liberties Oversight Board rapidly*
19 *accelerated its look into certain collection programs*
20 *in 2013, NSA was prepared as it had already been*
21 *providing detailed information for the range of other*
22 *oversight bodies it interacts with (and of course*
23 *generated additional information to respond to the*
24 *specific questions from that particular oversight*
25 *board). NSA has a long history of detailed interaction*
26 *with overseers generally, and certainly specifically*
27 *with respect to questions and inquiries ranging from*
28 *the specific to the general.*
29

1 108. And although the Ombudsperson role was developed
2 in the context of the Privacy Shield specifically,
3 I understand the role extends to the facts of this
4 context, specifically transfers using SCCs. In my
5 opinion, the Ombudsperson role will benefit from 15:00
6 leveraging many of the existing external and internal
7 oversight and compliance entities - which he mentions -
8 and compliance - sorry, to give a meaningful answer to
9 a proper inquiry, showing that in most every respect
10 the available pathways are substantial and the 15:00
11 Ombudsperson role, while adding an additional pathway,
12 will likely in practice heavily rely, to positive
13 effect, on the existing set of investigative and
14 oversight bodies who bridge the internal and external
15 oversight pathways." 15:00

16
17 And perhaps I'll allow the stenographers change.

18
19 Judge, if I can ask you to turn to paragraph 36 and --
20 page 36 and paragraph 115. He's talking about the 15:01
21 Snowden disclosures, which, he begins his analysis, I
22 should've drawn your attention to the previous page,
23 sorry, 111. But perhaps going to 115:

24
25 *"In my opinion, the asymmetry in information*
26 *publication led to the incorrect assumption that the*
27 *accuracy of many of the initial stories was not in*
28 *dispute. For example, in some situations in which I*
29 *was involved, a partially incorrect allegation was*

1 *presented and the government simply responded that 'it*
2 *followed the law'. In some of those situations the*
3 *governmental response was misinterpreted to mean that*
4 *the partially incorrect allegation was both fully*
5 *correct and would in fact be lawful as presented. This*
6 *misinterpretation was unfortunately the exact opposite*
7 *of what was intended by the governmental response,*
8 *while certainly a foreseeable misinterpretation in*
9 *hindsight.*

10
11 *116. Internal documents of the NSA tacitly assume, at*
12 *times, substantial knowledge and experience. While the*
13 *United States has only officially acknowledged a subset*
14 *of the leaked documents, as a general matter they were*
15 *written for internal consumption and contain numerous*
16 *shorthand terms. Such documents assume a substantial*
17 *amount of training, knowledge, experience gained over*
18 *many years. They use shorthand and jargon as*
19 *activities for what would be more proper explanations"*

20 --

15:02

21 **MS. JUSTICE COSTELLO:** I think that's "substitutes".

22 **MR. GALLAGHER:** "substitutes", sorry, "for what would
23 *be more proper explanations of dense concepts. At*
24 *times they may reflect an accurate view of only a small*
25 *subset of the NSA, often in a specific context, that*
26 *does not apply generally to the NSA. As such, they are*
27 *in many ways less relevant source material - especially*
28 *when publishing on an aggressive timeline while*
29 *exploring a bulk collection of documents - for a full*

1 *understanding of the value and safeguards in signals*
2 *intelligence activities. In short, in such documents*
3 *it is easier to see (or imagine) the risks than learn*
4 *the safeguards or the value."*

5
6 And he then deals with that over the next number of
7 pages, I don't want to take the court's time with it, I
8 draw attention to it. And his conclusions, on page 39,
9 I would draw specific attention to paragraphs 125 to
10 128. 15:03

11
12 I just want, Judge, to go back to just one matter, if I
13 can locate it quickly. And if I can't, I'll leave it
14 and give you the reference later. I think it's perhaps
15 better if I leave it and give you the reference later. 15:03

16
17 If I could refer you very briefly to the PCLOB report
18 in this context and just a few references that you
19 mightn't have. And I think that's to be found in five,
20 I think 14. 15:03

21 **MS. JUSTICE COSTELLO:** That's in the US book?

22 **MR. GALLAGHER:** It's the US materials, yes. Sorry,
23 it's 14/4 in mine, but it's divide 56 of the US
24 materials.

25 **MS. JUSTICE COSTELLO:** Thank you. I do have it, yes. 15:04

26 **MR. GALLAGHER:** You've been through much of this,
27 Judge, and I don't want to delay at the moment, I'll
28 just give you some references that are of particular
29 importance. Pages seven and eight describe the PRISM

1 and the two programmes operated under Section 702 by
2 way of summary. Paragraph -- or page ten, the second
3 last paragraph deals with the "about" communications
4 and a point that was referred to but not in any detail,
5 but it's important: 15:04

6
7 "*with regard*", it says in the second last paragraph, "
8 To the NSA's acquisition of 'about' communications, the
9 Board con" --

10 **MS. JUSTICE COSTELLO:** Sorry, page ten did you say? 15:04

11 **MR. GALLAGHER:** Page ten, sorry. The second last
12 paragraph.

13 **MS. JUSTICE COSTELLO:** The second last paragraph, yes.

14 **MR. GALLAGHER:** "*with regard to the NSA's acquisition*
15 *of 'about' communications, the Board concludes that the*
16 *practice is largely an inevitable byproduct of the*
17 *government's efforts to comprehensively acquire*
18 *communications that are sent to or from its targets.*
19 *Because of the manner in which the NSA conducts*
20 *upstream collection, and the limits of its current*
21 *technology, the NSA cannot completely eliminate 'about'*
22 *communications from its collection without also*
23 *eliminating a significant portion of the 'to/from'*
24 *communications that it seeks. The Board includes a*
25 *recommendation to better assess 'about' collection and*
26 *a recommendation to ensure that upstream collection as*
27 *a whole does not unnecessarily collect ['about']*
28 *communications."*

1 And over the page at 11, the first full paragraph, the
2 reference to the worth of what is being done.

3 **MS. JUSTICE COSTELLO:** In which particular -- the first
4 paragraph there?

