

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 FRIDAY, 10th MARCH 2017 - DAY 19

19

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1 THE HEARING RESUMED AS FOLLOWS ON FRIDAY, 10TH MARCH
2 2017

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

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

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

9
10 **MR. MCCULLOUGH:** May it please the court. Judge, there 11:04
11 are three broad areas with a number of subareas beneath
12 them that I want to cover today. First, I want to
13 complete the submissions that I was making yesterday in
14 relation to what I might call structure.

15 **MS. JUSTICE COSTELLO:** Mm hmm. 11:05

16 **MR. MCCULLOUGH:** That's to say what is the proper
17 structure by which the court knows the questions to ask
18 itself in this case.

19
20 And then, secondly, I want to revert very briefly to 11:05
21 some questions the court raised yesterday, I think
22 they'll fit in naturally then; and then, thirdly,
23 I want to turn to the substance of EU law and US law
24 and point out to the court how they are incompatible
25 with each other, all by reference, Judge, to what is 11:05
26 set out in the speaking note that the court has seen.

27 **MS. JUSTICE COSTELLO:** Hmm.

28 **MR. MCCULLOUGH:** I had dealt yesterday, Judge, with the
29 question of the State security exemption, if I may so

1 call it that, from the Treaty and I had submitted to
2 the court that, at least for the purpose of this case,
3 it is accepted that at EU level a Member State can in
4 its law infringe the data privacy rights of an EU
5 citizen only insofar as it is strictly necessary to do 11:06
6 so, whether that necessity is assessed by reference to
7 natural security or the concerns of fighting crime or
8 whatever, that's an overall principle. And I'll come
9 back, Judge, in just a moment at the completion of my
10 submissions on the structure as to the effect that that 11:06
11 has on this case.

12
13 I want to deal, Judge, with the material then that's at
14 paragraph 24 onwards in this speaking note dealing with
15 Member States as a comparator. The court will recall 11:06
16 the submission made by Facebook which is to say that,
17 assuming for a moment that there is some principle of
18 equivalence, assuming that there is some necessity on
19 the part of the US in its laws to abide by EU standards
20 before data transfer is permitted, well then the proper 11:07
21 comparator, comparator is the Facebook phrase, is the
22 between EU laws on the one hand and US laws on the
23 other hand, rather it's between the laws of the Member
24 States on the one hand and US law on the other hand.

25 11:07
26 I say that's wrong, Judge, for the reasons that are
27 very briefly set out in paragraphs 24 and 25. It's as
28 simple as this, Judge: That EU citizens are entitled
29 to the rights for the Directive provides as a matter of

1 EU law and they are entitled to the rights for which
2 the Charter provides.

3 **MS. JUSTICE COSTELLO:** And Mr. Gallagher submitted that
4 both the Directive and the Charter make exceptions for
5 national security and that, therefore, if you like, 11:07
6 there isn't an equivalence at EU level in relation to
7 national security with which to compare US security, if
8 I have summarised the argument correctly.

9 **MR. MCCULLOUGH:** That's what he makes, I suppose, as
10 his base case, Judge, but I think he accepts that, for 11:07
11 the purpose of the issue before this court, the Court
12 of Justice has made it clear that measures can be,
13 measures that infringe upon data privacy rights can be
14 justified only insofar as they are strictly necessary,
15 proportionate and strictly necessary, to the interests 11:08
16 of national security. So while he does maintain the
17 idea that he will be able to persuade I think the Court
18 of Justice, if the matter ever gets there, that the
19 entire area of national security is excluded from
20 consideration of this court or the Court of Justice, 11:08
21 I think for the moment, Judge, we can operate on the
22 assumption that what I say is correct.

23
24 Then, Judge, if there is a comparison to be made,
25 Judge, well then as a matter of EU law, and therefore 11:08
26 as a matter of Irish law, the EU citizens, citizens of
27 Ireland, citizens of every other Member State are
28 entitled to the rights for which the Directive and the
29 Charter provides. And it doesn't matter that their

1 individual national Member States in their legal
2 systems may fail in that regard, no doubt there are
3 deficiencies in the laws of the Member States in
4 various ways, but the fact that, for instance, the UK
5 or Denmark or Ireland may in its laws or their laws 11:09
6 fail to meet the standards provided by the Directive
7 and the Charter doesn't alter the nature of the rights
8 which EU citizens enjoy as a matter of EU law.

9
10 And it follows in my submission, Judge, that, when 11:09
11 there's a comparison to be made, it follows, therefore,
12 that the proper comparison is the comparison between EU
13 law on the one hand and US law on the other hand. It
14 is certainly the case, Judge, that's the comparison
15 made in Schrems. 11:09

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

17 **MR. MCCULLOUGH:** And that's the case from which the
18 court can take its best guidance.

19
20 I want to address then briefly, Judge, and this is 11:09
21 under the heading (e), paragraphs 26 and 27.

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

23 **MR. MCCULLOUGH:** The nature of the decision in Schrems,
24 and to make this submission, Judge: That the court can
25 see clearly from Schrems there's this comparative test, 11:10
26 this test of essential equivalence.

27 **MS. JUSTICE COSTELLO:** Hmm.

28 **MR. MCCULLOUGH:** If the court looks at footnote 27 you
29 will see the reference to paragraph 73 of Schrems in

1 which the court says:

2
3 *"The word adequate in Article 25(6) of the Directive*
4 *admittedly signifies the third country cannot be*
5 *required to ensure a level of protection identical to* 11:10
6 *that guaranteed in the EU legal order, however, as the*
7 *Advocate General has observed in point 141 of his*
8 *Opinion, the term 'adequate level of protection' must*
9 *be understood as requiring the third country in fact to*
10 *ensure, by reason of its domestic law or its* 11:10
11 *international commitments, a level of protection of*
12 *fundamental rights and freedoms that is essentially*
13 *equivalent to that guaranteed within the European Union*
14 *by virtue of Directive 95/46 read in the light of the*
15 *Charter."* 11:10

16
17 So that's, if you like, the test of essential
18 equivalence. I would just ask the court to note, of
19 course, that it's equivalent with the protection
20 guaranteed in the EU, Judge, and that means I think the 11:10
21 EU legal order.

22
23 So when you read though Schrems, Judge, it's evident
24 from subsequent parts of the judgment, particularly
25 paragraphs 92 to 94, that there is a broader test also 11:11
26 that's an absolute test; that there must be respect for
27 the Charter rights, in particular Articles 7, 8 and 47.

28
29 There's a reference, Judge, in the footnote to

1 paragraphs 92 to 94. The quote that's there is in fact
2 part of paragraph 92 and part of paragraph 94, so the
3 court will need to look at it when it comes to consider
4 the judgment, but the underlying parts, Judge, of those
5 paragraphs read as follows: 11:11

6
7 *"92. Furthermore and above all, protection of the*
8 *fundamental right to respect for private life at EU*
9 *level requires derogations and limitations in relation*
10 *to the protection of personal data to apply only in so* 11:11
11 *far as strictly necessary.*

12
13 *94. In particular, legislation permitting the public*
14 *authorities to have access on a generalised basis to*
15 *the content of electronic communications must be* 11:11
16 *regarded as compromising the essence of the fundamental*
17 *right to respect for private life, as guaranteed by*
18 *Article 7 of the Charter."*

19
20 And that's a feature of Schrems, Judge, that ultimately 11:12
21 it sets out the requirements of EU law by reference to
22 the Charter.

23
24 Now, in one sense that's only a reflection of the
25 principle of essential equivalence for this reason: 11:12
26 That EU citizens are entitled in the EU legal order to
27 the protections, not just of the Directive, but also
28 the protections of the Charter. And the principle of
29 essential equivalence, if it's put in place, Judge, if

1 it's operative here, means that data transfers to the
2 US can't take place unless there is that essential
3 equivalence, that similar level of protection.
4

5 But I suppose the point about the Charter is that that 11:12
6 requirement must stand as a principle of the EU legal
7 order apart from the Directive. Even if the Directive
8 was never there, it would still, in my respectful
9 submission, be a requirement of EU law at Charter level
10 that the data of EU citizens couldn't be transferred to 11:13
11 the US unless processing in the US was going to be
12 carried out in a manner compatible with the Charter.
13 So that's a broader but related principle, and I think
14 that follows from a proper reading of Schrems.

15 **MS. JUSTICE COSTELLO:** Am I right in thinking that in 11:13
16 Schrems the court's attention wasn't addressed to any
17 sort of arguments along the lines of the European Court
18 of Human Rights type jurisprudence in relation to
19 what's permissible in relation to national security?
20 You know, it would appear from the case law outlined by 11:13
21 Ms. Hyland that, let's say, the tolerance of
22 limitations on data privacy rights of EU citizens where
23 there is national security conducted by Member States
24 would appear to be greater than the tolerance indicated
25 in Schrems where there is surveillance of EU citizens' 11:14
26 Data by US government surveillance?

27 **MR. MCCULLOUGH:** well, I don't know if that's, it is
28 certainly true, Judge --

29 **MS. JUSTICE COSTELLO:** I mean I see what you are saying

1 there about the test of essential equivalence, strictly
2 necessary, but the Charter cases - sorry, the
3 Convention cases that Ms. Hyland was outlining, were
4 they applying that test as well?

5 **MR. MCCULLOUGH:** well they are, Judge, is the first 11:14
6 answer, yes. Under the -- well, three points, Judge.
7 First, it's true to say that the Convention cases
8 aren't referred to in any great detail in Schrems. But
9 it is nevertheless also correct to say, Judge, that the
10 same principles apply. I would just ask the court to 11:14
11 look at Schrems, paragraph 92, it's at the European
12 book of authorities, Book 3 Tab 36A.

13 **MS. JUSTICE COSTELLO:** Yes. Which paragraph again?

14 **MR. MCCULLOUGH:** Paragraph 92, Judge: "*Furthermore and*
15 *above all, protection of the fundamental right to* 11:15
16 *respect.*"

17
18 I am sorry, Judge, paragraph 92. I will have to come
19 back to paragraph 92 in a different context in a
20 moment, but it provides as follows. 11:15

21 **MS. JUSTICE COSTELLO:** Yes, I have it, yes.

22 **MR. MCCULLOUGH:** "*Furthermore and above all, protection*
23 *of the fundamental right to respect for private life at*
24 *EU level requires derogations and limitations in*
25 *relation to the protection of personal data to apply* 11:15
26 *only insofar as strictly necessary.*"

27
28 Now, there's no difference, Judge, in this regard
29 between the Charter and the Convention. The same

1 principles apply in Convention cases when they are
2 interpreting Article 8, as it is in the Convention.
3 Limitations on the rights for which Article 8 of the
4 Convention provides are permissible but they must be
5 proportionate restrictions. It is certainly true that 11:16
6 in the Convention cases there's a discussion but always
7 a fact-specific discussion of whether particular
8 restrictions meet that test or not, and that's of
9 course always a discussion that can be had, but it
10 doesn't alter, I think, Judge, the fact that the basic 11:16
11 principle is the same and recognised to be the same
12 between the two.

13
14 So there isn't, I think - I'll come back in due course,
15 if I may, to some of the meat of what Ms. Hyland said 11:16
16 about the Convention cases - but, at the level of
17 principle, Judge, there's no distinction between the
18 Convention and the Charter, nor should there be, and
19 I'll come back to why there isn't in fact in due course
20 in the EU legal order any proper distinction between 11:16
21 them.

22
23 Can I just turn then, Judge, to paragraph 28 onwards of
24 the speaking note.

25 **MS. JUSTICE COSTELLO:** Yes. 11:17

26 **MR. MCCULLOUGH:** And that's dealing with this question
27 of essential equivalence. I have submitted to the
28 court that the requirement of essential equivalence is
29 part only of the picture but an important part.

1 The court heard a lot of submissions, Judge, from
2 Mr. Cush, Mr. Collins and Mr. Gallagher all reflecting
3 on what they say is a distinction between the use in
4 Article 25 of the phrase "*adequate level of protection*"
5 and the phrase in Article 26 which refers to "*standard* 11:17
6 *contractual clauses providing adequate safeguards*".
7

8 And the summary of their argument in that regard,
9 Judge, I think is this: Schrems read into Article 25 a
10 requirement of essential equivalence, but it did so on 11:18
11 the basis of the phrase "*adequate level of protection*"
12 in Article 25. Article 26 uses a different phrase
13 "*adequate safeguards*" and the principle of essential
14 equivalence therefore can't be read into that because
15 they say it's a different thing. Could I just ask the 11:18
16 court to look at the relevant part of the Directive,
17 it's at EU Book of Authorities 1 Tab 4.
18

19 So Article 25(1), Judge, relates to the adequate level
20 of protection. 11:19

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

22 **MR. MCCULLOUGH:** The court can see it in the final
23 words of Article 25. And Article 26 derogations
24 provides:
25

26 "*By way of derogation from Article 25, and save where*
27 *otherwise provided by domestic law governing particular*
28 *cases, Member States shall provide that a transfer or a*
29 *set of transfers of personal data to a third country*
11:19

1 *which does not ensure an adequate level of protection*
2 *within the meaning of Article 25(2) may take place" on*
3 various conditions that are then set out.

4
5 And those at a basic level, Judge, there's no reason to 11:19
6 interpret the word "*adequate*" as meaning a different
7 thing in articles that follow one after the other. It
8 was said to you many times, Judge, that 'well
9 protections and safeguards are different words'. A
10 notable absence from that argument was any explanation 11:19
11 of the different quality of those standards, what is it
12 do Facebook say, do BSA say, so what is it that is
13 required by Article 26(2) that is less or what's the
14 content of that? And the court ultimately hasn't heard
15 anything on that. 11:20

16 **MS. JUSTICE COSTELLO:** And what do you say to
17 Mr. Cush's argument that all the languages have equal
18 standing in terms of how - with the Directives?

19 **MR. MCCULLOUGH:** Yes.

20 **MS. JUSTICE COSTELLO:** And that it's clear from the 11:20
21 German, French and Spanish versions, which I admit
22 I have not yet delved into, have different wording
23 between Article 25 and 26, so therefore it's wrong to
24 equate the "*adequate*" in 26 with the "*adequate*" in 25
25 because of the other languages, they are different 11:20
26 words?

27 **MR. MCCULLOUGH:** Yes. well, I think the reason that
28 they have different words, Judge, is because of the
29 slightly different functions that they are fulfilling.

1 Article 25 relates to an adequate level of protection,
2 Article 26, when it refers to safeguards, refers to
3 steps, measures, barriers that are put in place, but
4 the purpose for which they are put in place is to
5 achieve the same adequate level of protection for which 11:21
6 Article 25 provides.

7
8 I think the most important reflection is this, Judge:
9 That all of this has to be read in the light of the
10 Charter. 11:21

11 **MS. JUSTICE COSTELLO:** Just so I am understanding, you
12 are saying that if we take away adjectives, that the
13 safeguards must provide essentially equivalent to what
14 the protections are in Article 25?

15 **MR. McCULLOUGH:** Yes, Judge, although there is a subtle 11:21
16 distinction in that regard between Article 26(1) and
17 Article 26(2) which I'll come to, Judge.

18
19 Can I ask the court to turn back to Schrems, Judge,
20 which I think is helpful in explaining this. We say 11:22
21 the Directive has to be read in the light of the
22 Charter.

23 **MS. JUSTICE COSTELLO:** which paragraph are we now?

24 **MR. McCULLOUGH:** 36A, it's paragraph 72, Judge.

25 **MS. JUSTICE COSTELLO:** 72, thank you. I have that. 11:22

26 **MR. McCULLOUGH:** So 72, Judge, refers to Article 25(6).

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

28 **MR. McCULLOUGH:** Then 73 continues, and I think this is
29 the important, Judge, in looking at the overall context

1 of the Directive: *"The word adequate in Article 25(6)*
2 *admittedly signifies a third country."* Sorry, we
3 opened that before, Judge. Then it continues at the
4 foot of the page.

5 **MS. JUSTICE COSTELLO:** Yes. 11:22

6 **MR. MCCULLOUGH:** *"If there were no such requirement,*
7 *the objective referred to in the previous paragraph of*
8 *the present judgment would be disregarded.*
9 *Furthermore, the high level of protection guaranteed by*
10 *Directive 95/46 read in the light of the Charter needs* 11:22
11 *to be circumvented by transfers of personal data from*
12 *the Union to third countries for the purpose of being*
13 *processed in those countries."*

14
15 The objective referred to in the previous paragraph, 11:23
16 Judge, is in paragraph 72: *"Article 25(6) implements*
17 *the express obligation laid down in Article 8(1) of the*
18 *Charter to protect personal data and, as the Advocate*
19 *General has observed in point 139 of his Opinion, is*
20 *intended to ensure that the high level of that* 11:23
21 *protection continues where personal data is transferred*
22 *to a third country."*

23
24 Now everything has to be read in the light of the
25 Charter, Judge, and these comments are as true of 11:23
26 Article 26 as they are of Article 25. The proper
27 interpretation of the Directive must in every
28 circumstances be such as to ensure that the high level
29 of protection for which EU law provides is continued

1 where personal data is transferred to a third country.

2
3 And, seen in that light, Judge, it's hard to see how
4 one can interpret Article 26 in some way as permitting
5 that test to be failed when in fact it's the point of 11:24
6 the Directive and, if you like, the obligatory point of
7 the Directive under the Charter.

8
9 Just to refer the court to one more footnote, Judge,
10 from our paragraph 30, it's what the Advocate General 11:24
11 said in the Schrems case at footnote 30. It's just as
12 easy, I think, to look at it in the footnote, Judge,
13 where the Advocate General said:

14
15 *"The fact that the commission has adopted an adequacy 11:24*
16 *decision cannot have the effect of reducing the*
17 *protection of citizens of the Union with regard to the*
18 *processing of their data when that data is transferred*
19 *to a third country by comparison with the level of*
20 *protection which those persons would enjoy if their*
21 *data were processed within the European Union. The*
22 *national supervisory authorities must therefore be in a*
23 *position to intervene and to exercise their powers with*
24 *respect to transfers of data to third countries covered*
25 *by an adequacy decision. Were that not so, citizens of*
26 *the Union would be less well protected than they would*
27 *be if their data were processed within the European*
28 *Union."*

1 And he is talking about an Adequacy Decision, Judge,
2 but the point is the same; that the purpose of the
3 Directive, seen overall, is to ensure that the data of
4 EU citizens is as well protected when transferred to
5 the US as it is before its transfer. And, if that's 11:25
6 so, Judge, well then in my respectful submission it's
7 impossible to see how Article 26 can or should be
8 interpreted to provide for some lesser level of
9 protection.

10
11 I did say, Judge, that there's a distinction, if you
12 like, in that regard between Article 26(1) and
13 Article 26(2) and I'll just turn to that, if I may,
14 Judge.

15 **MS. JUSTICE COSTELLO:** Mm hmm. 11:25

16 **MR. MCCULLOUGH:** As I say the basic purpose of
17 Article 25, as the court can see, is to prohibit
18 transfers where there's no adequate level of
19 protection.

20
21 If you look at Article 26(1), Judge, you can see why
22 those derogations permit transfer. The point is being
23 made to you that these derogations, for instance, a
24 derogation where a data transfer may take place "*on*
25 *condition that the data subject is given its consent* 11:26
26 *unambiguously to the proposed transfer*" is not one that
27 necessarily ensures that there is the adequate level of
28 protection for which Article 25 provides.

29 **MS. JUSTICE COSTELLO:** There is a waiver.

1 **MR. MCCULLOUGH:** But that's because they are all
2 waivers, Judge. And one can see why if a person
3 doesn't want the adequate level of protection or is
4 willing to waive it, well then that should be a
5 legitimate derogation. So one can see why fits in the 11:26
6 structure. Article 26(2), Judge, though, the purpose
7 of that, I think it's clear, is to expand EU
8 protections to a third country but in this case to do
9 so by way of the standard contractual clauses.

10
11 And those clauses are clauses, Judge, between the data
12 *exporter* and the data *importer*. They are quite
13 different from what's contemplated in 26(1). And it
14 doesn't make sense, Judge, it's not in accordance with
15 what the Court of Justice said in Schrems and the 11:27
16 Advocate General said in Schrems to think that there
17 can be a lesser measure of protection provided for EU
18 citizens by virtue of a contract between two parties,
19 one of whom is not the data subject. So why does an EU
20 citizen get less protection than that to which he is 11:27
21 entitled in the EU simply because two other parties,
22 who are party to a contract transferring data across
23 the Atlantic, agree for a different level of
24 protection? And that, with respect, Judge, couldn't be
25 correct. It's different from Article 26(1) and the 11:28
26 purpose of Article 26(2), when the court reads it, in
27 my respectful submission, can only be this: To provide
28 that the standard contractual clauses provide the same
29 level of protection pursuant to contract that is

1 obtained for EU citizens pursuant to law.

2
3 It's, if you like, the analogue or the flip side of the
4 coin of Article 25. Article 25 is where the Commission
5 certifies that a particular country in its laws 11:28
6 provides an adequate level of protection, Article 26(2)
7 kicks in when a country doesn't provide that level of
8 protection by its laws but those can be overcome by a
9 contract.

10 **MS. JUSTICE COSTELLO:** So you accept that the SCCs can 11:29
11 operate to meet the required level of protection?

12 **MR. MCCULLOUGH:** Yes, they can. And the final point
13 I want to make about the structure of all this, Judge,
14 is to reflect back to Article 4 of the SCC decisions
15 which supports the point I'm making. 11:29

16
17 You remember that the structure of Article 4, Judge, is
18 as follows: That where requirements are imposed which,
19 to summarise and to paraphrase, have the effect that
20 protections for which, protections to which EU data 11:29
21 subjects are entitled are not in fact capable of being
22 met.

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

24 **MR. MCCULLOUGH:** Notwithstanding the contractual
25 clauses, well then the DPC or -- 11:29

26 **MS. JUSTICE COSTELLO:** That's where the contract lets
27 you down, I'll put it very colloquially.

28 **MR. MCCULLOUGH:** Exactly, Judge, exactly. It's the
29 text of Article 4 that supports this interpretation.

1 Because the text of Article 4, I think, makes it clear,
2 Judge, that the order forbidding the transfer of data
3 is to be made. It's the old Article 4, I should say of
4 course. The text of the old Article 4 makes it clear
5 that the circumstances in which that order is to be 11:30
6 made is when there's a failure to meet the adequate
7 level of protection. And all of that feeds into the
8 idea, Judge, which must be correct in my respectful
9 submission, that the test of effective equivalence,
10 which is found in Article 25 by the Court of Justice, 11:30
11 must in logic also apply to an SCC decision under
12 Article 26(2).

13 **MS. JUSTICE COSTELLO:** So to that extent do you
14 disagree with the Commissioner in her Draft Decision
15 where she sort of says 'the SCCs don't remedy the 11:30
16 problems in the US and how could they', I have
17 forgotten what paragraph that is in the Draft Decision.
18 She deals with the SCCs in a less fulsome way than she
19 does US law.

20 **MR. MCCULLOUGH:** Well, it's for that reason I say, 11:31
21 Judge, that she should have exercised have Article 4.

22 **MS. JUSTICE COSTELLO:** And I appreciate that you are
23 saying if Article 4 weren't there you would have an
24 entirely different case to make, I get that.

25 **MR. MCCULLOUGH:** Yes. Then, Judge, the final point 11:31
26 I want to make about this is that it is our submission
27 that there shouldn't be a reference to the Court of
28 Justice, as the court the aware. But if there is a
29 reference to the Court of Justice, I'll come back at

1 the end to suggest that we should all have an
2 opportunity to agitate the nature of the questions to
3 be asked with the court but one of those, I think,
4 would have to be a question about Article 25 and 26
5 effective equivalence but also Article 4, but I'll come 11:31
6 back to that at the end, Judge.

7
8 Moving on to paragraph 33, Judge, and the following
9 paragraphs briefly. This is just a brief consideration
10 of what processing means and I can summarise this very 11:31
11 quickly, Judge. The court has seen how processing is
12 defined in the Directive and there's a reference in
13 footnote 36 to Article 2(b) which sets out that
14 definition.

15 **MS. JUSTICE COSTELLO:** Mm hmm. 11:31

16 **MR. MCCULLOUGH:** And the only point I want to make,
17 Judge, is that processing includes making data
18 available, and the court will recall that from
19 Mr. Collins' opening submission.

20 **MS. JUSTICE COSTELLO:** Mm hmm. I just wanted to 11:32
21 clarify, I had some notes myself here.

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

23 **MS. JUSTICE COSTELLO:** Is your objection to the
24 processing in this that we'll say occurs as a result of
25 Mr. Schrems' Facebook data -- 11:32

26 **MR. MCCULLOUGH:** Yes.

