

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 WEDNESDAY, 8th MARCH 2017 - DAY 17

17

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APPEARANCES

For the PLAINTIFF: MR. MICHAEL COLLINS SC
MR. BRIAN MURRAY SC
MS. C. DONNELLY BL

Instructed by: MR. DAMIEN YOUNG
PHILIP LEE SOLICITORS
7/8 WILTON TERRACE
DUBLIN 2

For the 1ST DEFENDANT: MR. PAUL GALLAGHER SC
MS. NIAMH HYLAND SC
MR. FRANCIS KIERAN BL

Instructed by: MR. RICHARD WOULFE
MASON HAYES & CURRAN
SOUTH BANK HOUSE
BARROW STREET
DUBLIN 4

FOR THE 2ND DEFENDANT: MR. EOIN MCCULLOUGH SC
MR. JAMES DOHERTY SC
MR. SEAN O'SULLIVAN BL

Instructed by: AHERN RUDDEN QUIGLEY
5 CLARE STREET
DUBLIN 2

FOR UNITED STATES OF AMERICA: MS. EILEEN BARRINGTON SC
MS. SUZANNE KINGSTON BL

Instructed by: MCCANN FITZGERALD
RIVERSIDE ONE
37-42 SIR JOHN
ROGERSON'S QUAY
DUBLIN 2

FOR BSA The Software Alliance: MR. MAURICE COLLINS SC
MS. KELLEY SMITH BL

Instructed by: WILLIAM FRY SOLICITORS
2 GRAND CANAL SQUARE
DUBLIN 2

FOR DIGITAL EUROPE:

MR. MICHAEL CUSH SC
MS. NESSA CAHILL BL

Instructed by:

A&L GOODBODY
28 NORTH WALL QUAY
NORTH WALL
DUBLIN 1

FOR ELECTRONIC PRIVACY
INFORMATION CENTER:

MR. COLM O'DWYER SC
MS. GRAINNE GILMORE BL

Instructed by:

FREE LEGAL ADVICE CENTRE
13 DORSET STREET LOWER
DUBLIN 1

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INDEX

WITNESS

PAGE

SUBMISSION BY MR. GALLAGHER 5

SUBMISSION BY MS. HYLAND 93

1 THE HEARING RESUMED AS FOLLOWS ON WEDNESDAY, 8TH MARCH
2 2017

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

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

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

9
10 **MR. GALLAGHER:** Good morning, Judge. Judge, I'm going 11:04
11 to try and go speedily through the various issues that
12 I have left this morning. Before doing so, there are
13 just two or three clarifications from yesterday. You
14 asked me about the reference in the DeLong report to
15 the discontinued programme. 11:05

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

17 **MR. GALLAGHER:** And I confirmed it was a different
18 programme that had been discontinued back in 2011. It
19 wasn't a programme under Section 702, it was under some
20 other provision of the FISA Act, but it was 11:05
21 discontinued then.

22 **MS. JUSTICE COSTELLO:** Hmm.

23 **MR. GALLAGHER:** The second, the analogy to the American
24 football pitch, he corrected me and said he had
25 actually changed his analogy so we would understand it 11:05
26 better, to a soccer pitch.

27 **MS. JUSTICE COSTELLO:** We are talking about the
28 circles, but the corners?

29 **MR. GALLAGHER:** About the circles, yes. Judge, on page

1 131 of yesterday's transcript, I was opening page 35 of
2 the PCLOB report which said: "*Unlike PRISM*
3 *collections, raw Upstream collection is not rooted to*
4 *CIA or FBI and therefore it resides only in NSA systems*
5 *where it is subject to the NSA's minimisation* 11:06
6 *procedures.*"

7
8 And I said I thought that had changed. I was confusing
9 a change that arose in relation to the 12333 that is
10 mentioned in the expert reports, that *hasn't* changed. 11:06

11 So the position --

12 **MS. JUSTICE COSTELLO:** which one hasn't changed, so
13 I get it straight.

14 **MR. GALLAGHER:** Sorry, the Upstream explanation in
15 page 35. 11:06

16 **MS. JUSTICE COSTELLO:** That remains as is?

17 **MR. GALLAGHER:** That remains as is. Sorry for that
18 lack of clarity.

19
20 Judge, I have dealt at some length with the national 11:06
21 security position and I just want to perhaps draw the
22 threads together. We also have prepared a response to
23 the speaking note of the DPC in relation to that which
24 we will hand in (SAME HANDED TO THE COURT). I'm not
25 going to go through that, but it summarises the points 11:07
26 we want to make.

27
28 Judge, in essence our position with regard to national
29 security, the primary position is that it's outside the

1 scope of the Treaty and the Charter and therefore an
2 analysis or an assessment of the processing conducted
3 by the national security agencies of a foreign state,
4 in this case the US, is not subject to assessment by
5 reference to either. That is our primary position on 11:07
6 the basis of the section of the Treaty and the Charter
7 that I have identified and of course also the
8 Directive.

9
10 That approach, however, has not been adopted, as you 11:07
11 know, in Schrems and by the Commission in the Privacy
12 Shield in the sense that they have had some scrutiny of
13 that processing by reference to the Charter. For the
14 sake of the argument before you, we're adopting or
15 accepting that position for the sake of the argument, 11:08
16 reserving our position on the primary point if this
17 were to go further.

18
19 Adopting the approach then of Schrems and the
20 Commission, you do have regard and must have regard to 11:08
21 the fact that the processing is conducted in a national
22 security context. You must have regard to that because
23 the Charter rights are going to be abridged or limited
24 and national security and the associated, the foreign
25 affairs of the US, they are legitimate objectives and 11:08
26 they can in principle justify the abridgment of Charter
27 rights or the limitation of Charter rights 7 and 8 and
28 47.
29

1 In order for them to justify or in order for the
2 national security processing to justify an abridgment
3 of the rights, you have to be satisfied that they
4 haven't impaired the essence of those rights. For the
5 reasons that we have urged on the court, the essence of 11:09
6 the rights has not been impaired. There are
7 limitations on the rights, but the essence is still
8 there.

9
10 There has been no finding in the Draft Decision that 11:09
11 the essence of the rights has been impaired. Indeed,
12 the finding in paragraph 44 that there are remedies but
13 there are limitations on the remedies is, in and of
14 itself, inconsistent with a finding of an impairment of
15 the essence of the rights. Paragraph 44 of the 11:10
16 decision says the data subject is not completely
17 without redress and a number of remedial mechanisms are
18 available, and you will remember that paragraph 95 of
19 Schrems talked about there being no possibility of
20 redress. 11:10

21 **MS. JUSTICE COSTELLO:** What was the paragraph number
22 again?

23 **MR. GALLAGHER:** 95, Judge, of Schrems.

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

25 **MR. GALLAGHER:** And in those circumstances, there's no 11:10
26 question of the essence of the right, that's not a case
27 that can now be made at this stage in an attempt to
28 justify the position, it's in contradiction to the
29 decision. And it's also of course inconsistent with

1 the approach of the Commission in the Privacy Shield
2 which did not regard the essence of the rights being
3 impaired and accordingly felt justified in applying the
4 analysis that Article 52 of the Charter envisages,
5 which I have called the strictly necessary analysis for 11:11
6 short, but Article 52(1), as I indicated to you
7 yesterday, says:

8
9 *"The limitation must be provided for by law or respect*
10 *the essence of the rights, be proportionate, be 11:11*
11 *necessary and be carried out to genuinely meet*
12 *objectives of general interest or the rights of*
13 *freedoms of others."*

14
15 It's not obviously just confined to national 11:11
16 surveillance, but that is the subject of the Draft
17 Decision and that's what's relevant here. The Draft
18 Decision is premised entirely on national surveillance.
19 But law enforcement generally can do it and other
20 considerations of general interest of the type that 11:11
21 have been identified in the cases.

22
23 That's the analysis carried out by the Commission and
24 it says it meets the requirements of Article 52 and
25 that the limitations on those rights are strictly 11:11
26 necessary. So, as I say, adopting that approach for
27 the sake of the argument in this court and recognising
28 the reality that this court is not going to differ from
29 Schrems, the approach in Schrems, we say that the

1 failure to take account of the fact that it's within
2 the sphere of national surveillance, to carry out the
3 required assessment wholly invalidates the provisional
4 conclusion which is done by reference to a freestanding
5 abstract Article 47 right without recognising these 11:12
6 factors at all.

7
8 It is also faulty or it's defective because it doesn't
9 carry out the holistic analysis that is carried out by
10 the Commission that's envisaged by Article 25, 11:12
11 envisaged by paragraph 75 in Schrems - yes, 75 in
12 Schrems - and it is an incorrect approach. It also
13 fails to take account of the necessary balancing of
14 rights. And, as the court will be familiar from our
15 own constitution and tradition, rights are not 11:13
16 absolute, they are always subject to limitation. And
17 of course there are pre-eminent rights that are at
18 stake here in terms of the national surveillance
19 activities, the right to life, the right to security,
20 all Charter rights recognised, ultimately the right to 11:13
21 do business which is an important right and the
22 fundamental raison d'être of the original Community and
23 the continuing raison d'être of the European Union, the
24 right to conduct trade.

25
26 A right that needs to be balanced, as will be
27 recognised in the decision involving the European Data
28 Protection Supervisor that I will be referring to later
29 in the context of Article 25 and 26, an explicit 11:13

1 recognition by the European court that the supervisor,
2 as it is called in that case, must balance and take
3 into account that element of trade.

4
5 So the analysis is entirely wrong. Even starting from 11:14
6 the premise, which the DPC would ask you to start from,
7 there's been a failure to follow through the type of
8 analysis that's required by the Charter and that's
9 fundamentally defective.

10
11 I did draw attention yesterday that, in the Digital
12 Rights case and indeed in the later Watson case, that
13 the court did not regard the essence of the right being
14 impaired, even though the Directive required the
15 retention of *all* traffic data, and I stress the "*all*", 11:14
16 concerning fixed telephony, mobile telephony, internet
17 access, internet e-mail and internet telephony,
18 quoting:

19
20 "*It therefore applied to all - and I supervise 'all' - 11:15*
21 *means of electronic communication, the use of which is*
22 *very widespread, and of growing importance in people's*
23 *everyday lives. Further, in accordance with Article 3*
24 *of Directive 2006/24, the Directive covers all*
25 *subscribers and registered users. It therefore entails 11:15*
26 *an interference with the fundamental rights of*
27 *practically the entire European population.*"

28
29 Paragraph 56 of Watson. And paragraph 57:

1 *"In this respect it must be noted that Directive*
2 *2006/24 covers in a generalised manner all persons and*
3 *all means of electronic communication as well as all*
4 *traffic data without any differentiation, limitation or*
5 *exception being made in the light of the objective of* 11:15
6 *fighting against serious crime."*

7
8 That was not held to destroy or impair the essence of
9 the right. And of course, in considering that issue
10 here, if you get to it, and I suggest you can't get to 11:16
11 it because there has been no such finding by the DPC,
12 but, if you thought it was necessary to consider it,
13 those statements are of vital importance; but so also
14 is the detailed analysis that I referred the court to
15 yesterday as to the limitations and safeguards within 11:16
16 the system and the fact that discriminants are used in
17 targeting and that only a fraction of the
18 communications are captured.

19
20 Those are very important, not only in the assessment of 11:16
21 the validity of the limitations and in any assessment
22 of proportionality, but they are also of vital
23 importance in seeing whether the type of all embracing
24 interference with data, admittedly to the extent of
25 retention of the data, is of such a nature as to impair 11:16
26 the right. I do acknowledge of course that in Watson
27 and in Digital Rights it was the metadata rather than
28 the contents that was retained, but it was emphasised
29 that that was very significant. And you have the

1 evidence that in this case, while there is examination
2 of content, it is done in the controlled and targeted
3 way and limited way that is set out in detail, both in
4 the PCLOB report, and perhaps in very great detail and
5 by way of a practical explanation of the practice which 11:17
6 Schrems requires the court to look at, or anybody
7 carrying out an adequacy assessment, in Mr. DeLong's
8 report.