5 **MR. GALLAGHER:** Sorry, Judge, I was just asking 15:05
6 Mr. Kieran to look at something. It's the next page
7 and it's the first full paragraph:

8
9 *"Overall, the Board" - page 11 - "finds that the*
10 *protections contained... are reasonably designed and*
11 *implemented to ward against the exploitation of*
12 *information acquired under the program for illegitimate*
13 *purposes. The Board has seen no trace of any such*
14 *illegitimate activity associated with the program, or*
15 *any attempt to intentionally circumvent legal limits.*
16 *But the applicable rules potentially allow a great deal*
17 *of private information about US persons to be acquired*
18 *by the government. The Board therefore offers a series*
19 *of policy recommendations."*

20
21 Upstream collection is -- the PRISM collection is
22 looked at in detail in page 33 and following. In page
23 35 you'll see upstream collection referred to and how
24 it operates. And it's worth just looking at that. It
25 says: 15:06

26
27 *"The NSA acquires communications from a second means,*
28 *which is referred to as upstream collection. Upstream*
29 *collection is different from PRISM collection because*

1 *the acquisition occurs not with the compelled*
2 *assistance of the United States ISPs, but instead with*
3 *the compelled assistance (through a Section 702*
4 *directive) of the providers that control the*
5 *telecommunications backbone over which communications*
6 *transit. The collection therefore does not occur at*
7 *the local telephone company or e-mail provider with*
8 *whom the targeted person interacts (which may be*
9 *foreign telephone or Internet companies, which the*
10 *government cannot compel to comply with a Section 702*
11 *directive), but instead occurs 'upstream' in the flow*
12 *of communications between communication service*
13 *providers.*

14
15 *Unlike PRISM collection, raw upstream collection is not*
16 *routed to the CIA or FBI, and therefore it resides only*
17 *in NSA systems, where it is subject to the NSA's*
18 *minimisation procedures. CIA and FBI personnel*
19 *therefore lack any access to raw data from upstream*
20 *collection. Accordingly, they cannot view or query*
21 *such data in CIA or FBI systems."*

22
23 There *has* been some change to that, as you saw in the
24 agreed report, but they have to follow and sign up to
25 all of the systems and procedures and precautions of
26 the NSA. And I'll give you that reference later.

15:07

27
28 *"The upstream acquisition of telephone and Internet*
29 *communications differ from each other, and these*

1 *differences affect privacy and civil liberty interests*
2 *in varied ways. Each type of Section 702 upstream*
3 *collection is discussed below."*
4

15:08

5
6 And if you go to the next page, "*Upstream Collection of*
7 *Telephone Communications*":
8

9 "*Like PRISM collection, the upstream collection of*
10 *telephone communications begins with the NSA's tasking*
11 *of a selector. The same targeting procedures that*
12 *govern the tasking of an e-mail address in PRISM*
13 *collection also apply to the tasking of a telephone*
14 *number in upstream collection. Prior to tasking, the*
15 *NSA therefore is required to assess that the specific*
16 *telephone number to be tasked is used by a non-US*
17 *person reasonably believed to be located outside the*
18 *United States from whom the NSA assesses it may acquire*
19 *the types of foreign intelligence information*
20 *authorised under one of the Section 702 certifications.*
21 *Once the targeting procedures have been applied, the*
22 *NSA sends the tasked telephone number to a United*
23 *States electronic communication service provider to*
24 *initiate acquisition. The communications acquired,*
25 *with the compelled assistance of the provider, are*
26 *limited to telephone communications that are either to*
27 *or from the tasked telephone number that is used by the*
28 *targeted person. Upstream telephony collection*
29 *therefore does not acquire communications that are*

1 *merely 'about' the tasked telephone number."*

2
3 And then "*Upstream Collection of Internet*":

4
5 "*The process of tasking selectors to acquire Internet*
6 *transactions is similar to tasking selectors to PRISM*
7 *and upstream telephony acquisition, but the actual*
8 *acquisition is substantially different. Like PRISM and*
9 *upstream telephony acquisition, the NSA may only target*
10 *non-US persons by tasking specific selectors to*
11 *upstream Internet transaction collection. And, like*
12 *other forms of Section 702 collection, selectors tasked*
13 *for upstream Internet transaction collection must be*
14 *specific selectors (such as an e-mail address), and may*
15 *not be key words or the names of targeted individuals.*

16
17 *Once tasked, selectors used for the acquisition of*
18 *upstream Internet transactions are sent to a United*
19 *States electronic communication service provider to*
20 *acquire communications that are transiting through*
21 *circuits that are used to facilitate Internet*
22 *Communications, what is referred to as the 'Internet*
23 *backbone'. The provider is compelled to assist the*
24 *government in acquiring communications across these*
25 *circuits. To identify and acquire Internet*
26 *transactions associated with the Section 702 tasked*
27 *selectors on the Internet backbone, Internet*
28 *transactions are first filtered to eliminate potential*
29 *domestic transactions, and then are screened to capture*

1 *only transactions containing a tasked selector. Unless*
2 *transactions pass both these screens, they are not*
3 *ingested into government databases."*

4
5 And that's important, Judge. As you know, it was an 15:10
6 issue touched in evidence as to how it's collected. So
7 there are two screening filters and it's only the
8 information that passes the two screening filters that
9 is subsequently ingested into the government database.
10 And you did raise the issue that a wider body of data 15:11
11 is obviously screened for this purpose and of course,
12 whenever you use selectors, that follows as a matter of
13 course - the whole purpose is that you use it. But you
14 don't get access to that wider body of data; what's
15 ingested onto the databases is the product of using the 15:11
16 target selectors. But if you are to avoid bulk
17 collection, you must use targets. And if you use
18 targets, they have to be applied to a larger body of
19 data, that's how it operates.

20
21 Then it goes on: 15:11

22
23 *"Upstream collection acquires Internet transactions*
24 *that are 'to', 'from', or 'about' a tasked selector.*
25 *With respect to 'to' and 'from' communications, the*
26 *sender or a recipient is a user of a Section 702 tasked*
27 *selector. This is not, however, necessarily true for*
28 *an 'about' communication."*
29

1 And he describes how the "about" communication works.
2 And I think you've heard that, but that is the
3 description. And over the page, Judge, at 38, halfway
4 down, last paragraph:

5
6 *"In order to acquire 'about' communications while*
7 *complying with Section 702's prohibition on*
8 *intentionally acquiring known domestic communications,*
9 *the NSA is required to take additional technical steps*
10 *that are not required for other Section 702 collection.*
11 *NSA is required to use other technical means, such as*
12 *Internet protocol ('IP') filters, to help ensure that*
13 *at least one end of an acquired Internet transaction is*
14 *located outside the United States."*

15
16 And he gives an example of that. Then over the page he
17 deals with the MCTs and explains how they function at
18 39 and on over to page 40. And I don't intend reading
19 all of that out, much of it you've got, but that is the
20 important reference to it. But I would just like to 15:13
21 draw your attention to some of the numbers. Under the
22 heading "3. Upstream collection", the second paragraph:
23 *"The NSA-designed upstream Internet collection."* And
24 it draws the distinction in the second last sentence
25 between communications which are referred to as single 15:13
26 communication transactions and then the multiple
27 communication transactions. And in the last paragraph
28 on the page it says:

1 *"If the acquired MCT is a transaction between the*
2 *Section 702 target (who is assessed to be a non-US*
3 *person located outside the United States and is*
4 *targeted to acquire foreign intelligence information*
5 *falling under one of the approved certifications) and a*
6 *server, then all of the discrete communications*
7 *acquired within the MCT are also communications to or*
8 *from the target. Based on a statistical sample*
9 *conducted by the NSA, the FISC estimated that as of*
10 *2011 the NSA acquired between 300,000 and 400,000 such*
11 *MCTs every year (i.e. MCTs where the 'active user', was*
12 *the target him or herself)."*

13
14 Then it goes on:

15
16 *"When the acquired MCT is not a transaction between the*
17 *target and the server, but instead a transaction*
18 *between another individual and a server that happens to*
19 *include a... tasked selector... and may have no*
20 *relationship, or no more than an incidental*
21 *relationship to the [tasked] selector. These*
22 *non-target MCTs break down into three categories.*
23 *Based on the NSA's statistical study, the FISC*
24 *estimated that (as of 2011) the NSA acquired at least*
25 *1.3 million MCTs each year where the user who caused*
26 *the transaction to occur was not the target, but was*
27 *located outside the United States. Using this same*
28 *statistical analysis, the FISA court estimated that the*
29 *NSA would annually acquire an additional approximately*

1 7,000 to 8,000 MCTs of non-targeted users who were
2 located in the United States, and between approximately
3 97,000 and 140,000 MCTs each year where NSA would not
4 be able to determine whether the user who caused the
5 transaction to occur was located inside or outside the
6 United States.

7
8 The NSA's acquisition of MCTs is a function of the
9 collection devices it has designed. Based on
10 government representations, the FISC has stated that
11 the 'NSA's upstream Internet collection devices are
12 generally incapable of distinguishing between
13 transactions containing only a single discrete
14 communication to, from, or about a tasked selector and
15 transactions containing multiple discrete
16 communications, not all of which are to, from, or about
17 a tasked selector.' while some distinction between
18 SCTs and MCTs can be made with respect to some
19 communications in conducting acquisition, the
20 government has not been able to design a filter that
21 would acquire only the single discrete communications
22 within transactions that contain a Section 702
23 selector. This is due to the constant changes in the
24 protocols used by Internet service providers and the
25 services provided. If time were frozen and the NSA
26 built the perfect filter to acquire only single,
27 discrete communications, that filter would be
28 out-of-date as soon as time was restarted and a
29 protocol changed."

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And he goes on to explain that. Then the last paragraph in that section:

"Because of the greater likelihood that upstream collection of Internet transactions, in particular MCTs, will result in the acquisition of wholly domestic communications and extraneous US person information, there are additional rules governing the querying, retention, and use of such upstream data in the NSA minimisation procedures."

And there is a figure, I can't just put my finger on where it is stated, but it's already been given in evidence, that Upstream is less than 10% of the -- the *entire* of Upstream is less than 10% of the section 702 programme.

15:16

Judge, if I can just ask you to briefly refer to 98. And it speaks of existing protections for non-US persons' privacy. And in the last paragraph it mentions a point mentioned by Mr. DeLong, that:

15:17

"The first important privacy protection provided to non-US persons is the statutory limitation on the scope of section 702 surveillance, which requires that targeting be conducted only for purposes of collecting foreign intelligence... The definition of foreign intelligence information purposes is limited to

1 *protecting against.*"

2
3 And he describes it. And he says:

4
5 *"Further limitations are imposed by the required* 15:17
6 *certifications identifying the specific categories of*
7 *foreign intelligence information, which are reviewed*
8 *and approved by the FISC."*

9
10 Then he goes on in the next paragraph: 15:17

11
12 *"The second group of statutory privacy protections for*
13 *non-US persons are the penalties that apply to*
14 *government employees who engage in improper information*
15 *collection practices."*

16
17 Then the next paragraph; the third privacies are the
18 criminal prosecutions under 1806. And just a
19 paragraph, the second paragraph, first full paragraph
20 on page 100: 15:18

21
22 *"Finally, as a practical matter, non-US persons also*
23 *benefit from the access and retention restrictions*
24 *required by the different agencies' minimisation and/or*
25 *targeting procedures. While these procedures are*
26 *legally required only for US persons, the cost and*
27 *difficulty of identifying and removing US person*
28 *information from a large body of data means that*
29 *typically the entire dataset is handled in compliance*

1 *with the higher US person standards."*

2
3 Page 103 and following contain a policy analysis. And
4 on page 104, under the section of "The value of the 702
5 Programme", that has been assessed. And the conclusion 15:18
6 is:

7
8 *"The Section 702 program makes a substantial*
9 *contribution to the government's efforts to learn about*
10 *the membership, goals, and activities of international*
11 *terrorist organizations, and to prevent acts of*
12 *terrorism from coming to fruition. Section 702" --*

13 **MS. JUSTICE COSTELLO:** Where are you reading?

14 **MR. GALLAGHER:** I'm terribly sorry, 104 and under the
15 heading "Value of the Section 702 Programme". 15:19

16 **MS. JUSTICE COSTELLO:** Oh, the first paragraph. Sorry,
17 I beg your pardon.

18 **MR. GALLAGHER:** Yeah, the first paragraph, Judge. Then
19 that's all I want to draw your attention to in that.
20 If I can briefly ask you to go to 59. That's where the 15:19
21 FISC rules of procedure to which reference has been
22 made are contained. And page four of that, the
23 provision in Rule 11 relating to where novel issues
24 arise and looking for assistance in relation to novel
25 issues. And over the page, Rule 13, the government 15:19
26 obligation, if it discovers something, to make a
27 submission to the court, which was specifically
28 referred to in the Privacy Shield.
29

1 That also contains the Brown report, which I'm not
2 going to open, in divide 66, which Prof. Swire referred
3 to, Judge.

4
5 If I can then refer you to a different report, if I can 15:20
6 just hopefully lay my hands on it. It's a Council of
7 Europe report and I thought I had it --

8 **MS. JUSTICE COSTELLO:** Take your time.

9 **MR. GALLAGHER:** -- handy. I'll find it in a moment,
10 Judge. 15:20

11 **MS. JUSTICE COSTELLO:** No, no, take your time so you
12 have a proper look.

13 **MR. GALLAGHER:** Thank you very much. I can move on
14 without delaying it --

15 **MS. JUSTICE COSTELLO:** No, no, find it if you want. 15:20

16 **MR. GALLAGHER:** -- and I'll come back to it. As luck
17 would have it, I can't just put my finger on it. I'll
18 move on, because I won't be derailed. But I'll bring
19 you to it in a moment.