27 **MS. JUSTICE COSTELLO:** -- that when it arrives in the
28 US, as I understood Ms. Barrington said that your
29 complaint really didn't relate to when it was in

1 transit, that it only related to when it landed on the
2 shores in Facebook Inc.'s hands, if I can put it that
3 way; what I am asking you, I suppose, is the complaint
4 not concerned with what we discussed with Transit
5 Authority under 12333. 11:32

6 **MR. MCCULLOUGH:** It is.

7 **MS. JUSTICE COSTELLO:** That's the transiting stuff
8 which wasn't meant to be going to the US but just was
9 passing through, or is the complaint concerned with
10 interception *before* it reaches the US under 12333? 11:32

11 **MR. MCCULLOUGH:** Well, it is concerned, I have to say
12 it's primarily concerned with section 702, 12333 is
13 relevant also. That's one part of the answer to the
14 question.

15 **MS. JUSTICE COSTELLO:** But not the Transit Authority as 11:33
16 far as I understand? It was more the interception and
17 the undersea cables outside the US before it arrives;
18 is that right?

19 **MR. MCCULLOUGH:** Yes, Judge, yes. But 12333 has a
20 relevance, and I'll come to it in just a moment, but 11:33
21 both of those are relevant. Section 702 is clearly the
22 most relevant part of what the court is considering,
23 12333 has an application also. It is part of the
24 system of US law whereby the data, private data of EU
25 subjects is intercepted, and that's clearly so on the 11:33
26 evidence. That's what the Transit Authority in fact
27 permits the NSA to do.

28
29 But I suppose a separate part of the question, Judge,

1 is when does the processing to which I object kick in.
2 And that's a series of acts of processing here, Judge,
3 the transfer itself, the importation, the making
4 available. I suppose the basic rule of Article 25 and
5 the subsequent articles is there can't be a transfer in 11:34
6 the first place unless US law is going to provide
7 essential equivalence and respect for the Charter.
8

9 So I don't think it's correct to say, Judge, that
10 I object only to the making available when it happens, 11:34
11 Judge. I say it is a more subtle question than that.
12 There can't be the first act of processing, that's to
13 transfer, unless there is a guarantee in US law that
14 the rights of EU citizens would be protected as if the
15 data had never left. 11:34
16

17 Just looking, Judge, at what happens when it does reach
18 the US, and that's what we address at paragraph 36,
19 Judge. It's clear, Judge, just looking at section 702,
20 section 702 is the main authority. The language in 11:34
21 section 702, Judge, and I'll just remind the court of
22 where that's to be found.

23 **MS. JUSTICE COSTELLO:** well, if you want to put it on
24 receiving or broadcasting, I have it here.

25 **MR. MCCULLOUGH:** I'll try and do that, Judge. 11:35

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

27 **MR. MCCULLOUGH:** It's BO 3, Judge.

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

29 **MR. MCCULLOUGH:** I'll have to get my reference, just

1 give me one second, Judge. Section 1881.

2 **MS. JUSTICE COSTELLO:** That's what I am receiving,
3 somebody is broadcasting it to me anyway.

4 **MR. MCCULLOUGH:** Sorry, Judge.

5 **MS. JUSTICE COSTELLO:** No, no. 11:36

6 **MR. MCCULLOUGH:** It's probably best to turn that off
7 just for a moment, and I'll just have to find section
8 1881, Judge.

9 **MS. JUSTICE COSTELLO:** well, it appears to be on page
10 50 of 66. 11:36

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

12 **MS. JUSTICE COSTELLO:** I think.

13 **MR. MCCULLOUGH:** Sorry, Judge, if you can look at
14 section 1881h (i) that's under the heading "*Directives*
15 *and Judicial Review of Directives*". 11:36

16 **MS. JUSTICE COSTELLO:** I think I'm on receiving mode so
17 I'm just waiting for those who are more skilled at
18 doing it than I am. Sometimes I think the books are
19 better. I don't want to be accused of being a complete
20 Luddite, I will try. 11:36

21 **MR. MCCULLOUGH:** Sorry, I have to be in something else,
22 Judge, I just realised.

23 **MR. MURRAY:** I don't know does that mean that
24 Mr. McCullough is leaving us, Judge.

25 **MS. JUSTICE COSTELLO:** No, it's called broadcasting 11:37
26 mode, I think.

27 **MR. MCCULLOUGH:** It is at broadcasting now, thanks.
28 Yes, Judge, I'm on another tablet broadcasting now.
29 So, Judge, you should be on --

1 **MS. JUSTICE COSTELLO:** This is going to be a great
2 transcript!

3 **MR. MURRAY:** well, I think, considering we're dealing
4 with the law of the United States, Judge, we are
5 entitled to say 'strike that from the record'. 11:37

6 **MR. MCCULLOUGH:** You should be on page 52 of 66, Judge,
7 if everything is going to according to plan.

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

9 **MR. MCCULLOUGH:** At the foot of the page there is
10 122(A)(h). 11:37

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

12 **MR. MCCULLOUGH:** Then: "*with respect to an acquisition*
13 *authorised under subsection (a), the Attorney General*
14 *and the Director of National Intelligence may direct,*
15 *in writing, an electronic communications service* 11:37
16 *provider to:*

17 (A) *immediately provide the government with all*
18 *information, facilities, or assistance necessary to*
19 *accomplish the acquisition in a manner that will*
20 *protect the secrecy of the acquisition.*" 11:37

21

22 So there's a requirement, Judge, to provide the
23 government with all information, facilities or
24 assistance. And making available, Judge, as a matter
25 of EU law is processing and in my respectful submission 11:38
26 it follows, Judge, that any programme under
27 Section 702, including the two of which we know, but
28 any programme under Section 702 will, therefore,
29 necessarily involve data processing as a matter of EU

1 law.

2

3 So that's all I wanted to say about the structure,
4 Judge. I suppose I just want to try and summarise it,
5 Judge, or summarise the important parts of it in this 11:38
6 way. I submitted to the court yesterday and this
7 morning that, as a matter of EU law, infringements by
8 Member States of data privacy rights can be justified
9 on grounds of national security only if and to the
10 extent that they are strictly necessary. So what's the 11:38
11 relevance of that to this case, Judge?
12

13 It follows, Judge, that in my submission, in looking at
14 the various steps that we have gone through, that a
15 transfer to the US is permissible only to the extent 11:39
16 that infringements in US law of the data rights of EU
17 citizens could be justified if they took place in the
18 EU and therefore it can be justified only on the basis
19 that they are strictly necessary in the interests of
20 national security. 11:39
21

22 So there's an essential equivalence, Judge, a necessity
23 to respect the Charter. If the rights of EU data
24 citizens could be infringed here on the grounds of
25 national security only on the basis of strict necessity 11:39
26 so the same will have to be said of the EU law.

27 **MS. JUSTICE COSTELLO:** And then how does that tie in
28 with the SCCs? If the two private companies comply
29 with the requirements of the SCCs, they are not going

1 to impact the US law, so how does that tie in?
2 **MR. MCCULLOUGH:** well that's I suppose where, it comes
3 back to Article 4, Judge.
4 **MS. JUSTICE COSTELLO:** Yes.
5 **MR. MCCULLOUGH:** The purpose of the SCCs is to ensure 11:40
6 that, well no matter what the laws says, I can overcome
7 the problem by contract, but if I can't overcome the
8 problem by contract well then the data transfer cannot
9 take place, that's what Article 4 provides for.
10 **MS. JUSTICE COSTELLO:** You are saying that the problem 11:40
11 cannot be overcome because of the state of the US law?
12 **MR. MCCULLOUGH:** Exactly, Judge, exactly.
13 **MS. JUSTICE COSTELLO:** so that means effectively that
14 you are exporting, I think, I can't recall who made the
15 submission, that you are exporting the Charter rights 11:40
16 with EU data, so to speak?
17 **MR. GALLAGHER:** You are, Judge, I think that's correct.
18 Or, to put it another way, you can't transfer unless
19 you can transfer on the basis that the rights of EU
20 subjects are transferred with it. 11:40
21 **MS. JUSTICE COSTELLO:** Equivalence to the Charter?
22 **MR. MCCULLOUGH:** Yes, exactly, Judge. And that's
23 really what those relevant parts of the Directive are
24 about, but also what the Charter is about in order to
25 protect the fundamental rights of EU citizens. 11:41
26
27 Just to return briefly, Judge, to a few questions that
28 you raised yesterday. One question was what can the
29 DPC do if it's asked to enquire only into Facebook,

1 what can it do about other companies, and I wanted to
2 just mention, Judge, section 10(1)(a) of the Data
3 Protection Act. I don't need to open it now, Judge,
4 just to mention that that provides that the DPC may, on
5 its own motion, investigate any matter. And so, Judge, 11:41
6 if the DPC saw some unfairness in the fact that it had
7 investigated Facebook but found circumstances that were
8 applicable to other companies, it wouldn't have to wait
9 for another complaint.

10
11 Secondly, Judge, we had a discussion yesterday of 11:41
12 national security, I just want to reflect briefly on
13 this. National security has been mentioned a lot in
14 this case and it has been said or at least inferred
15 that everything done pursuant to section 702 and EO 11:42
16 12333 fits under the national security rubric or at
17 least under a rubric that is analogous to the national
18 security rubric in the Charter. Now I submit, Judge,
19 that that's not so. When you look at what the
20 justifications for actions under 702 in particular but 11:42
21 also 12333 are, Judge, they are much wider than that
22 and that follows from the definitions of foreign
23 intelligence, Judge.

24
25 The court will recall that under 702 the requirement as 11:42
26 far as obtaining access to the data of an EU citizen is
27 concerned, first he must be not US and, secondly, the
28 material must be obtained for the purpose of foreign
29 intelligence. And so what does foreign intelligence

1 mean then, Judge? Foreign intelligence is defined in
2 section 1801 of the FSA, I'll just find that for the
3 court.

4
5 It should be on the court's, if this one is now 11:43
6 broadcasting, Judge, it should be on the court's book.

7 **MS. JUSTICE COSTELLO:** Yes, foreign intelligence
8 information.

9 **MR. MCCULLOUGH:** Foreign intelligence, Judge, yes.
10 This is section 1801 of FISA. 11:44

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

12 **MR. MCCULLOUGH:** And the court can see what "*foreign*
13 *intelligence information*" means. If I just skip to
14 two, Judge: "*Information with respect to a foreign*
15 *power or foreign territory that relates to, and if* 11:44
16 *concerning a US citizen is necessary to -*
17 *(A) the national defense or the security of the United*
18 *States; or*
19 *(B) the conduct of the foreign affairs of the US."*

20 11:44
21 So, Judge, that's not the same as a national security
22 exemption. Just look at one part of it, Judge:
23 "*Information with respect to a foreign territory that*
24 *relates to the conduct of the foreign affairs of the*
25 *US."* 11:44

26
27 Now, if material falls under that rubric and, if you
28 are a non-US person, FISA entitles the NSA to obtain
29 that data from Facebook. The 12333 exemption, Judge,

1 the 12333 definition of foreign intelligence is wider
2 again.

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

4 **MR. MCCULLOUGH:** But in the interests of time, Judge,
5 perhaps I just won't refer to that at the moment, but
6 the court has it. 11:45

7 **MS. JUSTICE COSTELLO:** I recall, it was opened.

8 **MR. MCCULLOUGH:** It is a wider again definition. And
9 I suppose that has two important consequences, Judge,
10 I just need to mention briefly. First, it reflects on
11 Facebook's basic argument about the national security 11:45
12 exemption. Because they say that everything done under
13 FISA can be justified on the grounds of national
14 security, it falls outside the Treaty, it would fall
15 outside the Treaty - sorry, it falls outside the Treaty 11:45
16 because the Treaty only applies to national security.

17
18 Sorry, it is undoubtedly the case that things are done
19 under FISA that *do* relate to the national security
20 exemption as set in the Treaty. 11:45

21 **MS. JUSTICE COSTELLO:** But not everything.

22 **MR. MCCULLOUGH:** But a lot doesn't have to do so at
23 all. And that does also reflect, Judge, on the
24 strictly necessary analysis.

25
26 I mean to what extent, Judge, can FISA measures, when
27 carried out under US law, ever be justified as a matter
28 of *EU* law on this ground? I have suggested to the
29 court that they could be justified if they could be 11:45

1 said to be strictly necessary in the interests of
2 national security. But in fact FISA measures by
3 definition contain many actions, many individual
4 actions that aren't even attempted to be justified on
5 the grounds of national security. 11:46

6 **MS. JUSTICE COSTELLO:** And how does that play with the
7 acknowledgment of the CJEU, certainly in Schrems and
8 other cases from recollection, obviously the laws are
9 not going to be the same.

10 **MR. MCCULLOUGH:** Yes. 11:46

11 **MS. JUSTICE COSTELLO:** Is there no margin for, if you
12 like, an absence of overlap or where they stray?

13 **MR. MCCULLOUGH:** I have no doubt, Judge, that the Court
14 of Justice would say, the Court of Justice makes it
15 clear they don't have to be exactly the same, that's 11:46
16 what the principle of effective equivalence means, that
17 you are not looking for the same and you couldn't be
18 looking for the same word by word, the principle of
19 effective equivalence.

20 11:47
21 But this is a much wider problem than that, Judge, with
22 respect. If it be the case, and I respectfully submit
23 that it must be the case, that US laws can only be
24 justified on the grounds of national security if they
25 are effectively equivalent to the sort of laws that 11:47
26 would pass in the EU on the grounds of national
27 security.

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

29 **MR. MCCULLOUGH:** well then it's a vital consideration

1 to note that FISA does not in fact require a national
2 security justification at all.

3 **MR. GALLAGHER:** Judge, could I just intervene, I am
4 sorry. I am taken aback by this. The DPC's decision
5 is on the basis of national surveillance, that's what 11:47
6 we are addressing. This was never mentioned in the
7 opening statement and now, when I have completed my
8 submissions, this new point is being raised by
9 Mr. McCullough, and I do object to that.

10 **MR. MCCULLOUGH:** With respect, Judge, I don't think 11:47
11 it's a new point, Judge. In fact it's a point really
12 that arises directly from what Mr. Gallagher says. The
13 court is left with the firm impression that national
14 security is the FISA justification. That's the basis
15 of what Mr. Gallagher said. I'm pointing out to the 11:48
16 court that's not so at all, Judge, that foreign
17 intelligence, which is the basis of the justification
18 for FISA measures, necessarily includes a wide number
19 of individual steps.

20 **MS. JUSTICE COSTELLO:** well, I see what you are saying 11:48
21 in relation to the definitions.

22 **MR. MCCULLOUGH:** Yes.

23 **MS. JUSTICE COSTELLO:** But I think Mr. Gallagher's
24 point was that wasn't taken up, I think, by the DPC
25 and, I think by implication, that you are not allowed 11:48
26 to take it up if she hasn't taken it up because it's
27 not in the case.

28 **MR. MCCULLOUGH:** well, I think it must be in the case,
29 Judge. I mean it is perhaps the case the DPC didn't

1 take it up, Mr. Murray can answer for the DPC on that,
2 Judge.

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

4 **MR. MCCULLOUGH:** I suppose the point is this, Judge:
5 That this case as presented by Facebook in any event 11:48
6 doesn't depend upon the DPC's case. The court will
7 recall that one of the basic points made to you by
8 Facebook is that the DPC was wrong to concentrate only
9 on remedies and should have concentrated on the
10 substantive law of the US. Now, I'm taking up 11:49
11 Facebook's point on that and making arguments on
12 substantive law. So I don't think Facebook can be
13 heard validly to say, Judge, that we are here to
14 discuss only what is in the DPC decision. Facebook
15 itself expanded the case beyond that. 11:49

16 **MR. GALLAGHER:** Judge, there is a fundamental
17 unfairness about that.

18 **MS. JUSTICE COSTELLO:** Yes.

19 **MR. GALLAGHER:** It wasn't mentioned in the opening
20 statement. Mr. McCullough, who is in an antagonistic 11:49
21 position to my client, is coming after me. There was
22 no warning this was going to be raised. The exemption
23 in any event includes national security and other, as
24 you know it's broader than national security. And
25 I would -- 11:49

26 **MS. JUSTICE COSTELLO:** which exemption now are we
27 talking about, in the Directive?

28 **MR. GALLAGHER:** In the Directive, exactly.

29 **MS. JUSTICE COSTELLO:** Yes.

1 the DPC's decision.

2 **MS. JUSTICE COSTELLO:** Mr. McCullough, in relation to
3 this matter and you had the written, you had seen the
4 written submissions of Facebook and obviously of the
5 DPC before the case opened and you heard the opening of 11:51
6 Mr. Collins, I think if it had been the case that you
7 had wanted to advance this particular point in relation
8 to the definitions it should in fairness have been
9 made, flagged to them in advance.

10 **MR. MCCULLOUGH:** I would agree, Judge, if it's a point 11:51
11 that hadn't been made before. But in fact
12 Mr. Gallagher is wrong, he just - if the court looks at
13 paragraph 148 of the DPC's submissions, Judge, the
14 point is made, it is squarely made.

15 **MS. JUSTICE COSTELLO:** DPC is Tab 3, isn't that it? 11:51
16 148?

17 **MR. MCCULLOUGH:** Yes.

18 **MS. JUSTICE COSTELLO:** Extend beyond the national
19 security context, yes.

20 **MR. MCCULLOUGH:** Exactly, Judge. So that point is 11:52
21 made, Judge. It may not have been a point that the
22 witnesses were asked to address, Judge, but it is
23 certainly a point that is addressed in their written
24 statements and it is certainly a point that's in the
25 case, Judge. 11:52

26 **MR. GALLAGHER:** Judge, sorry, that's reference to
27 *criminal* rules, and I did indicate to you the same
28 rules apply to law enforcement. This is a different
29 point, this is clearly a different point, and it wasn't

1 opened on that basis and the case wasn't conducted on
2 that basis. There's a reference to Prof. Swire, and
3 I drew your attention to that, I said Prof. Swire had
4 referred to criminal rules but I said that was no part
5 of the case and criminal rules is quite distinct from 11:52
6 what Mr. McCullough is now raising.

7 **MR. MCCULLOUGH:** well, Judge, I don't want to spend a
8 lot of time on it, Judge, and of course if the court
9 thinks that it should have raised the point in some
10 other way well then so be it, Judge. But I do say it's 11:53
11 a point, Judge, that in fact *has* been raised before.
12 In any event I'm not sure it's a point the court can
13 entirely ignore if there is some unfairness about it.
14 Of course, I am sure the court can manage it, Judge.

15
16 If I can move on from the point, Judge, if it's
17 agreeable to the court. I just want to deal briefly,
18 Judge, with a point that the court mentioned yesterday
19 about the European Court of Human Rights case law,
20 Judge. 11:53

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

22 **MR. MCCULLOUGH:** I didn't have a straightforward answer
23 to that, Judge, which I should have had at the time,
24 but I want to give you an extract from a book called
25 "*The EU Charter of Fundamental Rights: A Commentary*" 11:53
26 (SAME HANDED TO THE COURT).

27
28 And this does demonstrate, Judge, an overlap between
29 the Convention and the Charter, but it demonstrates

1 there's an area in which there may not be an overlap as
2 well. So it provides, Judge, under this heading:

3
4 *"Insofar as the EU has not acceded to the Charter of
5 Fundamental Rights, the latter is not EU law."* 11:54

6
7 The court is aware that Union itself hasn't acceded to
8 the Convention: *"Whilst it is true that Article 6(3)
9 TEU stresses that the ECHR may serve as a source of
10 inspiration for the discovery of general principles of 11:54
11 EU law, it does not follow from that Treaty provision
12 the Convention may prevail over conflicting national or
13 produce direct effect. This is a question for national
14 constitutions to address."*

15
16 And then, top of the page: 11:54

17
18 *"In light of the Explanations relating to Article 52(3)
19 of the Charter, the latter is 'intended to ensure the
20 necessary consistency between the Charter and the 11:54
21 ECHR', 'without thereby adversely affecting the
22 autonomy of [EU] law and of that of the [CJEU]'.
23 However, the autonomy of EU law may only be granted in
24 the principle of 'of the more extensive protection', ie
25 the level of protection guaranteed under EU law may 11:54
26 never be lower than that guaranteed by the ECHR as
27 interpreted by the Court of Human Rights."*

28
29 And if the court looks at paragraph, the footnote.

1 **MS. JUSTICE COSTELLO:** 52, yes. Sorry, which footnote
2 were you going to draw my attention to?

3 **MR. MCCULLOUGH:** The footnote in this work, Judge,
4 footnote 143.

5 **MS. JUSTICE COSTELLO:** Yes. 11:55

6 **MR. MCCULLOUGH:** Judge, quotes from Article 52(3) of
7 the Charter to which specific reference is made to the
8 Convention.

9 **MS. JUSTICE COSTELLO:** I think Mr. Collins opened that
10 to me. 11:55

11 **MR. MCCULLOUGH:** Very good, Judge. The work goes on,
12 Judge, to make the point that, if the Convention rights
13 fall below the level of rights for which the Charter
14 provides well then the Charter will provide higher
15 rights. That's what is said, I think in summary, in 11:55
16 the next paragraph.

17 **MS. JUSTICE COSTELLO:** Hmm.

18 **MR. MCCULLOUGH:** And then in the final paragraph in the
19 page the point is made:

20 11:55
21 *"As to the rights recognised by the Charter which*
22 *correspond to rights guaranteed by the ECHR,*
23 *Article 52(3) of the Charter states that, without*
24 *prejudice to more extensive protection, 'the meaning*
25 *and scope of those rights shall be the same as those* 11:55
26 *laid down by the ECHR'."*

27
28 And if you look at footnote 147, Judge, you'll see that
29 there is an explanation, Judge, found in the Charter in

1 Article 7 --

2 **MS. JUSTICE COSTELLO:** Corresponding to 8.

3 **MR. MCCULLOUGH:** -- which is the privacy right

4 corresponds to Article 8 of the Charter.

5 **MS. JUSTICE COSTELLO:** Yes. 11:56

6 **MR. MCCULLOUGH:** But of course there is no equivalent

7 to Article 8 of the Convention -- of the Charter

8 I should say.

9 **MS. JUSTICE COSTELLO:** The Charter in the Convention.

10 **MR. MCCULLOUGH:** In the Convention, so I just want to 11:56

11 bring that material to the court's attention. They are

12 clearly intended to be complementary documents, but

13 I think it's clear that, insofar as there is lesser

14 protection, well then the protections which the charter

15 provides will prevail. And I would also agree, Judge, 11:56

16 that the Charter analysis of proportionality and

17 necessity is one that would certainly be of interest to

18 the Court of Justice when interpreting.

19 **MS. JUSTICE COSTELLO:** When you say *Charter* there, did

20 you mean the Convention analysis? 11:56

21 **MR. MCCULLOUGH:** I am so sorry, I did. My apologies,

22 Judge, my apologies. The ECHR analysis of

23 proportionality and necessity is going to be of

24 assistance to the Court of Justice when interpreting

25 Charter rights. 11:56

26

27 And then, Judge, the final point arising from yesterday

28 that I wanted to make was arising from a discussion

29 that we had about the old version of Article 4,

1 Article 4(1)(a).

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

3 **MR. MCCULLOUGH:** You will remember the court had raised
4 a concern about whether that referred to remedies or to
5 substance and I made the submission yesterday that it 11:57
6 refers to both of necessity and I had suggested that EU
7 law imposes on the importer a requirement to give
8 access where there's no effective remedy in the US and
9 that remedies were therefore relevant.

10 11:57
11 But of course I should have added, Judge, that part of
12 our submission is that the DPC didn't complete a full
13 investigation of our complaint. The court can look at
14 our complaint, but it isn't of course restricted to
15 remedies. It's a complaint made both in respect of 11:57
16 substance and in respect of remedies. So that's part,
17 if you like, of the original issue that I raised,
18 Judge. We say that if the DPC had completed that
19 investigation, she would have found, we say, that there
20 was a breach of our Article 7 and Article 8 rights also 11:58
21 and should, on that basis, have exercised her powers
22 under Article 4.

23
24 Now whether I'm right or wrong, Judge, about what she
25 would have found, it is certainly something that should 11:58
26 have been done and I say, unless and until done, is
27 part of why I say the reference is unnecessary, Judge,
28 because but are other issues that require to be
29 determined.

1 Can I return then, Judge, as briefly as I can, to the
2 parts of this speaking note that begin on page 13
3 onwards.

4 **MS. JUSTICE COSTELLO:** Yes.