9
10 It is important to stress the simple and obvious point 11:17
11 that Mr. DeLong's evidence, Prof. Clarke's evidence,
12 Herr Ratzel's evidence, none of that has been
13 challenged in the slightest, but Mr. DeLong is in the
14 unique position of being able to talk to what actually
15 happens. And it is of course very significant that 11:18
16 such evidence is before the court, directly from
17 somebody who was involved, to correct the mistaken
18 assumptions that underlay Schrems and to put before the
19 court in a very transparent and complete way all of the
20 relevant information that is unambiguously required by 11:18
21 the case law and the emphasis as to how it operates in
22 practice, the type of evidence that was missing from
23 all of the cases, Digital Rights, Watson and everything
24 else, and a measure obviously of how significant
25 Facebook regard these proceedings and the importance of 11:18
26 putting before the court a complete record.

27
28 That then, as I say, is the strictly necessary analysis
29 which we say holds good and that in any event the court

1 is bound by the decision. And there is just one or two
2 documents I want to briefly refer to in this context.
3 Judge, the GDPR, which is the regulation that
4 I referred to the other day.

5 **MS. JUSTICE COSTELLO:** That's the one coming in next 11:19
6 year?

7 **MR. GALLAGHER:** Exactly, in a ham-fisted way, referring
8 to it as a directive, but I'm glad to say that it's a
9 regulation that you will find in that first book in
10 divide 11 of the material. I don't want to overload 11:19
11 the court with detail, but merely to make one --

12 **MS. JUSTICE COSTELLO:** I think that boat sailed.

13 **MR. GALLAGHER:** Sorry?

14 **MS. JUSTICE COSTELLO:** I think that boat sailed.

15 **MR. GALLAGHER:** I was just going to say it was a bit 11:19
16 late to express that regret, but it is genuine and it
17 has been there since the beginning, it's not an
18 afterthought. But I am perhaps even more conscious as
19 time goes on.

20
21 There are just two matters, Judge, and, if you go to 11:19
22 Article 2, just a simple point, it's on page 32. Just
23 the material scope of this new regulation. You will
24 see:

25
26 *"1. The Regulation applies to the processing of 11:19
27 personal data wholly or partly by automated means and
28 to the processing other than by automated means of
29 personal data which form part of a filing system or*

1 *intended to form part of a filing system.*

2
3 *2. This Regulation does not apply (a) in the course of*
4 *an activity which falls outside the scope of Union*
5 *law."*

11:20

6
7 So the exception is still recognised and the European
8 Parliament case shows that the processing in the US is
9 outside the scope of Union law, the act of transfer is
10 not and the DPC's speaking note seek to confuse the 11:20
11 two. They emphasise the transfer, which we have always
12 accepted has to be governed by EU law, but they seek to
13 ask the court to ignore entirely that the processing,
14 which is of concern to the DPC, is a processing by the
15 national security, it is that processing that is 11:21
16 outside the scope of European law and it is that which
17 dictates at the very least a strictly necessary
18 analysis, even if one accepts, as we do, for the
19 purpose of the argument that some analysis by reference
20 to the Charter is required. 11:21

21
22 There is also some attempt, with the greatest of
23 respect, to confuse matters further by suggesting that,
24 if data is being shared by the US, which it is as you
25 know in the uncontradicted evidence, that it's being 11:21
26 shared by the Union under the common foreign and
27 security policy provisions of the Union. That's wrong
28 in the evidence. It's clear from Mr. DeLong and
29 Prof. Clarke that it's shared with individual Member

1 States. But I draw attention to paragraph 2(b) which
2 in any event makes it clear that the Regulation does
3 not extend to Member States when:

4
5 *"Carrying out activities which fall within the scope of* 11:22
6 *Chapter 2 of Title V of the TEU."*

7
8 Those are the specific provisions on the common foreign
9 and security policy that are now part of the European
10 Treaties, and a fundamental part of them. So even if 11:22
11 that were so, it is excluded.

12 **MS. JUSTICE COSTELLO:** I just want to get clear in my
13 head. You were talking about the, obviously there is
14 two types of data processing, I think it's agreed by
15 anybody. 11:22

16 **MR. GALLAGHER:** Yes.

17 **MS. JUSTICE COSTELLO:** There's the transfer from
18 Facebook Ireland to Facebook Inc., were you accepting
19 that that's not in the context of national security?
20 It's the potential processing of personal data of EU 11:22
21 citizens when Facebook Inc. is in receipt of it.

22 **MR. GALLAGHER:** Absolutely.

23 **MS. JUSTICE COSTELLO:** That you are arguing is governed
24 by the national security?

25 **MR. GALLAGHER:** Absolutely, Judge. 11:22

26 **MS. JUSTICE COSTELLO:** I just want to get that clear.

27 **MR. GALLAGHER:** Yes. And we did make, and it's
28 something that I did want to emphasise again. We did
29 say it in our submissions. We couldn't obviously say

1 anything other than all, and our whole case is
2 premised, all the evidence of Prof. Meltzer is this
3 data is transferred for economic reasons, trade
4 reasons, and nobody could contend that, in the light of
5 Article 25 and 26, that the fact of processing of 11:23
6 making it available is not caught by the Directive.

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

8 **MR. GALLAGHER:** But what is critical and what is elided
9 in the DPC's submissions is that the objection is not
10 taken per se to a transfer to Facebook Inc. in the US, 11:23
11 the objection is taken because of the separate
12 susceptibility to processing by the national security
13 agencies in the United States. It is that separate
14 processing that is outside the scope of the Treaty.
15 The European Parliament makes that clear, specifically 11:23
16 deals with it in the context of security processing,
17 and in any event the wording of the Treaty.

18
19 So, therefore, if you are looking at the intrusions in
20 the rights, you must look at it in the context that 11:24
21 you're not dealing with intrusions in the private
22 sphere, there's no complaint that the private law
23 doesn't restraint private actors from abusing, if I can
24 use that term, the data. It's that the public law
25 governing the state doesn't specifically provide 11:24
26 remedies. But you cannot look at that in the abstract
27 by reference to Article 47, you have to take account
28 that that is national security which inevitably
29 involves an abridgment of Charter rights, so that is

1 the very important and fundamental distinction.

2
3 The last document that I want to refer you to in this
4 context, having I am afraid found it struggling
5 yesterday, it's in my fourth book of the EU agreed 11:24
6 materials, it's divide 61 which I think is of more
7 relevance -- oh, no, it's not. I have made the same
8 mistake. Just one second, I do have it today. It's
9 53, I think, sorry. This is getting a bit too much.
10 Yes, 53, sorry. 11:25

11
12 It is the same book - well, sorry, for me it's the same
13 book, I'm sure it's not for you.

14 **MS. JUSTICE COSTELLO:** Oh it is, sorry.

15 **MR. GALLAGHER:** There is a reference to the Council of 11:25
16 Europe - Prof. Swire talks about it - report, but you
17 haven't actually been asked to look at it. I do want
18 to ask you to look at it briefly.

19
20 If you'd be kind enough to just go to the first page, 11:25
21 you will see it's: "*Democratic and effective oversight*
22 *of national security services of council of Europe*
23 *members.*"

24
25 And if you go to page 7, "*National Practices in Council* 11:25
26 *of Europe Member States*", item 3. And the second
27 paragraph of that:

28
29 "*It is emphasised that there is no Council of European*

1 of member state whose system of oversight comports with
2 all of the internationally or regionally recognised
3 principles and good practices discussed in this issue
4 paper."

5
6 And then: "There is no best approach to organising a
7 system of security service oversight. Nevertheless,
8 this issue paper seeks to highlight particular
9 approaches or practices that offer significant
10 advantages from a human rights perspective."

11
12 And over the page, next page, you will see under the
13 heading "*Independent Oversight Institutions*" that:

14
15 "*Expert security/intelligence oversight institutions*
16 *play an increasingly prominent role in the supervision*
17 *of security services. This issue paper adopts the view*
18 *that they are fundamental to enhancing the efficacy of*
19 *oversight and improving human rights.*"

20
21 So oversight is critical. Then the "*Judicial Bodies*":

22
23 "*Judicial bodies are primarily discussed with reference*
24 *to the authorisation of intrusive surveillance*
25 *measures. Attention is drawn to the fact that very few*
26 *states require judicial authorisation for bulk*
27 *surveillance measures, access to communications data or*
28 *the use of computer network exploitation.*"

1 And it says: *"This area of law lags behind*
2 *developments in surveillance measures."*

3
4 And at the bottom, *"Internal Controls"*: *"Although the*
5 *internal controls within security services are not a* 11:27
6 *focus of this issue paper, it is essential to note that*
7 *it is individual members of security services that play*
8 *the most significant role in ensuring the security*
9 *service is human rights compliant and accountable.*
10 *External oversight can achieve little if the security* 11:27
11 *services do not have an internal culture and members of*
12 *staff that respect human rights."*

13
14 And the evidence you have on that comes from Mr. DeLong
15 but also from Prof. Swire who carried out the 11:27
16 classified review and confirmed he believed it and the
17 PCLOB report that I referred you to yesterday, the
18 sections where they didn't believe that there was --
19 sorry, the section quoted in Mr. DeLong's report where
20 they didn't believe that there was deliberate evasion 11:28
21 of controls.

22 **MS. JUSTICE COSTELLO:** And this is a 2015 document?

23 **MR. GALLAGHER:** This is a 2015 document. Those are
24 very important, those are things that some witnesses
25 sought to dismiss, but they clearly are critical. 11:28
26 Mr. DeLong identified in great detail the extent of the
27 compliance culture, the sanctions for people if they
28 don't comply with it. Of course in that context you
29 saw that the FISC rules, that I drew your attention to

1 yesterday, Rule 13, noted in the Adequacy Decision
2 requires the NSA to disclose to FISC any non-compliance
3 that is identified. There are now reports of
4 non-compliance incidents, as Mr. DeLong explained.

5 **MS. JUSTICE COSTELLO:** I forgot to ask, what happens, 11:29
6 does the FISC court then review the orders or what does
7 it do?

8 **MR. GALLAGHER:** The FISC court then reviews, and
9 obviously it can review the authorisation. It can
10 identify whether the directives are being compliant 11:29
11 with the authorisation and, as you saw, the FISC court
12 ultimately can direct, as it did in the 2011 Bates
13 opinion, to direct that a programme be discontinued.
14 So those are very significant powers. Of course it is
15 secret in the sense that it's not open to the public. 11:29
16 It would be astounding and contrary to the whole
17 purpose if it were.

18
19 But, on any assessment, the extent of the transparency
20 between the court and now the reports that are 11:29
21 published with regard to targeting procedures,
22 compliance, oversight, there's been no suggestion that
23 anybody else does better than that, and that goes as
24 far as can consistently be gone in protecting the
25 efficacy of the surveillance. 11:30
26

27 And of course the court will realise that, contrary to
28 serious crime, which has its own problems, and
29 organised crimes as Prof. Clarke explained, you are

1 dealing with very sophisticated state actors, hostile
2 countries with enormous IT ability, that even
3 information that ordinary people might regard as not
4 very disclosing of intelligence methods would be of
5 immense value to them in undermining the effect of 11:30
6 these programmes and in carrying out their own
7 objectives.