20 15:20
21 If we go back to book four, which I was looking at,
22 there's the evidence of Herr Ratzel, the former
23 Interpol Chief, to be found in divide 17. And I'm not
24 going to delay on that. The submissions of the DPC say
25 'well, he just gives some examples'. And of course, 15:21
26 that is so. It's very clear that these examples give a
27 clear justification for the signals intelligence and
28 explain the importance of it. And the purpose of the
29 examples is just that - to show how it is used in

1 protecting safety and the importance of this objective,
2 being a core objective obviously of a sovereign state.

3
4 So I draw your attention to it. Mr. Collins summarised
5 it. And it *is* worth reading the entire. As I say, we 15:21
6 make an apology, with no disrespect to Mr. Ratzel, that
7 the English is just slightly less fluent than we would
8 - and I hope he doesn't read this transcript - than we
9 might do it. He declined any assistance of a
10 translator and clearly *speaks* fluent English, but the 15:22
11 English is written perhaps as you might expect it to be
12 written by a non-English speaker.

13
14 The third piece of evidence in this context that's *very*
15 important is in book five of these books and it is the 15:22
16 affidavit of Michael Clarke. And he is the professor
17 who comments from a European perspective on the sort of
18 issues that are addressed by Mr. DeLong. And you'll
19 see in his report, in the first page he sets out his
20 credentials. He is a Professor of Defence Studies. He 15:23
21 was a Director General of the Royal United Services
22 Institute - a think tank. And he occupied various
23 other posts.

24
25 In March 2014, he says at the bottom of the page, he 15:23
26 was appointed by the Deputy Prime Minister to chair an
27 independent surveillance review at RUSI, which reported
28 in 2015 and dealt with a democratic licence. The
29 Report of the Independent Surveillance Review was

1 published as part of the public discussion around the
2 Interception of Communications Bill, which was due to
3 be enacted in December 2016, was enacted in either
4 November or December, and I've referred to it.

15:23

5
6 In paragraph -- or page three, he just gives a
7 definitional note and he distinguishes between what he
8 calls in the first paragraph surveillance by the
9 security and intelligence agencies, SIAs or the law
10 enforcement agencies, LEAs. And you'll find those
11 acronyms throughout his report.

15:24

12
13 At page five he deals with the necessity for a level of
14 electronic surveillance. And of course, this is
15 important, because the movement away, obviously, from
16 the individualised authorisation that existed in the
17 old FISA - obviously a different situation arose where
18 people made individual phone calls and had individual
19 communications - to a situation of mass communication
20 that we have now, even those changes have been enormous
21 since 2006.

15:24

15:24

22
23 I remember myself, when on circuit in 1995, people
24 queued up at the phone box in the courthouse to make
25 calls. That's how we communicated. And of course,
26 those could be tracked and intercepted and authorised.
27 But when you've three billion internet users making
28 enormous numbers of communications on a daily basis,
29 billions of communications, you're in an entirely

15:25

1 different environment. And Prof. Clarke explains the
2 challenges that this poses, both in terms of serious
3 and organised crime and national security.

4
5 In paragraph six he says:

15:25

6
7 *"These changing patterns of terrorism and crime as they*
8 *affect EU countries - more serious and organised*
9 *criminality; more well organised and lethal terrorist*
10 *attacks - are believed to be at least partly*
11 *facilitated by the revolution in internet-based*
12 *communication and accessible high level computing*
13 *capacity. Such developments and the deepening reality*
14 *of digital societies throughout Europe have created*
15 *many new potential platforms, opportunities and modes*
16 *of operation for individuals and groups involved in*
17 *criminal and terrorist activities. Such developments*
18 *have similarly affected the potential vulnerability of*
19 *modern, digital societies to industrial and*
20 *foreign-based espionage."*

21
22 Then he gives the necessity analysis. And at eight:

23
24 *"'Digital society' refers to the phenomenon whereby the*
25 *power of the internet, allied to powerful computing*
26 *capacity, penetrates the lives and activities of*
27 *individuals and organisations throughout society,*
28 *creating unprecedented levels of dependence on*
29 *electronic communication and generating equally*

1 *unprecedented levels of data about individuals and*
2 *organisations. The potential to harvest new data is*
3 *also immense, since modern data analytics can identify*
4 *correlations within billions of otherwise unrelated*
5 *pieces of information."*

6
7 And he identifies what we would know, the economic and
8 social benefits. And then the proliferation of
9 communications platforms. And in paragraph 11 he says:

10
11 *"For most of the Twentieth Century, until the late*
12 *1980s, the only way most individuals or organisations*
13 *could communicate was via postal services, telephone or*
14 *telex lines, or through meetings. In the digital*
15 *society, however, there has been an explosion in the*
16 *applications of internet-based communication. More*
17 *than two million apps are currently available for*
18 *almost anyone in the world to download. As of June*
19 *2016 Microsoft Android offered 2.2 million different*
20 *apps available for download; Apple offered just on 2*
21 *million. Apple's portfolio of available apps grows by*
22 *more than 1000 per day. In 2009 around 15,000 apps*
23 *every month were being offered to Apple; by 2015 it was*
24 *being offered around 40,000 apps per month. All of*
25 *these apps and filesharing arrangements are potentially*
26 *capable of being manipulated for malign purposes.*
27 *Beside the overwhelmingly legitimate uses of such*
28 *technologies, therefore, criminals, terrorists and*
29 *foreign agents have been able to diversify their modes*

1 of communication to make detection, or evidence
2 gathering, by the SIAs/LEAs significantly more
3 challenging."

4
5 He identifies the growth of encryption. And then in 15:28
6 13:

7
8 "The internet is intrinsically transnational and by the
9 turn of the Twenty-first Century this inherent quality
10 was recognised to have created significant new
11 challenges for all western SIAs/LEAs, not just from
12 international terrorism but also from transnational
13 organised crime. This was recognised by the US
14 National Security Council as a generically novel threat
15 both to the United States itself and more generally to
16 international political order. In more recent years
17 new transnational challenges have also emanated from
18 the evident efforts of autocratic governments that are
19 deemed to pose security challenges to western
20 societies."