5 **MR. MCCULLOUGH:** Under the heading (h), and this is now 11:58
6 dealing with substantive US surveillance law. The
7 first point to make, Judge, is that, as I suggested in
8 opening our case, we agree entirely with the DPC about
9 the state of redress in US law. And we say, Judge,
10 that the analysis being carried out by the DPC of that 11:59
11 demonstrates that there is a lack of effective
12 equivalence between the state of EU law on the one hand
13 and US law on the other hand in that regard and,
14 equally and by extension, a lack of respect for
15 Article 47 Charter rights. That in itself would be 11:59
16 sufficient insofar as the issue arises. I say it
17 doesn't for the reasons I have discussed, but insofar
18 as the issues arises, Judge, that would be enough to
19 demonstrate the invalidity of the SCC decisions, as
20 I say insofar as that arises, Judge. 11:59

21 **MS. JUSTICE COSTELLO:** This is on the assumption that
22 she doesn't exercise the Article 4 powers?

23 **MR. MCCULLOUGH:** It's on the assumption that a question
24 is necessary, Judge, it's on the assumption Article 4
25 isn't the appropriate path to take. 11:59

26 **MS. JUSTICE COSTELLO:** The answer.

27 **MR. MCCULLOUGH:** It's on the assumption that for some
28 reason Article 4 is inoperative or can't be exercised,
29 it's on the assumption then that the SCC decisions

1 don't contain the escape valve, it's on the assumption
2 then that the court is considering that question
3 whether it has its own doubts and then referring the
4 question to the Court of Justice.

5
6 But I say, Judge, on all of those assumptions well then
7 there is a lack of effective equivalence in respect of
8 redress for all the reasons that the DPC have said and
9 I don't intend to spend a moment on that, Judge,
10 I won't add to that. The stenographers just want to
11 change, Judge. 12:00

12
13 Judge, to try and telescope this and make it shorter,
14 there's an element of repetition in some of these
15 paragraphs here, Judge, so I'm going to take paragraphs 12:00
16 37 to 41 -- to 42, excuse me, together with paragraphs
17 45 to 51, because they really cover the same material.
18 And everything that I say is within those paragraphs
19 Judge, but I'll just organise it slightly differently
20 to cover the same material in shorter time. 12:01

21
22 The first point, Judge, is that Section 702 the main
23 authority. The court is, I think, fully conscious of
24 that. And that's addressed in paragraphs 37 to 40,
25 Judge. Simply to make that point. 12:01

26
27 Paragraph 41 and 42, Judge, deal with the relevance of
28 E012333. And E012333 is also relevant, Judge, for the
29 reasons discussed. In particular it appears to govern

1 or permit the transit authority. And on the evidence,
2 that permits the US security services to have access to
3 data that passes across the US. And --

4 **MS. JUSTICE COSTELLO:** Though as a matter of fact, does
5 that actually apply in your Facebook transfers? 12:02

6 **MR. MCCULLOUGH:** It may not apply a great deal to
7 Facebook, Judge. I think that was stated in the
8 evidence also. I think that's true.

9 **MS. JUSTICE COSTELLO:** So while it might be on your
10 overall sort of image of what happens in the US, is it, 12:02
11 does it arise on the facts of this case and this --

12 **MR. MCCULLOUGH:** I suspect it's not of great relevance
13 to Facebook, Judge.

14 **MR. GALLAGHER:** No, the evidence was it *didn't*. And
15 Ms. Gorski accepted that -- 12:02

16 **MR. MCCULLOUGH:** I think that's correct, Judge.

17 **MR. GALLAGHER:** -- that it didn't apply to Facebook,
18 Judge.

19 **MR. MCCULLOUGH:** I'll have to find the particular piece
20 of evidence, I've a slightly different memory of it. 12:02
21 But I'll come back to it, Judge. Yes, I think I'm
22 correct in remembering, Judge, that 12333 also applies
23 in the transatlantic cables --

24 **MS. JUSTICE COSTELLO:** Yes, it did. And that's what I
25 was -- 12:03

26 **MR. MCCULLOUGH:** -- before it arrives in the US, Judge.

27 **MS. JUSTICE COSTELLO:** -- incoherently asking you about
28 later.

29 **MR. MCCULLOUGH:** Yeah. And I'll just, I'll ask

1 somebody to find that --

2 **MR. GALLAGHER:** Sorry, Ms. Gorski dealt with Upstream.
3 Excuse me, I was incorrect in my intervention. She
4 dealt with Upstream, she didn't deal with that.

5 **MS. JUSTICE COSTELLO:** well, what we can do is we can 12:03
6 park this and after lunch somebody can clarify that
7 point.

8 **MR. MCCULLOUGH:** I'll just find precisely what was said
9 about that, Judge.

10 **MS. JUSTICE COSTELLO:** I know it's a small point, but I 12:03
11 recall Ms. Barrington saying that 12333 didn't arise
12 because the complaint related to sending the data to
13 Facebook and it was on the basis of once it arrived in
14 Facebook Inc., wherever that's situate.

15 **MR. MCCULLOUGH:** She did, Judge. And for the reasons 12:03
16 that I explored a few minutes ago --

17 **MS. JUSTICE COSTELLO:** And I just wanted to hear
18 whether she was right or not.

19 **MR. MCCULLOUGH:** Certainly, Judge, our complaint
20 relates to the processing that's involved in the 12:03
21 transfer and not just the transfer once it hits US
22 shores. So it may be that 12333 is relevant to that.
23 I'll just have to find that, Judge, in the transcript
24 and come back to you if I may. For the moment, Judge,
25 I think it suffices to say that it's certainly part of 12:04
26 the picture insofar as US law in general is concerned,
27 for the reasons that have been discussed.

28
29 And I'll just mention at paragraph 42, Judge, the point

1 that is made there, about which I think there's no
2 doubt, that 12333 and PPD-28 are not justiciable.
3 Indeed, I think the court may not have been brought to
4 - it's hard to believe there's a document or part of a
5 document the court hasn't seen - but I think the court 12:04
6 may not have been shown section 6D of PPD-28.

7 **MS. JUSTICE COSTELLO:** well, I'm not going to comment
8 from memory.

9 **MR. MCCULLOUGH:** well, it should come up on your tablet
10 now, Judge. 12:04

11 **MS. JUSTICE COSTELLO:** I'll go to the hard copy.

12 **MR. MCCULLOUGH:** Very good, Judge.

13 **MS. JUSTICE COSTELLO:** I'm in a Directive.

14 **MR. MCCULLOUGH:** PPD-28 is in book three of the US
15 authorities at B43. 12:05

16 **MS. JUSTICE COSTELLO:** Thank you. That's tab 43. What
17 section of this are you talking about?

18 **MR. MCCULLOUGH:** It's Section 6(d), Judge.

19 **MS. JUSTICE COSTELLO:** Thank you. well, its pristine,
20 so you must be right. 12:05

21 **MR. MCCULLOUGH:** I see. It was stated in the evidence,
22 Judge, but in fact it's, if you like, even clearer, it
23 doesn't really need witnesses to confirm it. It said:

24
25 *"This directive is not intended to, and does not,*
26 *create any right or benefit, substantive or procedural,*
27 *enforceable at law or in equity by any party against*
28 *the United States, its departments, agencies, or*
29 *entities, its officers, employees, or agents."*

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Now, there *is* a similar reference in 12333, Judge. I'll just ask somebody to find that and I'll come back to you with that reference. But it's also expressly stated in E012333.

12:06

Can I move from that, Judge, to the material that's at paragraph 45 and I'll come back to paragraph 44 I hope in a more sensible order in due course? In paragraph 45 and 46, Judge, we make a point - we agree with the DPC's submission on this - that the primary focus of the court must be on the laws of the third country, not with practice. And the material on which we base that, Judge, is set out in footnote 55 of the speaking note. And the court will see the reference to paragraph 50 of Schrems, in which it's stated specifically it's the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection.

12:06

12:06

12:07

Mr. Gallagher mentioned the paragraph that is mentioned in the footnote directly thereafter, paragraph 75. And I say, Judge, properly read, that isn't in *fact* to a similar effect. That provides the Commission is obliged to assess the contents of the applicable rules in that country - in this case the US - resulting from its domestic law or international commitments and the practice designed to ensure compliance with those rules. And the focus in paragraph 75, Judge, is on the

12:07

1 rules that are in place to ensure -- sorry, the
2 practice that is in place to ensure compliance with the
3 legal rules. But the focus remains on the legal rules.
4

5 Then there's a reference to paragraph 94, which again 12:07
6 expressly refers to legislation. And then finally,
7 Judge, there's a reference to paragraph 117 of the
8 Watson decision. It contains a useful, it's a single
9 sentence, Judge, but I think useful, in paragraph 117.
10 It provides that data retention measures must lay down 12:08
11 clear rules indicating the circumstances under which
12 providers of electronic communication services must
13 grant the national authorities access to that data and
14 states expressly that a measure of that kind must be
15 legally binding under domestic law. 12:08

16
17 So I hope that usefully collects the material, Judge,
18 upon which we say in any event that the court's focus
19 must be on the laws and not practice.

20 **MS. JUSTICE COSTELLO:** And what do you say to that both 12:08
21 the European Court of Human Rights case law which was
22 looking at all the other parameters -- maybe you want
23 to deal with that in due course. They were looking at
24 things like equivalence to Ombudsmans, they were
25 looking at the culture, they were looking at all the 12:08
26 other - the holistic approach I think was what
27 Ms. Hyland described it as.

28 **MR. MCCULLOUGH:** Sure. I don't say, Judge, that
29 they're irrelevant. But I say the court's primary

1 focus has to be on the state of the law of a foreign
2 country. That's, I suppose, particularly so, Judge,
3 when so much of the emphasis in this case on the part
4 of Facebook and the US Government as to the protections
5 that are provided in US law, notwithstanding the text 12:09
6 of Section 702, was on PPD-28 and E012333. And the
7 court will recall that they're not even statutory
8 administrative schemes, they're just interpretations
9 that are set up by a presidential order or directive.
10 **MS. JUSTICE COSTELLO:** I gather they're binding upon 12:09
11 the personnel.
12 **MR. MCCULLOUGH:** Yes.
13 **MS. JUSTICE COSTELLO:** But they don't go further, as
14 far as I can gather.
15 **MR. MCCULLOUGH:** They're binding on the personnel, 12:09
16 Judge. But they're capable of being altered tomorrow.
17 So they don't even -- and the same applies to --
18 **MS. JUSTICE COSTELLO:** well, I mean, the EU may move
19 slowly, but it's capable of varying *its* laws too. I
20 mean, that's inherent in law. 12:09
21 **MR. MCCULLOUGH:** It is, Judge. But a lot of the, I
22 suppose, systems that are going to be looked at in the
23 context of the Court of Human Rights, perhaps without
24 really making this distinction, but many of the systems
25 that are going to be looked at are systems that are set 12:10
26 up at least under statute, or at least under law. In
27 this case the major protections are said to be PPD-28,
28 which is reflected in part in E012333 - that's a
29 Presidential Order, Presidential Directive - and then

1 the Privacy Shield Ombudsman, which again is set up as
2 a simple administrative scheme with no statutory basis
3 as far as one can see.
4

5 So they are -- one can see why the focus must be on the 12:10
6 legal order, Judge, and not on the protections that may
7 well be ephemeral that are set up in order to, it is
8 said, lessen the impact of those legislative measures.

9 **MS. JUSTICE COSTELLO:** And do you place any -- how do
10 you treat of the reflection in the Directive which 12:10
11 refers to international commitments and the commitments
12 in the Privacy Shield? Does that *qualify* as an
13 international commitment? Because I think the Directive
14 says by their laws or their international agreements, I
15 think. 12:11

16 **MR. MCCULLOUGH:** Their international commitments. It
17 does, Judge, yes. Well, I mean, I suppose I haven't --
18 the honest answer, Judge, is I haven't thought through
19 what "international commitment" means, nor have I
20 looked up whether it has a particular meaning. On the 12:11
21 face of it, Judge, it is likely to relate to treaties
22 and the like, as opposed to schemes that have been set
23 up, even in those schemes have been set up in order to,
24 if you like, enable a foreign country, or a foreign
25 entity - the EU - to reach a favourable decision. It's 12:11
26 hard to see it's an international *commitment* properly
27 so-called. This all arises from the contents of the
28 Privacy Shield Decision and the annexes to it in which
29 schemes are set up.

1 MS. JUSTICE COSTELLO: Mm hmm.

2 MR. McCULLOUGH: Then just to move on, Judge. What we
3 say in this -- at paragraph 47, Judge, and the
4 following paragraphs, Judge, we set out what are the
5 requirements of EU law. And those requirements, 12:11
6 insofar as they're relevant, Judge, are largely to be
7 found in two cases; in Schrems and then in Watson.
8 what we've tried to do, Judge, hopefully to be of some
9 assistance, is to set out in the footnotes the relevant
10 parts of both of those judgments that we say give rise 12:12
11 to statements of the standards of EU law. So footnote
12 56, Judge, sets out quotes from Schrems and footnote 58
13 sets out quotes from Watson.

14

15 It's important just to pause to remember something 12:12
16 about Schrems, Judge; that albeit that it ultimately
17 turned on the failure of the Commission to set out
18 certain statements in its decision, along the way to
19 reaching that decision it set out certain clear
20 standards of what EU law required and made certain 12:13
21 clear statements about how foreign laws would be in
22 breach of those standards unless they achieved EU
23 standards. And that's what is achieved, Judge, in
24 paragraphs 92 to 95 in particular of Schrems, which is
25 set out, as I say, in footnote 56. 12:13
26

27 So just looking at paragraph 93 -- paragraph 92 sets
28 out the "strictly necessary" requirement. Then
29 paragraph 93:

1
2 *"Legislation is not limited to what is strictly*
3 *necessary where it authorises, on a generalised basis,*
4 *storage of all the personal data of all the persons*
5 *whose data has been transferred from the European Union*
6 *to the United States without any differentiation,*
7 *limitation or exception being made in the light of the*
8 *objective pursued and without an objective criterion*
9 *being laid down by which to determine the limits of the*
10 *access of the public authorities to the data, and of*
11 *its subsequent use, for purposes which are specific,*
12 *strictly restricted and capable of justifying the*
13 *interference which both access to that data and its use*
14 *entail."*

15
16 And just thinking about that for a moment, Judge, can
17 be it said that US law, as it's been explained to the
18 court, meets that requirement? And we say not, Judge.
19 We say that in fact there *is* access to all data. All
20 data is processed in the meaning of EU law. The fact 12:14
21 that some is extracted and kept doesn't alter that
22 fact. Is there an objective criterion laid down by
23 which to determine the limits of the access of the
24 public authorities to that data? well, as far as non-EU
25 citizens -- sorry, non-US persons are concerned, the 12:14
26 only requirement is that it have the collection of
27 foreign intelligence as the purpose. And the court has
28 seen the width of the definition of foreign
29 intelligence. Sorry, a significant purpose of its

1 collection must be foreign intelligence.

2
3 And that's the extent of the requirement of US law:
4 One, that you're non-US - you obviously are; and then
5 secondly, that a significant purpose must be the 12:15
6 collection of foreign intelligence. That's *actually*
7 the extent of the requirement under Section 702. And
8 in my respectful submission, Judge, that couldn't
9 conceivably be thought to meet the standards that it is
10 said a law would require to meet in paragraph 92 -- 93 12:15
11 of Schrems.

12 **MS. JUSTICE COSTELLO:** And you're saying because of
13 that scope, the fact that you have to have the tasking
14 of selectors and you have to have your directives and
15 your certificates, that doesn't arise? 12:15

16 **MR. MCCULLOUGH:** But the court saw what the tasking
17 was. I'll come to this in a moment, Judge. We got
18 very interesting evidence, I think from Prof. Swire,
19 about this in which he showed us the document that the
20 person has to complete before a person, before a non-EU 12:15
21 citizens can be tasked. I'll bring the court to that
22 evidence in a moment. In fact it provides almost no
23 protection for non-US persons. It largely consists of
24 a requirement that you demonstrate the person is a
25 non-US person and you state that it's for the purpose, 12:16
26 significant purpose of collecting foreign intelligence.
27 But I'll bring the court to that evidence in just a
28 moment.
29

1 And the same applies to paragraph 94, Judge:

2
3 *"In particular, legislation permitting the public*
4 *authorities to have access on a generalised basis to*
5 *the content of electronic communications must be*
6 *regarded as compromising the essence of the fundamental*
7 *right to respect for private life, as guaranteed by*
8 *Article 7 of the Charter."*

9
10 And that's exactly what Section 702 *does*, Judge. 12:16

11 Section 702 permits Upstream to take place. And if
12 that's so, well, then Section 702 permits a system to
13 be maintained in place in which the NSA have access to
14 every single piece of information that goes across the
15 internet. Because that's what Upstream *is*. It may 12:16
16 extract from it, having -- considers it all, admittedly
17 by a machine, but that makes no difference. And it may
18 extract from it and keep only the bits that respond to
19 its particular level of interest. But its starting
20 point is to look through the entire of the internet 12:17
21 traffic passing through a particular point. And that,
22 in my respectful submission, falls foul of what the
23 Court of Justice says in paragraph 94, that is:
24 Legislation permitting the public authorities to have
25 access on a generalised basis to the content of 12:17
26 electronic communications.

27
28 Then paragraph 95 deals with remedies, Judge, and I
29 won't refer to that. Then dealing with Watson in the

1 footnote at the foot of the page, Judge.

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

3 **MR. MCCULLOUGH:** Now, Watson is a case that applies by
4 analogy, Judge, but nevertheless applies correctly by
5 analogy. It is a case dealing, of course, with EU 12:17
6 legislative measures and not with foreign measures.
7 And it is a case that was dealing not with national
8 security, but with crime. But the principles are the
9 same, Judge. And so useful principles can be
10 extracted, I say, from Watson, in particular at 12:18
11 paragraph 109 of Watson. 109, 110 and 111 again set
12 out general principles and not dissimilar to those in
13 Schrems. 109:

14
15 *"... national legislation must, first, lay down clear*
16 *and precise rules governing the scope and application*
17 *of such a data retention measure and imposing minimum*
18 *safeguards, so that the persons whose data has been*
19 *retained have sufficient guarantees of the effective*
20 *protection of their personal data against the risk of*
21 *misuse."*

22
23 Then importantly:

24
25 *"That legislation must, in particular, indicate in what*
26 *circumstances and under which conditions a data*
27 *retention measure may, as a preventive measure, be*
28 *adopted, thereby ensuring that such a measure is*
29 *limited to what is strictly necessary."*

1
2 So can it be said, Judge, that retention is strictly
3 necessary when its *only* requirement is that it have as
4 a significant purpose the collection of foreign
5 intelligence when that is widely defined in the way it
6 is? Could that be said to meet the requirements of
7 strict necessity? And I say clearly not, Judge.

8
9 Then paragraph 110 is to similar effect:

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

27
28 So there's a requirement, Judge, that the national
29 measures should put in place objective criteria that

1 establish a connection between the data retained and
2 the objective pursued. And there must be an actual
3 circumscription of the extent of the measure and thus
4 the public affected. So it brings one back to the same
5 point, Judge; is the limitation that a significant 12:20
6 purpose must be the collection of material for the
7 purpose of foreign intelligence? Could that *conceivably*
8 meet the standard for which paragraph 110 provides?
9

10 Then paragraph 111, Judge, provides that: 12:20

11
12 *"... the national legislation must be based on*
13 *objective evidence which makes it possible to identify*
14 *a public whose data is likely to reveal a link, at*
15 *least an indirect one, with serious criminal offences,*
16 *and to contribute in one way or another to fighting*
17 *serious crime or to preventing a serious risk to public*
18 *security."*
19

20 And again the same point applies, Judge; can it be said 12:20
21 that US law requires the existence of objective
22 evidence demonstrating a link even between national
23 security on the one hand and the material that's been
24 collected on the other hand when you look at the width
25 of the definition and you look at the ease with which 12:20
26 the material relating to non-US persons can be
27 collected?
28

29 Then, Judge, there's more specific material that's set

1 out at paragraph 120, 121 and 123. 120 provides that
2 it's essential -- sorry:

3
4 *"In order to ensure, in practice, that those conditions*
5 *are fully respected, it is essential that access of the*
6 *competent national authorities to retained data should,*
7 *as a general rule, except in cases of validly*
8 *established urgency, be subject to a prior review*
9 *carried out either by a court or by an independent*
10 *administrative body, and that the decision of that*
11 *court or body should be made following a reasoned*
12 *request by those authorities submitted, inter alia,*
13 *within the framework of procedures for the prevention,*
14 *detection or prosecution of crime."*

15
16 Now, it's said, Judge, correctly, that the FISC court
17 exists. And I *think* it was said by Mr. Gallagher that
18 that meets the standards of EU law that are set out in
19 paragraph 120. But in fact the court has heard - I
20 think the court knows - in evidence that as far as
21 non-US persons are concerned, there is one FISC
22 authorisation. It does *not* look at the individuals
23 whose data is being collected. And can that be said,
24 Judge, truly to meet the requirements for a prior
25 review?

12:21

12:22

26 **MS. JUSTICE COSTELLO:** When you say one authorisation,
27 is that the annual one?

28 **MR. MCCULLOUGH:** Yes, Judge. Sorry, the annual
29 authorisation, the court is quite correct.

1
2 *"Likewise, the competent national authorities to whom*
3 *access to the retained data has been granted must*
4 *notify the persons affected, under the applicable*
5 *national procedures, as soon as that notification is no*
6 *longer liable to jeopardise the investigations being*
7 *undertaken by those authorities. That notification is,*
8 *in fact, necessary to enable the persons affected to*
9 *exercise, inter alia, their right to a legal remedy,*
10 *expressly provided for in Article 15(2) of Directive*
11 *2002/58, read together with Article 22 of Directive*
12 *95/46, where their rights have been infringed."*

13
14 **(SHORT PAUSE IN PROCEEDINGS)**

15
16 **MS. JUSTICE COSTELLO:** We have lift off.

17 **MR. MCCULLOUGH:** Judge, I was dealing with paragraph
18 121 of Watson, which is quoted in one of our footnotes.

19 **MS. JUSTICE COSTELLO:** Yes.

20 **MR. MCCULLOUGH:** And making the point, Judge, that 12:26
21 Watson sets out an absolute requirement of
22 notification. Now, I'll return briefly, Judge, to what
23 Ms. Hyland said in the context of ECHR cases. But we
24 can say this with absolute certainty, that 702 does
25 knotted provide for notification under *any* 12:26
26 circumstances, no matter what the level of risk or non
27 risk associated with notification. It just doesn't
28 happen.

1 Then -- and I'll be submitting to the court that's
2 clearly, *clearly* in breach of the provision, the
3 requirement of EU law set out by Watson in paragraph
4 121. It has the consequence, I say, *clearly* that US
5 law *cannot* be effectively equivalent to the rights 12:26
6 provided for -- sorry, cannot be effectively equivalent
7 to the rights that obtain in EU law for EU citizens in
8 respect of data privacy.

9
10 Then finally, at paragraph 123: 12:27

11
12 *"In any event, the Member States must ensure review, by*
13 *an independent authority, of compliance with the level*
14 *of protection guaranteed by EU law with respect to the*
15 *protection of individuals in relation to the processing*
16 *of personal data, that control being expressly required*
17 *by Article 8(3) of the Charter and constituting, in*
18 *accordance with the Court's settled case-law, an*
19 *essential element of respect for the protection of*
20 *individuals in relation to the processing of personal*
21 *data."*

22
23 So there's a requirement for a review by an independent
24 authority of compliance with the level of protection
25 guaranteed by EU law. Now, there are measures to 12:27
26 review what has occurred, Judge, but can it be said
27 that the measures of which the court has heard
28 constitute review by an independent authority of
29 compliance with the level of protection guaranteed by

1 EU law if in fact they're directed not at all to a
2 consideration of the *sort* of standards for which EU law
3 provides, they're directed, understandably, to a
4 consideration of whether the requirements of US law
5 have been met? But those requirements, Judge, as I've 12:28
6 said, in the case of EU citizens consist essentially of
7 a statement that a significant purpose of what is
8 occurring is the collection of foreign intelligence.
9 **MS. JUSTICE COSTELLO:** In relation to the notification
10 point, the Directive and the Charter in Europe do not 12:28
11 apply to national security.
12 **MR. MCCULLOUGH:** Yes, Judge.
13 **MS. JUSTICE COSTELLO:** As defined in European law.
14 **MR. MCCULLOUGH:** Yes, Judge.
15 **MS. JUSTICE COSTELLO:** So as I understand it - and 12:28
16 correct me if I'm wrong - there is no notification
17 requirement in the context of national security
18 surveillance under EU law?
19 **MR. MCCULLOUGH:** I don't think that's right, Judge, no.
20 I think it comes back to the question -- 12:28
21 **MS. JUSTICE COSTELLO:** But that was a submission that
22 was being made.
23 **MR. MCCULLOUGH:** It comes back to the question of
24 necessity, Judge, and proportionality --
25 **MS. JUSTICE COSTELLO:** And you say that applies even to 12:29
26 --
27 **MR. MCCULLOUGH:** -- which I think follows from the
28 cases being opened by Ms. Hyland. You can't simply
29 say, you know, play a get out of jail free card and say

1 'I did this in the interests of national security, you
2 can't look at it'. You have to just -- insofar as a
3 measure infringing upon *anybody's* rights is strictly
4 necessary in order to protect national security, it's
5 in order. But it must meet that test. 12:29

6 **MS. JUSTICE COSTELLO:** But where does the requirement
7 to notify -- let's forget about the US, let's say the
8 French are surveilling either you or I or their own
9 citizens; where is the obligation in EU law, under EU
10 law to notify the subject who has been surveilled once 12:29
11 it's okay in national security terms, they're now no
12 longer a person of interest or the risk is passed?