8
9 So you are dealing in an area that is completely
10 different from the enforcement of crime where, 11:30
11 notwithstanding the sophistication of the organised
12 gangs, it doesn't even approach what hostile states or
13 terrorist groupings can marshal in terms of the ability
14 to do damage in the form of the hostile actor described
15 by Prof. Swire. 11:31

16
17 On page 32 you'll find at the bottom of the page:

18
19 *"The court has long recognised that the concept of*
20 *effective remedy cannot carry the same meaning in the 11:31*
21 *context of secret intrusive measures because the*
22 *efficacy of such measures depends upon their remaining*
23 *secret. In view of this, the Court has accepted that,*
24 *as long as secret surveillance measures are either*
25 *ongoing or cannot be revealed to the subject for other 11:31*
26 *legitimate reasons, remedies need only be as effective*
27 *as they can be given the circumstances. However, the*
28 *court has held that the fact that a person cannot be*
29 *informed as to whether or not they are under*

1 *surveillance or have been under surveillance should not*
2 *preclude them from being able to raise a complaint with*
3 *an oversight body. Such a body should be able to*
4 *conduct investigations to ensure that any measures are*
5 *being used in accordance with the law, without* 11:31
6 *informing the complainant one way or the other. Once*
7 *measures are known to the subject, as a result of a*
8 *legal requirement to notify him/her, or they are*
9 *otherwise revealed, he or she must have recourse to a*
10 *body that can provide an effective remedy."* 11:32

11
12 That's of course why the Ombudsperson procedure is
13 regarded as so important because it is properly
14 understood in the relevant context.

15
16 And then, Judge, on page 41 chapter, 4 what was in the
17 summary "*there is no Council of Europe state*", the last
18 paragraph:

19
20 "*whose system of oversight comports with all of the* 11:32
21 *internationally or regionally recognised principles and*
22 *good practices."*

23 **MS. JUSTICE COSTELLO:** Sorry, I missed the page.

24 **MR. GALLAGHER:** Sorry, 41.

25 **MS. JUSTICE COSTELLO:** 41, thank you. 11:32

26 **MR. GALLAGHER:** And the last paragraph.

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

28 **MR. GALLAGHER:** "*Equally it must be emphasised that*
29 *there is no one best approach to organising a system of*

1 *security service oversight. Diverse constitutional*
2 *arrangements, legal and political systems, and*
3 *historical contexts necessitate a range of approaches*
4 *within the Council of Europe area. Accordingly,*
5 *caution should be exercised when considering any* 11:32
6 *wholesale importation or copying of examples from other*
7 *states. There is, however, no doubt that there are*
8 *models or practices that can be regarded as more*
9 *effective."*

10
11 And those examples are discussed. 11:33

12
13 If you go to page 46 at the bottom you'll see that they
14 deal with the oversight committees in the form of
15 parliamentary committees. And, at the top of page 47, 11:33
16 it says, in the first line, first sentence, complete
17 sentence: "*Beyond these committees with niche*
18 *mandates, many parliaments have other committees whose*
19 *remits cover aspects of service policy or activity."*

20
21 So that's a recognised form of oversight. Judicial
22 bodies are dealt with on page 52 and it says: 11:33

23
24 "*Although the courts may scrutinise and adjudicate on*
25 *the action and output of security services in many* 11:33
26 *contexts, this section will focus on the role of*
27 *judicial bodies in authorising intrusive surveillance."*

28
29 And then you see "*Complaints Against Security*

1 Services":

2
3 *"Regarding claims against security surveillance, most*
4 *Council of Europe states offer the theoretical*
5 *possibility of an individual bringing an action to seek 11:34*
6 *a remedy. Bringing an action may be more*
7 *straightforward when a person wishes to challenge an*
8 *arrest, interrogation or detention. However, as*
9 *mentioned, there are often significant obstacles to*
10 *litigating against service services. Using the courts 11:34*
11 *to challenge security service surveillance or data use*
12 *is even more complex because, in most cases, an*
13 *individual will not find out about such infringements*
14 *of their rights."*

15
16 And they quote the Venice Commission, and you remember
17 Prof. Swire quoted that.

18
19 *"Challenges are only likely to be brought if an*
20 *individual finds out about such measures through some 11:34*
21 *form of notification requirement, by accident, from a*
22 *whistleblower or through some other legal proceedings.*
23 *There are sometimes explicit restrictions on persons*
24 *seeking to challenge secret surveillance in ordinary*
25 *courts before they have been notified of their having 11:34*
26 *been targeted.*

27
28 *The UK has created a special body."*
29

1 And that's the Investigatory Powers Tribunal. And over
2 the page at the first paragraph:

3
4 *"Although the types of measures requiring external*
5 *authorisation vary, they commonly include the targeted* 11:35
6 *interception of communications (where the*
7 *person/organisation whose communications are to be*
8 *intercepted is known at the outset), search and seizure*
9 *of property and the installation of recording devices*
10 *in dwellings. By contrast, in most states judicial* 11:35
11 *authorisation is not, for example, required for*
12 *information collection using human sources, untargeted*
13 *bulk surveillance, computer network exploitation,*
14 *searching pre-existing data banks."*

15 11:35
16 Now on any version that report of the Council of Europe
17 States has to be, even if the comparator is not the
18 Member States, it has to be of major significance in
19 assessing proportionality and the limitation and the
20 acceptability of the limitation on the rights and 11:36
21 perhaps put to bed, if I may say so, something that has
22 taken a lot of the court's time in this case, this
23 whole issue about the limitation on standing, which
24 I will deal with briefly, and on redress as if this is
25 some sort of US invention that exists nowhere else and 11:36
26 that it is, in and of itself, creates a problem. It's
27 not, it is standard and one has to assume that all of
28 these Council of Europe States are presumed to be in
29 compliance with the Convention. But, even if that were

1 not so --

2 **MS. JUSTICE COSTELLO:** The report you are saying?

3 **MR. GALLAGHER:** The report is obviously, but states are
4 presumed to comply with the law and their international
5 obligations. And, even if that were *not* the case, 11:36
6 clearly this is a vital matter to be taken into account
7 and clearly taken into account in the approach of the
8 Commission.

9
10 So finally then with regard to the approach in national 11:36
11 security, apart from all of those criticisms it was a
12 wholly selective approach focussing on one aspect of
13 the regime remedies for which there is no warrant or
14 justification in the cases, it gave a distorted view of
15 the position, it was taken out of context, it didn't 11:37
16 look at practice, it didn't look, even in the context
17 of remedies, of non-judicial remedies, and while, by
18 definition, a non-judicial remedy is not a judicial
19 remedy, it is relevant in assessing the limitations on
20 judicial remedies. And, most of all of course, it 11:37
21 failed to take into account the Ombudsman procedure
22 which is regarded as vital and clearly is part of best
23 practice.

24
25 There is some fairly lame, if I may say so, attempt to 11:37
26 make some mild criticism of it in the submissions,
27 something that they are not entitled to do because it
28 wasn't part of the decision. There is no suggestion on
29 the part of the DPC that there is anything wrong with

1 the Commission decision or any basis for challenging
2 it, and that is not something that they are entitled to
3 do now.

4
5 I want then to move quickly to Article 25 and 26 of 11:38
6 which you have heard much, and I have only one or two
7 points to add to what is there. They are perhaps
8 obvious to the court already, but they are a slightly
9 different emphasis from, and I think important
10 emphasis, difference in emphasis from the submissions 11:38
11 you have heard already.

12
13 One thing is absolutely clear, Article 26 - and you'll
14 find the Directive in...

15 **MS. JUSTICE COSTELLO:** I have it. 11:38

16 **MR. GALLAGHER:** Or, sorry, the decision, excuse me -
17 the Directive is different from Article 25 in its
18 approach, we know that, on any view, leave aside any
19 linguistic analysis. There are just two aspects of
20 Article 26(2) and (4) that I want to refer to. 11:38

21
22 Firstly 26(2) specifically addresses in the fifth line
23 "*where the controller adduces adequate safeguards*". In
24 opening I said that was very important because, by
25 definition, it could not be envisaged that the 11:39
26 controller is going to address national security or
27 public law or achieve a complete answer to any issue
28 that might arise in that regard.
29

1 That is absolutely clear. Whether you use the word,
2 adequate, sufficient or anything else, nothing could be
3 clearer than that. And it's reinforced by 26(4) where
4 the Commission is tasked, and there is no challenge to
5 the Directive: "*In accordance with the procedure*
6 *referred to in Article 21(2) that certain standard*
7 *contractual clauses offer sufficient safeguards.*"

11:39

8
9 So what is to offer the sufficient safeguards? It's
10 the contractual clauses. We know the contractual
11 clauses can't change public law. So to conclude, as
12 the DPC did, that you don't even look at the standard
13 clauses because they don't change public law is, as you
14 heard many times now, fatally flawed. But, more
15 importantly in the context of what I'm now going to
16 say, it just is inconsistent with any approach in the
17 context of Article 26 that requires an adequacy of the
18 law assessment.

11:39

11:40

19
20 Article 26 requires the controller to adduce the
21 safeguards. They do actually address issues with
22 regard to the mandatory provisions of the foreign law
23 where the importer is unable to carry out the
24 instructions of the exporter and a claim can be brought
25 against the exporter in this jurisdiction, and
26 Ms. Hyland will deal briefly with those.

11:40

11:40

27
28 So they do deal in part with it, but of course, even if
29 they never dealt in any part with it, the answer is

1 that the solution lies within the terms of the SCC
2 decision itself. And that's to be found in divide 10.
3 You'll remember there is a recognition in the footnote
4 in page 12 of that - sorry, not page 12, just one
5 second - yes in page 12 under Clause 5, "*obligations of* 11:41
6 *the data importer*" and the reference below to which
7 I drew your attention to *mandatory* requirements, a
8 recognition that you have all of these protections in
9 place but they are of course subject to mandatory
10 requirements of the third country. 11:41

11
12 And how do you deal with the mandatory requirements of
13 the third country? As I said in part they are dealt
14 with in the content of the model clauses, but in truth
15 the solution is both clever, effective and obvious when 11:42
16 you pause for a moment's reflection.

17
18 If you go back to Article 4 of this decision, which is
19 the embodiment of the decision or the substantive part
20 of it, on page 8 you see the answer. It says: 11:42

21
22 "*without prejudice to their powers to take action to*
23 *ensure compliance with national provisions adopted*
24 *pursuant to the Directive, the competent authorities in*
25 *the Member States may exercise their existing powers to* 11:42
26 *prohibit or suspend data flows to third countries in*
27 *order to protect individuals with regard to the*
28 *processing.*"
29

1 So if, notwithstanding the model clauses that are
2 adduced to provide or introduced to provide the
3 sufficient safeguards, specifically under the wording
4 of 26(2) and (4), they don't work in the case of a
5 third country, then the answer is you can suspend in 11:43
6 respect of that country. Why is that there? It is
7 there to give extra protection in the sort of situation
8 that is now envisaged, but it also recognises, as
9 I think Mr. Collins certainly said in passing, that the
10 SCC decisions govern all third country transfers. You 11:43
11 are being asked to invalidate, well not you because you
12 can't do it, but...

13 **MS. JUSTICE COSTELLO:** It's only in relation to the US,
14 not in relation to all those countries.

15 **MR. GALLAGHER:** No, but you see that's what they say. 11:43
16 **MS. JUSTICE COSTELLO:** Yes.

17 **MR. GALLAGHER:** They say it's only in relation to the
18 US, but it cannot be invalidated only in relation to
19 the US, it applies to everybody. So it's a complete
20 misconception. And the reason it cannot be 11:43
21 invalidated, because one country's laws don't meet the
22 requirements, is because it contains within it the
23 basis for addressing that: You suspend the flow to
24 that country. But this is the extraordinary thing, and
25 Mr. Murray shot up at one stage, 'it's only in the US' 11:44
26 and in the statement of claim they say it's only in the
27 US, but it's a complete misunderstanding; the SCC
28 decisions, as you can see in their terms, relate to
29 transfers to *all* third countries.

1 So the court, the European court couldn't be asked on
2 the basis of concerns about the US to invalidate. It
3 would mean the stopping of flows to all countries. And
4 why would you do that when you look at the provisions
5 of 4(1), if you are not meeting the requirements of the 11:44
6 Directive, you suspend the transfer to that country.
7 Who does that? The DPC, the person who Schrems says
8 has all of the powers and, in paragraphs 41 to 45, it
9 emphasises the importance of the role of the DPC, and
10 in the European Data Supervisor case, that I will be 11:45
11 coming to, it emphasises that. So let's see what the
12 DPC can do.