21
22 And he gives examples of implications of terrorism and
23 crime, paragraph 16:

24
25 "In the three months from December 2014 to February
26 2015 one commercial terrorist monitoring organisation
27 recorded a leap in ISIS-related twitter postings from
28 around 100,000 per day to 1.2 million per day, some of
29 which - estimated to be a low proportion - created by

1 *botnets, but most reflecting direct personal*
2 *connectivity."*

3
4 He describes botnets and the likes later, I don't think
5 we need to delay on it, it's just the scale. In 15:29
6 paragraph 20, over the page, he refers to the UK's Home
7 Office assessment of cyber crime as:

8
9 *"A tier 1 threat to the UK's national security.*
10 *Malware, ransomware attacks and the targeted compromise*
11 *of UK networked systems, particularly from criminals*
12 *based overseas, are an increasing threat. Cyber*
13 *techniques are used by organised criminals to commit*
14 *fraud against government departments, businesses and*
15 *the public. Firearms, drugs and other illegal*
16 *commodities are traded on the internet, including the*
17 *'dark web', using virtual currencies. We are seeing an*
18 *expansion of cyber crime 'as a service', with some*
19 *instances of organised crime groups hiring cyber*
20 *experts."*

21
22 If you go to page 11, paragraph 24, he sets out the
23 benefits of electronic surveillance. And in paragraph
24 25:

25
26 *"One benefit is that the inherently international*
27 *nature of internet communications may allow SIAs/LEAs*
28 *to gain access, through legal means in their own*
29 *domestic environments, to material in networks*

1 *operating in foreign jurisdictions. In cases submitted*
2 *by the UK's GCHQ to the David Anderson review of bulk*
3 *access, it was repeatedly shown that between 2009 and*
4 *2013 access to data and communications inside the UK*
5 *had linked the authorities to wider terror networks in*
6 *the Middle East, or to active international paedophiles*
7 *involved in child... exploitation. In particular, the*
8 *nature of the internet offers the authorities the*
9 *capacity to perform at an international level, some key*
10 *tasks in information handling; not just in intelligence*
11 *gathering and investigation, but also in the more*
12 *specialised areas of forensic data preservation and*
13 *recovery and in the authentication of digital evidence.*

14
15 A second benefit is that it's cost effective in terms
16 of resources, in 26 he says. And then 27:

15:31

17
18 *"A third benefit is that the vulnerabilities of the*
19 *digital society for the law-abiding public when facing*
20 *criminal and terrorist activity are also potential*
21 *vulnerabilities for criminals and terrorists."*

22
23 And at paragraph 28 he identifies a fourth benefit,
24 which is:

25
26 *"A fourth benefit is that electronic monitoring is*
27 *inherently able to uncover networks of connected*
28 *individuals and organisations if SIAs/LEAs choose, and*
29 *are legitimately able, to pursue extensive linkages.*

1 *This is of particular relevance in combating current*
2 *trends in international jihadist terrorism as they have*
3 *developed in the last twenty years. Classic terrorist*
4 *[activity] has traditionally operated in cell*
5 *structures, where networks of groups and individuals*
6 *were intended to be anonymous or not to exist at all.*
7 *From the 1970s to the 1990s European SIAs and LEAs*
8 *could only effectively penetrate the terrorist networks*
9 *that threatened Europe through big investments in" -*
10 *that's human intelligence - "to reveal their*
11 *connectedness. Since the advent of the Al Qaeda threat*
12 *to Europe and the western world in the late 1990s,*
13 *however, international jihadism has been distinguished*
14 *by its highly networked and barely concealed*
15 *structures; and in the case of Islamic State, by its*
16 *public acknowledgement and celebration of such*
17 *structures as part of its attempt to build*
18 *international momentum behind the appeal for a*
19 *Caliphate. In contrast to most previous terrorist*
20 *organisations that have been based around tight cadres*
21 *of specialised individuals, Al Qaeda and IS have*
22 *attempted to develop from their inner cadres elements*
23 *of a mass movement, largely mobilising determined*
24 *amateurs who make little attempt to keep their*
25 *identities or intentions secret. The friends and*
26 *family links between would-be terrorists involved in*
27 *plots as far removed as the 9/11 attacks, terrorism in*
28 *the UK and guerrilla warfare in Yemen, for example, can*
29 *be well documented from public sources."*

1
2 He identifies then the response of SIAs and LEAs and,
3 on page 14 at paragraph 35 and following, deals with
4 the rules of interception. And he says that:

5
6 *"Given the exponential growth in the volumes of data*
7 *and communication available on the internet, the*
8 *reality for SIAs and LEAs is that all surveillance has*
9 *to be targeted. In the UK, untargeted searches, or*
10 *simply 'trawling' for information is not lawful and*
11 *would be a very uneconomic use of resources if it were.*
12 *Typically, SIAs/LEAs seek access to information that*
13 *requires different levels of intrusion on the basis of*
14 *different targeting requirements. They can be defined*
15 *in the following way:*

16
17 *36. Communications data."*

18
19 And he describes what that refers to. And I think
20 you've had much of that already. And over the page he
21 gives figures. And in paragraph 37:

15:34

22
23 *"The overall proportions are said to be similar in*
24 *cases heavily involving the SIAs. In 2013 it was*
25 *reported by The Guardian that senior intelligence*
26 *officers had revealed that, 'Every single major*
27 *international terrorism investigation has involved the*
28 *interception of communications ... It matters because*
29 *terrorists have to communicate'. In 2014 the UK Home*

1 Secretary told Parliament, 'Communications data has
2 played a significant role in every Security Service
3 counter-terrorism operation over the last decade. It
4 has been used as evidence in 95 per cent of all serious
5 organised crime cases handled by the Crown Prosecution
6 Service'.

7
8 38. Though communications data is far and away the form
9 of access most frequently required by the SIAs/LEAs,
10 the necessary authorisation requires a degree of
11 targeting dictated by the cases to which it is being
12 applied. In the UK the rationales for authorisation
13 are audited annually by an independent commissioner and
14 staff. In the case of foreign-based CSPs from whom
15 communications data has to be obtained, requests can be
16 denied or targeting rationales challenged."

17
18 He deals with content data, because it's more intrusive
19 obviously. And in 40:

20
21 "Bulk Data and Bulk Interception. Bulk data has
22 emerged as one of the most controversial aspects of the
23 debate around privacy and security. There is a
24 misunderstanding in the term itself. Bulk interception
25 refers to the interception of large volumes of data.
26 Bulk data, in itself, refers to information that exists
27 in bulk form, though it may be intercepted very simply.
28 Bulk data interception and access is also commonly
29 regarded as 'untargeted', but this too is a

1 *misunderstanding. Bulk data interception and access*
2 *draws large amounts of material into its searches, the*
3 *vast majority of which will be of no interest to the*
4 *authorities. In that respect it is distinguished from*
5 *'targeted' access to communications or content data,*
6 *for example. But the sheer volume of material now*
7 *generated on the internet means that bulk searches have*
8 *to be 'targeted' to the extent that they have to be*
9 *directed to those areas, or limited timeframes, that*
10 *the search and filter technologies available to the*
11 *SIAs are capable of handling".*

12 **MS. JUSTICE COSTELLO:** Can I just understand what he's
13 saying there? He's sort of saying "bulk" is a sort of a
14 larger target, but not indiscriminate?