13 **MR. MCCULLOUGH:** Because that's what the Court of
14 Justice has said, Judge, must be provided. And if a
15 national measure fails to provide it, it's in breach. 12:30

16 **MS. JUSTICE COSTELLO:** The court of Justice? In Watson?

17 **MR. MCCULLOUGH:** In Watson has said 'This is a
18 requirement of EU law - notification'. And it may well
19 be, Judge, to use the example you're taking, French law
20 doesn't provide it - obviously I don't know. But 12:30
21 whether or not it does, Judge, if it doesn't it's in
22 breach of EU law in not doing so. It's a requirement
23 according to Watson, the Court of Justice in Watson, of
24 EU law that there should be notification.

25 **MS. JUSTICE COSTELLO:** Notwithstanding the fact that 12:30
26 Watson is in the criminal area --

27 **MR. MCCULLOUGH:** Yes.

28 **MS. JUSTICE COSTELLO:** -- where, as we know, EU has
29 competence, as opposed to national security.

1 **MR. MCCULLOUGH:** Yes, exactly, Judge. And I don't
2 think that makes any difference, Judge, to the analysis
3 that's conducted here, the requirement of strict
4 necessity. The requirement of strict necessity applies
5 anyway.

12:30

6
7 And of course, each case must be viewed in its
8 individual facts. I can easily envisage that there
9 would be would be nothing wrong with a system that
10 provided for a lesser or greater method of notification 12:30
11 or a system of notification that said in the case of
12 some people, because they pose *such* a risk to national
13 security, they won't be notified for 20 years. But
14 this is not what the US law provides for. The US law
15 provides for no notification ever for anybody. And one 12:31
16 just asks the question, Judge: Could that *ever* meet the
17 test for which Watson, the Court of Justice provided in
18 Watson, a national measure or French measure saying 'We
19 just won't notify you'?

12:31

20
21 So, Judge, those are the tests, Judge. And we set out,
22 Judge, in paragraph 48, Judge, a summary, I suppose, of
23 why we say that those tests are failed. I'll just
24 enumerate them if I may, Judge - they follow from what
25 I've said. I'll just refer the court to the relevant 12:31
26 footnotes where evidence in this regard can be found.

27
28 First, because US law permits indiscriminate
29 surveillance. And if the court looks at our footnotes

1 63 and 44, the court will see the evidence set out in
2 that regard. At footnote 63, Judge, of course, you'll
3 see there's extensive evidence set out from Ms. Gorski,
4 Prof. Swire, Prof. Vladeck, talking there about
5 Upstream and making the point that the nature of 12:32
6 Upstream is such that the entire of the data flowing
7 across a particular point in the internet is examined -
8 examined by a machine, Judge, but that makes no
9 difference. That's the nature of Upstream. And
10 there's similar material, Judge, at footnote 44, but I 12:32
11 think in footnote 44 relating to, yes, relating to
12 12333.

13
14 Then secondly, Judge, US laws permit direct access.
15 The material in that regard is set out at footnote 41, 12:33
16 where Prof. Swire says:

17
18 *"So in terms of direct, my own view would be direct*
19 *access to the internet backbone upon Upstream is a fair*
20 *reading."* 12:33

21
22 That's what he says, Judge. He says there's direct
23 access on the part of the US Government, the NSA,
24 directly under Upstream.

25 12:33
26 Thirdly, Judge, US laws permit mass surveillance, as I
27 say, properly so understood, Judge. It certainly
28 permits the surveillance of the data of very large
29 numbers of people under both PRISM and Upstream. It's

1 said, Judge, that they're only a small proportion of
2 the population of the world - well, of course, they
3 are. But the court has heard of necessity that a great
4 deal of data private to a great number of other people
5 is necessarily caught when you get material to, from, 12:34
6 about and then chains of e-mails --

7 **MS. JUSTICE COSTELLO:** And the MCTs.

8 **MR. MCCULLOUGH:** MCTs, exactly, Judge. So that, in my
9 respectful submission, meets the test of mass
10 surveillance. If you look at footnote 43, Judge, 12:34
11 you'll see reference to how that is undoubtedly so in
12 relation to 12333. 12333 *avowedly* permits bulk
13 surveillance. Because that's, if you like, the point
14 of 12333.

15 **MS. JUSTICE COSTELLO:** Is it semantic to make a 12:34
16 distinction between bulk surveillance and mass
17 surveillance, or is it quality? What's...

18 **MR. MCCULLOUGH:** No, I don't think it's semantic,
19 Judge. I mean, I suppose to take, you know, the
20 obvious example; if you want to say surveilling people, 12:35
21 leaving aside electronic communications, do you look at
22 everybody? Do you follow everybody, you look at
23 everybody's mail, say? Or do you look at only the mail
24 of a select number of people? I suppose one would be
25 properly described as targeted, the other is mass. 12:35
26

27 In this case, Judge, we know what Upstream does.
28 Upstream *actually* looks at the mail of everybody, the
29 communications of everybody. That's the nature of it.

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And the point, Judge, I suppose that I should have made at the beginning about these programmes - all this evidence is grounded in the programmes, related to the programmes. But of course, the programmes are only examples. The programmes are only what we know occurs at the moment under Section 702. There may be other programmes, although doubt was expressed as to whether that's so, but there's evidence to and fro on that. But it doesn't *matter* very much. *Because* they are carried out under Section 702, they are examples only of what can occur. So if you like, the most extreme effects, the most extreme parts of every one of those programmes are apparently legally permissible as a matter of EU law -- my apologies, of US law. And it follows, therefore, that as a matter of US law, the US Government is capable of introducing *another* programme the following day under Section 702 which has the same characteristics.

12:35

12:35

12:36

12:36

So if, as I say, mass surveillance, or indiscriminate surveillance perhaps more correctly, is permitted under Upstream, well, then it's permitted under Section 702. If direct access is permitted under Upstream then it's permitted under Section 702.

12:36

Then fourthly, Judge, US laws permit targeting without limitation of non-US persons. And the relevant material in that regard, Judge, is to be found, I

1 think, at footnotes 39 and 50, again referring just to
2 the programmes of which we know. But if you look just
3 at footnote 50, Judge, you will recall this, that the
4 targeting and minimisation procedures in 702 have no
5 relevance to EU citizens, they've no relevance to 12:37
6 anybody except US persons. So there's no targeting and
7 minimisation procedures, save those which I'll mention
8 in a moment under PPD-28. But Section 702 itself
9 provides for no targeting, no minimisation for EU
10 citizens. And the only requirement is this significant 12:37
11 purpose, being the collection of foreign intelligence.
12 **MS. JUSTICE COSTELLO:** And what do you say is the
13 relevance, if any, of the fact that if you set up a
14 filter system that's designed to minimise and target US
15 systems that de facto it will minimise and target EU 12:37
16 people also because the same test is applied to them?
17 **MR. MCCULLOUGH:** well, it was said in the evidence,
18 Judge, that if you set up targeting minimisation for US
19 citizens, you're going to benefit EU citizens.
20 **MS. JUSTICE COSTELLO:** Yes. 12:38
21 **MR. MCCULLOUGH:** Now, I can just about see how there
22 might be an indirect benefit, but it's very tangential
23 if there is. The point of the targeting and
24 minimisation procedures, when the court comes to
25 consider them under Section 702 or 1881(a), the point 12:38
26 of them all is in fact to *avoid* obtaining material on
27 US citizens. That's what lies behind *all* of those
28 procedures. It's not -- targeting and minimisation are
29 *largely* designed to ensure that, to ensure that there's

1 a way of avoiding --

2 **MS. JUSTICE COSTELLO:** And you're saying it's not for
3 targeting the, if I put it, the likely suspects?

4 **MR. MCCULLOUGH:** well, no, there is an element of that
5 in it too, Judge. But the main purpose of targeting 12:38
6 minimisation is to ensure that you catch the
7 material -- that you *don't* get the material of US
8 citizens. So of course, if you do that, that's of no
9 protection to non-US persons.

10 12:39

11 Now, targeting then and minimisation in the more
12 specific sense relating to US persons, I have to say
13 I'm at a loss logically to see how that is going to
14 lead to targeting and minimisation for non-US persons.

15 To take just an obvious example, Judge; if your job is 12:39
16 to ensure that you only collect relevant material

17 relating to Mr. Jones, a US person, you have no
18 obligation, no such obligation at all in relation to
19 Ms. Smith, an EU person. Those targeting and
20 minimisation requirements procedures just don't apply. 12:39

21 So I suppose I can see how you collect less incidental
22 information about Ms. Smith if you target Mr. Jones in
23 a more specific way, but in fact there's no limitation,
24 no targeting and minimisation limitation in respect of
25 the collection of data relating to the EU person. So 12:39
26 if there *is* a benefit, Judge, it's entirely tangential.

27
28 Then fifthly, Judge, there's no adequate prior review.
29 And I've mentioned that, that arises under paragraph

1 120 of Watson. I've mentioned, Judge, what, in my
2 respectful submission, is the inadequacy of the FISC
3 system in the context of paragraph 120.
4

5 There is never any notification, Judge, we know that. 12:40
6 I'll just mention, if I may, Judge, what Ms. Hyland
7 said about the FRA report in that context. That's to
8 be found at book five, tab 61. And she referred to
9 material at page 61. And she read this material,
10 Judge, under paragraph 3.1, a precondition obligation 12:40
11 to inform and the right to access.

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

13 **MR. MCCULLOUGH:** The starting point is, as the text
14 says:
15

16 *"The obligation to inform and the right to access one's*
17 *own data can generally be perceived as strong*
18 *safeguards for ensuring the effectiveness of a remedial*
19 *action, and, ultimately, legal scrutiny by judicial or*
20 *non-judicial bodies. From the point of view of the*
21 *right to data protection, these safeguards also ensure*
22 *transparency of data processing and the exercise of*
23 *other rights of the individual."*
24

25 And so on. Then about six or seven lines down, Judge: 12:41
26 *"To safeguard national security".*

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

28 **MR. MCCULLOUGH:** The text continues:
29

1 *"To safeguard national security, obligations and rights*
2 *may, in accordance with Article 13(1) of the Data*
3 *Protection Directive, be restricted to the extent*
4 *necessary and properly justified."*

5
6 And I don't doubt that, Judge, that there may be a
7 restriction on the right to notification under the
8 Directive to which we refer. Because that's what
9 Article 13 talks about.

10
11 *"According to the CJEU, the judicial review guaranteed*
12 *by Article 47 of the Charter first requires full*
13 *knowledge by the individual, and subsequently by the*
14 *court, of the information on which the administration*
15 *based its decision. The adversarial procedure shall be* 12:41
16 *complied with" --*

17 **MS. JUSTICE COSTELLO:** I think that's "*principle*".

18 **MR. MCCULLOUGH:** Sorry, "*The adversarial principle*
19 *shall be complied with, so that the individual can*
20 *decide whether there is an argument to make against the*
21 *national decision. From there the court may review the*
22 *national decision."*

23
24 That's really talking about, if you like, one side of
25 the balance that is to be made under Article 13(1) of 12:42
26 this Directive. First there's this general principle.
27 But then "*At the same time*", they continue:

28
29 *"At the same time, for overriding reasons connected to*

1 *state security, it may prove necessary not to disclose*
2 *certain information to the individual. However, the*
3 *court shall be able to review whether the invoked*
4 *reasons are valid, and the national authority shall*
5 *prove that the disclosure of the information would*
6 *compromise state security. There is no presumption*
7 *that the reasons invoked exist and are valid."*

8
9 Judge, compare that with the position in US law where
10 there's actually no question of notification. And by 12:42
11 definition, therefore, there's no system set up in US
12 law of reviewing that. It's just not a requirement of
13 US law.

14
15 If you look at the cases, Judge, to which reference is 12:42
16 made in the box beside it, there's a reference to
17 **Klass**, of which the court heard, about which the court
18 heard from Ms. Hyland, making the point, Judge, in
19 essence, that there may be *some* cases in which it will
20 be legitimate not to inform a subject for *years* after 12:43
21 surveillance of the fact that he'd been surveilled.
22 And again, Judge, one can see that that might be a
23 system, if set up, that might satisfy the requirement
24 for notification. But that would be a system in which
25 a decision was made, an objective decision was made 12:43
26 that some people are classified one way, others are
27 classified another way, 'Those on whom we have
28 collected information, who actually pose no risk or
29 whose information we have collected who in fact turn

1 out to be irrelevant to our inquiries we'll tell about
2 it'. That's not part of the US system at all.

3
4 And the same applies in the cases over the page, Judge,
5 maybe just the second page, weber:

12:44

6
7 *"However, the fact that persons concerned by secret*
8 *surveillance measures are not subsequently notified*
9 *once surveillance has ceased cannot by itself warrant*
10 *the conclusion that the interference was not 'necessary*
11 *in a democratic society', as it is the very absence of*
12 *knowledge of surveillance which ensures the efficacy of*
13 *the interference."*

14
15 But then:

16
17 *"[A]s soon as notification can be carried out without*
18 *jeopardising the purpose of the restriction after the*
19 *termination of the surveillance measure, information*
20 *should, however, be provided to the persons concerned."*

21
22 That's the principle under the Convention, Judge. And
23 the same applies in the case below that, The
24 Association For European Integration and Human Rights
25 and Ekim against, I think, Bulgaria where the same
26 quote is in the final words:

12:44

27
28 *"However, as soon as notification can be made without*
29 *jeopardising the purpose of the surveillance after its*

1 *termination, information should be provided to the*
2 *persons concerned."*

3
4 So with respect, Judge, I don't think these parts of
5 the Convention really assist the court that Facebook is 12:44
6 making. They demonstrate, as is undoubtedly the case,
7 that it would be legitimate under the Directive and the
8 Charter to have a system whereby you didn't just pass
9 over the information immediately. But what they *don't*
10 demonstrate is the legitimacy of a system in which 12:45
11 there is no *question* of notification under any
12 circumstances. And in that regard, Judge, in my
13 respectful submission, there's a --

14 **MS. JUSTICE COSTELLO:** This might be a hypothetical
15 question, but in relation to Upstream, where you're 12:45
16 submitting that everything that passes over particular
17 points of the internet is surveilled because it is
18 subject to automatic searching in order to find out
19 whether tasked communications pass through those
20 points, would that require notification of all the 12:45
21 blanks, if I can put it that way? That sounds rather
22 horrendous.

23 **MR. MCCULLOUGH:** Yes. I suppose, Judge, one might take
24 the view that if it ever came to a proper measuring
25 system to be justified under the Convention, or under 12:45
26 the Directive, the answer to that might be no. The
27 answer -- a country, say Ireland, might legitimately
28 say --

29 **MS. JUSTICE COSTELLO:** I could see our e-mail boxes

1 being filled up with 'You have been surveilled and not
2 touched'.

3 **MR. MCCULLOUGH:** No. I can see, Judge, that a Member
4 State might legitimately say 'The requirement of
5 notification *should* relate only to those whose data I
6 have *retained*, as opposed to those whose data I have
7 accessed'. The adequacy of that --

12:46

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

9 **MR. MCCULLOUGH:** -- would require to be assessed.

10 **MS. JUSTICE COSTELLO:** No, I mean, it's going to what I
11 was sort of groping around about; there's a qualitative
12 incremental invasion of privacy depending on the nature
13 of the process that's applied, processing applied.

12:46

14 **MR. MCCULLOUGH:** Yes, there is, Judge. It's
15 *undoubtedly* the case, Judge, that retention poses a
16 greater threat to data privacy than merely surveilling.
17 That's obviously the case, Judge. And therefore, it
18 might be so that the notification requirement, just for
19 instance, might be more easily met in respect of those
20 whose data we've just surveilled but not retained. And
21 I suppose the same might apply to the various
22 requirements of EU law, that there might be a
23 distinction to be made between those people.

12:46

12:46

24
25 But just looking at the particular issue we're talking
26 about, notification, Judge, the point I'm making is
27 that for *any* of those groups, US law simply doesn't
28 provide for *any* form of notification.

12:47

29 **MS. JUSTICE COSTELLO:** Oh, I accept my question was a

1 hypothetical.

2 **MR. MCCULLOUGH:** Yes, Judge. Then finally, Judge, I
3 think separately in respect of what I say are breaches
4 of substantive law, there's no subsequent review on an
5 individual a basis of compliance with those standards. 12:47
6 And that follows from paragraph 123 of Watson.

7
8 So, Judge -- there may, of course, as the court knows,
9 be other programmes, there may well be certainly other
10 programmes in the future. And so, Judge, for the 12:48
11 reasons that I've described, Judge, in our respectful
12 submission, as is suggested at paragraph 51 of these
13 speaking notes, the state of US law is not compatible
14 with the Charter. That is demonstrated by the evidence
15 in respect of the programmes of which we *know*. But it 12:48
16 is all the *more* clear, I think, Judge, in relation to
17 the law itself, section 702 in particular.

18
19 And for the reasons discussed, Judge, if that is so,
20 well then a system in the EU, in an EU member country 12:48
21 that had the characteristics which the US legal system
22 have would not pass muster. And if *that* is so, well
23 then data can't be transferred to the US, because to do
24 so is in breach of the principles of effective
25 equivalence and respect for Charter rights. And that's 12:49
26 how I say that feeds into the structure, Judge.

27
28 I just wanted to return then, Judge, to the earlier
29 parts of this speaking note, just to deal with the

1 material, Judge, at page 15; that's the changes in US
2 law since Schrems.

3 **MS. JUSTICE COSTELLO:** Yes.

4 **MR. MCCULLOUGH:** I just want to deal with this and one
5 other issue then, Judge, and then I'll be able to 12:49
6 conclude. And much of this material here, Judge, I
7 suppose is obvious. We say, Judge, that although
8 there's a great deal of emphasis on it, there are in
9 fact limited changes in Schrems in the state of US law.
10 There are in fact no *substantive legal* changes properly 12:49
11 so-called. Section 702, and 12333 insofar as it's
12 relevant -- and I'll come back to that,
13 Mr. O'Sullivan's been able to collect the material on
14 that, in just a moment. But there's no changes to the
15 legal structure, Judge. 12:50

16
17 An emphasis was laid on the following matters about
18 which we make some brief comments in paragraph 44.
19 First, on the Privacy Shield Ombudsperson. And the
20 court has heard this material, so I'll simply point 12:50
21 out, Judge, that it's not a tribunal, it's an executive
22 officer of the US department, therefore can't provide
23 redress within the meaning of Article 47.

24
25 Second, the point is made that the options available to 12:50
26 the Ombudsperson are very limited. The court will see
27 that at footnote 47. The court's aware what the
28 response *is*; the response from the Ombudsman is either
29 a statement that the requirements have been complied

1 with, or in the event of noncompliance, that the
2 noncompliance is being remedied. So a person whose
3 rights have been breached and a person whose rights
4 have been found by the Ombudsperson to be breached but
5 not remedied actually will just never hear again from 12:51
6 the Ombudsperson, that's just the end of it as far as
7 that person is concerned.

8
9 Then there's reference to the standing type obstacle of
10 which the court has heard at the third indent, Judge, 12:51
11 which is set out there and I won't spend time on that.

12
13 Then, Judge, in relation to PPD-28, the court will
14 recall some discussion about the tasking and the
15 minimisation procedures -- the targeting, I should say, 12:51
16 sorry, and minimisation procedures provided for by
17 PPD-28. And the court will recall that there's no such
18 protection in Section 702 itself for EU citizens, but
19 it's said that there's some protection --

20 **MS. JUSTICE COSTELLO:** In your note there you have 12:51
21 "*tasking* and minimisation". Are we talking about
22 tasking or targeting?

23 **MR. MCCULLOUGH:** It should actually be "targeting",
24 Judge, that's a misprint. And therefore, it's only by
25 reference to PPD-28 that any such protection is to be 12:52
26 found. And the evidence, Judge, that establishes that
27 to be so is mentioned at footnote 50.

28
29 Then over the page, Judge, the reasons why that's not

1 adequate are set out: First, that PPD-28 isn't a law;
2 secondly, Article 1 of PPD-28, which *does* refer or does
3 relate to Section 702 programmes is cast in *extremely*
4 wide terms. And I'd ask the court to look at that in
5 due course. But the terms, Judge, are aspirational, 12:52
6 wide, indefinite and, in my respectful submission, they
7 provide no effective protection, particularly under
8 circumstances where, as has been demonstrated to the
9 court, they are in fact nonjusticiable.

10
11 Article 2, Judge, sets up some limitations, but they
12 relate only to bulk surveillance. That's expressly
13 stated in Article 2. And those in fact, as far as the
14 US Government is concerned, appear to be 12333
15 measures, as opposed to Section 702 measures. And 12:53
16 again, Judge, the court has had the opportunity of
17 looking at them, but in my respectful submission, they
18 are so vague as to provide no effective protection.

19
20 Article 4, Judge, is said to provide limits on 12:53
21 retention and dissemination. They're not the same
22 limits on retention and dissemination as are found in
23 Section 702, the text makes it clear they're the limits
24 that are to be found in 12333. And there's no
25 limitation in it on the collection of data. And this 12:54
26 requires the court to follow this labyrinth down a bit
27 I'm afraid, but when the court then turns to 12333 in
28 order to see the targeting minimisation protections
29 that are introduced via it to PPD-28 and thereby to

1 Section 702 programmes, the court will see just how
2 wide they are. Because those targeting and
3 minimisation procedures are based upon the foreign
4 intelligence definition in 12333, which is wider again
5 than the foreign intelligence definition in Section 12:54
6 702.

7
8 And in my respectful submission, Judge, when you look
9 carefully at that, PPD-28 and E012333, to which it
10 refers for *this* purpose and which is, therefore, 12:54
11 certainly relevant for this purpose anyway, contains
12 targeting and minimisation procedures that are not in
13 fact of assistance in cutting down on an objective
14 basis the range of those to whom they apply.

15 12:55
16 Now, all of that, Judge, of course, in the context of
17 both PPD-28 and E012333 being expressly nonjusticiable.
18 So even if they're breached, Judge, well then what of
19 it in a legal sense? They just don't provide for a
20 remedy. And that's the point made, Judge, at the last 12:55
21 indent.

22
23 Then, Judge, just over the page, dealing with, if you
24 like, the third big change that was said to be
25 introduced, the Privacy Act and the Judicial Redress 12:55
26 Act, all evidence demonstrated that they're simply not
27 relevant because they don't apply to the NSA. So the
28 court will recall the Privacy Act provides for certain
29 protections. But the Privacy Act doesn't apply to the

1 NSA. The Judicial Redress Act equally, therefore,
2 doesn't apply to the NSA. And indeed the NSA is not a
3 designated agency under the Judicial Redress Act.
4

5 So for the reasons that are set out, Judge, in the 12:56
6 material mentioned at paragraph, at footnote 54, when
7 Prof. Vladeck was talking, I think the court can safely
8 conclude that that is not part of the picture to which
9 it needs to pay any attention.

10 12:56
11 Very briefly, Judge, if I can ask the court to turn
12 forward to, finally, the material at paragraph 53.
13 There is one matter that I have to return to after
14 this, but paragraph 53, Judge, deals with an issue upon
15 which a great deal of emphasis was laid by Facebook, 12:56
16 this is the Privacy Shield Decision. And I say, Judge,
17 that's not germane to the court's consideration of
18 these matters, for six reasons that are set out.
19 They're not numbered one to six, Judge, but they do
20 follow one to six in what is said here. 12:56

21
22 The first, Judge, is this, that the adequacy decision,
23 or *no* adequacy decision is effectively binding. And we
24 know that, Judge, because that's what the Court of
25 Justice found in Schrems. In Schrems it was contended 12:57
26 that you can do, the court could do -- that the DPC
27 could do nothing about this, the court could do nothing
28 about this, it just had to abide by the decision of the
29 Commission. And that turned out to be not correct. It

1 was correct that the court couldn't strike it down and
2 the DPC had to observe it until it was struck down.
3 But it doesn't have some magical status. It is clearly
4 something that is open to attack and the mere fact that
5 an adequacy decision has been reached does not mean 12:57
6 that it's immune from challenge.