13
14 So in order to protect individuals with regard to the
15 processing, where? And this is the condition: It is 11:45
16 established, so it must be established, not a
17 well-founded concern: *"That the law to which the data*
18 *importer process is subject imposes upon him*
19 *requirements to derogate from the application data*
20 *protection law - that's the law in Ireland - which go 11:45*
21 *beyond the restrictions necessary in a democratic*
22 *society as provided for in Article 13."*

23
24 So you remember Article 13 applies for restrictions
25 that can be imposed on the entities within the Member 11:45
26 State, this in a sense is an analogue; if the laws of
27 the US or anywhere else require the person to go beyond
28 or who require the person to do something which go
29 beyond the restrictions, then the DPC intervenes, so it

1 has to be established that it does that, it hasn't been
2 established here. And then you go on: "*where those*
3 *requirements are likely to have a substantial adverse*
4 *effect on the guarantees.*"

11:46

5
6 So it's not just to show that they go beyond the
7 restrictions necessary, there is a further condition:
8 They have they have to have a substantial adverse
9 effect on the guarantees provided by the applicable
10 data protection.

11:46

11
12 So that's the solution. It is simple, it is coherent,
13 it is neat, it provides the entire answer to the case,
14 and it's amazing the DPC didn't have regard to the very
15 powers which she has, but, you see, that would have
16 required her to go through these steps and establish,
17 but what she can't do is ask this court to lend its aid
18 to a reference that is misconceived because it seeks an
19 invalidation of the SCC decision, the SCCs decisions,
20 in respect of third countries, because that would be
21 its consequence, without dealing with the, without
22 dealing with the powers that are conferred on her.

11:46

11:47

23
24 In a sense it's the opposite to Schrems. In Schrems
25 the complaint was the DPC had powers which he never
26 exercised. Well, this is the same thing, it is seeking
27 this court's imprimatur that it goes off. And the
28 court somehow somebody says 'well you don't have to go
29 through that step and satisfy me that that step doesn't

11:47

1 stop'. If it is established you stop it. And that's
2 why that's there. And the extent of this, there was
3 some reference to the fact that Nasscom, which is an
4 Indian trade body sought to be joined as amicus, they
5 were too late and McGovern J refused it, but they 11:48
6 recognised and everybody recognises that an
7 invalidation of the SCCs stops their use for everybody.
8

9 And of course the effect of that would be catastrophic,
10 it was something that was never intended. These were 11:48
11 carefully introduced to allow for dealing with
12 countries where there was no Adequacy Decision, because
13 they are not required where there is an Adequacy
14 Decision, but it also had an inbuilt protection if that
15 country's laws overstepped the mark. And what's 11:48
16 interesting and what is critical is the test is: Do
17 the restrictions go beyond what is necessary in a
18 democratic society, the very test that I have spent the
19 last day and a bit explaining was the relevant test in
20 the context of national surveillance and not the test 11:49
21 applied by the DPC.
22

23 So that, as I say, is the answer in relation to that,
24 and I want to hand in the decision in European
25 Commission -v- European Data Protection Supervisor. We 11:49
26 do have, I think, the folder for you now, Judge. Is
27 the index agreed? It's been handed up, so at least you
28 have something to put it into. There is just one
29 statement here that elucidates --

1 **MS. JUSTICE COSTELLO:** I think it was four volumes.

2 **MR. GALLAGHER:** Sorry?

3 **MS. JUSTICE COSTELLO:** I think it was four more
4 volumes.

5 **MR. GALLAGHER:** Oh, I am sorry. Well, it is still 11:49
6 better to have them, I suspect, in some as is all I can
7 say lamely.

8 **MS. JUSTICE COSTELLO:** Put it this way: Mr. Kavanagh
9 is busy putting my marked-up ones in.

10 **MR. GALLAGHER:** Thank you, and thank you Mr. Kavanagh. 11:49
11 The decision, Judge, it really related to, the
12 Commission complained that the European Data Protection
13 Supervisor in Germany, it was against the German
14 government, the intervenor was the European Data
15 Protection Supervisor, but it complained that the 11:50
16 supervisor in Germany wasn't sufficiently independent,
17 it was subject to some parliamentary scrutiny, I think,
18 with regard to the cost of the office and it was felt
19 that the interference would be inconsistent with the
20 importance of the position conferred on the DPC. 11:50

21

22 And if you go to page 1908 under the findings of the
23 court you'll see the scope of the requirement of the
24 independence of the supervisory authorities. And,
25 skipping to paragraph 20, where it says: 11:50
26

27 *"In the second place, concerning the objectives of*
28 *Directive 95/46 it is apparent from the third, seventh*
29 *and eighth recitals in the preamble thereto that,*

1 through the harmonisation of national provisions on the
2 protection of individuals with regard to the processing
3 of personal data, that directive seeks principally to
4 ensure the free movement of such data between Member
5 States, which is necessary for the establishment and 11:51
6 functioning of the internal market within
7 Article 14(2)."

8
9 Then 21: "However, the free movement of personal data
10 is liable to interfere with the right to private life - 11:51
11 that's recognised.

12
13 22. For that reason, and as is apparent from the 10th
14 recital, the latter seeks not to weaken the protection
15 guaranteed by existing national rules, but on the 11:51
16 contrary to ensure, in the European Community, a high
17 level of protection of fundamental rights."

18
19 And then 23: "The supervisory authorities provided for
20 in Article 28 are therefore the guardians of those 11:51
21 fundamental rights and freedoms, and their existence in
22 the Member States is considered, as stated in the 62nd
23 recital to the Directive, as an essential component of
24 the protection of individuals with regard to the
25 processing of the data." 11:52
26

27 And then it goes on to 24: "In order to guarantee the
28 protection, the supervisory authorities must ensure a
29 fair balance between, on the one hand, observance of

1 *the fundamental right to private life and, on the*
2 *other, the interests requiring free movement of*
3 *personal data."*
4

5 So that is a very important aspect, as I have urged on 11:52
6 the court, that trade aspect. It is a recognition of
7 the power given to the supervisor. Article 4 of the
8 SCCs is entirely consistent with that. That doesn't
9 involve abandoning standards, it imposes a different
10 approach to Article 25, but it reinforces the 11:52
11 explanations you have already had as to why Article 25
12 test is not, could not and never was the correct test
13 and that, to the extent that the standard contractual
14 conditions cannot provide adequate protection in a
15 particular case as against mandatory provisions of the 11:53
16 third country law, there is a focussed, an individual,
17 a targeted measure that the DPC can adopt that doesn't
18 affect other third countries that are not party to
19 these proceedings, whose laws haven't been examined and
20 who may suffer from no such deficiency, if a deficiency 11:53
21 were established and approved. And of course no such
22 deficiency has been established or approved.

23
24 And can I, in the context of that, refer you just for
25 one moment to the report of Prof. Meltzer which you 11:53
26 will find in Book 4 of the court papers. I don't
27 intend to delay on this, I would ask the court, as
28 undoubtedly it will, to consider his evidence which
29 again isn't challenged. Mr. Collins drew your

1 attention to the key expert opinions on page 2 as to
2 the consequences, but also I think of interest in
3 understanding this is page 17 which sets out the
4 economic importance for the EU of cross-border
5 transfers of personal data and sets out the relevant 11:54
6 figures that arise in that context.

7
8 And then in 11.2 at the bottom of the page it refers to
9 the US and EU economic relationship with the US: "*Is*
10 *the most important trading partner outside the EU,* 11:55
11 *accounting for 27.5% of the all exports and over 31.7%*
12 *of all EU imports are from the US.*"

13
14 And then: "*United States investment in EU employs*
15 *approximately 3.7 million Europeans.*" The 11:55
16 transatlantic data flow, this is dealt with on page 18.
17 In page 22 there is a section dealing with "*EU*
18 *digitally deliverable services trade*" and the
19 importances of the transfer of data in that. Page 24
20 deals with opportunities and "*the global internet*", it 11:55
21 says at 11.10:

22
23 "*And cross-border provide a particular opportunity for*
24 *SMEs to be engaged in the international economy.*"

25 11:55
26 And it is important, as I did emphasise when opening,
27 that this materially concerns SMEs, small medium
28 enterprises, and not just the giants that have been
29 referred to here. This catches them all. The

1 explanation of course is even apart from, as he
2 explains in the previous section to which I briefly
3 referred, even apart from the IT companies, every US
4 company that has a subsidiary or an associate in Europe
5 and vice versa, they are trading data all the time, 11:56
6 transferring data about employees and about people,
7 about customers. It's just such an integral part of
8 trade nowadays, as Prof. Meltzer explains, that it's
9 difficult to conceive of trade without it. At page 28
10 he gives the quantitative effect and on page 31 a 11:56
11 summary of what would happen if this transfer of data
12 was interrupted.

13
14 So the importance of that again is not contested and,
15 in fairness to Mr. O'Dwyer in that opening affidavit as 11:57
16 I drew attention to, I think it was paragraph 107, he
17 identified the Commission report which identified the
18 enormous impact on GDP of Europe.

19
20 So that's Article 25 and 26. I then want to deal 11:57
21 briefly with the position of the adequacy of US law,
22 not because - briefly - not because it is not
23 important, we very much contend that it is adequate,
24 but because I think what's relevant to the court in
25 making that determination can be summarised in a 11:57
26 convenient way. And part of my submissions on this,
27 I have mentioned to Mr. Murray, neither party is
28 handing in further speaking notes, but I have said that
29 I am going to hand in this document. It is just a

1 summary for the court of the sections, a table, so that
2 you have them because it is mesmerising trying to
3 remember the various provisions to which reference was
4 made.

5 **MS. JUSTICE COSTELLO:** Thank you very much. 11:58

6 **MS. DONNELLY:** Judge, I just want to reserve our
7 position.

8 **MR. GALLAGHER:** Oh, absolutely, they need to.

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

10 **MR. GALLAGHER:** I had given a copy, but I had meant to 11:58
11 send it earlier and they haven't had an opportunity of
12 looking at it. But it's just meant to be hopefully
13 helpful to the court to help memorise the relevant
14 provisions.

15 11:58
16 But can I just look at one thing first, this idea of
17 standing that has taken so much time, and we say the
18 resolution of the standing issue is simple, without
19 doing any injustice to the learned witnesses who gave
20 evidence, and really resolves or revolves, resolves 11:58
21 itself into one issue or revolves around an issue and
22 that is ultimately the question of knowledge that you
23 have been the subject of surveillance. You will see or
24 have seen in the Council of Europe report it is
25 recognised that most people don't have that knowledge 11:59
26 and therefore, as it says, have no possibility of
27 challenging in the courts which is one of the reasons
28 why the other procedures of oversight are so important.
29

1 That's recognised. But you have been treated, as
2 I say, to an analysis of that with great particularity
3 and great learning but that really was premised on an
4 unspoken assumption that this was somehow
5 extraordinary, had no mirror image anywhere else, that 11:59
6 was unique, and certainly the Draft Decision creates
7 that impression and fails to recognise the context.

8
9 If I can summarise very briefly what the court has
10 heard, and this, I say, is on the *uncontested* evidence. 12:00
11 Lujan, and as we know ACLU -v- Clapper, said that there
12 are three elements of standing which the experts have
13 actually agreed in their common report. And the first,
14 as you know, is injury-in-fact; the plaintiff must have
15 suffered an injury-in-fact, an invasion of a legally 12:00
16 protected interest which is (a) concrete and
17 particularised and (b) actual or imminent, not
18 conjectural or hypothetical.

19
20 Then the second pillar is causation. There must be a 12:00
21 causal connection between the injury and the conduct
22 complained of. The injury has to be fairly traceable
23 to the challenged action of the Defendant and not the
24 result of the independent action of some third party
25 not before the court. That's a concept you are 12:00
26 familiar with and not one that generated any
27 controversy; and, three, redressability. Third, it
28 must be likely as opposed to merely speculative the
29 injury will be redressed by a favourable decision.