15 **MR. GALLAGHER:** Exactly. The phrase "bulk" has been 15:37
16 conflated with "indiscriminate", and it's a distinction
17 that's drawn in PPD-28 as well. "Bulk" is not
18 indiscriminate, you still use discriminants. And you
19 have to do that (A) because you just couldn't handle
20 the volume and it wouldn't be effective; and (B), in 15:37
21 any event, under PPD-28 the focus is, as you know, on
22 targeted interception. So he's clearing up some
23 misapprehensions whereby "bulk" is just conflated with
24 "indiscriminate" and that you access everything.
25 That's not so. 15:37

26
27 In 42 he says:

28
29 *"For western SIAs there are two main operational*

1 *purposes for intercepting data in bulk. The first is*
2 *to reconstitute split communications, given that the*
3 *internet breaks messages down into packets to transmit*
4 *them and then reconstitutes them at the destination.*
5 *For the SIAs" - the intelligence agencies - "a targeted*
6 *message or flow of information may have to be*
7 *intercepted at multiple points to recover the whole*
8 *message. It is in this sphere where enhanced*
9 *encryption makes the task significantly more*
10 *challenging for the SIAs. The second is for 'target*
11 *discovery' to identify individuals of particular*
12 *interest to the security services or; to identify*
13 *potential but as yet unknown threats to national*
14 *security. The UK's Parliamentary Intelligence and*
15 *Security Committee summed it up:*

16
17 *'GCHQ's bulk interception capability is used primarily*
18 *to find patterns in, or characteristics of, online*
19 *communications which indicate involvement in threats to*
20 *national security. The people involved in those*
21 *communications are sometimes already known, in which*
22 *case valuable extra intelligence may be obtained (for*
23 *example, a new person in a terrorist network, a new*
24 *location to be monitored, or a new selector to be*
25 *targeted). In other cases, it exposes previously*
26 *unknown individuals or plots that threaten our security*
27 *which would not otherwise be detected.'*

28
29 43. In his special report, reviewing the operational

1 utility of bulk powers, David Anderson accepts most of
2 the arguments of the SIAs in favour of this type of
3 interception. It is particularly effective, he
4 concludes, in combating cyber-crime, even though he
5 acknowledges that its utility in the overall
6 intelligence picture in the future may be diminished by
7 the evolution of internet technologies. For the
8 present, however, he is clear that bulk interception of
9 data and communications has fed directly either into
10 ongoing investigations or else into prioritising areas
11 for future investigations into the most serious threats
12 to national security. It offers the SIAs the
13 possibility of keeping up with the agility of
14 terrorists and criminals to create fast-moving threats
15 to national security, operating across many different
16 areas of the internet. In these functions bulk
17 interception, by several different means that he
18 reviews in his report, is either acting on a targeted
19 basis, or else is helping to establish a targeted basis
20 for further investigations. In David Anderson's view,

21
22 'The bulk interception power has proven itself to be of
23 vital utility across the range of GCHQ's operational
24 areas, including counter-terrorism in the UK and
25 abroad, cyber-defence, child sexual exploitation,
26 organised crime and the support of military operations.

27
28 The power has been of value in target discovery but
29 also in target development, the triaging of leads and

1 as a basis for disruptive action. It has played an
2 important part, for example, in the prevention of bomb
3 attacks, the rescue of a hostage and the thwarting of
4 numerous cyber-attacks'."

5
6 And it goes on in more detail. And then the summary is
7 on page 20. And in paragraph 49:

8
9 "It is my belief that with such a range of activities
10 being conducted 'on line' it would be impossible for
11 the SIAs/LEAs to try to counter their operations
12 'offline'. It is also my belief that intercepting the
13 communications of criminals, terrorists and espionage
14 groups through electronic means is, in principle,
15 necessary insofar as this is a modern day equivalent of
16 traditional policing techniques such as legitimately
17 tapping a telephone or trailing a suspect to ascertain
18 with whom they communicate. As patterns of electronic
19 communication activities have evolved for all in the
20 digital society, so, it is my belief, it is necessary
21 that security and policing agencies should be able to
22 operate in the same space.

23
24 50. Throughout EU member states data collection,
25 interception and processing by the SIAs/LEAs must be
26 conducted on the basis that such activities are deemed
27 lawful, necessary and proportionate. As the foregoing
28 has shown, however, the implied intrusion of the
29 SIAs/LEAs both into the depth and width of the

1 *electronic fabric of a digital society as they go about*
2 *their work is necessarily great. It is my belief that*
3 *of the three pre-conditions, the advent of digital*
4 *society across the EU makes the judgement of what is*
5 *proportionate in any given operation significantly more*
6 *difficult to determine.*

7
8 *51. Civil liberties issues are not trivial and I have*
9 *not tried to encompass them in this report. I have*
10 *tried to deal with what is technically possible and*
11 *what I believe to be current practice; not how to weigh*
12 *a judgement between security and privacy. That must*
13 *rest on a balance that weighs the intrusions of the*
14 *SIAs/LEAs into the lives of EU citizens against the 200*
15 *plus real or attempted annual terror plots against*
16 *European targets or the 3,000 active, organised crime*
17 *groups believed to be operating in and through the*
18 *continent."*

19
20 I don't think I drew your attention to page four and
21 paragraph three, which says that:

15:42

22
23 *"The most recently available figures from EUROPOL*
24 *record 211 terrorist attacks either 'completed, failed*
25 *or foiled' in 2015 against members of the EU. All*
26 *sources of terrorism as defined by the EU are included*
27 *in these figures, including jihadism, right and left*
28 *wing extremism and national separatism. The completed*
29 *attacks caused" --*

1 **MS. JUSTICE COSTELLO:** Sorry, I didn't quite find,
2 where were you?

3 **MR. GALLAGHER:** It's paragraph three on page four.

4 **MS. JUSTICE COSTELLO:** Thank you. Sorry. "*The*
5 *completed attacks*", yes.

15:43

6 **MR. GALLAGHER:** Yeah.

7

8 *"The completed attacks caused 151 fatalities and*
9 *seriously injured more than 360 people. Some 103 of*
10 *these 211 cases were recorded in the UK. EUROPOL also*
11 *records the arrest of 1077 individuals across the EU on*
12 *terrorism-related charges. Of these, 44% were arrested*
13 *on suspicion of membership of a terrorist organisation,*
14 *and 23% on suspicion of attack-related activities (up*
15 *from 13% in 2014). EUROPOL also pointed to a 'notable*
16 *increase in arrests of individuals of Russian origin in*
17 *the EU'. Court proceedings were completed against 514*
18 *individuals on terrorist-related charges in 2015."*

19

20 So that is the evidence on the legitimacy of the
21 objective, which is recognised, and the necessity for
22 the type of intrusion that does take place in relation
23 to the data. And I want to try and --

15:44

24 **MS. JUSTICE COSTELLO:** You just might help me a little
25 bit with one -- there seems to be a little bit of
26 tension between some of the evidence there.