7
8 Then secondly, Judge, and I suppose most importantly
9 for present purposes, the court has to look at what the
10 Privacy Shield Decision actually is. It's not a 12:57
11 finding of general adequacy, it's only a finding that
12 there's adequate protection for transfers to the US by
13 those who sign up to the Privacy Shield principles.
14 And the material in that regard is set out at footnote
15 69, Judge; people must, users of it must self-certify. 12:58
16 So just look, Judge, over the footnote at recital 16,
17 or recital 16 on that footnote

18 **MS. JUSTICE COSTELLO:** Yes.

19 **MR. MCCULLOUGH:** *"The protection afforded to personal*
20 *data by the Privacy Shield applies to any EU data 12:58*
21 *subject whose personal data has been transferred from*
22 *the Union to organisations in the US that have*
23 *self-certified their adherence to the principles with*
24 *the US Department of Commerce."*

25
26 And recital 136 -- sorry, 139, 19: 12:58

27
28 *"As part of their self-certification, organisations*
29 *have to commit to complying with the principles."*

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And then 136:

"In the light of these findings, the commission considers that the US ensures an adequate level of protection for personal data transferred from the Union to self-certified organisations in the US under Privacy Shield." 12:58

So it's not a general measure, Judge, it's a measure that applies only under those specific circumstances. 12:58

The third point, Judge, just at the top of that page, page 24 -- and of course, I should say, Judge, we don't know whether Facebook has signed up to those principles, we don't know whether it *is* transferring data pursuant to those principles. The third point is the point made at the top of page 24; it *certainly* isn't relying on them for *these* transfers. *These* transfers are transfers that, according to the information it gave to the DPC, it relies on the SCC decision to transfer. 12:59

MS. JUSTICE COSTELLO: So you say that, contrary to Mr. Gallagher's submission, this isn't a collateral attack on the Privacy Shield? 12:59

MR. MCCULLOUGH: No.

MS. JUSTICE COSTELLO: Because it doesn't apply because we haven't any evidence that they have self-certified?

MR. MCCULLOUGH: well, it's not *just* that, Judge.

1 That's certainly true. But it's not a general adequacy
2 decision *anyway*. And it's been presented to you as if
3 it was some sort of validation of US law under all
4 circumstances for everybody. It's not. It says that
5 if you certify that you adhere by certain principles, 12:59
6 if you self-certify, *then* you can transfer pursuant to
7 Privacy Shield.

8 **MS. JUSTICE COSTELLO:** Is it adopted under, what was
9 it, 25(6)?

10 **MR. MCCULLOUGH:** I think it -- 13:00

11 **MR. GALLAGHER:** Yes.

12 **MR. MCCULLOUGH:** I think it has been, Judge, yes. I
13 think it has been, yeah. Then, Judge, the fourth
14 point, over the page at (d) is that in any event, while
15 the Privacy Shield may be a strong indication of the 13:00
16 Commission's view, the Commission has been wrong in
17 these matters and indeed -- like, I suppose that's the
18 origin of the first Schrems case, Judge.

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

20 **MR. MCCULLOUGH:** That the Commission was wrong in that 13:00
21 regard.

22 **MS. JUSTICE COSTELLO:** I just want to understand your
23 argument here. Are you saying that the Privacy Shield
24 isn't a binding measure on the DPC?

25 **MR. MCCULLOUGH:** No, it *is* a binding measure on the 13:00
26 DPC, Judge.

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

28 **MR. MCCULLOUGH:** Yeah, it is. But --

29 **MS. JUSTICE COSTELLO:** And, therefore, on the court?

1 **MR. MCCULLOUGH:** Sorry, but it's been presented to the
2 court as if it were an adequacy finding that is
3 relevant that, if you like, prevents the court
4 embarking upon and reaching a decision on the questions
5 of effective equivalence. And in my respectful 13:01
6 submission, it doesn't do that at all. All it does is
7 it says that there are adequate safeguards under
8 Article 25 for those who sign up to observe certain
9 principles. But that's not a set of principles that
10 anybody has signed up to in *this* case. It just doesn't 13:01
11 *arise* in the context of this case, Judge, in my
12 respectful submission.

13
14 The fifth point, Judge, is this, that when you look at
15 the Privacy Shield Decision, Judge, it also contains a 13:01
16 provision akin to the Article 4 provision - it's at
17 Article 3 of the Privacy Shield Decision. It also has
18 a safety valve in it, in the same way as the Safe
19 Harbour decision had a safety valve in it which was
20 struck down. Now the Privacy Shield Decision has a 13:01
21 safety valve in it, its Article 3, which is phrased in
22 wide terms. And so again the Privacy Shield Decision
23 is subject to precisely the same logic as the Safe
24 Harbour decision was in Schrems. You *can't* rely on it
25 if the net effect of your reliance on it is to deprive 13:02
26 EU citizens of the rights to which they're entitled
27 under the Directive and the Charter.

28
29 So it's circular, Judge, to say that it's an adequacy

1 decision. It's an adequacy decision that contains
2 within it a provision whereby the DPC can *override* it.
3 **MR. GALLAGHER:** Sorry, it's not the DPC, it's the
4 Commission.
5 **MS. JUSTICE COSTELLO:** well, I think what you mean is 13:02
6 that in the sense that the DPC can bring proceedings to
7 challenge it in the way that Mr. Schrems brought
8 proceedings by way of judicial review which ultimately
9 challenged Safe Harbour, is that what you meant?
10 **MR. MCCULLOUGH:** Sorry, Judge, just give me one second, 13:02
11 because I've to find it.
12 **MS. JUSTICE COSTELLO:** well, perhaps we might take it
13 up at two.
14 **MR. MCCULLOUGH:** Very good, judge.
15 **MS. JUSTICE COSTELLO:** That'll give you a longer time 13:02
16 to find it.

17
18
19 (LUNCHEON ADJOURNMENT)

20 13:03
21
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29

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 14:06
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MS. JUSTICE COSTELLO:** I just wanted to confirm that
8 I will be in a position to resume this on Tuesday.

9 **MR. GALLAGHER:** Thank you.

10 **MR. MCCULLOUGH:** Thank you, Judge. 14:06

11 **MS. JUSTICE COSTELLO:** I hope it doesn't interfere with
12 previous arrangements.

13 **MR. MCCULLOUGH:** Judge, before lunch I was making a
14 point about the fact that the Privacy Shield decision
15 contains what I described as a safety valve, similar to 14:06
16 the safety valve contained in Article 4 of the SCC
17 decisions. And I was making the point that that
18 demonstrates that an Adequacy Decision in itself leaves
19 open the possibility that if, contrary to the finding
20 by the Commission, it turns out that the protections 14:07
21 provided by the foreign law are not adequate.

22 **MS. JUSTICE COSTELLO:** And who operates the safety
23 valve, yes.

24 **MR. MCCULLOUGH:** well, that's the point. And I had
25 suggested it was the Commissioner, Judge, and I think 14:07
26 Mr. Gallagher had intervened, so I just wanted to
27 return, and said it was the Commission. I just wanted
28 to give the court the text of the article to which
29 I was referring in any event, and in fact you will find

1 it, Judge, in footnote 72 of our speaking note.

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

3 **MR. MCCULLOUGH:** And it's Article 3 of the Privacy
4 Shield decision itself. The Privacy Shield decision,
5 Judge, just to point you to the place where you'll find 14:07
6 it, is at Book 1 of the EU authorities, Tab 13.

7 **MS. JUSTICE COSTELLO:** Hmm.

8 **MR. MCCULLOUGH:** The decision itself is a short item,
9 as the court is aware, at the end of a very long series
10 of recitals. One paragraph of it is Article 3 which 14:08
11 provides as follows:

12

13 *"whether the competent authority of the Member States*
14 *exercises their authority pursuant to Article 28(3) of*
15 *Directive 95/46/EC leading to the suspension or 14:08*
16 *definitive ban of data flows to an organisation in the*
17 *US that is included in the Privacy Shield List in*
18 *accordance with Sections I and III of the Principles*
19 *set out in Annex II in order to protect individuals*
20 *with regard to the processing of their personal data, 14:08*
21 *the Member State concerned shall inform the Commission*
22 *without delay."*

23

24 So, in the case of Ireland, Judge, it's the DPC who
25 makes an order. 14:08

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

27 **MR. MCCULLOUGH:** She exercises her powers pursuant to
28 Article 28(3) which, in the case of our Ireland, are
29 her powers under section 11 of the Data Protection Act.

1 when does she do that? She does it when she needs to
2 do so in order to protect individuals with regard to
3 the processing of their personal data. And so it's an
4 important aspect, Judge, of the Privacy Shield decision
5 that it contains within it the recognition that it may 14:09
6 not be a decision that actually does provide adequate
7 protection for individuals with regard to the
8 processing of their personal data.

9 **MS. JUSTICE COSTELLO:** Is that required because in
10 Schrems 1 the CJEU says that you can't preclude a 14:09
11 national authority from enquiring?

12 **MR. MCCULLOUGH:** well, the Safe Harbour Decision,
13 Judge, contained an article - was it Article 3 or 4 -
14 Article 3, Judge, which was prescriptive and it set out
15 limited circumstances in which the DPC could make an 14:10
16 order under Article 28(3) or section 11. And one of
17 the findings in Schrems at the end of the judgment was
18 to the effect that that too was a breach of...

19 **MS. JUSTICE COSTELLO:** Was it Article 28?

20 **MR. MCCULLOUGH:** It was a breach of, I think, 14:10
21 Article 28, Judge, and perhaps the Charter rights, but
22 it was also struck down. The Article 3 aspect of the
23 Safe Harbour Decision was struck down, but that was
24 precisely because it was too prescriptive as to the
25 conditions that it laid down in order to justify the 14:10
26 intervention of the DPC.

27 **MS. JUSTICE COSTELLO:** Hmm.

28 **MR. MCCULLOUGH:** so the original version of Article 4
29 in the SCC decisions contained a set of circumstances

1 under which the DPC could intervene. They are less
2 prescriptive than those in the Safe Harbour Decision,
3 I won't bring the court to it, but if the court looks
4 at it you will see the criticism made in Schrems, at
5 the very end of the judgment, of the quite prescriptive 14:11
6 nature of the circumstances under which the DPC could
7 act.

8
9 The Article 4 conditions in the Safe Harbour Decision
10 was always less prescriptive, but the 2016 amendment of 14:11
11 the SCC decisions was premised on a conclusion that,
12 because of what the Court of Justice had said in
13 Schrems in relation to Article 3 of Safe Harbour, it
14 was now better to open up Article 4 so as to remove any
15 prescription as to the circumstances in which the DPC 14:11
16 could act, and that's the order of events.

17 **MS. JUSTICE COSTELLO:** And this Article 3 and Privacy
18 Shield is in comparable terms to the new Article 4?

19 **MR. MCCULLOUGH:** Exactly, Judge, it's in comparable
20 terms with what I might call the new model article. 14:11

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

22 **MR. MCCULLOUGH:** It's the same for practical purposes
23 as Article 4 of the SCC decisions in its new version.

24 **MS. JUSTICE COSTELLO:** Hmm.

25 **MR. MCCULLOUGH:** Judge, I want to go back to one thing 14:11
26 I said about the Privacy Shield decisions before lunch.
27 I said that we don't know if Facebook have signed up.
28 I think in fact we have heard in the course of the
29 evidence that they *have* signed up. In that context

1 there is one document missing from those before the
2 court. In our footnote 6, Judge, we refer to a letter,
3 correspondence passing between us and the solicitors
4 for the DPC, I should give you that, Judge.

5 **MS. JUSTICE COSTELLO:** Thank you. (SAME HANDED TO THE 14:12
6 COURT)

7 **MR. MCCULLOUGH:** Because you don't have it as yet.
8 Hopefully you will be able to add it, Judge, to the
9 folders that you have.

10 14:12
11 And you see, Judge, in the recent past we asked them
12 again what are the basis upon which, the legal basis
13 upon which your client relies to transfer and they said
14 that they weren't answering that in circumstances
15 where: "*Your request doesn't relate to an issue in the* 14:12
16 *above proceedings.*" And then they made a comment in
17 respect of costs, Judge. The comment in respect of
18 costs doesn't matter for present purposes.

19
20 But the point is this, Judge: That we don't know the 14:13
21 basis upon which Facebook transfers all data to the
22 States. The court will recall that's an express issue
23 that we raised in the complaint. It's clear that there
24 are other bases but the DPC was asked to investigate
25 them, Judge, and didn't do so. That's one of the 14:13
26 criticisms we make about the necessity of a reference.

27
28 what we can certainly say, Judge, about the Privacy
29 Shield decisions is that they are not relied on in this

1 case.

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

3 **MR. MCCULLOUGH:** For the purpose of *these* transfers
4 and, therefore, Judge, in my respectful submission,
5 they don't affect the court's decision in *this* case. 14:13

6
7 And then the final point I want to make about Privacy
8 Shield, Judge, is what's expressed at paragraph 55 of
9 the speaking note. For the reasons, Judge, that we
10 have gone through, the Privacy Shield, the adequacy, 14:14
11 the validity, I should say, of the Privacy Shield
12 decision doesn't arise in this case. But we do also
13 express the view, Judge, that it is in fact invalid
14 under Article 25 of the Directive and the Charter. We
15 say it's not being invoked and considerations such as 14:14
16 that don't arise.

17
18 But I suppose it is important just to say this, Judge:
19 If I am wrong about all of that and if the court thinks
20 that it plays an important part in its considerations 14:14
21 well then the court will have to reflect back to the
22 way in which the first Schrems case developed. In that
23 case, Judge, ultimately the issue that came before
24 Hogan J wasn't one in which the parties
25 straightforwardly raised the validity of the Safe 14:14
26 Harbour Decision but he said well I need to have a
27 decision on that in order to enable a - sorry,
28 ultimately the Court of Justice embarked upon that and
29 said now we need to have a decision as to the validity

1 of the Safe Harbour Decision.

2
3 So, while I'll not advocating for this, Judge,
4 I suppose one possible outcome of all of this, if
5 Privacy Shield becomes central to the court's decision, 14:15
6 although I say it didn't for all the reasons I have
7 explained, well then it's possible the court will have
8 to ask about that as well. That's an issue I suppose
9 to be raised when we see the court's judgment and, if
10 the issue arises, well then we would have an 14:15
11 opportunity to talk about questions, Judge. As I say
12 in our respectful submission the drafting of questions
13 won't arise, but, if it does, Judge, I suppose that's a
14 possibility that may have to be considered depending
15 upon the role the Privacy Shield plays in the court's 14:15
16 determination. I am just, if you like, marking that,
17 Judge.

18
19 Just a few other issues, Judge, that I want to return
20 to. One, Judge, was a point I was discussing before 14:15
21 lunch in relation to gaining access to data and
22 I wanted to bring the court's attention to something
23 that the Advocate General said in Schrems, Judge, and
24 to something that appears in one of the recitals to the
25 Directive. It's perhaps just actually the latter, 14:16
26 Judge, if the court looks at our footnote 66.

27
28 I make this point, Judge, because there's a suggestion,
29 I think, implicit in what Facebook says that there's a

1 distinction to be drawn between, if you like, searching
2 by a machine, sort of automatic searching on the one
3 hand, and then physically looking through documents on
4 the other hand. That's an addressed at footnote 66,
5 Judge. We say, Judge, that there isn't any difference 14:16
6 in law between the two, no difference between a manual
7 search on the one hand and a search by an automated
8 process on the other hand.

9
10 We rely in that regard, Judge, on a recital in the 14:16
11 Directive, the Directive at issue in this case, recital
12 17, which provides:

13
14 *"whereby the protection of individuals must apply as*
15 *much to automatic processing of data as to manual* 14:17
16 *processing."* Then Article 3:

17
18 *"The director shall apply to the processing of personal*
19 *data wholly or partly by automatic means, and to the*
20 *processing otherwise than by automatic means of* 14:17
21 *personal data which form part of a filing system or are*
22 *intended to form part of a filing system."*

23
24 Sorry, just to look at one thing. Yes, Judge, sorry,
25 I just wanted to get clear for myself that that's a 14:17
26 quote from Directive 95/46, which it is, Judge, that's
27 what Article 3 provides.

28
29 Now, Judge, I just wanted to return briefly to this

1 question of whether, that we had some discussion about
2 before lunch and in which Mr. Gallagher intervened, as
3 to the extent to which this distinction between
4 national security on the one hand and foreign
5 intelligence on the other hand was discussed in the 14:18
6 evidence.

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

8 **MR. MCCULLOUGH:** And I just wanted to bring the court's
9 attention to something to which I should have brought
10 the court's attention, Judge, which is part of 14:18
11 Ms. Gorski's evidence where she was asked about and
12 gave an answer to this. It's at transcript Day 4
13 page 30 and question 36, Judge.

14
15 She is asked a question: "Q. *At item 2 it is suggest 14:19*
16 *that the US régime is 'required to meet the objectives*
17 *of genuine interest or the rights and freedoms of*
18 *others' and it goes on to provide: 'The surveillance*
19 *is designed to stop terrorism and protect national*
20 *security, arguably the foremost duty of the state'?* 14:19

21
22 *A. Certainly stopping terrorism and protecting*
23 *national security are objectives that the government*
24 *pursues through its foreign intelligence surveillance,*
25 *but the foreign intelligence surveillance is much*
26 *broader given the definition of foreign intelligence in*
27 *FISA and also given the even broader definition of*
28 *foreign intelligence in Executive Order 12333. Under*
29 *the executive order, foreign intelligence is defined in*

1 *such a way that virtually any communication made by a*
2 *foreigner abroad could be deemed foreign intelligence."*

3
4 which is a point, Judge, I think I was making before.

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

14:19

6 **MR. MCCULLOUGH:** That the material that falls under the
7 foreign intelligence rubric in 12333, but in particular
8 in 702, is clearly broader than the national security
9 rubric.

10
11 Then the final point, Judge, to which I said I would
12 return is 12333. And I said, Judge, I just asked
13 somebody to have a look at the evidence so as to
14 reflect on what parts of 12333 are relevant, Judge.

15 And it applies, Judge, and is relevant to all

14:20

16 collection outside the US, so that's collection that
17 occurs on the transatlantic cable before data, if you
18 like, hits the US border, if that's an accurate
19 analogue for what data actually does.

20
21 Ms. Gorski dealt with that, Judge, on Day 4, pages 16,
22 145 and 147. She said that that is relevant to EU
23 citizens' data on route to the US.

24
25 The Transit Authority, Judge, and the radio
26 communications authorities also fall within 12333, but
27 I accept that they are not relevant to Facebook, Judge.
28 Because, insofar as Facebook specifically is concerned,
29 Judge, our complaint is data, if you like, that goes to

14:21

1 and then stops in the US and then is subject in the US
2 to surveillance by national security.

3
4 Then finally, Judge, I just wanted to return to a point
5 that I made earlier which is addressed at paragraphs 56 14:21
6 and 57 of the speaking note, it is simply to do with
7 the questions. In summary, Judge, as the court is
8 aware, our submission is that there oughtn't to be a
9 reference for all of the reasons that I have embarked
10 upon, but if I'm wrong about that, Judge, and there is 14:21
11 to be a reference, as the DPC suggests, well then, in
12 our respectful submission, Judge, it's not simply a
13 matter of asking the single question that the DPC has
14 raised, there would almost certainly be other questions
15 to be asked. 14:22

16
17 The precise nature of those questions I think would
18 necessarily depend upon the court's findings, what the
19 court had found by way of factual background. So
20 I won't address that now with the court, it would be a 14:22
21 waste of time to do so, but I just say, I think in
22 common with Ms. Hyland, Judge, is if the court,
23 contrary to our submission, reached the conclusion that
24 it is appropriate to refer a question well then we
25 would welcome the opportunity to address the court 14:22
26 again as to the appropriate questions to be referred.
27 May it please the court.

1 **SUBMISSION BY MR. GALLAGHER:**

2
3 **MR. GALLAGHER:** Judge, before Mr. Murray starts
4 I wonder might I be permitted to correct two matters
5 that, it will just take me a moment, that 14:22
6 Mr. McCullough touched on and then refer to the
7 significance of that Gorski answer that he has just
8 mentioned, if that's permissible.

9 **MS. JUSTICE COSTELLO:** well I think it is probably
10 preferable, yes, that everything is dealt with fairly 14:22
11 in this matter. Yes, thank you.

12 **MR. GALLAGHER:** Yes. Thank you, Judge. The point in
13 relation to the DPC's powers under the Adequacy
14 Decision.

15 **MS. JUSTICE COSTELLO:** Yes. 14:23

16 **MR. GALLAGHER:** I don't think that's been accurately
17 set out by Mr. McCullough, with the greatest of
18 respect. If you look at Article 3, Judge.

19 **MS. JUSTICE COSTELLO:** Just let me get that out now.

20 **MR. GALLAGHER:** Yes. 14:23

21 **MS. JUSTICE COSTELLO:** It's in the first book, isn't
22 it?

23 **MR. GALLAGHER:** It is, in divide --

24 **MS. JUSTICE COSTELLO:** 13, is it?

25 **MR. GALLAGHER:** -- 13, exactly, Judge. what's referred 14:23
26 to, and it's on page 35, Judge, that you were referred
27 to, Article 3 of the decision.

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

29 **MR. GALLAGHER:** What is referred to in Article 3 of the

1 decision is not a power of the DPC, of any Member State
2 to suspend in any way the Privacy Shield, all that the
3 DPC can do is to suspend a data flow to an organisation
4 in the US included in the Privacy Shield where the
5 principles are not adhered to. And you will remember 14:24
6 that the principles dealt with what I called the
7 private sector, the private activities and the public
8 security was dealt with separately.

9
10 So if somebody doesn't comply with the principles, you 14:24
11 can stop in respect of an organisation. But it's
12 Article 4 that deals with a revision of the Privacy
13 Shield and it's only the Commission that is given a
14 role in respect of that. (Short pause)

15 14:24
16 Sorry, Judge. The second point was just, he made a
17 reference, and I think slightly critical of Ms. Hyland,
18 to page 61 of the FRA Report and footnote 438 and the
19 passage which quoted notification and he referred to
20 the case of ZZ at the footnote. 14:25

21 **MS. JUSTICE COSTELLO:** This is page 61, is it?

22 **MR. GALLAGHER:** It is page 61, footnote 438.

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

24 **MR. GALLAGHER:** And said it or implied, I'm not making
25 any criticism of Mr. McCullough on a personal basis, 14:25
26 but just he implied it was a case of notification and
27 national security - or, in the case of national
28 surveillance, it was an entirely different case. It
29 was a case about the reasons given for a decision to

1 refuse entry to the UK on the grounds of national
2 security which is a different matter.

3
4 And, finally, on the reference to Gorski, the answer of
5 a witness in a case doesn't make the matter an issue. 14:25
6 It has never been an issue, national surveillance is
7 the basis of the decision and, while we've gone outside
8 the reasoning of the decision, we've never gone outside
9 the issue which was national surveillance. Judge, in
10 any event Article 4(2) of TEU provides, outside the 14:26
11 scope is essential state functions. And also you find
12 in Article 3(2), which is the Directive itself, refers
13 to national security including the economic well-being
14 of the state. So it's not an issue, if it were an
15 issue I would say that was a legitimate objective, but 14:26
16 it's not been made an issue in the case by this answer
17 by Ms. Gorski.

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

19
20 **SUBMISSION BY MR. MURRAY:** 14:27

21
22 **MR. MURRAY:** May it please you, Judge. We've an awful
23 lot to respond to, Judge, in the sense that I think
24 there have been altogether seven speeches made.

25 **MS. JUSTICE COSTELLO:** Oh, I know and you are not being 14:27
26 confined, I have cleared my diary for next week.

27 **MR. MURRAY:** Well I am alarmed to [inaudible] say til
28 next week.

29 **MS. JUSTICE COSTELLO:** I am looking at what happened.

1 we have already had a 33% increase.

2 **MR. MURRAY:** Yes. Well, Judge, I make those comments,
3 not by way of laying foundation for certainly next
4 week, but really just explaining that...