1 That didn't generate any controversy. You did, Judge,
2 ask, I think, during the course of some of the evidence
3 on this whether somebody who did not have a Fourth
4 Amendment right would satisfy the redressability prong
5 of the standing analysis and you posited that or you 12:01
6 asked the question whether a EU citizen, because they
7 lacked standing on the Fourth Amendment, would not be
8 able to establish that.

9
10 That is answered in the following way: The 12:01
11 redressability prong asks only if the nature of the
12 injury is such that it would be redressed by a ruling
13 in the plaintiff's favour. It's independent of the
14 cause of action in that sense. Obviously you have to
15 have a cause of action. If you are an EU citizen, it's 12:01
16 not under the Fourth Amendment, it has to be under the
17 statute or the APA or whatever, but you just ask 'well
18 if you establish your case is it capable, is the court
19 capable of redressing it'. The answer to that was
20 undisputed, it is; the court will stop the harm if it's 12:02
21 continuing, make a declaration where that's
22 appropriate, grant damages. So redressability is not
23 the issue.

24
25 And in terms of injury-in-fact, the issue has really 12:02
26 revolved on whether they can establish that there is an
27 actual or imminent interference with the protected
28 rights. If there is an abuse of data, of their data,
29 that is sufficiently concrete and it is sufficiently

1 particularised and that was accepted by Prof. Richards
2 and Mr. Serwin. Sorry, I'll leave the stenographers
3 change.

4
5 And the actual or imminent, as opposed to conjectural 12:03
6 or hypothetical, as you know, revolved around whether
7 somebody, in the first instance, could sufficiently
8 *plead* they were the subject of surveillance - if they
9 didn't, they were struck out on the facial challenge,
10 the initial dismissal - and if they did plead it, there 12:03
11 could be an application for summary judgment on the
12 basis that they didn't ultimately have sufficient
13 evidence to support the pleas.

14
15 In the interval between the motion to dismiss on facial 12:04
16 grounds - I suppose similar to our striking out because
17 on the face of the pleadings there's no cause of action
18 - if you survive that, you got your discovery.
19 Obviously issues might, depending on the circumstances,
20 arise with regard to state privilege, as they would 12:04
21 anywhere, but you get your discovery and you get a
22 chance then to produce the evidence that supports the
23 pleas. And if you're unable to do that, you are then
24 the subject of an application for summary judgment, as
25 happened in Amnesty -v- Clapper and your case is struck 12:04
26 out.

27
28 If, of course, you have evidence, as you might have,
29 that you *have* been the subject of surveillance, if you

1 have the type of evidence that they had available in
2 ACLU -v- Clapper then you can produce evidence to show
3 that you are somebody who is particularly affected in a
4 concrete way. The problem is having that evidence.
5 And obviously there are significant constraints and 12:05
6 being able to establish that unless you have notice
7 that you were subject to surveillance.

8
9 Now, Prof. Vladeck gave evidence - and there is *some*
10 disagreement, but no *fundamental* disagreement - that 12:05
11 there are ways around it; you can, as they did in ACLU
12 -v- Clapper, without direct evidence, have sufficient
13 evidence by virtue of the leak and the extent of the
14 meta-data programme to satisfy the court that they
15 actually were affected. Prof. Vladeck said in the 12:05
16 light of the Snowden disclosures that it's much easier
17 now to establish the type of facts that they were
18 unable to establish in Amnesty -v- Clapper at that
19 initial stage before the disclosure.

20 12:06
21 But whether or which, if you have notice then you meet
22 the standing criteria. If you don't have notice then
23 you have difficulties, but no stranger difficulties or
24 no more onerous difficulties than you'd face in Europe
25 than you face anywhere in the context of national 12:06
26 surveillance, as recognised in the Council of Europe
27 decision.

28
29 So, far from being in and of itself some major

1 objection to the adequacy of the remedies, it is an
2 inherent feature in this area, something recognised
3 explicitly by the Commission in the Adequacy Decision,
4 where it refers in the body of it - I just can't
5 remember the paragraph for a moment, but I'll come back 12:06
6 to it, give it to you - the body of the Commission
7 decision, that standing is in issue and that can be
8 raised and can create difficulties. That is what the
9 DPC recognised, went no further *than* that. And in
10 fairness, none of the experts go any further. 12:07

11
12 So the standing, which was the major objection to the
13 adequacy of the remedies, resolves itself into the
14 question of notice. And the question of notice is
15 something inherent in this activity -- or lack of it is 12:07
16 inherent in the activity - something that we now know
17 is neither strange nor unusual - but an inherent part
18 of the limitations that must exist if the objective is
19 to be achieved and, therefore, acceptable.

20 12:07
21 It is worth reminding the court, if I may, of what was
22 said with regard to the standing which supports that
23 simple proposition. First, and from our evidence - and
24 I'll deal with the concessions made by Prof. Richards
25 and Mr. Serwin in a moment - Prof. Vladeck put it 12:08
26 lucidly at day 12, page 63 where he stated:

27
28 *"Right. So I mean, again I think if the claim is that*
29 *an EU citizen believes that their data has wrongly been*

1 collected by the US Government from a firm like
2 Facebook, that's concrete. The question is not proving
3 that that harm was concrete, the question is proving
4 that that harm actually occurred. And so all of the
5 pressure in that context is going to be on the actual 12:25
6 or imminent prong of standing doctrine, not the
7 concrete particularised prong."

8
9 "Because I think there's just no dispute in US law that
10 government data collection is a concrete harm whether 12:25
11 it's lawful or not."

12
13 So proving the actual or imminent is the issue. And
14 that, of course, relates to notice. And
15 Prof. Richards, on day eight, at page 45 said: 12:09

16
17 "... certainly in the private sector, somebody
18 interferes with your e-mails and gets access to your
19 e-mails, that's something which in and of itself is a
20 harm that would sustain a claim, isn't that correct? 12:12

21 A. Assuming the other elements of standing were --
22 injury in fact were met, yes.

23 Q. Well, I mean, there would be injury in fact if
24 somebody accessed your e-mails and looked at the
25 content, isn't that correct? That would be an injury in 12:13
26 fact. And it would be particularised as well,
27 Professor.

28 A. I believe that's correct."
29

1 Now, that's in a private context. And you heard
2 Prof. Vladeck explain that actually, in a government
3 context that is even more the case. Similarly, on day
4 nine, under re-examination from Mr. Murray,
5 Prof. Richards accepted the following. He was asked: 12:09
6 "*Mr. Gallagher put to you and I think you agreed with*
7 *him that*" --
8 **MS. JUSTICE COSTELLO:** Do you have the page reference,
9 sorry?
10 **MR. GALLAGHER:** Oh, that one I'll come back to you. 12:10
11 It's just missing from my note. I do have it. On day
12 nine, under re-examination with Mr. Murray,
13 Prof. Richards accepted the following:
14
15 "*Mr. Gallagher put to you and I think you agreed with* 11:08
16 *him that the interception of the contents of an e-mail*
17 *or a telephone conversation, access as it were to the*
18 *contents of the communication, was likely to be found*
19 *to be concrete and particularised?*
20 *A. That's correct."* 11:08
21
22 At day eight, page 90, the following interaction with
23 Prof. Richards occurs with respect to **ACLU -v- Clapper:**
24
25 "*Q. It's the court interpreting Amnesty and stating* 14:26
26 *what it understands Amnesty to mean?*
27 *A. Yes.*
28 *Q. And therefore Amnesty -v- Clapper does not prevent*
29 *standing where somebody can show that their data has*

1 *been collected?*

2 A. *Yes.*

3 Q. *And --*

4 A. *As they were able to show in this particular case.*

5 Q. *In that particular case. And if that can be shown,* 14:26
6 *as it was shown in that particular case then there is*
7 *an entitlement to relief?*

8 A. *If that can be shown, the injury [in] fact element*
9 *of standing has been satisfied and one would move on to*
10 *the causation and redressability elements of standing."* 14:27
11

12 At day eight on page 126 he's accepted the following
13 with respect to title 23 of ECPA and he says:

14

15 "*Yes. If you establish the unlawful use, you would* 15:22
16 *have standing --*

17 Q. *You'd have standing.*

18 A. *- under this provision.*

19 Q. *So there's no issue about standing under the ECPA if*
20 *you establish that somebody has unlawfully used or* 15:22
21 *disclosed the information?*

22 A. *I think you would have to prove that it was your*
23 *information and that it -- but yes. I believe you're*
24 *referring to the injury in fact requirement again?*

25 Q. *Yeah.* 15:22

26 A. *But yes, it is my belief that a violation of the*
27 *unlawful use or disclosure provisions of the Electronic*
28 *Communications Act broadly defined would suffice for*
29 *stand -- if proven, would suffice to satisfy the injury*

1 *in fact requirement, yes..."*

2

3 *"Q. And there's no complexity or difficulty or doubt*
4 *about that, is there?"*

5 *A. With respect to the information covered by ECPA,*
6 *no."*

15:23

7

8 And at day eight, page 127 he also accepted:

9

10 *"If a person can prove that the contents of their*
11 *communications certainly have been unlawfully*
12 *intercepted, the injury in fact requirement, if they*
13 *could find - and of course, notice remains a problem*
14 *here - but if they find out about it and if they can*
15 *prove and establish proof, then no, in those*
16 *circumstances standing would be satisfied."*

15:23

15:24

17

18 That was his answer, that was what he accepted. And
19 the question then says:

20

21 *"Yeah. And it's not just the injury in fact, but the*
22 *other two components would be satisfied as well, isn't*
23 *that correct?"*

12:12

24 *A. The injury in those cases would be caused by the*
25 *unlawful act of the defendant and the injury would be*
26 *redressed by the deposition of the statutory damages."*

15:24

27

28 That probably should be *"imposition of the statutory*
29 *damages"*.

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"Q. So there's no issue about standing at all there if you can do that?"

A. Under those facts, if proven, of course not.

Q. And is that stated anywhere in your report?

15:24

A. No."

At day eight, page 132, the following interaction with Prof. Richards occurred:

12:13

"Q. I take it that you agree in the context of Section 1810 of FISA that if there is unlawful use or disclosure in that context and somebody can establish that, there is no difficulty about standing?"

A. If someone learns about it and is able to use the facts that they have learned about the secret acquisition of their data by whatever means and that it was unlawful under US law then it is my belief that standing would be able to be satisfied in that case, that is correct."

15:31

15:32

Importantly, on day eight, at the bottom of page 132 and top of page 133, the following interaction occurred with Prof. Richards:

12:13

"... in those circumstances, standing is not complex or difficult to establish under those three statutory provisions that I've referred you to.

A. In those circumstances, however factually unlikely,

1 *it is my belief that standing can be satisfied, yes."*

2
3 And the last three statutory provisions that are
4 referred to in that question are ECPA, APA and 1810 of
5 FISA. But clearly it applies to them all. The 12:14
6 question is: Have you notice? If you *have* then the
7 injury-in-fact element of standing can be satisfied.
8 And there is no element of causation and
9 redressability, because it's caused, the wrong is
10 caused by the government surveillance or interception 12:14
11 and it *can* be redressed either by damages or
12 declaratory or injunctive relief.

13
14 At day ten, pages 31 and 32, in the context of a
15 discussion of ACLU -v- Clapper, the following 12:14
16 interaction with Prof. Serwin occurred:

17
18 "Q. *They are just there at the top. Sorry, just when*
19 *you keep on going in the next column, when you go to*
20 *the next column, top of the page: 'If the telephone 11:40*
21 *metadata program is unlawful, appellants have suffered*
22 *a concrete and particularised injury'?*

23 A. *They are hitting all three elements of standing*
24 *there. what they are saying is concrete and*
25 *particularised injury, then they are hitting causation 11:40*
26 *and they are hitting redressability.*

27 Q. *Yes, absolutely.*

28 A. *I think what they have done is kind of collapse*
29 *the -- they are hitting all three elements of standing.*

1 *I will say they do not talk about actual or imminent in*
2 *that paragraph. There is three elements of standing.*

3 Q. Yes.

4 A. *There is injury-in-fact, causation and*
5 *redressability."*

11:40

6
7 And I think it is fair to ask the question as to *why*
8 this became such an issue when the *real* issue is the
9 question of notice? And if there is notice then you can
10 prove that you get over the actual or imminent, there's
11 no doubt it's particularised or concrete, the causation
12 doesn't arise and redressability doesn't arise, they're
13 all fulfilled. And it's no different to our own rules;
14 this is something the courts haven't had to grapple
15 with in the context of data protection here. But
16 normally a plaintiff has to --

12:15

12:15

17 **MS. JUSTICE COSTELLO:** In Digital Rights wasn't the
18 mere possession of a phone sufficient?