15:44

27 **MR. GALLAGHER:** Yes.

28 **MS. JUSTICE COSTELLO:** Obviously I think, I can recall
29 specifically the PCLOB report; they were talking about

1 the tiny percentage, I think it was 0.000031 of the
2 internet traffic.

3 **MR. GALLAGHER:** Yes.

4 **MS. JUSTICE COSTELLO:** And that seemed to be suggesting
5 that really this isn't too bad, to put it at a very 15:44
6 crude high level. Then we have here Prof. Clarke
7 saying that he refers to the intrusion of the SIAs and
8 the LEAs both in depth and width of the electronic
9 fabric of a digital society is *necessarily great*.

10 **MR. GALLAGHER:** Yes. 15:45

11 **MS. JUSTICE COSTELLO:** So I'm just wondering, I know
12 neither of them are purporting to do the balance
13 between --

14 **MR. GALLAGHER:** No.

15 **MS. JUSTICE COSTELLO:** That you're talking about. But 15:45
16 you're talking about the assessment of -- that has to
17 be conducted --

18 **MR. GALLAGHER:** Exactly.

19 **MS. JUSTICE COSTELLO:** -- as little as necessary.

20 **MR. GALLAGHER:** Yeah. I think it's a frank 15:45
21 acknowledgment. Mr. DeLong acknowledges the privacy
22 concerns. Obviously many people would regard that as
23 great - they don't want any intrusion. What they're
24 saying, it *is* great in that sense, but it is not mass,
25 it is not undifferentiated, it is not indiscriminate, 15:45
26 it is not taking all of the information and ingesting
27 it onto your servers. I think they would be doing a
28 *disservice* to what's involved if they said this isn't
29 significant. It is. And what they try to do is

1 justify the significance of it.

2
3 And those are very powerful, uncontradicted witness
4 statements as to (A) how they operate and why they *do*
5 use means for limiting and safeguarding the task in 15:46
6 which they're engaged and, in particular, the extent of
7 the interference with data and limiting the amount of
8 data that is ultimately collected by using the
9 filtering processes. Obviously what's relevant of
10 particular concern in this case is the process used in 15:46
11 the US. And Mr. DeLong gives detail in relation to
12 that process, whereas Prof. Clarke is dealing with it
13 more on an overview and emphasising its importance.
14 But he does acknowledge that this is significant and
15 nobody is down down-playing that. 15:46

16
17 But the one thing that *does* emerge from the
18 uncontradicted evidence is the relevance of the
19 safeguards and the limitations. And the description
20 given by Mr. DeLong, which of course is consistent with 15:46
21 that in the PCLOB report, shows that it is very much a
22 targeted and focused interference with data, it's not
23 indiscriminate, it's not mass surveillance in any
24 sense. And the rules and regulations that are now in
25 place are designed to maintain that. 15:47

26
27 That, of course, is the approach taken by the
28 Commission, that had access obviously not to
29 Mr. DeLong, but had access to the people in the US and

1 to the PCLOB report, and they took the view that this
2 was a legitimate objective and that the intrusion went
3 no further than was strictly necessary.
4

5 But of course this court isn't being asked to decide 15:47
6 that. That would be an assessment of the necessity
7 which would be very difficult for *any* court to do and a
8 very significant margin of discretion is, in any event,
9 given to countries in that area and to tell a country
10 it can't do a particular type of surveillance that it 15:48
11 says is necessary for all these important objectives
12 would be a very serious matter. But it points out that
13 this is the task that needs to be *undertaken* before you
14 *conclude* that the law of the other Member State is not
15 *adequate*. Because the adequacy is judged from the 15:48
16 perspective of the peculiar aspect and special aspect
17 of national security. It's treated in a different way,
18 it is accepted that it's an interference with the
19 rights, and, therefore, you apply the strictly
20 necessary analysis. 15:48
21

22 As I say, that is wholly missing from what was done in
23 this case and you cannot possibly reach a conclusion as
24 to adequacy without conducting that.
25

26 Paragraph 75 of Schrems which I did refer to - it's not
27 necessary to open it - talks about examining, and I
28 quote:
29

1 *"Accordingly, when examining the level of protection*
2 *afforded by a third country, the Commission is obliged*
3 *to assess the content of the applicable rules in that*
4 *country resulting from its domestic law or*
5 *international commitments and the practice designed to*
6 *ensure compliance with those rules, since it must,*
7 *under Article 25(2)... take account of all the*
8 *circumstances surrounding."*

9
10 I did draw your attention to 25(2) when you asked me 15:49
11 that this morning. The rules and the practice are
12 vital. Of course, many of the rules identified by
13 Mr. DeLong are legislative. All of these oversight
14 bodies are grounded on statute. And then the more
15 specific detailed rules are what one would expect in 15:49
16 any situation - administrative rules that have a legal
17 effect, because they have legal consequences. But
18 they're not statutes obviously, and that's recognised
19 in the ECHR as being rules and regulations that can be
20 taken into account. And for very obvious reasons, 15:50
21 while there is provision for targeting and minimisation
22 and for all forms of certification and oversight in
23 directives, the *detail* cannot be disclosed, because
24 that would negate the very purpose of the whole
25 national security regime and there is no requirement to 15:50
26 do that.

27
28 So the Commission looked at all of those matters, took
29 all of those matters into account. And we say you

1 couldn't have *any* doubts about the adequacy of the
2 regime without conducting such an exercise, which was
3 never conducted here.

4
5 But it also emphasises another matter that is of 15:50
6 significance and I just want to spend a short period of
7 time on it - it's connected with this, and it won't be
8 long - and that is you have to have a holistic
9 approach. Nobody, in *any* of the cases -- the CJEU, in
10 any of these cases, just picked out the remedies and 15:51
11 said 'Let's look at what the remedies are here and see
12 whether they're adequate'. They looked at the contours
13 of the national security issues, the access which was
14 had to the data, looked for limitations and safeguards
15 and assessed strict necessity on that basis. That is 15:51
16 precisely what the European Commission did.