5 **MS. JUSTICE COSTELLO:** It's a short week. 14:27

6 **MR. MURRAY:** Well I hope so, Judge. Just logistically
7 managing, I suppose, the responses to all of the
8 various points which have been brought from different
9 perspectives, some in conflict with each other, some
10 new, some old, some variance, some familiar themes, 14:27
11 that what I'm proposing to do in the course of the
12 reply, and it will either be myself or myself and
13 laterally Mr. Collins, is to try to gather together by
14 reference to a number of themes the contentions you
15 have heard. 14:28

16
17 what I have done, Judge, and I'll just hand a copy up
18 to you and one to my Friends is to try to (SAME HANDED
19 TO THE COURT) produce some sort of a road map. I don't
20 present it, Judge, as being completely comprehensive of 14:28
21 the issues in the case, although it is, as I now see,
22 headed "*issues*", but it is the road map of the
23 questions which seem to me to have emerged from the
24 various submissions you have heard, and what I've laid
25 out here defines more or less the sequence in which I'm 14:28
26 going to deal with them.

27
28 First of all, the issue identified as to whether the
29 court is entitled to look at matters that are (a) not

1 addressed in the Draft Decision or (b) have arisen in
2 the course of the hearing in considering whether to
3 make a reference, and this is the issue as to whether
4 it has been, I think perhaps inaccurately, referred to
5 as to whether the court of its own motion can refer, 14:29
6 although that is it in part. It is also the extent to
7 which the Commissioner, when she comes to invoke the
8 jurisdiction under paragraph 66 of Schrems, is confined
9 to the Draft Decision so described, that's the first
10 issue. That's a new issue. I suppose by definition 14:29
11 it's a new issue in the sense that it's directed to
12 what has transpired in the course of the hearing.

13
14 The second issue, whether the reference is a moot.
15 This was, I think, Mr. Gallagher's first point. Again 14:29
16 I think it's a new issue, but an issue we can deal
17 with, I think, very briefly.

18
19 And then, thirdly, whether the court is precluded from
20 referring by reason of the Privacy Shield decision. 14:29
21 Now I think it's fair to say that those three issues
22 travel together to some extent because most, if not
23 all, of the discussion around the introduction of new
24 issues beyond the decision or the court's own motion
25 are related to the Ombudsman process in the Privacy 14:30
26 Shield. The Privacy Shield decision is also to some
27 extent a new issue and, certainly in the manner in
28 which it has been presented, is a fresh question.
29

1 So we'll deal with those and I don't think they will
2 take terribly long.

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

4 **MR. MURRAY:** Fourthly then, Judge, I'm going to suggest
5 the court should move to the issue of the findings the 14:30
6 court should make in relation to US law. And
7 curiously, although this was the only issue on which
8 there was cross-examination, it's probably one of the
9 less contentious questions and, to the extent that, in
10 my submission, when the court comes to look at the 14:30
11 expert evidence it has heard, there isn't a huge
12 difference between the parties as to the contents of US
13 law.

14
15 Then, fifthly, Judge, we move from there to consider 14:30
16 how those issues should be applied to the adequacy
17 analysis; in other words, that raises a series of
18 questions, which I think fit together, is the
19 proportionality analysis always necessary or is it
20 sufficient to look and see is the essence of the right 14:31
21 protected in the third country; if it is sufficient to
22 look at the essence of the right, is the essence of
23 Article 47 right impaired by US law? If the concern is
24 with the absence of a remedy for the purpose of
25 Article 47, is the focus properly solely on judicial 14:31
26 remedies or should the court also look at non-judicial
27 remedies.

28
29 Then next, Judge, if the court finds that there is an

1 inadequacy, and of course one of the features of the
2 SCCs, easily forgotten perhaps, is that by definition
3 there's an inadequacy because if there weren't an
4 inadequacy there wouldn't be a need for the SCCs in the
5 first place. But obviously --

14:31

6 **MS. JUSTICE COSTELLO:** well, there could also not have
7 been an adequacy finding, wasn't that also?

8 **MR. MURRAY:** That's correct. But certainly, in our
9 respectful submission, I'll come back to this later,
10 that's a starting point. But nonetheless obviously the
11 court needs to identify what that is and to proceed
12 then to see is that inadequacy, and I have used, well,
13 neutral language for the moment, sufficiently addressed
14 by the SCCs and then that raises a series of

14:32

15 sub-questions: what's the appropriate test, do the
16 SCCs in force at the time of the Draft Decision meet
17 that test in the light of the findings of US law, and
18 in particular were the SCCs capable of meeting the
19 inadequacy identified by the Commissioner, is the
20 Ombudsman mechanism part of the SCCs.

14:32

14:32

21
22 Just to stop there. I phrase it as a question,
23 although I don't know that it's a matter in factum in
24 dispute between the parties to the extent that my
25 instructions are and my client takes the view that the
26 Ombudsman mechanism is part of the SCCs, but it is an
27 outcome achieved in a somewhat opaque way, and I'll
28 explain why I say that in due course, but it's part of
29 the sequence of logic, as it were.

14:32

1 And then, finally, if it is part of the SCCs, does it
2 change the answer to (b); in other words, the answer in
3 relation to adequacy.

4
5 Is the proper comparator the law of the EU or that of 14:33
6 the individual Member States? The relevance of the
7 ECHR jurisprudence, the relevance of the fact that some
8 of the processing undertaken in the US for the purposes
9 of national security, Article 4, and then, finally,
10 I have gathered together some of the objections 14:33
11 Mr. Schrems directs at me; does he challenge the
12 validity of the SCCs, if not is the Commissioner
13 nonetheless entitled to seek a reference and was the
14 Commissioner required to resolve all other aspects of
15 his complaint before proceeding to seek the reference. 14:33
16 I'm sure I have missed something, as I said, but that
17 presents the issues and the themes with which I will be
18 addressing.

19
20 Some of them I can deal with very quickly because we 14:34
21 have dealt with them before, as I said others, insofar
22 as they develop the case from the written submissions,
23 I'll need to spend a little more time on.

24
25 Judge, before I do that and before I begin with the 14:34
26 first of those, I'm going to ask the court to perhaps
27 just take ten or 15 minutes to step back from the
28 minutiae of all of this. I'm not going to suggest that
29 this is a simple case, but I am going to suggest,

1 Judge, that it is not necessarily as complex as might
2 appear from the blizzard of arguments and contentions
3 that you have heard from the defendants and from the
4 amici.

5
6 In particular, Judge, I'm going to suggest that there
7 are three issues, which are on this list and which
8 I will deal with in detail when we come to them, but
9 three issues which in truth can be resolved with
10 comparative ease, resolved insofar as the issue before 14:34
11 the court is whether there should be a reference rather 14:35
12 than whether particular questions of EU law should be
13 definitively determined by the court.

14
15 The first of those is the argument advanced by 14:35
16 Facebook, which I don't think it's unfair to say has
17 been central to their case and is certainly central to
18 their evidence in that it occupied a very significant
19 proportion of it, which is whether you assess, whether
20 the Commissioner assesses the adequacy of third country 14:35
21 laws by reference to what I am going to call an *EU* law
22 standard or whether that is an exercise which ought to
23 be undertaken by reference to a standard of the laws
24 applicable in the individual Member States.

25
26 Do we, when you look at the contents of US law in 14:36
27 relation, in the context of national security -- I'm
28 going to inevitably lapse into Mr. Gallagher's habit of
29 saying national *surveillance* which is a new phrase, but

1 national security; do you look at the EU standard
2 derived from the court's interpretation of Article 47
3 or do you look at the law in Germany or Holland or
4 Britain or amalgamate them or try to identify the
5 lowest common factor or denominator amongst them. 14:36

6
7 In my respectful submission that is an issue that can
8 be resolved by this court relatively easily. Nobody,
9 insofar as we can ascertain, who has ever approached
10 this issue has addressed it in the manner which is 14:36
11 being suggested by Facebook. The court in Schrems, the
12 Commission in the Privacy Shield do not look to
13 identify the elements of the laws of the individual
14 Member States and from there make a determination as to
15 adequacy, they operate on the basis of the principles 14:37
16 of EU law.

17
18 And for this court to adopt the analysis which has been
19 suggested by Facebook in relation to *this* question
20 would unavoidably involve you in adopting an approach 14:37
21 and an analysis which is at loggerheads with the
22 approach and analysis adopted by the Court of Justice
23 and indeed, insofar as it is significant, the
24 Commission. And, Judge, I would venture to suggest
25 that that method of analysis as suggested by my Friends 14:38
26 is one which, when one looks at how this area of
27 European law has developed, it's a method of analysis
28 which, with respect, makes little sense for this
29 reason: when the court looks at the three principal

1 decisions in this area, Digital Rights, Schrems and now
2 Watson, they are all, but in particular Digital Rights
3 and Watson, examples of the Court of Justice deciding
4 that the laws of the individual Member States and, not
5 just one or two Member States, the laws of the vast 14:38
6 majority or, in the case of Digital Rights, all of the
7 Member States, actually or arguably, and I'll come back
8 to that later, fell short of the standard in the
9 Charter.

10
11 I mean Watson is a particularly, well Digital Rights is
12 a good example because there the court struck down a
13 Directive which had been implemented in all Member
14 States and yet the constituents of that Directive were
15 held by the court to be contrary to the Charter; and in 14:39
16 Watson the court determined that, if I can use the
17 phrase, automatic retention, mandatory automatic
18 retention without differentiation between those who may
19 be involved in criminal activity or may not or may not
20 be in areas affected by criminal activity or not was 14:39
21 contrary to the Charter, although in fact nobody, none
22 of the plaintiffs argued for such an outcome in Watson
23 and many of the Member States had laws precisely to
24 that effect.

25
26 So the fact of the matter is that the standard which
27 has been set by the European Court of Justice is one
28 which has arisen from what the court ultimately
29 identified as deficiencies in the laws of the

1 individual Member States. It would make very little
2 sense to say that the standard against which you match
3 the third country is anything other than that European
4 standard.

5
6 And it would furthermore, in my respectful submission,
7 make little sense because it begs so many questions.
8 How exactly is this calculus to be devised and applied,
9 is it where every Member State has a particular rule,
10 is it where most Member States have a particular rule, 14:40
11 is it where the Member States that have developed
12 security services have a rule, is the lowest common
13 denominator of all the Member States, it's a method of
14 analysis, in my respectful submission, which would be
15 extremely difficult to apply, but, most importantly 14:41
16 insofar as you are concerned, it is a method of
17 analysis which is entirely at loggerheads with the
18 analysis adopted by the Court of Justice to the extent
19 that, in my respectful submission, it is not a method
20 of analysis that the court would appropriately adopt 14:41
21 itself and say 'I am refusing a reference on this basis
22 because the law of Germany and the law of Holland or
23 British law are worse or less protective than the law
24 of the United States'.

25
26 So I present that as a first issue which, and maybe
27 Mr. Gallagher is right, maybe he will be able to go to
28 the Court of Justice and convince it that the analysis
29 it adopted in those various cases is wrong, but that is

1 where that issue would have to be resolved. It is one
2 of a number of features of the Facebook case which
3 incline towards rather than against a reference.
4

5 The second issue, Judge, relates to the question of 14:41
6 national security, and exactly the same point applies
7 in this connection. As we understand the Facebook
8 case, the national security argument has perhaps three
9 different versions. The first is the version whereby,
10 because the court, because my client originally was 14:42
11 concerned with matters affecting the national security
12 of the United States, that for that reason alone
13 competence was ousted and the review which was
14 undertaken was precluded. That's the version, I should
15 observe, which is recorded in the written submissions. 14:42
16

17 The second version is in fact conceptually quite
18 distinct from that. It is that national security is
19 off limits to the Charter and, therefore, if a case
20 were to arise as to the national security surveillance 14:43
21 practices of the German authorities, the court would
22 have to say it's off limits and therefore the
23 comparator with the United States is effectively,
24 certainly taken to its logical conclusion, one where
25 there is no comparator at all. That's the second 14:43
26 version.
27

28 And the third version, with which I'm not concerned at
29 the moment and I'm going to come back to in the course

1 of the substantive submissions is well, and it really
2 fits in more the European Court of Human Rights level,
3 national security is a very important objective, it has
4 particular features and aspects to it. They condition
5 the proportionality test properly applied to data 14:44
6 protection, insofar as it arises.

7
8 But to take the first two of those, Judge: For either
9 of those to be correct then Hogan J, when he referred
10 Schrems to the Court of Justice, overlooked a 14:44
11 fundamental jurisdictional aspect of the dispute which
12 was before him. Not only did Hogan J overlook that -
13 because remember, Judge, the entire first Schrems case
14 was about and, as far as I can ascertain, only about
15 national security surveillance in the United States. 14:44
16 You will recall the references by Hogan J and indeed
17 the Court of Justice to the Snowden disclosures and the
18 practices of the NSA, it was all about national
19 security, but Hogan J apparently did not realise that
20 actually he was referring something which was entirely 14:45
21 outside the competence of European law. When it got to
22 Europe, the Advocate General, whose ruling or opinion
23 you will see is replete with references to national
24 security and the national security practices in the
25 United States, the Advocate General overlooked it and, 14:45
26 the Advocate General having overlooked it, the Court of
27 Justice overlooked it as well.

28
29 Because actually their ought to have been one of two

1 short sharp answers to it: (a) this is national
2 security in the United States and national security is
3 outside the competence and the Charter doesn't apply or
4 the Directive doesn't apply so that's the end of that,
5 or (b) well when we compare regulation or remedies, 14:45
6 paragraph 95, in Europe with those in the United
7 States, well actually there aren't any in Europe
8 because it is all completely off limits, and that of
9 course is not the analysis which was adopted.

10
11 Not only Hogan J, the Advocate General and the Court of
12 Justice, but when the European Commission comes to
13 undertake its analysis for the purposes of Privacy
14 Shield, it does not pay any heed to this apparently
15 fundamental competence bar. Indeed, taken to its 14:46
16 logical conclusion, the argument dictates that the
17 European Commission should not have been engaging in
18 this exercise of analysis of US surveillance law at
19 all.

20
21 So that again in my respectful submission takes this
22 court to a very short point of conclusion on the
23 national security issue, the first two aspects of it,
24 the third is different and I'll deal with it
25 differently. 14:47

26 **MS. JUSTICE COSTELLO:** Yes.

27 **MR. MURRAY:** And the point of conclusion is that for
28 you to conclude that the national security bar pulls
29 down the curtains on this entirely would put the court

1 in clear conflict with the decision in Schrems. And
2 I don't believe that that can be addressed by saying
3 'well nobody argued it before them'.

4 **MS. JUSTICE COSTELLO:** It's a matter of jurisdiction.

5 **MR. MURRAY:** It is absolutely fundamental. Once again 14:47
6 maybe Mr. Gallagher is right, I'm going to explain very
7 shortly in a moment why he isn't but maybe he is right,
8 but, if he is, the only place that question can be
9 determined is by the Court of Justice. And it is, and
10 I do no disrespect to the sophistication and novelty of 14:47
11 the argument, but it is striking that he has been
12 unable to produce before the court, not only any
13 authority in the form of judicial decision, but any
14 informed commentary which even suggests that the
15 analysis which has been so vigorously urged upon you is 14:48
16 the correct one, and this is again a central pillar of
17 the case advanced by Facebook.

18
19 Judge, in fact the arguments, and again I will develop
20 this in more detail when I look at this, undoubtedly it 14:48
21 will be Tuesday in the context of the issue sheet,
22 no. 9, but it is actually in my respectful submission
23 very simple. First of all, national security, where
24 it's referred to in TEU or in the Directive, is the
25 national security of Member States. It is not the 14:48
26 national security of a third party state. And, insofar
27 as it is suggested that, once you enter the zone of
28 national security, Member States are entitled to pull
29 down the shutters on their data privacy laws and say

1 'sorry the Charter doesn't apply, we can do what we
2 like', that is fundamentally misconceived and can
3 I just direct you to two statements in the FRA Report
4 which address this very issue.

5
6 I don't remember the book it is in, Judge.

7 **MS. JUSTICE COSTELLO:** I have it, it is Tab 61.

8 **MR. MURRAY:** And it's...but if you look --

9 **MS. JUSTICE COSTELLO:** Just as a matter of curiosity,
10 what's the status of this FRA Report? I mean it is
11 evidence because Mr. Geoffrey Robertson exhibited it,
12 am I right?

13 **MR. MURRAY:** It was exhibited to Mr. Robertson's
14 affidavit. It is also obviously a document of some
15 official status and I think with the relevant
16 provisions of the...

17 **MS. JUSTICE COSTELLO:** Yes. You know the way,
18 obviously when you have decisions of the European
19 Council, they speak for themselves.

20 **MR. GALLAGHER:** Yes.

21 **MS. JUSTICE COSTELLO:** I am just wondering does that
22 speak for itself?

23 **MR. GALLAGHER:** It does, for the reasons identified by
24 Ms. Hyland, it's a particular role provided for.

25 **MS. JUSTICE COSTELLO:** Based on its role, thank you.

26 **MR. GALLAGHER:** It is, yes, and Mr. Robertson explains
27 that also in his second affidavit.

28 **MR. MURRAY:** Yes. Mr. Robertson's affidavit, evidence
29 as it is now formulated, seems to be largely...

1 MS. JUSTICE COSTELLO: Based on this.

2 MR. MURRAY: well - based on this, yes. If you turn,
3 Judge, to page 10 and if you look, Judge, on the
4 right-hand column.

5 MS. JUSTICE COSTELLO: Mm hmm. 14:50

6 MR. MURRAY: Second paragraph, the paragraph begins:

7
8 *"The limits of the national security exemption are*
9 *subject to debate, including in relation to the*
10 *activities of intelligence services. Although* 14:50
11 *international guidelines exist, there is no uniform*
12 *understanding of 'national security' across the EU.*
13 *The concept is not further defined in EU legislation or*
14 *in CJEU case law, although the CJEU has stated that*
15 *exceptions to fundamental rights must be interpreted* 14:51
16 *narrowly and justified."*

17
18 But this is the important statement, Judge: *"The CJEU*
19 *has also stated that the mere fact that a decision*
20 *concerns state security does not render EU law* 14:51
21 *inapplicable."*

22
23 Now that is, as Mr. Gallagher correctly observed by
24 reference to the footnote derived from a case ZZ, which
25 was a case about entry into a Member State. But, if 14:51
26 you turn over the next page, this is elaborated upon,
27 again on the left-hand side. You'll see there's a
28 quotation there, Judge, and if I can just open the two
29 sentences before that quotation:

1 *"The 'national security' exception thus cannot be seen*
2 *as entirely excluding the applicability of EU law. As*
3 *the UK Independent Reviewer of Terrorism Legislation*
4 *recently put it - and this is Mr. Anderson's report -*
5 *'National security remains the sole responsibility of* 14:51
6 *each Member State'."*

7
8 So the EU has no role in legislating in relation to the
9 Member States' national security: *"But, subject to*
10 *that, any UK legislation governing interception or* 14:52
11 *communications data is likely to have to comply with*
12 *the EU Charter because it would constitute a derogation*
13 *from the EU Directives in the field."*

14
15 And, Judge, I will come back to this in a little bit 14:52
16 more detail, but perhaps just to state it at its most
17 simplest for the purposes of this introduction: Once
18 you fall within the scope of EU law, and, as the court
19 has heard, the provisions in relation to the Union's
20 competence over data protection and data processing are 14:52
21 contained in article, I think it's 16 of TFEU, data
22 processing within the competence of EU law, once you
23 fall within the competence of EU law any derogation
24 from that is subject to review by reference to the
25 general principles of the Charter. 14:53
26

27 You don't get a pass because in a particular context
28 the purpose of your processing relates to national
29 security. To take an example, which I'm sure is one

1 I'm going to regret because, necessarily these examples
2 don't cross over, tax is outside the competence of the
3 EU, but that does not mean that tax laws don't, cannot
4 come under scrutiny if they interfere with the freedom
5 of movement or freedom of establishment or if they 14:53
6 don't constitute a State aid, for example.

7
8 So, Judge, the contention that once you are within the
9 zone of national security, which of course, the FRA
10 refers to the uncertainty even around the definition of 14:54
11 that, what exactly is it, is all terrorism national
12 security or only terrorism from outside forces? And
13 what's the difference between outside terrorism and
14 domestic terrorism and the difference between
15 terrorism, the difference between terrorism and 14:54
16 widespread organised crime, is widespread organised
17 crime outside national security and domestic terrorism,
18 what are the lines, they are very difficult lines to
19 draw.

20 14:54
21 But in our respectful submission, and again I will
22 elaborate upon this, but for the purpose of this
23 introduction the underlying point that I am anxious to
24 emphasise is that one can see why the Court of Justice
25 assumed that national security was not or the fact it 14:55
26 was dealing with US national security was not relevant
27 to its evaluation of Schrems. And, therefore, again
28 maybe there's an issue to be referred here, but not an
29 issue which can preclude the court from making a

1 reference without going directly counter to what the
2 court has done, the Court of Justice has done.

3
4 I think the approach taken by the Commission as well to
5 the Privacy Shield decision speaks volumes about the 14:55
6 general understanding of the limits of national
7 security as a defence to data protection claims.
8 That's the second issue that I'm just anxious to
9 emphasise.

10 14:55
11 And the third is Privacy Shield. This again has
12 acquired, I suppose, a life in the course of the
13 hearing that it did not have in submissions. I don't
14 make any point about that, we are here to address
15 everything. But I think, Judge, there have been some, 14:56
16 well some confusion has been generated around this and
17 it's important to separate out what we're about, what
18 Privacy Shield is about and how the two relate to each
19 other, if they do at all.

20 14:56
21 I am not challenging Privacy Shield. I think one of
22 the interesting aspects, albeit a very superficial
23 observation, but one of the interests aspects of the
24 Privacy Shield decision is that it's not a decision on
25 the adequacy of United States law, it's a decision on 14:56
26 the adequacy of the protection provided by the Privacy
27 Shield, that's how it is titled. And of course the
28 reason for that is this: Privacy Shield is United
29 States law plus the principles provided for in the

1 Privacy Shield, the various undertakings given by the
2 United States government as referred to in the
3 appendices to the shield, plus the Ombudsperson. And
4 what the European Commission decided was the sum of
5 those parts were adequate and transfers may be made 14:57
6 under the Privacy Shield by those companies who are
7 prepared and/or in a position to subscribe to its
8 principles. But the fact that it is there does not
9 mean that US law has been found to be adequate and in
10 particular it does not amount to a finding that the 14:57
11 SCCs are adequate.

12
13 Now, Judge, there's a number of threads of the case
14 which cross over at this point.

15 **MS. JUSTICE COSTELLO:** It feels like looking at a 14:58
16 carpet page in the Book of Kells, I have to say.

17 **MR. MURRAY:** Yes, and hopefully, with the aid of the
18 road map I have given you, we can try to kind of
19 separate some of these. This case is about the SCCs
20 and, at the time the decision of the Commissioner was 14:58
21 issued in its draft or preliminary form, the SCC
22 decisions stood on their own. Thereafter Privacy
23 Shield was introduced or the decision was finalised.
24 Now, just to say this, and there's no evidence to this
25 effect, let me just say that before I make this 14:58
26 observation.

27
28 But the reason there's no evidence to this effect is
29 that this was never an issue in the affidavits. In

1 fact at the time the decision was issued by the
2 Commissioner it was not clear that Privacy Shield was
3 going to be finalised within two months. This process
4 has been going on for two years, and it was not evident
5 when it was going to be finalised and the Commissioner 14:59
6 was under direction from this court to proceed with
7 Mr. Schrems' investigation. I'll come back to that,
8 but, I think somewhat unfairly, this impression has
9 been given that the Commissioner knew that this was
10 about to come out and for some reason, which I haven't 14:59
11 been able to discern what it is implied the reason is,
12 she rushed this decision out and got her proceedings
13 out in the knowledge that Privacy Shield was about to
14 land. That is emphatically not the case.

15
16 Anyway, to go back, Judge, to the issue. The case is
17 about the SCCs because at the time of the decision and
18 now Facebook transfers information under the SCCs and
19 the question is whether they operate validly having
20 regard to Article 25 and Article 26, save for one 15:00
21 matter, the Privacy Shield stands quite independently
22 of that.

23
24 Now, Facebook -- I'll just let the stenographer change,
25 Judge. 15:00

26
27 Now, Judge, since Privacy Shield came into effect, it's
28 our understanding - and again there isn't evidence
29 before the court, but it's a matter that's objectively

1 ascertainable and I'm sure this won't be disputed by my
2 Friends - Facebook transfers two categories of data
3 under Privacy Shield, but the rest of its data is
4 transferred under SCCs. And I get that from Facebook's
5 own website, where they publicise their involvement in 15:01
6 Privacy Shield. Everything else is transferred under
7 SCCs. And --

8 **MS. JUSTICE COSTELLO:** Does that mean that they've
9 signed up to the principles?