19 **MR. GALLAGHER:** Absolutely. And I was going to deal
20 with that

12:16

21 **MS. JUSTICE COSTELLO:** So that there was an inference,
22 in effect?

23 **MR. GALLAGHER:** Oh, yeah. But, sorry, it didn't even
24 require inference. It was an established fact. And
25 the court notes that - you have the phone. The
26 evidence, as I referred you to --

12:16

27 **MS. JUSTICE COSTELLO:** It was automatic for all...

28 **MR. GALLAGHER:** Everything. All. All communications.
29 So it was on your data had been interfered with.

1 MS. JUSTICE COSTELLO: So that was like the Verizon...

2 MR. GALLAGHER: Exactly. So *everything* was caught.

3 And *that's* why the court in that case didn't have any
4 issue. But nobody has produced *any* case which deals
5 with a situation of the type that is produced in the
6 US. 12:16

7
8 I've referred a number of times and Ms. Hyland will
9 refer you to it, because there's another aspect of it,
10 but in the from a report, page 67 to which I've 12:16
11 referred, I'll just read out the passage, I won't ask
12 you to look at it. It's in my book four of 13 and it's
13 in divide 61. But the passage is sufficient:

14
15 "*A judgment of the Federal Administrative Court in*
16 *Germany illustrates the difficulties individuals face*
17 *when confronted with strict procedural rules on*
18 *providing concrete evidence to prove their victim*
19 *status. In this case, a complaint was lodged against*
20 *strategic surveillance of communications under Section*
21 *5 of the... Act by the Federal Intelligence Service*
22 *(BND), after it was reported that 37 million*
23 *communications were caught in 2010 by the dragnet*
24 *search, mostly e-mails, of which only 12 were*
25 *considered 'relevant'.*"

26
27 This is German intelligence.

28
29 "*The complainant argued that it was very likely that he*

1 *was affected by the dragnet search because of his*
2 *frequent international e-mail communications as a*
3 *professional lawyer with contacts abroad; hence, he*
4 *requested a statement that the BND acted in a*
5 *disproportionate manner and violated his right to*
6 *privacy of communications. The Federal Administrative*
7 *Court, however, held that the complaint was*
8 *inadmissible since complaints against strategic*
9 *surveillance of telecommunications under the relevant*
10 *domestic law were only admissible if it was evident*
11 *that the complainants had been affected. The court*
12 *added that the right to an effective remedy does not*
13 *mean that the burden of proof must be eased on the*
14 *ground that the individual is not informed when the*
15 *data collected through the search terms are immediately*
16 *deleted."*

17
18 So that was in Germany. And *no* intelligence agency
19 says 'Actually, we confirm you are...' It would very
20 easy to pick, to actually inter -- or to actually track 12:18
21 the approach of the intelligence agencies; lots of
22 people put in requests, they're told *they're* not
23 surveyed and it doesn't take the people who are engaged
24 in this sort of business very long to establish
25 patterns, to establish likelihoods of modes of 12:18
26 conveyance, timing, sectors that might be subject to
27 surveillance.

28
29 So to confirm, not deny is something that is

1 recognised, particularly in the sophisticated agencies;
2 I don't say that's so in every country, but it *is*
3 something that is recognised in the Council of Europe
4 report, it is something that the German court
5 recognised. Obviously in other countries which don't 12:19
6 have the sensitive national surveillance that perhaps
7 the larger countries, things are different. But it's
8 something that needs to be put in context.

9
10 But you can leave aside whether Spokeo -- and certainly 12:19
11 the preponderance of the cases before you established
12 that Spokeo *didn't* change the law and the judgment of
13 the majority said they were only identifying the
14 difference between particularised and concrete, which
15 was already, they said, clear from earlier decisions. 12:19
16 But in a sense, why were you bothered with all of that
17 when it is accepted that there is a limitation in terms
18 of your ability to be able to prove that depends on
19 notice? But that is a limitation which, if it's not
20 common to every national surveillance system, is common 12:20
21 to many. And in this case there was undisputed
22 evidence to justify it from Prof. Swire - he wasn't
23 cross-examined on it - by Mr. DeLong, who wasn't
24 cross-examined on it, and even Prof. Vladeck, who has a
25 view about all of these things that he described as an 12:20
26 outlier on the other side in terms of criticism, said
27 he understood.

28
29 So that really was the standing. And then you look at

1 the substantive provisions. There's no great criticism
2 of those. Those are extensive by any version, as you
3 see from what's put before you. There are remedies
4 that can be obtained. It *is* very noteworthy that
5 Section 702 was omitted entirely from any analysis, 12:21
6 very significant. Everybody must, who is looking at
7 the remedies in the focused way that Mr. Serwin was
8 doing and Prof. Richards, should have adverted to it.
9 A declaration and an injunction are very important
10 remedies, even if you have to establish certain proofs 12:21
11 to get the declaration and injunction. It's not
12 perhaps to --

13 **MR. MCCULLOUGH:** You mean the APA, I think.

14 **MR. GALLAGHER:** Sorry?

15 **MR. MCCULLOUGH:** The APA, I think. 12:21

16 **MR. GALLAGHER:** The APA. Oh, what did I say?

17 **MR. MCCULLOUGH:** Sorry, it's a different section, 702
18 might not --

19 **MR. GALLAGHER:** Oh, it's Section 702 APA, sorry.
20 There's the two sections. Sorry. And obviously you 12:21
21 don't get a declaration perhaps in quite the same
22 circumstances you might get it here, it seems to be a
23 bit more limited. But undoubtedly, if the matter is
24 continuing, you'll get it. If it's not continuing,
25 you'll have established the breach, you'll have got 12:21
26 redress because the illegality will have been
27 established, you don't need a particular remedy.

28
29 The Section 18 USC 2712, or 18 USC 2712 ECPA, we've set

1 out in the table the remedies. It *is* willful
2 violation. But as I said, that is not something that
3 is unusual in actions against the state, and
4 particularly in terms of damages. And indeed you did
5 ask, Judge, in the context of the European Community, 12:22
6 whether actions could be brought against - I should say
7 Union - Union institutions for damages. And the basis
8 for non-contractual liability is Article 340 of the
9 TFEU, where the institutions must make good damage
10 caused in the performance of their duties. But the 12:23
11 case law - the Treaty doesn't say it - the case law
12 says that it must be willful.

13
14 So that's not an uncommon requirement. And even
15 Schrems says the laws don't have to be the same, the 12:23
16 remedies don't have to be the same. And the
17 interposition of that is understandable. And it's
18 accepted that 2712 is a waiver of sovereign immunity,
19 as APA waves it as well.

20 12:23
21 Then 18 USC 2707 ECPA; any intentional or wilful
22 violation of the stored communication. And again we've
23 set out sovereign immunity there applies to claims
24 against the US, but officer suits are possible.

25 12:23
26 And 18 USC 2520; it provides persons whose wire, oral
27 or electronic communication is intercepted, disclosed
28 or intentionally used - the Wire Tap Act - damages,
29 including punitive damages, sovereign immunity, and

1 references to what Mr. Swire notes.

2
3 Over the page, 1810, we've set out the position there -
4 the Judicial Redress Act and Privacy Act. And it is
5 acknowledged that in the context of the surveillance by 12:24
6 the NSA that's not of much use, it's not *actually* part
7 of the Privacy Shield and Adequacy Decision. It *is* of
8 use against other departments that might get it;
9 Homeland Security, Department of Commerce, Secretary
10 of -- or the Department of State - I think that's for 12:24
11 the foreign affairs - those are all subject to it, as
12 are the Department of Justice. So it is of *use*, but it
13 doesn't cover everything and there are limitations, as
14 you know, and the issue with regard to covered
15 documents. 12:24

16
17 Then Computer Fraud and Abuse Act and the Right to
18 Financial Privacy Act.

19
20 So those are remedies. The problem, to the extent that 12:24
21 it exists, is, in standing, in establishing the actual
22 element of standing, something that is a frequent
23 provision in legal systems, something that can *actually*
24 be got around. And Prof. Vladeck said something very
25 important; he said if you plead your case properly -- 12:25
26 he said the posture of the case was so important,
27 meaning the state of the case. Firstly, if it's
28 pleaded, they won't get a dismiss. Then you get your
29 discovery. And very often, he says, there can be a

1 settlement at that stage for all sorts of reasons.

2
3 So it's true, as Mr. Serwin said, defeating a motion to
4 dismiss isn't a remedy. Of course it isn't, no more
5 than defeating such an application here or defeating 12:25
6 some attempt in the proceedings to constrain your case.
7 But it's *part* of the remedy, it's part of the process
8 and it *can* yield dividends. And of course, the
9 existence of these remedies are very important
10 constraints. 12:26

11
12 And what we haven't included there, but you'll
13 remember, is that under FISA itself, directives can be
14 challenged by the corporations and are being
15 increasingly challenged or queried - you've the 12:26
16 evidence of Facebook, very detailed and complex and
17 comprehensive procedures that they engage in in dealing
18 with these directives - and those companies can plead
19 constitutional rights, can challenge, they clearly have
20 standing. And in that process, you *can* get a 12:26
21 determination of constitutionality that you wouldn't,
22 of course, get by a challenge by a foreign national.
23 But that limitation on the right to challenge the
24 constitutional validity of a law is again a feature of
25 many legal systems and all of the systems differentiate 12:26
26 between the position of foreigners and citizens to some
27 degree.

28
29 So Mr. DeLong also --

1 **MS. JUSTICE COSTELLO:** But is that the comparator, or
2 whether an EU citizens here in the EU could challenge
3 the provisions of a -- relies on the Directive?

4 **MR. GALLAGHER:** You're absolutely right. I alided the
5 distinction between two separate things. You're 12:27
6 looking at the remedies *available* to the EU citizen.
7 But, Judge, when looking at the *limitations* on those,
8 that's a factor that you can take into account, the
9 proportionality, the fact that that is something that
10 exists. But I shouldn't have allided both. 12:27

11
12 So, Judge, obviously I could spend a great deal of time
13 on the US law - it wouldn't be fair to the court to do
14 so at this stage and the task presented by some of the
15 witnesses to the court of some minute analysis of the 12:27
16 decision is not one we say the court ought to engage
17 in; even on the *uncontested* evidence, the agreed
18 evidence, there are substantial remedies and the
19 limitations are not such as to make this inadequate, if
20 that were the test, and it's not. They, looked at in 12:28
21 the round with all of the other remedies, are very
22 substantial. The standing has been overemphasised, as
23 Prof. Vladeck said. And it really comes down to a
24 question of notice. And if you analyse it in terms of
25 notice, the complexity of the US law disappears. And 12:28
26 it's clear there *are* adequate remedies and the question
27 of proof doesn't make them inadequate in any real sense
28 in the area of law in which we are talking.

29

1 So they are *only* inadequate in this notional abstract
2 assessment of remedies, which in truth, though not
3 stated, is done by way of a comparison with the
4 remedies that might be available against a *private*
5 actor. Constraints are inevitable in claims against 12:28
6 the state and, as Ms. Hyland will briefly advert to,
7 there are standing constraints in EU law and standing
8 constraints in Irish law with regard to challenging.
9

10 The Article 4 amendment is a bit of a red herring. 12:29

11 Let's take it that it's unlikely that a foreign citizen
12 with no close connection with the US can rely on it --

13 **MS. JUSTICE COSTELLO:** You mean the Fourth Amendment to
14 the Constitution?