17
18 And of course, it's done not just because national
19 security has to be treated in that way given its
20 particular and peculiar status, but also because 15:51
21 national security involves necessarily a limitation of
22 the rights. And when you're looking at the limitation
23 of the rights, you must assess them in terms of what is
24 the extent of those, or what is the extent of those
25 limitations, what protections and safeguards are there 15:52
26 to ensure that the limitations go no further than is
27 strictly necessary? They recognise, as does the court
28 in Schrems, that the *remedies* can be limited. And the
29 court, remember, in Schrems talked about the essence of

1 the right being implicated or being denied where there
2 was no possibility for an individual to pursue legal
3 grounds. In paragraph 96:

4
5 *"Likewise, legislation not providing for any*
6 *possibility for an individual to pursue legal remedies*
7 *in order to have access."*

8
9 So it recognises that there will be limitations on
10 those remedies. And Article 47 itself recognises that. 15:53

11
12 So you can't start with the remedies and say there are
13 limitations and say that *because* there are limitations,
14 that means they're not adequate. Because (A) it begs
15 the question as to what you're comparing it to, but 15:53
16 (B), in national security, by definition there are
17 going to be limitations on the remedies. That matter
18 was not addressed at all by the DPC. And if you go to
19 the Charter, which is in divide one of the first book
20 of EU materials, that is apparent from an examination 15:53
21 of 52 in particular. Firstly, you will see Article 47
22 is:

23
24 *"Everyone whose rights and freedoms guaranteed by the*
25 *law of the Union are violated has the right to an*
26 *effective remedy before a tribunal in compliance with*
27 *the conditions laid down in this Article."*

28
29 And *"Everyone is entitled to a fair and public*

1 *hearing... [before an] impartial tribunal", that's a*
2 *separate matter. But it's the rights and freedoms*
3 *guaranteed by the laws of the Union. And Article 52*
4 *tells us that limitations can exist on those. So:*

5
6 *"Any limitation on the exercise of the rights and*
7 *freedoms recognised by this Charter must be provided*
8 *for by law and respect the essence of those rights and*
9 *freedoms. Subject to the principle of proportionality,*
10 *limitations may be made only if they are necessary and*
11 *genuinely meet objectives of general interest*
12 *recognised by the Union or the need to protect the*
13 *rights and freedoms of others."*

14
15 So the possibility of limitations on the exercise of 15:55
16 all rights, which of course includes 47 and 7 and 8, is
17 provided for in 52; you must respect the essence of the
18 right, you mustn't negate the essence of the right.
19 And subject to that, of course, there is an assessment
20 with regard to necessity and proportionality. 15:55

21
22 So that's not much different from the approach of the
23 ECHR. But taken at its height from the DPC's point of
24 view, if you apply the Charter, that's the sort of
25 analysis you need to engage in - that's what was 15:55
26 engaged in in Schrems, Digital Rights and in Watson -
27 and you make the assessment on that basis. That is the
28 assessment, as I said, that the Commission has done,
29 but not the DPC. And therefore, any assessment of

1 adequacy is, for that reason, in and of itself invalid.

2
3 I do want to refer you then to -- or before moving to
4 that, just to say this; remedies, as we say in our
5 written submissions, are an accessory right. They are 15:56
6 a remedy where there is a breach of the law. If the
7 law -- or where you want to assert a breach of the law.
8 where the law is, or the legal rights are limited, as
9 they are in the area of national security, to assess
10 and evaluate the remedies, you must, of course, 15:56
11 evaluate substantive law in the first place and you
12 must look at the limitations on that law and in that
13 overall context make the judgment.

14
15 If you go, Judge, to the Directive for one moment, this 15:56
16 ties in with the question of Article 26, which I will
17 be coming to shortly and the difference between 25 and
18 26. But the Directive is in divide four of that first
19 book, that same book. And the adequacy of the level of
20 protection -- or, sorry, the principles in Article 25 15:57
21 which underpin this, 25(1):

22
23 *"The Member States shall provide that the transfer to a*
24 *third country of personal data which are undergoing*
25 *processing or are intended for processing after*
26 *transfer may take place only if, without prejudice to*
27 *compliance with the national provisions adopted*
28 *pursuant to the other provisions of this Directive" -*
29 again the reference to the national provisions - *"the*

1 *third country in question ensures an adequate level of*
2 *protection."*

3
4 Then 25(2), to which you've been referred, tells you
5 about how that adequacy is to be protected. And 15:57
6 Article 6 provides for the Commission assessing that
7 adequacy in the context of Article 31(2), it's a very
8 formal procedure. And if you go to Article 31(2) you
9 see the procedure by which it makes its decision.

10
11
12 Then if you just go back to Article 29 you see the
13 Working Party. And Mr. Collins opened that to you and
14 what *its* role is. And you'll see in Article 29(2):

15 *"The Working Party shall be composed of a* 15:58
16 *representative of the supervisory authority or*
17 *authorities designated by each Member State and of a*
18 *representative of the authority or authorities*
19 *established"* by the government institutions and other
20 bodies. 15:58

21
22 So the DPC was part of that. The adequacy must be done
23 in accordance with the case law, it must be done in
24 accordance with a particular procedure and while she is
25 entitled to question that in the context of a decision, 15:59
26 it must be in that context and there isn't room for her
27 to conduct the truncated exercise which she conducted
28 which *doesn't* recognise the special position of
29 national security, *even* within the context of the

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Charter.

So I do want briefly tomorrow to just draw your attention to the Council of Europe report which I just couldn't lay my hands on just now to update you. I've taken a little bit longer than I thought going through that evidence. I will try and finish by lunchtime - the other issues are net and a lot of what I have said here, I'll be able to apply them to the other issues and then Ms. Hyland will start. I suspect she won't finish tomorrow, she'll go into the Thursday, so there is a bit of slippage, Judge, for which I apologise.

15:59

15:59

MS. JUSTICE COSTELLO: And then, Mr. McCullough, I think you were about a day, is that right?

MR. MCCULLOUGH: Yes, Judge. Hopefully less, Judge, but that's what I should allow.

15:59

MS. JUSTICE COSTELLO: Yes. So, Mr. Murray, so we look like you might be up on the Friday, is that right?

MR. MURRAY: That sounds like it, Judge, yes.

Mr. Collins was hoping to be back here on Friday, so we'll divide the reply between the two of us, Judge. But I think it's likely to take -- I have to hear the remainder of what Mr. Gallagher and Ms. Hyland will say, but it will take, I think, between a half a day and a day.

16:00

16:00

MS. JUSTICE COSTELLO: Yes. And again I'm not cutting anybody short, but I have another commitment on Tuesday of next week. So...

MR. GALLAGHER: Okay.

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MS. JUSTICE COSTELLO: ... if we need to run over, it would have to be resumed *after* that other commitment.

MR. MURRAY: Very good.

MR. GALLAGHER: Thank you, Judge.

MR. MURRAY: Thank you, Judge.

16:00

THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 8TH MARCH AT 11:00

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