10 **MR. MURRAY:** They've signed up. But it does *not* mean 15:01
11 that it is convenient or appropriate for *them* to
12 transfer all of their data under Privacy Shield.
13 Because of course, Privacy Shield involves undertakings
14 at the importer level as well and certain constraints
15 and restrictions which one can see a data exporter 15:01
16 might not wish to, or might not be *able* to apply to all
17 of its data. So I don't know *why* they don't use it for
18 all of their data, but it is certainly the case that
19 they do not.

20 15:02
21 And in fact you raised a question with Mr. Gallagher -
22 and in fairness to Mr. Gallagher, one never disagrees
23 with the judge's point - but you said 'well, are you
24 saying it's moot because if I strike down the SCCs then
25 you can just go and transfer all of your information 15:02
26 under Privacy Shield?' And Mr. Gallagher, again I say
27 it, for the reason I don't criticise him for -- said
28 'Yes, that's exactly what I'm saying'. But in truth,
29 that is *never* what they have said. And there is no

1 evidence before the court that they would want to or
2 even *could* do that.

3
4 So that is why the adequacy finding as to Privacy
5 Shield does not mean that there is adequacy which binds 15:02
6 the court, or an adequacy finding which binds the court
7 or my client, leaving aside the point made by
8 Mr. McCullough as to the impact of the Safe Harbour
9 decision. But there is one point at which Privacy
10 Shield *undoubtedly* intrudes, and it's this: That 15:03
11 certainly on one reading of the Privacy Shield material
12 - and as I've already said to you, it's my client's
13 reading - the Ombudsman is now a remedy available for
14 those whose data is transferred under the SCCs. So if
15 that is so, one of the issues that arises is whether 15:03
16 the existence of the Ombudsman under Privacy Shield as
17 transferred over to SCCs remedies the inadequacies
18 which were identified by the Commissioner in her draft
19 decision.

20 15:04
21 Now, we say they don't, because it's not an independent
22 judicial remedy. And we've seen that -- we did not say
23 that in our decision, absolutely, but we did make this
24 point very clearly in our written submissions and
25 indeed in our evidence - Mr. Richards addressed it. 15:04
26 That brings in my entitlement to go outside the
27 decision, which is obviously the first point,
28 substantive point I'm going to come to shortly, but
29 just in terms of this sketch, as it were.

1
2 If we are -- if the Court of Justice agrees that
3 Ombudsman is not a remedy, that resolves the
4 difficulties that we identified, then that undoubtedly
5 could have implications for Privacy Shield. It does 15:04
6 not *necessarily* invalidate Privacy Shield, but
7 absolutely it *could* have implications. But it is an
8 entirely separate matter, insofar as it can be separate
9 given that the Ombudsman derives from the Privacy
10 Shield's decision, but it is not a challenge to the 15:05
11 Privacy Shield itself, because that is not a matter
12 which we have brought before the court.

13
14 But the critical point, Judge, is that for that reason,
15 the Privacy Shield adequacy decision does not determine 15:05
16 the issues which are before you, aside from the point
17 that Mr. McCullough has already made that of course the
18 consequence of the Safe Harbour decision and the
19 consequence of Schrems is that even though there is an
20 adequacy decision, that doesn't prevent the reference 15:05
21 of an issue as to its validity.

22 **MS. JUSTICE COSTELLO:** But Mr. Gallagher said you could
23 only do that where you have a head-on challenge, not a
24 side wind challenge, or "collateral" was, I think, the
25 way he put it. 15:06

26 **MR. MURRAY:** well, how can that be correct? That sounds
27 right when it's said, as all things Mr. Gallagher says
28 *sounds* right when it's said the first time. But just
29 reflect on that. If it is the case that the Ombudsman

1 is part of the SCCs, if that's the case then a
2 challenge to the SCCs is a challenge to the Ombudsman,
3 because it's part of the SCCs. If that has a
4 *consequence* for Privacy Shield, that's a separate
5 matter. That's not a challenge to Privacy Shield. It 15:06
6 may be a consequence --

7 **MS. JUSTICE COSTELLO:** He was making it in a broader
8 sense. He was saying, as I understand it, that Privacy
9 Shield was an adequacy decision in relation to US law.
10 Now, you said you disagree for the reasons you've just 15:06
11 outlined. But he says that that is a binding adequacy
12 decision on, binding both on your client and on this
13 court and that you can't have a collateral attack on an
14 adequacy decision, if you're challenging the SCCs you
15 can't incidentally ignore an adequacy decision in the 15:06
16 Privacy Shield

17 **MR. MURRAY:** But the adequacy decision is an adequacy
18 decision, as I said, as the title to the decision
19 itself announces, not on US law, but on the Privacy
20 Shield, applicable to those transferring their 15:07
21 information *under* the Privacy Shield, *not* applicable to
22 regimes which do not have all of the features of the
23 Privacy Shield. That *must* be the case, it's a matter
24 of simple logic.

25 15:07
26 Now, Judge, if I just stop there. Again and by way of
27 introduction, as it were, to the issues, if one just
28 stops there and says if I am *right* about what I've just
29 said about those three points - and in my respectful

1 submission, they do admit of *very* simple resolution -
2 if I am *right* about those three points then (1) we
3 don't get involved in the Member State comparator,
4 because that's *entirely* contrary to the what the Court
5 of Justice has done and doesn't make any sense anyway 15:07
6 and is without any authority; (2) we don't get involved
7 in national security, because that would put you at
8 loggerheads with the court in Schrems and the
9 Commission in the Privacy Shield, and in any event it
10 seems to *us* to be wrong, but I understand the argument 15:08
11 and see how Mr. Gallagher might wish to have it decided
12 by the Court of Justice; (3) the Privacy Shield
13 adequacy decision does not, simply does not affect what
14 the court here is concerned with.

15 15:08
16 And if I'm right on those three issues, which don't
17 require, in my respectful submission, a great deal of
18 detailed analysis, then what is *left* in the case? And
19 there are, not to diminish them, but what I'm going to
20 describe as satellite issues, such as: Is it moot? Is 15:08
21 it Article 4 a complete barrier to my claim? As
22 Mr. Schrems has always said and as Mr. Gallagher has
23 now said, in direct contradiction to the position
24 adopted in his written submissions, there's the issue
25 of is it moot? 15:09

26
27 But aside from those satellite issues and Mr. Schrems'
28 issues, what's left? And in truth, what is left is
29 really what was there when we started: (1) what are the

1 protections given by *EU* law to data protection
2 entitlements insofar as relevant to the issues with
3 which you are concerned? (2) what is the state of *US*
4 law regarding those protections? (3) if they are, are
5 there inadequacies in *US* law which render it 15:09
6 inadequate? And (4) if there is, is that an adequacy
7 resolved by the SCCs? Those are the core issues before
8 you, in my respectful submission. And, Judge, I would
9 submit that when one looks at those issues, actually
10 it's not a hugely complex exercise to address them. 15:10

11
12 Mr. McCullough has very helpfully taken you laterally
13 through what the Court of Justice in Watson said. I'm
14 going to keep referring to Watson simply because it is
15 so recent and so comprehensive in its analysis. So you 15:10
16 see what's there - an obligation to give notice. Not,
17 if I can respectfully say, as Mr. McCullough described
18 it, an *unqualified* obligation to give notice, an
19 obligation to give notice at the point where the
20 investigation isn't prejudiced by giving notice. 15:10
21 That's an *obligation*.

22
23 And I would just ask you to note, Judge, that that is
24 an obligation that has proportionality built into it.
25 It's not *subject* to proportionality, the 15:10
26 proportionality is built into the formulation of the
27 rule - an obligation to give notice when the
28 investigation is not prejudiced, is no longer
29 prejudiced. That's a core and irreducible part of

1 European law following Watson. Watson certainly said
2 that, but it wasn't the first time it had been said; in
3 fact it is very clearly stated in the Advocate
4 General's decision in Schrems. And in point of fact,
5 Prof. Brown, whose report you will recall was lauded by 15:11
6 Prof. Swire and upon whose report - Prof. Brown of
7 Oxford University - and upon whose report my Friends
8 place great reliance for its authority, he says,
9 pre-Watson, that the position in the Court of Human
10 Rights law was that there was an obligation to give 15:11
11 notice. So that's a core and irreducible feature of EU
12 law. (2) you have to have a right to the possibility
13 of a remedy. And it has to be a judicial remedy, or at
14 the very least a remedy provided by an independent
15 tribunal. 15:12

16
17 Just to take those two core irreducible rights; they
18 are not capable of being eradicated or overwritten by
19 reference to some generally thrown blanket of public
20 interest, they are the *essence* of the rights in EU law. 15:12
21 And if you just put those to one side and say, and ask
22 what have we learned from the evidence that the court
23 has heard about US law? And what we have learned - and
24 I will go through the US law in a little more detail, I
25 think later this afternoon - but just for the purpose 15:13
26 of *this* introduction, what we have learned as a matter
27 of absolute clarity: There is no obligation ever to
28 give notice under US law insofar as the provisions with
29 which you are concerned go. And we also know that if

1 you *do not know* that you have been under surveillance -
2 and emphasise they're not ever obliged to tell you -
3 you are liable to be deprived of *any* remedy by reason
4 of the rules on standing. It is not sufficient to
5 establish a reasonable, well founded belief that you're 15:13
6 under surveillance. I think it was -- I hope this is
7 an accurate record, but it's certainly a close
8 approximation to what Prof. Vladeck said; you have to
9 prove that you *have been* or shortly *will be* under
10 surveillance. And that's Facebook's definition of the 15:14
11 standing requirement.

12
13 Now, those two travel together. And this is an
14 important aspect, Judge, of the Strasbourg
15 jurisprudence when you come to look at it. Because 15:14
16 while in *some* situations the Strasbourg jurisprudence
17 suggests that obligations of notification *may* in fact
18 be subordinated to public interest concerns, they also
19 sanction and arise in the context of rules about
20 standing which are far more liberal. In other words, 15:14
21 all right, if you don't have an obligation to notify -
22 and maybe there's good reason for that, although
23 European law does not acknowledge that that can be
24 overridden - well then, a liberal standing rule
25 resolves some of the difficulties that you face because 15:15
26 you're under no obligation to notify, say.

27
28 And in fact, as it happens, this, as you may recall is
29 *precisely* what Hogan J. said in Schrems when he decided

1 that Mr. Schrems *did* have standing; well, you mightn't
2 be able to prove that you're within the Clapper test,
3 but if there's a more liberal test where you can say
4 that you're someone who uses Facebook, your information
5 has gone to the United States, you believe there's a 15:15
6 reasonable prospect that you *may* be subject to
7 surveillance, well, then the fact that nobody's obliged
8 to tell you becomes of less significance, because
9 you've a liberal standing regime which enables you to
10 get a remedy otherwise. Because in fact the court's 15:15
11 judgment in Watson makes it clear that the notification
12 obligation is closely related to the right to the
13 remedy. The only reason -- it's not that there's
14 anything terribly important about *notifying* people,
15 it's a means to an end. You notify them, because 15:16
16 without notifying them they have no remedy.

17
18 So if you just take the US law *to that point* - and
19 there are other and, we say, *very* fundamental issues
20 around it - but keeping it at its simplest, the fact of 15:16
21 the matter is that *most* people - and again I don't
22 believe there to be *any* dispute about this, this was
23 Ms. Gorski's evidence, but it was accepted by
24 Prof. Swire - *most* people who are under surveillance in
25 the United States, most non-US nationals will *never be* 15:16
26 *able to sue*. They will certainly -- and, sorry, I want
27 to be careful I'm not misrepresenting what has been
28 said by the witnesses; what was agreed by the witnesses
29 is most people will never know. That's as a matter of

1 fact accepted. But the consequence of that, which *may*
2 not be accepted but which I say is irrefutable, is that
3 most people will never be able to sue, they will have
4 no possibility, because they will never know and
5 because the rules of standing are such as to preclude 15:17
6 them from suing unless they meet the now *overly* well
7 rehearsed formula in Clapper.

8
9 So match those against each other, the EU law
10 principles which you've just put to one side and the US 15:17
11 principles which we've identified and about which there
12 are disputes around the margins and in relation to
13 which there are other deficiencies as well, but just
14 those two, because they're the most fundamental.
15 What's the outcome? The outcome is that the US law does 15:17
16 not match the standard.

17
18 And it doesn't matter whether you use the word, in our
19 submission, "adequacy" or "sufficient" or "compensate"
20 or whatever other descriptions were applied in the 15:17
21 course of some of the word games that were played in
22 submissions, it doesn't matter, it's absolutely clear
23 that they do not match the standard of the essence of
24 the right.

25 15:18
26 So then the next question is: well, do the SCCs resolve
27 that? And that question answers itself. Because it
28 doesn't matter if you can sue the importer or the
29 exporter or get damages for breach of contract against

1 them, it is absolutely irrelevant and of no avail
2 whatsoever, because you *don't know* and because the
3 standing rules prevent you from *ever* obtaining a
4 remedy.

5 **MS. JUSTICE COSTELLO:** Does that argument apply to *most* 15:18
6 third countries across the world?

7 **MR. MURRAY:** well, it's certainly an argument -- I
8 mean, that depends obviously on the content of the
9 local laws.

10 **MS. JUSTICE COSTELLO:** I mean, it's predicated on every 15:18
11 third country having some class of notice requirement,
12 be it limited in whatever way it might or might not be
13 limited. The implication seems to me, if that's
14 correct, that unless there is some sort of notification
15 in a third country, the SCCs can never operate to 15:19
16 remedy.

17 **MR. MURRAY:** well, not necessarily.

18 **MS. JUSTICE COSTELLO:** Okay.

19 **MR. MURRAY:** And I fully understand the court's, you
20 know, curiosity about how this is going to play outside 15:19
21 the US. But not necessarily. I mean, for example, in
22 Ireland if the standing rule that were to be applied is
23 that identified by McKechnie J. in Digital Rights, by
24 Hogan J. in Schrems then you have a remedy.

25
26 And it does bring in another issue which Mr. Gallagher
27 reacted with some irritation when it was raised by
28 Mr. O'Dwyer for EPIC, it does bring into focus this
29 issue, because the remedy responds to different types

15:20

1 of issue - remedy for rectification of incorrect
2 information, remedy for damages for past wrongful
3 disclosure, there's a basket of issues that can arise
4 and the remedy has different implications for each of
5 them, remedy for *future* surveillance; but there's also 15:20
6 a *very* fundamental remedy which EU citizens are
7 *completely* cut out of in the United States, and its a
8 this: It is the remedy of being able to go to a court
9 and say 'It is against your basic law to access my
10 private data without prior independent authorisation', 15:21
11 which, as Mr. McCullough has shown you earlier this
12 afternoon, is a *core* entitlement. But you -- I mean,
13 we cannot, none of us whose information is liable to be
14 accessed on foot of Section 702 procedures or schemes,
15 we have *no* way of going to the United States and saying 15:21
16 'I want a remedy of stopping this for this very
17 reason'.

18
19 And just to say by the by, because it was said to you
20 with *absolute* assurance by Ms. Barrington and with *some* 15:21
21 but not quite absolute assurance by Mr. Gallagher 'Sure
22 that's the same as here, non-citizens don't have
23 rights', that is *not* the case. That's simply *not* the
24 case. And there's a section in Kelly on the
25 Constitution as to the not inextensive case law which 15:22
26 has suggested otherwise.

27
28 So, Judge, that analysis, when you've taken out
29 national security and law of Member States and Privacy

1 shield, that's where the case comes back to. And in my
2 respectful submission, although I'm loath to say it's
3 simple, there is certainly a straight line of analysis,
4 which of course *my* client would say leads to the
5 conclusion that at the very least there are well 15:22
6 founded concerns as to the validity of the SCC which
7 should be determined and agitated in the forum which
8 has jurisdiction to do so.

9
10 So, Judge, I want to move on to the list, having thus 15:23
11 summarised where I'm going, as it were, and to deal
12 with a number of the issues that I *haven't* addressed
13 which have been raised. And the first is, as you'll
14 see, whether the court is entitled to look at issues
15 that are not addressed in the draft decision or that 15:23
16 have arisen in the course of the hearing in deciding
17 whether to make a reference. And there are two issues
18 here, and I emphasise this. The first is whether, even
19 though I've come and made arguments before the court
20 and put them in my written submissions or indeed make 15:23
21 them now, whether I'm to be told 'You can't do that
22 because it's not in your draft decision'. And related
23 to but distinct from that is whether you, Judge, are
24 entitled to say 'well, as the national court, *I* am now
25 concerned that there's an issue around these SCCs for a 15:23
26 reason that has *not* been spotted by anybody else and I
27 want this determined'.

28
29 The two issues do elide, but I'll ask you to key them

1 separate to some extent. And this has been largely
2 raised regarding the Ombudsman, which is really the
3 first question: Can I step outside the draft decision?
4 But it may be relevant to other issues which the court
5 has heard about and is concerned about, so I *am* going 15:24
6 to address you at a little length on this, because I
7 think it's important that the court have a complete
8 picture of the source and extent of its jurisdiction.
9

10 And can I just say that we are surprised that this 15:24
11 argument has been advanced, because it appears to us
12 that it is absolutely fundamental to your role as a
13 national court that where you entertain a concern in
14 relation to an issue of European law which has arisen
15 before you, irrespective of whether it's raised by the 15:24
16 parties, that you have the entitlement, although not
17 obviously the obligation, to refer.
18

19 I'm going to ask you to go back to the basic principles
20 and to start off with CILFIT, which is at tab 21. And 15:25
21 this is the oft-cited case dealing with the power of
22 national courts to refer. But I open it to you because
23 it does, Judge, identify, as it were, the *theory* of all
24 of this, which I think is important when the court
25 comes to resolve the argument which has been advanced 15:25
26 by Mr. Gallagher. And if you turn, Judge - and it's
27 tab 21 - to paragraph seven. 3248 is the page number
28 at the bottom.

29 **MS. JUSTICE COSTELLO:** 3428?

1 **MR. MURRAY:** Sorry, 3428, Judge. Paragraph seven.

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

3 **MR. MURRAY:** So there -- just three paragraphs I want
4 to open.

5
6 *"7. That obligation to refer a matter to the Court of*
7 *Justice is based on cooperation, established with a*
8 *view to ensuring the proper application and uniform*
9 *interpretation of Community law in all the Member*
10 *States, between national courts, in their capacity as*
11 *courts responsible for the application of Community*
12 *law, and the Court of Justice. More particularly, the*
13 *third paragraph of Article 177 seeks to prevent the*
14 *occurrence within the Community of divergences in*
15 *judicial decisions on questions of Community law."*

16
17 And just perhaps to stop there, Judge. We'll see
18 perhaps immediately why the theoretical underpinnings
19 of this are so important. I mean, if *you* were to
20 decide, just to take this example as one random one, if 15:26
21 you were to decide 'Actually, I'm not going to refer
22 this, because in my view the national security laws of
23 the United States are completely outside the parameters
24 of European law' - now, that's a big statement of
25 principle to make, never having been made before, but 15:27
26 just imagine you did and your decision is handed down
27 and it's not appealed and that's the end of that, Irish
28 law now states as follows, on a fundamental question
29 which has *never* been determined in the Court of Justice

1 before. well, how are other national courts supposed
2 to react to that? You have proclaimed Community law in
3 an area that has *never* been determined before and is
4 fundamentally important. And of course, the example
5 immediately demonstrates what the court would *do* in 15:27
6 that situation if presented with such a profound issue
7 of such wide implication. well, just imagine the issue
8 arises, not because any of the parties have raised it,
9 but because the court itself becomes concerned that
10 this is so; is it to be *seriously* said in that 15:28
11 situation that you say 'well, if the parties haven't
12 raised it, I won't refer'? And of course CILFIT decides
13 that that is emphatically *not* the case. But the reason
14 is because of the duty of co-operation, or, as it is
15 now, of sincere co-operation provided for in Article 15:28
16 4(3) of TEU.

17
18 So, Judge, just to continue:

19
20 *"The scope of that obligation must therefore be*
21 *assessed, in view of those objectives, by reference to*
22 *the powers of the national courts, on the one hand, and*
23 *those of the Court of Justice, on the other, where such*
24 *a question of interpretation is raised within the*
25 *meaning of Article 177.*

26
27 *8. In this connection, it is necessary to define the*
28 *meaning for the purposes of Community law of the*
29 *expression 'where any such question is raised'."*

1
2 And this, of course, is the significance of CILFIT,
3 that under Article 177, that was the language used,
4 where an issue is *raised*, leading to the suggestion on
5 a literal construction that has to be raised by
6 somebody rather than by the court itself.

7
8 *"In order to determine the circumstances in which a*
9 *national court or tribunal against whose decisions*
10 *there is no judicial remedy under national law is*
11 *obliged to bring a matter before the Court of Justice.*

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

25
26 Now, that principle is applied and restated in the case
27 law again and again, to the extent that it's a
28 fundamental principle governing the operation of
29 national courts and their relationship with the

1 Community institutions. And one example of that - and
2 there are many - but one simply because it's been
3 opened to you in another context, is the decision in
4 Inuit. And that was, I think, originally handed up,
5 Judge, by Ms. Barrington. And this does, to some 15:30
6 extent, intersect with the issues of direct action and
7 the structural relationship between the limitations on
8 the right of direct action on the one hand and the
9 power to --

10 **MS. JUSTICE COSTELLO:** I don't suppose you have an idea 15:30
11 where it is in this new supplement?

12 **MR. GALLAGHER:** It was meant to be in 45, remember, and
13 it was empty and I think we handed it in again
14 yesterday.

15 **MS. JUSTICE COSTELLO:** Thank you. Yes, I have it, 15:30
16 thank you.

17 **MR. MURRAY:** So, Judge, I know this has been opened to
18 you at least twice, but not in this context. If I
19 could ask you to look at paragraph 94?

20 **MS. JUSTICE COSTELLO:** Yes. 15:30

21 **MR. MURRAY:** So there the court, in outlining this
22 structure, says:

23
24 *"... it must be emphasised that, in proceedings before*
25 *the national courts, individual parties have the right*
26 *to challenge before the courts the legality of any*
27 *decision or other national measure relative to the*
28 *application to them of a European Union act of general*
29 *application, by pleading the invalidity of such an*

1 act."

2
3 That's before the *national* courts.

4
5 "95. *It follows that requests for preliminary rulings*
6 *which seek to ascertain the validity of a measure*
7 *constitute, like actions for annulment, means for*
8 *reviewing the legality of European Union acts."*

9
10 So this is being explained by the court in the context 15:31
11 of the narrow rules as to standing applicable to direct
12 actions. And then they say:

13
14 "96. *In that regard, it must be borne in mind that*
15 *where a national court or tribunal considers that one*
16 *or more arguments for invalidity of a European Union*
17 *act, put forward by the parties or, as the case may be,*
18 *raised by it of its own motion, are" - and just the*
19 *word, the next phrase is significant - "well founded" -*
20 *this, of course is the very language, as you now know*
21 *too well, imported into Schrems - "it is incumbent upon*
22 *it to stay proceedings and to make a reference to the*
23 *Court for a preliminary ruling."*

24
25 So where you think that there's an issue which is well 15:32
26 founded, it is *incumbent* upon the court to stay the
27 proceedings and to make a reference. And it just, it
28 proceeds in paragraph 97 - and this is relevant to the
29 standing, but just while I'm opening this:

1
2 *"Having regard to the protection conferred by Article*
3 *47... it must be observed that that article is not*
4 *intended to change the system of judicial review laid*
5 *down by the Treaties, and particularly the rules*
6 *relating to the admissibility of direct actions brought*
7 *before the Courts of the European Union."*

8
9 And then authority is cited in reference to that. And
10 as it happens, Judge - and I relish the prospect of 15:32
11 opening a paragraph in Schrems which I don't think has
12 been opened yet, and there must be very few - the issue
13 actually was raised, the ruling of the Advocate General
14 in Schrems, paragraph 36.

15 **MS. JUSTICE COSTELLO:** while you're finding that, I'll 15:32
16 ask you this question. When I was addressing a
17 question to Mr. Gallagher in relation to this point
18 about whether I could consider matters of my own motion
19 or as things had arisen in the course of the hearing,
20 he said not in the particular circumstances of this 15:33
21 case, where in effect you were going for a review type
22 procedure --

23 **MR. MURRAY:** Yeah. That's exactly what he said.

24 **MS. JUSTICE COSTELLO:** -- as set out in the Schrems...

25 **MR. MURRAY:** Yes. In fact -- 15:33

26 **MS. JUSTICE COSTELLO:** And that that, therefore,
27 precluded me from relying on "of your own motion"
28 jurisdiction.