15 **MR. GALLAGHER:** The Fourth Amendment, sorry, excuse me. 12:29

16 **MS. JUSTICE COSTELLO:** There's a lot of articles. I
17 want to keep straight.

18 **MR. GALLAGHER:** Yeah, sorry, the Fourth Amendment.
19 Thank you, Judge. I've made that mistake before.

20 **MS. JUSTICE COSTELLO:** No, I want the transcript right 12:29
21 so I can make sense of it.

22 **MR. GALLAGHER:** No, I did, I made it before and I was
23 corrected, with an element of horror, by
24 Prof. Richards, who said there is no Article -- well,
25 there *is* an Article 4, but not this one. The Fourth 12:29
26 Amendment.

27
28 The Fourth Amendment goes to the merits, it's a cause
29 of action if it's available to you. You've heard from

1 Prof. Vladeck that even in terms of US citizens this
2 right for damages, the Bivens right, isn't of much use.
3 But they have other remedies. And it may well be that
4 the courts will develop, in the case that's to be
5 decided - is it the Hernandez case? Not the Hernandez 12:30
6 case, the never -- I can't pronounce it, the
7 ver-something case that's to be decided shortly about
8 the shooting across - it is Hernandez; it's the
9 defendant I can't pronounce - shooting across the
10 border, whether it applies in that case. 12:30

11
12 And as Prof. Vladeck explained, there was an
13 injury-in-fact there - the unfortunate boy had been
14 shot - the Article 4 had nothing to do with standing,
15 it had to do with the basis of the merits of the claim; 12:30
16 can you rely on that as part of your cause of action,
17 which is separate from standing, or do you find some
18 other basis for establishing a violation of your rights
19 if that's not available? And here we have the statutory
20 provisions that are available. 12:30

21
22 And it *is* significant when you're assessing the legal
23 position to take account not only of the failure to
24 adequately deal with this in the decision, but also to
25 just reflect, if I may ask the court to do so - and 12:31
26 it's, of course, a matter entirely for the court - on
27 what Prof. Vladeck said, his initial reluctance to get
28 involved and then his willingness to do so because he
29 thought they were material deficiencies in the analysis

1 of the adequacy. Mr. Murray tried to suggest that
2 these were somewhat an academic oversensitivity. I
3 don't believe they were anything of the sort, not least
4 the APA. But it does show the dangers of engaging in
5 the sort of partial exercise that the DPC engaged in, 12:31
6 apart from anything else in that context.

7
8 So, Judge, standing is not the problem, with respect,
9 it's been made out to be and shouldn't cause the court
10 to conclude that there are well founded concerns with 12:32
11 regard to the remedies and extensive remedies that are
12 available in this context.

13
14 There was also the rather curious issue of Rule 11
15 raised by Mr. Serwin and quickly backtracked from and 12:32
16 his subsequent memorandum and Prof. Richards making an
17 attempt to suggest what he said didn't really say --
18 didn't really mean what it conveyed to the ordinary
19 reader. But Rule 11, I think, is no different from our
20 own obligation not to make wild accusations in 12:32
21 pleadings, to have *some* belief that they *can* be
22 substantiated, as Prof. Vladeck said, by reference to
23 evidence or whatever - he said that he has never even
24 heard it *discussed* in this context as an inhibition.
25 And Mr. Serwin did, in fairness to him, admit that it 12:32
26 had never arisen, he wasn't aware of it arising in any
27 case.

28
29 But it shows the danger of proceeding, as the DPC did,

1 on a memorandum from an expert who had no knowledge or
2 experience or expertise in national surveillance law
3 raising an issue that's not an issue at all, achieving
4 a prominence in her report. It's not even regarded in
5 the Adequacy Decision - rightly so - because it is just 12:33
6 ultimately so irrelevant. It's no impediment at all,
7 but much time was taken in that regard.

8
9 And it *is* remarkable, as I said before, that we were
10 not told that Mr. Serwin did *not* have an expertise - 12:33
11 that emerged in cross-examination - and it does show
12 the dangers of the exercise in which the DPC engaged in
13 getting her own report, showing it to nobody, putting
14 forward well founded concerns to the court, engaging in
15 an expensive process that has involved us all and 12:34
16 involved court time, ignoring the submissions of the US
17 Government and indeed not giving Facebook any
18 opportunity to comment on it that has led us to this
19 position.

20 12:34
21 Then I want to come to the next item, Judge, and that
22 is the court's concern, or the issue raised by the
23 court as to whether -- sorry, whether -- the issue
24 raised by the court as to whether, if the court had
25 concerns, a reference could be justified on that basis. 12:34
26 And the answer to that, we say, is emphatically no and
27 is to be found unambiguously in Schrems in paragraphs
28 64 and 65. But also -- that's book two of 13 in mine
29 and the divide is, I'll give it to you again, 36. But

1 also as a matter of principle.

2
3 I've drawn your attention to the passages in the
4 Commission -v- European -- or Commission -v- Germany, I
5 keep called it the European Data Protection Supervisor, 12:35
6 but it was about the role of the Data Protection
7 Supervisors and its independence and the importance of
8 that role. It's like, I suppose, the analogue we would
9 be more familiar with here is where you have a
10 procedure within a taxation statute or a planning 12:35
11 statute where there's a procedure to be followed and
12 you then come to the court as part of that procedure.
13 But it's not something that can be raised by the court
14 separately, given that this is the procedure by which
15 it's come before the court. And 64 and 65, on page 20, 12:35
16 draw that distinction very clearly.

17
18 *"In a situation", 64 says, "where the national*
19 *supervisory authority comes to the conclusion that the*
20 *arguments put forward in support of such a claim are*
21 *unfounded and therefore rejects it, the person who*
22 *lodged the claim must, as is apparent from the second*
23 *subparagraph of Article 28(3) of [the Directive], read*
24 *in the light of Article 47... have access to judicial*
25 *remedies enabling him to challenge such a decision*
26 *adversely affecting him before the national courts."*

27
28 That's what you're doing, you're challenging the
29 decision of the DPC. And it says:

1
2 *"Having regard to the case-law cited in paragraphs 61*
3 *and 62 of the present judgment, those courts must stay*
4 *proceedings and make a reference to the Court for a*
5 *preliminary ruling on validity where they consider that*
6 *one or more grounds for invalidity put forward by the*
7 *parties or, as the case may be, raised by them of their*
8 *own motion are well founded."*

9
10 So in the context that the claim is rejected as
11 *unfounded*, the court must review that. And in that
12 context it may decide that it's appropriate to put it
13 forward on its own motion. Then that is distinguished
14 in 65:

12:37

15
16 *"In the converse situation, where the national*
17 *supervisory authority considers that the objections*
18 *advanced by the person who has lodged with it a claim*
19 *concerning the protection of his rights and freedoms in*
20 *regard to the processing of his personal data are well*
21 *founded, that authority must, in accordance with the*
22 *third indent of the first subparagraph of [the*
23 *Directive], read in the light in particular of Article*
24 *8(3) of the Charter, be able to engage in legal*
25 *proceedings. It is incumbent upon the national*
26 *legislature to provide for legal remedies enabling the*
27 *national supervisory authority concerned to put forward*
28 *the objections which it considers well founded before*
29 *the... courts in order for them, if they share its*

12:37

1 *doubts as to the validity.*"

2
3 So the distinction is drawn between the procedures.
4 And it's understandable in the first the conclusion is
5 that the complaint is *unfounded*. We, in our procedure, 12:38
6 have a judicial review on that basis and in that
7 context; when it comes before the court, the court can
8 send it forward. The converse case, there's no
9 mechanism provided for in the Act and in our general
10 system where the DPC *shares* the view that the concerns 12:38
11 are well founded. But the DPC can't declare that,
12 that's a Commission decision that's binding on her, as
13 Schrems explains, so all she can do is put it before
14 the court, having carried out that analysis, analysis
15 in respect of which she seeks deference to be given to 12:38
16 her decision in her submissions.

17 **MS. JUSTICE COSTELLO:** I just want to tease that out as
18 a matter of principle. What's the principled
19 difference between disagreeing with the DPC's analysis
20 of a complaint or agreeing with it? 12:39

21 **MR. GALLAGHER:** Because...

22 **MS. JUSTICE COSTELLO:** I mean, I understand what the
23 judgment's saying there, paragraph four and five. But
24 to draw the -- at 64 and 65. But to draw the
25 distinction you're saying there, what's the principle 12:39
26 distinction?

27 **MR. GALLAGHER:** Well, it seems that the principle of
28 the decision, Judge, is that if the matter comes before
29 the -- sorry, if the DPC has concerns that are well

1 founded, there is no procedure, as I said, in the law
2 that that goes any further. The court mechanism is
3 only engaged to *allow* it go further to comply with the
4 obligation that it's the CJEU that must make the
5 pronouncement.

12:39

6
7 And all the court is being asked to do in these terms
8 is do you share the concerns of somebody who, in this
9 instance, has carried out an investigation, who is the
10 person, as you'll see when I go back to paragraphs 41
11 to 43, that is given this special position and has this
12 special expertise? And what the court is saying is if
13 that person has carried out the wrong analysis then you
14 don't have any valid analysis which you can share. The
15 procedure is the DPC will go back, will examine it
16 again and *then* it may come forward to the court. But
17 what is envisaged in the normal way by this procedure
18 is that the analysis be done by the DPC. And
19 therefore, all the court is being asked to do is to
20 *share* those doubts by reference to what the DPC has
21 done. And in the normal way, where somebody who is in
22 a statutory position - as it would be under Irish law -
23 has failed to carry out the proper analysis of the
24 decision is not effective, then you say it goes back,
25 there's nothing to stop the DPC looking at the matter
26 again, taking into account criteria that the court has
27 identified and the court explaining why it doesn't
28 share the doubts.

12:40

12:40

12:40

12:41

1 But the court is not being asked in this context to do
2 some freestanding analysis. This is meant to be a
3 fairly simple and straightforward procedure. But the
4 court is not being asked to do its own freestanding
5 analysis. And what is clearly envisaged is, in those 12:41
6 circumstances, the court should say the DPC, who is the
7 person who is given the statutory function, should look
8 at it afresh. That's what would be done normally in
9 our system and it seems to be the distinction that's
10 being drawn here. As a matter of principle that's not 12:41
11 unusual, because the person that *is* given the statutory
12 task, if they don't do it properly what is normally
13 done is they're asked to *do* it properly.

14
15 So the court doesn't go to the second stage, the court 12:42
16 looks and says 'Are those doubts well founded? Do I
17 share they're well founded?' If the court says 'No, I
18 don't' then it doesn't go to the second stage of saying
19 'I have other and separate doubts'. What is
20 appropriate in that instance is a proper analysis is 12:42
21 done by the DPC and then it comes forward. So that is
22 an important distinction.

23
24 Judge, if you look at paragraphs 40 -- 39 really to 46,
25 those are the paragraphs, and 40 perhaps to -- sorry, 12:42
26 40 to 45 on page 17. What the court is trying to do in
27 those instances is to identify - or the CJEU - is to
28 identify the importance of the role of the DPC. It is
29 *enshrined* in the Directive, it is *enshrined* as a

1 consequence in the legislation and it is the DPC that
2 is given this role as guardian. The court's role is of
3 a supervisory role and the court will look at the
4 decision and see if it's well founded. And if it's not
5 then that's not something that the court transmits to 12:43
6 Europe - that's not envisaged - the procedure is it
7 goes back to the person who has the duty, the primary
8 duty of carrying out the analysis. And it may come
9 forward again in those circumstances if, having looked
10 at the matter in the light of the court's directions, 12:43
11 the Commissioner forms a similar decision.

12
13 So I think the principle is rooted in the special
14 position of the DPC and the fact that these analyses,
15 Judge, are envisaged as happening at DPC level as 12:44
16 opposed to somebody coming to court and bypassing the
17 DPC. And that is why, if there is an inadequacy, the
18 appropriate step for the court to take is to afford the
19 DPC an opportunity of addressing that inadequacy,
20 carrying out the - when I say "inadequacy" there, I 12:44
21 should say defect in the decision - carrying out the
22 proper analysis.