29 **MR. MURRAY:** Yes, well, in fact the afternoon delight I

1 was planning was to take out the transcript of that
2 very exchange. Because this is what Mr. Gallagher said
3 - now that you raise it, I can deal with it now - he
4 said 'well, the first thing is it's a bit like a tax or
5 planning reference that comes up to the court, it's on 15:33
6 its own path'. Now, just to stop there. That's a
7 particularly *unfortunate* example, because of course, if
8 An Bord Pleanála make a reference to the High Court or
9 the Tax Appeals Commission states a case and the High
10 Court sees an issue of European law - and they arise 15:34
11 *frequently* in *both* contexts - there is and can be *no*
12 doubt but that the court is under -- has the
13 jurisdiction of its own motion to refer those issues to
14 the Court of Justice. That's the first thing. So that
15 actually doesn't withstand analysis. 15:34

16
17 But he then proceeded, because you pressed him and you
18 said 'But what's the difference in theory between the
19 judicial review of the Commissioner's decision where
20 it's clear that the court *does* have the jurisdiction to 15:34
21 refer it itself under the formula in Schrems and the
22 next paragraph where the Commissioner brings it to
23 court?' And Mr. Gallagher responded in that very way.

24
25 But there is in fact *no* difference. And that is 15:34
26 demonstrable by both the theoretical and the practical.
27 There is no difference *in theory*, because you are still
28 functioning as a national court. And if you, as a
29 national court, come upon what you believe to be an

1 issue of European law that is of sufficient import and
2 significance and relevant so to do, how is that right
3 taken away from you by the fact that it's the
4 Commissioner who's brought the reference, or brought
5 the proceedings? And Mr. Gallagher's answer was, in my 15:35
6 respectful submission, deeply unsatisfactory. It was
7 'well, the Commissioner is the expert body and she has
8 made this draft decision' - and I think the word he
9 used a of times was "done this analysis" - 'and she's
10 brought the analysis to you and you're kind of 15:35
11 constrained by that analysis'. But when one asks the
12 question *why*, there is no answer.

13
14 Then the practical, because what he then when went on
15 to say is this: So what happens is that if you've a 15:35
16 doubt that I haven't agitated, you're supposed to say
17 to me 'But I've another doubt' and then, on
18 Mr. Gallagher's construct, my client goes back to her
19 office and pensively reflects on the doubt that you've
20 raised, concludes that she agrees with it, writes it 15:36
21 out - that's her analysis - comes back to you and says
22 'well, I share your doubt, Judge' and then you say
23 'well, we both have a doubt then, so I'll refer'. That
24 is -- and it was described *almost* in those terms by
25 Mr. Gallagher. 15:36

26
27 So in my respectful submission, the response to that
28 query when you raised it itself, with respect to
29 Mr. Gallagher, discloses the infirmity in the

1 proposition which underlies it.

2
3 So that, as it were, is the pre-existing legal position
4 in -- and, sorry, I was going to refer you just to the
5 Advocate General in Schrems. 15:36

6 **MS. JUSTICE COSTELLO:** Yes, sorry, I interrupted you
7 while we were digging it up.

8 **MR. MURRAY:** Tab 36. So if you go to the Advocate
9 General's decision, which is the second tab in tab 36,
10 and go forward, Judge, to paragraph 125 and 126. 15:37

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

12 **MR. MURRAY:** I'm going to actually, just for another
13 reason now that we have it open, ask you to begin at
14 paragraph 123. This comes back to the national
15 security point I made earlier: 15:37

16
17 *"... the referring court itself observes that the*
18 *guarantee provided by Article 7 of the Charter and by*
19 *the core values common to the constitutional traditions*
20 *of the Member States would be compromised if the public*
21 *authorities were allowed access to electronic*
22 *communications on a casual and generalised basis*
23 *without the need for objective justification based on*
24 *considerations of national security" - there, nobody is*
25 *under any doubt as to what the precise considerations 15:38*
26 *are - "or the prevention of crime specific to the*
27 *individuals concerned and attended by appropriate and*
28 *verifiable safeguards. The referring court thus*
29 *indirectly casts doubts on the validity of [that*

1 Decision].

2
3 *124. The assessment of whether under the safe harbour*
4 *scheme the United States guarantees an adequate level*
5 *of protection of the personal data transferred*
6 *therefore necessarily leads to consideration of the*
7 *validity of that decision.*

8
9 *125. In that regard, it should be observed that in the*
10 *context of the instrument of cooperation between the*
11 *Court of Justice and national courts that is*
12 *established by Article 267 TFEU, even where a request*
13 *to the Court for a preliminary ruling relates solely to*
14 *the interpretation of EU law the Court may, in certain*
15 *specific circumstances, find it necessary to examine*
16 *the validity of provisions of secondary law.*

17
18 *126. Accordingly, on a number of occasions, the Court*
19 *has of its own motion declared invalid an act which it*
20 *was asked only to interpret."*

21
22 And this is obviously the Court of Justice, but it's a
23 demonstration of the same fundamental principle and
24 theory in operation.

25
26 *"It has also held that, '[i]f it appears that the real*
27 *purpose of the questions submitted by a national court*
28 *is concerned rather with the validity of [EU] measures*
29 *than with their interpretation, it is appropriate for*

15:39

1 *the Court to inform the national court at once of its*
2 *view without compelling the national court to comply*
3 *with purely formal requirements which would uselessly*
4 *prolong the procedure under Article [267 TFEU] and*
5 *would be contrary to its very nature'."*

6
7 I'll just stop there. Judge, you will recall this, but
8 it's something that's perhaps disappeared into history
9 in this case, but Mr. Schrems himself, in the case
10 before Hogan J., didn't challenge Safe Harbour. The 15:39
11 reference was made by Hogan J. *in that context.*

12
13 Now, Judge, in my respectful submission, one takes that
14 principle and now looks at how it's applied in the
15 relevant paragraphs in Schrems. And Mr. Gallagher 15:39
16 again, in the course of, or just before the exchange
17 that we had been discussing, constructs these two
18 paragraphs as if they're a statute. And his basic
19 point as I understand it is, well, in paragraph 64
20 there's reference to the court having the power to 15:40
21 refer these matters of its own motion and that *isn't*
22 said in paragraph 65 and, therefore, the court is
23 saying in paragraph 65 that you don't have the power to
24 refer. You know, that's essentially the approach
25 adopted. 15:40

26
27 Now, it's a curious way to interpret a statute and in
28 particular a curious way to contend that through that
29 process of exclusion as between one paragraph and

1 another, the Court of Justice has *displaced* a
2 fundamental principle of European law, well established
3 in the jurisprudence, itself a product of the
4 obligation of sincere co-operation so as to put this
5 court in a situation where, even though an issue is
6 presented before it which it believes of moment or to
7 be well founded, that it does not refer.

8
9 So, Judge, to look at paragraph 64:

10
11 *"In a situation where the national supervisory*
12 *authority comes to the conclusion that the arguments*
13 *put forward in support of such a claim are unfounded*
14 *and therefore rejects it, the person who lodged the*
15 *claim must, as is apparent from the second subparagraph*
16 *of Article 28(3)... read in the light of Article 47...*
17 *have access to judicial remedies enabling him to*
18 *challenge such a decision adversely affecting him*
19 *before the national courts. Having regard to the*
20 *case-law cited in paragraphs 61 and 62... those courts*
21 *must stay proceedings and make a reference... for a*
22 *preliminary ruling on validity where they consider that*
23 *one or more grounds for invalidity put forward... or,*
24 *as the case may be, raised by them of their own motion*
25 *are well founded."*

26
27 Then there's a case referred to, T&L Sugars. And this,
28 I think, is going to be the only case which hasn't been
29 referred to you already, which I'm going to hand up.

1 And I'm doing so simply because it features there in
2 the court's ruling in Schrems (Same Handed). And if
3 you turn, Judge, to paragraph 48, which is the
4 paragraph that's referred to, you see a recitation very
5 similar to that in the Inuit case and in fact referring
6 back to the Inuit case. Paragraph 48 is what the court
7 refers to.

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

9 **MR. MURRAY:** "... it must be borne in mind that where a
10 national court or tribunal considers that one or more
11 arguments for invalidity of a European Union act, put
12 forward by the parties or, as the case may be, raised
13 by it of its own motion, are well founded, it is
14 incumbent upon it to stay proceedings and to make a
15 reference to the Court for a preliminary ruling on the
16 act's validity, the Court alone having jurisdiction to
17 declare [the act] invalid."

18
19 Then:

20
21 "49. As regards persons who do not fulfil the
22 requirements of the fourth paragraph of Article 263
23 TFEU for bringing an action before the Courts of the
24 European Union, it is for the Member States to
25 establish a system of legal remedies and procedures
26 which ensure respect for the fundamental right to
27 effective judicial protection."

28
29 And that again, I suppose, restates another point

1 relevant to Ms. Barrington's submissions, the
2 suggestion that you can draw an analogy between the
3 locus standi rules in European law for direct action
4 and the rules applied in the United States.

15:43

5
6 So to go back then, Judge, to paragraph 64, that's what
7 it says, that's why it says it. But what's important
8 is it is confirming the application of a principle of
9 general import. And then in paragraph 65 it says:

10
11 *"In the converse situation, where the national*
12 *supervisory authority considers that the objections*
13 *advanced by the person who has lodged with it a claim*
14 *concerning the protection of his rights and freedoms in*
15 *regard to the processing of his personal data are well*
16 *founded, that authority must, in accordance with the*
17 *third indent of the first subparagraph of Article*
18 *28(3)... be able to engage in legal proceedings."*

19
20 Now, Judge, can we just stop there? There's something
21 very obvious in that which I think again sight has got
22 lost of; there's no reference to draft decisions or
23 preliminary decisions or *final* decisions in that
24 formulation. As it happens, in this case my client
25 produced a draft decision. And it is that draft
26 decision which formed the launching pad for these
27 proceedings, as you're aware. But she did not have to
28 *do* that. She doesn't have to reach a *final* decision,
29 and I don't think anybody contends -- well, possibly

15:44

15:44

1 Mr. McCullough, on one version of his argument, does.
2 But certainly Facebook don't say she had to reach a
3 *final* decision.

4
5 It just so happens that she reduced her reasoning to 15:44
6 the form of a draft decision, subject to any further
7 submissions. And that is the vehicle through which she
8 expresses her belief that the objections that have been
9 advanced by Mr. Schrems, as she interpreted them and as
10 he *appears* now to accept he was at least in one sense 15:45
11 saying, that is how she expressed her concern that
12 those objections were well founded. But she didn't
13 have to *do* it that way. And that's why what has become
14 something that's been said so often it's become true,
15 that, 'well, you know, she can't step outside the four 15:45
16 corners of her draft decision', 'her draft decision was
17 unfair, she should've done this', as if this were a
18 judicial review, which it's not.

19
20 So that, I think, becomes important when you look at 15:45
21 the Ombudsman issue. Because the Commissioner, not in
22 her draft decision - but she *can't* be confined to her
23 draft decision, she's defined by what she brings to the
24 court, and she's *brought* to the court the concern she
25 has in relation to the Ombudsman. They're expressed in 15:46
26 the written submissions which were -- to which
27 Mr. Gallagher referred. And I think it's paragraph 110
28 and following where I think over the course of four,
29 maybe five paragraphs she outlines the concern she has

1 in relation to the Ombudsman and how it fits into
2 Article 47. So to say because it's not in the draft
3 decision she can't raise it and that you can't refer it
4 is, in my respectful submission, fundamentally
5 misconceived.

15:46

6
7 But even if that's wrong, you're *still* entitled, being
8 conscious and aware of the issue, to refer of your own
9 motion, which is the point at which the two issues
10 coalesce, I suppose.

15:46

11
12 Then it proceeds:

13
14 *"It is incumbent upon the national legislature to*
15 *provide for legal remedies enabling the national*
16 *supervisory authority... to put forward the objections*
17 *which it considers well founded."*

18
19 Not to put forward a final decision or a draft decision
20 or to be defined or *confined* by either, but simply to
21 put forward the objections and then for the national
22 court, if it shares the doubts, to make a reference.

15:47

23
24 Now, if I can ask you, Judge, then to turn to the
25 transcript of Mr. Gallagher's submissions on this? And
26 I'm not going to engage in the unedifying prospect of
27 asking you to pick words that he has used and pars them
28 and analyse them and raise your eyebrows that they
29 changed in a later formulation, I'm simply going to ask

15:47

1 you to look at the argument, because this is where it's
2 laid out. It's day number -- sorry, Judge.

3 **MS. JUSTICE COSTELLO:** I didn't bring my transcripts
4 down, I'm afraid. And my tablet has gone off-line.

5 **MR. MURRAY:** It's day 17, Judge. And we can -- 15:48

6 **MS. JUSTICE COSTELLO:** Perhaps I can borrow a tablet,
7 just so I'm following it.

8 **MR. MURRAY:** We can arrange that (Same Handed to the
9 Court).

10 **MS. JUSTICE COSTELLO:** Thank you. 15:48

11 **MR. MURRAY:** Day 17.

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

13 **MR. MURRAY:** And, judge, the issue commences at page
14 65. And...

15 **MS. JUSTICE COSTELLO:** Day 17, okay. 15:48

16 **MR. MURRAY:** Day 65, Judge. We can give you a hard
17 copy, Judge, if you would prefer?

18 **MR. GALLAGHER:** Day 17, page 65.

19 **MR. MURRAY:** Yeah, day 17, page 65.

20 **MS. JUSTICE COSTELLO:** I have it. Thank you. 15:48

21 **MR. MURRAY:** I don't think anyone thinks we're here on
22 day 65, although...

23 **MS. JUSTICE COSTELLO:** No comment.

24 **MR. MURRAY:** ...it may feel that way. But, Judge, if
25 you turn to page 65 you'll see Mr. Gallagher starts 15:48
26 off:

27

28 *"I've drawn your attention to the passages in...*
29 *Commission -v- Germany... its independence and the*

1 *importance... I suppose, the analogue we would be more*
2 *familiar with here is where you have a procedure within*
3 *a taxation statute or a planning statute where there's*
4 *a procedure to be followed and you then come to the*
5 *court as part of that procedure. But it's not* 12:35
6 *something that can be raised by the court separately,*
7 *given that this is the procedure by which it's come*
8 *before the court."*

9
10 And I've already alluded to that, that that's just 15:49
11 *wrong. In all of those contexts where there are*
12 *procedures where matters come to the court, the court,*
13 *of course, retains that power to refer.*

14
15 And then he quotes paragraph 64 and he says: 15:49

16
17 *"That's what you're doing, you're challenging the...*
18 *DPC."*

19
20 And he says: 15:49

21
22 *"so in the context that the claim is rejected" - I'm on*
23 *page 66 now - "as unfounded, the court must review*
24 *that. And in that context it may decide that it's*
25 *appropriate to put it forward on its own motion. Then* 12:37
26 *that is distinguished in 65."*

27
28 And there's *no* distinction drawn in 65, no distinction
29 whatsoever. The very point that presents itself from

1 this analysis is that if the court had been drawing a
2 distinction to the intent of saying that this
3 fundamental feature which characterises *all* proceedings
4 before a national court is *disapplied* here, that is, of
5 course, exactly what it would say. 15:50

6
7 So he then quotes paragraph 65. And he says over at
8 page 67: "*So the distinction is drawn between the*
9 *procedures*" - that's true, of course. 64 is where the
10 objector, if I can use that phrase, brings judicial 15:50
11 review. 65 is where the Commissioner comes to court.
12 But it's a distinction drawn between the procedure, not
13 the consequence in terms of the scope of the court's
14 power to review.

15 15:50
16 "*We, in our procedure, have a judicial review on that*
17 *basis and in that context; when it comes before the*
18 *court, the court can send it forward*" - that, I think,
19 means make a reference - "*the converse case, there's no*
20 *mechanism provided for in the Act and in our general* 12:38
21 *system where the DPC shares the view that the concerns*
22 *are well founded. But the DPC can't declare that,*
23 *that's a Commission decision that's binding on her, as*
24 *Schrems explains, so all she can do is put it before*
25 *the court, having carried out that analysis, analysis* 12:38
26 *in respect of which she seeks deference to be given to*
27 *her decision in [our] submissions."*

28
29 Then you ask this question: 'well, what's the

1 difference in theory between the two?' And at the
2 bottom of page 67 Mr. Gallagher says:

3
4 *"well, it seems that the principle of the decision,*
5 *Judge, is that if the matter comes before the -- sorry, 12:39*
6 *if the DPC has concerns that are well founded, there is*
7 *no procedure, as I said, in the law that that goes any*
8 *further. The court mechanism is only engaged to allow*
9 *it go further to comply with the obligation that it's*
10 *the CJEU that must make the pronouncement. 12:39*

11
12 *And all the court is being asked to do in these terms*
13 *is do you share the concerns of somebody who, in this*
14 *instance, has carried out an investigation, who is the*
15 *person, as you'll see when I go back to paragraphs 41 12:40*
16 *to 43, that is given this special position and has this*
17 *special expertise?"*

18
19 The special expertise which I understand every other
20 part of their submission says isn't there insofar as 15:51
21 these issues are concerned, because they say she's not
22 entitled to deference.

23
24 *"And what the court is saying is if that person has*
25 *carried out the wrong analysis then you don't have any 12:40*
26 *valid analysis which you can share. The procedure is*
27 *the DPC will go back" - and this is the point I made to*
28 *you now, apparently - "the DPC go back, will examine it*
29 *again and then it may come forward to the court. But*

1 *what is envisaged in the normal way by this procedure*
2 *is that the analysis be done by the DPC. And*
3 *therefore, all the court is being asked to do is to*
4 *share those doubts by reference to what the DPC has*
5 *done. And in the normal way, where somebody who is in* 12:40
6 *a statutory position - as it would be under Irish law -*
7 *has failed to carry out the proper analysis of the*
8 *decision is not effective, then you say it goes back,*
9 *there's nothing to stop the DPC looking at the matter*
10 *again, taking into account criteria that the court has* 12:41
11 *identified and the court explaining why it doesn't*
12 *share the doubts."*

13
14 So this *astonishing* procedure is what is apparently
15 envisaged, that the DPC comes with *some* doubts, the 15:52
16 court says 'No, I think they're wrong, but I have my
17 own ones, here they are', the DPC goes back, thinks
18 about those, comes back and then says 'This is now why
19 I think it's...' and the court refers. I mean, it
20 seems, with respect, absurd. And certainly, *had* this 15:52
21 been the extraordinary process envisaged, one would've
22 expected it to be elaborated upon in somewhat greater
23 detail.

24
25 Page 69, over the page: 15:53

26
27 "*But the court is not being asked in this context to do*
28 *some freestanding analysis."*
29

1 Now, just to stop there. You are being asked to do an
2 analysis - I'm sure you'll be delighted to be told that
3 you've been released from that obligation - but that is
4 what the purpose of the last four weeks has been;
5 you're being asked to do an analysis. And it is that 15:53
6 fact, that very consideration, that you *have* to do an
7 analysis and weigh up and consider all of the arguments
8 and issues and evidence that have been presented to you
9 that puts you in no different position from *any* other
10 court in *any* other case in addressing your obligation 15:53
11 to, or your power to refer.

12
13 So, Judge, to perhaps conclude with this issue. The
14 argument is ill-founded. First, the power of the court
15 to refer is critical, it's long standing, if it's going 15:54
16 to be ousted that has to be stated, and it isn't;
17 second, the argument would involve the extraordinary
18 prospect that the court, faced with an apparent
19 illegality under European law, but a decision that
20 cannot be determined by the CJEU because it wasn't 15:54
21 raised by the Commissioner; thirdly, the judgment
22 doesn't state what Mr. Gallagher suggests and the only
23 way of reaching that conclusion is to pars it as if it
24 were a statute; fourth, there's no *principled* reason
25 why such a power would exist on a judicial review but 15:54
26 not on the procedure with which you were concerned - in
27 *both* situations you're being asked to conduct an
28 assessment of whether a reference is required; and
29 finally, *none* of this arises insofar as the issue

1 around the Ombudsman is concerned, because that is an
2 issue that we have *in fact* brought to the court, albeit
3 not within our draft decision, but as I've explained,
4 in our respectful submission it does not have to be.

15:55

5
6 Judge, I think I can deal with the mootness issue *very*
7 quickly. I'm in the court's hands as to whether you're
8 -- I'll do it in five minutes I'd say.

9 **MS. JUSTICE COSTELLO:** Very good.

10 **MR. MURRAY:** Okay. So this was actually the first
11 issue Mr. Gallagher raised. And we were surprised by
12 that, I must say. The principles are not controversial
13 - nobody disputes that a moot arises where a decision
14 will not have the effect of resolving a controversy.
15 We don't dispute that the CJEU *may* decide not to
16 investigate a reference because it's hypothetical -
17 **Gasparini**. But what we have difficulty with is
18 understanding *how* exactly this is said to arise *at all*.

15:55

15:55

19
20 And there were a number of aspects to this flown and,
21 in our respectful submission, on consideration, none of
22 them bear analysis. First it was said, well, this is
23 conjectural and the conjecture is that you exclude the
24 Privacy Shield, that's what you were -- it's
25 conjectural because you exclude the Privacy Shield.
26 And that goes back to the point I made earlier on; this
27 is not *about* the Privacy Shield, this is a freestanding
28 claim which operates independently of the Privacy
29 Shield, except as regards the Ombudsman. Nobody's

15:56

15:56

1 asking you to exclude or include or do anything else
2 with the Privacy Shield, it simply does not arise.

3
4 Second, Mr. Gallagher never actually said this until
5 the court raised the issue when you said 'well, are you 15:56
6 saying it's moot because if the SCCs were struck down
7 then you would just move over to the Privacy Shield and
8 do all of your transfers under that?' And Mr. Gallagher
9 agreed with that, and I've referred to that already.

10 But of course, the court cannot proceed on that 15:57
11 assumption. And it doesn't even *know*, and it has never
12 been said by Facebook that they would wish to or
13 necessarily *could* simply transfer over to the Privacy
14 Shield. It may well be that they could, but it may
15 well be that it's difficult or there may well be 15:57
16 commercial or business reasons for not doing so. But
17 insofar as *you're* concerned, that has not occurred.

18
19 And just to observe, Judge, to do that at the very
20 least would involve significant logistics. Facebook 15:57
21 would have to comply with additional requirements that
22 do *not* apply under the SCCs; they include rules on
23 onward transfers to controllers and processors, which
24 are *different* under Privacy shield; controllers have to
25 comply with the Privacy shield principles; there are 15:57
26 limitations on the purposes for which information can
27 be transferred to processors; the importer is subject
28 to a degree of regulation that's not applicable under
29 the SCCs and in some circumstances may not wish to

1 *become* so subject; the complaints handling procedures
2 are more onerous; the dispute resolution procedure is
3 more detailed. So there are significant differences.
4 So that's not a basis for a moot.

15:58

5
6 Thirdly, he said 'well, Privacy Shield is going to be
7 reviewed in July'. But what has that got to do with
8 *anything*? (A) because we're not concerned with the
9 Privacy Shield, and (B) because it *hasn't* been
10 reviewed.

15:58

11
12 Fourthly, it was said it was moot because there's a new
13 regulation. Now, the new regulation takes effect in
14 May 2018. And although it was *said* that it was moot
15 because of the new regulation, you were not referred to 15:58
16 a *single* provision *of* the new regulation which would
17 render it moot in any way. So we're at a loss to
18 understand what exactly happens when the new regulation
19 comes into effect that renders it moot. In fact
20 footnote 207 to the Privacy Shield records that the 15:58
21 Privacy Shield is suspended once the new regulation
22 takes effect in May 2018 for a period of six months --
23 of at least six months. So it's not apparent to us on
24 what basis it can be said this is moot.

15:59

25
26 There's an issue raised by Mr. Schrems that it's
27 hypothetical because we should perhaps have considered
28 the rest of his complaint first. And we'll come to
29 that, Judge, when I look at the Mr. Schrems-specific

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complaints.

I'm going to move on, Judge, to the next item on the list, which is the Privacy Shield and that's...

MS. JUSTICE COSTELLO: well, I think we can certainly give ourselves a break until Tuesday.

15:59

MR. MURRAY: May it please the court.

MS. JUSTICE COSTELLO: May I hand down the tablet that was handed up to me pro tem (Same Handed). Thank you very much.

16:00

THE HEARING WAS THEN ADJOURNED UNTIL TUESDAY, 14TH MARCH AT 11:00

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'**But** [2] - 142:18, 143:17
'**her** [1] - 150:16
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'**necessary** [1] - 74:10
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'**where** [1] - 137:29
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'**You** [2] - 76:1, 134:21

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