23
24 And it is noteworthy, Judge, that the court does draw
25 that distinction very much. It uses the words of its 12:44
26 own motion in the context of paragraph 64 and clearly
27 doesn't use it in the context of --

28 **MS. JUSTICE COSTELLO:** 65.

29 **MR. GALLAGHER:** -- 65. And that is --

1 evidence, as you *must* do in deciding whether you share
2 the doubts and, if so, make a reference, that you
3 embark on some analysis of your own and say 'I am now
4 not putting forward the DPC's doubts', which is what
5 the court seems to envisage, 'I'm actually putting 12:46
6 forward my own doubts in the matter'. That doesn't
7 *appear* to be envisaged.

8
9 I can't say that you could never, in theory, have such
10 a situation that the principle is one that could never 12:46
11 embrace that, but the principle as recognised by the
12 court here does draw that clear distinction. And the
13 reason why you go further than the DPC is for that
14 overriding obligation in relation to EU law. And
15 certainly, even if you had an *entitlement*, Judge, there 12:47
16 is no obligation to do so, you still have a discretion,
17 it's not *necessary* to determine this case. In this
18 case you can determine it by saying the Commissioner's
19 are not well founded. That disposes of the particular
20 difficulty and it goes back in the normal way and is 12:47
21 addressed.

22
23 I suppose there's another reason, Judge, while one
24 should be slow in those -- or, sorry, there *are* the
25 other reasons which I've indicated to you why one 12:47
26 should be very slow as a matter of discretion to put it
27 forward here, given the process that does exist, which
28 won't exist in all cases and didn't exist back at the
29 time of Schrems of where this issue is now going to be

1 determined by the institution that is given the
2 *obligation* of looking at adequacy under Article 25. So
3 in this particular case, adequacy isn't the test under
4 Article 26. The Commission carries out the adequacy
5 assessment and that is going to be carried out in July. 12:48

6 **MS. JUSTICE COSTELLO:** I know I'm jumping around here,
7 but just seeing as you mentioned that there, one of the
8 things that I want to stand back and make sure I don't
9 get lost in the labyrinth and just playing forward; if
10 the Standard Contractual Clauses were to be declared 12:48
11 invalid by the Court of Justice if a reference were
12 made, is the data permitted then to be transferred
13 pursuant to Privacy Shield under Article 25?

14 **MR. GALLAGHER:** Oh, yes.

15 **MS. JUSTICE COSTELLO:** So is that one of the reasons 12:49
16 you're saying this is a moot? Because even if these are
17 struck down, vis-à-vis the US...

18 **MR. GALLAGHER:** Yes, absolutely. And of course, I'm
19 not jumping back --

20 **MS. JUSTICE COSTELLO:** Because I know you were talking 12:49
21 about it being a collateral challenge to Privacy
22 Shield. I was wondering whether you envisaged somehow
23 that being implicated in any decision of the CJEU or
24 whether it was still going to stand. Because --

25 **MR. GALLAGHER:** Yeah, it's very difficult to see that 12:49
26 the CJEU would even *embark* on an analysis --

27 **MS. JUSTICE COSTELLO:** Possibly I'm asking to you do a
28 moot. But anyway.

29 **MR. GALLAGHER:** Yeah. No, but just to answer your

1 question, the CJEU will embark on an analysis of
2 adequacy in the context of the SCC decisions, not just
3 because that's not the test, but because the court
4 would recognise that an assessment of adequacy involves
5 a level of complication and detail that the *Commission* 12:49
6 is *specifically charged* to conduct. So you would wait
7 to see what it says after its review. That would be
8 what you would challenge, if you were challenging
9 *anything* at this stage. It's after the review whether
10 its says it's right. It would be an entire and utter 12:50
11 moot.

12
13 If the SCCs were declared invalid - and it's difficult
14 to see how they could *ever* be declared invalid if the
15 Privacy Shield had made a *finding* and which was never 12:50
16 challenged that the law was adequate, because the
17 *ground is inadequacy*; that's misconceived because of
18 Article 4, as I have said - but then you just transfer,
19 in any event under, the Privacy Shield, because that
20 covers everything. I mean, if you have your finding of 12:50
21 adequacy under Article 25, you'd need --

22 **MS. JUSTICE COSTELLO:** Oh, yeah, you're under 25, you
23 don't need 26. Yeah.

24 **MR. GALLAGHER:** Exactly. That's exactly it. But if
25 the SCCs, contrary to all our submissions, were 12:50
26 declared invalid on the basis of *inadequacy*, that would
27 pose a real problem. Because you have the Privacy
28 Shield saying it's adequate; whether the court would be
29 prepared to embark on that, I don't conceive that it

1 would be, I think it would have to address in that
2 instance or postpone it until the adequacy issue was
3 dealt with in the context of Article 25. There are two
4 challenges in respect of that, as you know. But in any
5 event, it's difficult to see anything being done until 12:51
6 the further review takes place. And you have the input
7 of all of the various bodies, including the Article 29
8 Working Party and the other people who were inclined to
9 do it -- or who were entitled to do it.

10
11 The decision that I wanted to refer you to, Judge, on
12 mootness at a European level is at divide 27 of book
13 two, it's the Gasparini decision. And it is a decision
14 that looked at the principle of ne bis in idem, the
15 fundamental principle you can't be tried twice for the 12:52
16 same matter. And it involved the courts in Spain
17 interpreting a judgment of the superior courts in
18 Portugal that evidently wasn't very clear as to what it
19 meant. The facts, I needn't go into, but if you go to
20 page 9259 at paragraph 38 you'll see: 12:52

21
22 *"The third question is based on the premiss that the*
23 *criminal courts of a Member State declare that it has*
24 *not been established for the purposes of the offence of*
25 *smuggling that the goods are from outside the*
26 *Community."*

27
28 In other words, the premise that the person was
29 entitled to an acquittal. Then 39:

1
2 *"Such a premiss is inconsistent, however, with the*
3 *facts of the main proceedings as described by the*
4 *national court and reproduced in paragraphs 16 to 18 of*
5 *the present judgment.*

6
7 *40. Admittedly, the majority of the defendants in the*
8 *main proceedings allege that the national court has*
9 *misread the judgment of the [Supreme Tribunal in*
10 *Portugal]."*

11
12 I needn't continue with that. Then if you go to 42:

13
14 *"In the light of the national court's reading of the*
15 *judgment of the [Portuguese court], doubts arise as to*
16 *the admissibility of the third question.*

17
18 *43. On such a reading, the premiss upon which the third*
19 *question is founded, namely the acquittal of the*
20 *defendants because there was no, or insufficient,*
21 *evidence that the goods were from outside the*
22 *Community, is not present.*

23
24 *44. According to the Court's settled case-law, while*
25 *the Court is in principle bound to give a ruling where*
26 *the questions submitted concern the interpretation of*
27 *Community law, it can in exceptional circumstances*
28 *examine the conditions in which the case was referred*
29 *to it by the national court, in order to confirm its*

1 *own jurisdiction. The Court may refuse to rule on a*
2 *question referred for a preliminary ruling by a*
3 *national court only where it is quite obvious that the*
4 *interpretation of Community law that is sought bears no*
5 *relation to the actual facts of the main action or its*
6 *purpose, where the problem is hypothetical, or where*
7 *the Court does not have before it the factual or legal*
8 *material necessary to give a useful answer."*

9
10 So the hypothesis principle. And just to go back why 12:54
11 you couldn't do it of its own motion here. Supposing,
12 Judge, I were wrong in my interpretation of Schrems 64
13 and 65; well, that's irrelevant, because you *can't* do
14 it here. And the reason you *can't* do it here is you're
15 bound by the Adequacy Decision, as I identified in the 12:54
16 other passage in Schrems where the court is bound by
17 the decision. And as I have said, that has *not* been
18 challenged. Even *now* the DPC doesn't say that was
19 wrong. She was a member of the Working Party that was
20 consulted in relation to it. And you saw, Mr. Collins 12:54
21 put in the press release of the Working Party at the
22 time. They will be consulted in the new process. But
23 where it's not under challenge, then you just can't do
24 it on the facts of this case.

25
26 As I said at the beginning, apart from that being a 12:55
27 principle of EU law, of the binding nature of the
28 decision, there is, of course, the fundamental aspect
29 that it would be an injustice in terms even of our own

1 procedures that you would, as I said, through a side
2 wind or collaterally, put in issue something that was
3 not put in issue in the pleadings, that if it had been
4 might well be addressed differently, other issues might
5 arise, issues of evidence etc. So it cannot *be* 12:55
6 introduced in that way or any issue arising in relation
7 to it.

8
9 And you'll see in paragraph 52 of Schrems where it says
10 the organs are bound by it. So in this case, I don't 12:56
11 think that issue arises for your consideration.

12
13 I want to try and finish, Judge, so unless there's
14 another question on that --

15 **MS. JUSTICE COSTELLO:** No, not at all. Thank you. 12:56

16 **MR. GALLAGHER:** -- I'm going to move to the next two
17 matters very quickly, really one matter I think that I
18 have to deal with -- two matters that I want to deal
19 with very quickly.

20 12:56
21 EO12333. I would remind the court that, as Mr. Collins
22 said on day two, page 69, line 19, that:

23
24 *"I think as a broad principle one can say that actual*
25 *intelligence activities that take place outside the US* 12:56
26 *I think are conducted pursuant to EO12333, with which*
27 *we are not really concerned. Because we are only*
28 *concerned with what happens to date when it goes to the*
29 *US and how it is processed or accessed within the US.*

1 *So we're not actually concerned that much with*
2 *EO12333."*

3
4 And we say that's correct. We're looking at the laws
5 of the US as they apply in the US to data transferred 12:57
6 and stored in the US. That's what was assessed in the
7 decision.

8
9 In any event, the matter is dealt with in the Privacy
10 Shield with a recognition that different rules apply to 12:57
11 what is conducted outside the US and there is no
12 holding that there is any lack of adequacy because of
13 the existence of 12333. In fact, all of the
14 constraints, and in particular PPD-28, were regarded as
15 very important in bringing an Executive Order, which 12:57
16 is, of course, a species of law - not the same as a
17 statute, but is nevertheless binding and has legal
18 effect - that those constraints were sufficient to
19 satisfy the Commission. And also there is the fact in
20 paragraph 75 of the Commission decision noting that 12:57
21 there is no acknowledgment of the use of --

22 **MS. JUSTICE COSTELLO:** Did you say 75 or 95?

23 **MR. GALLAGHER:** 75. Of the Adequacy Decision, sorry.

24 **MS. JUSTICE COSTELLO:** Yes, I have that.

25 **MR. GALLAGHER:** Of the Adequacy Decision. No 12:58
26 acknowledgment of the use of 12333 in the manner
27 speculated on. And the -- that that obviously applies.

28
29 Sorry, I'm helpfully passed just a note on the matter

1 that I was missing, Judge, the reference on day nine to
2 Mr. Richards' evidence. And it was page eight. You'll
3 remember --

4 **MS. JUSTICE COSTELLO:** Thank you. Yes, I'll put it in
5 my notes. 12:58

6 **MR. GALLAGHER:** Yes, page eight and line five. The
7 other matter that I want to just very, very briefly
8 deal with, if you go to the book of submissions - I'll
9 be about five or six minutes on this and I'll use the
10 two minutes before lunch, if I may - and just look at 12:58
11 the Plaintiff's submissions. As I say, we didn't have
12 these when we filed our submissions, but there's one or
13 two stand-out items that I just want to draw attention
14 to; I think we've dealt with most of what we say are
15 the errors. 12:59

16
17 But if you go to page six there's the extraordinary
18 submission in paragraph 14:

19
20 "*It is apparent*" - this is referring to 65 of Schrems - 12:59
21 "*that the making of the reference is **required***", they
22 say, "*where two elements are present.*

23
24 (1) *First, the Commissioner must '**consider**' that the*
25 *objections are 'well founded'; and*

26 (2) *Second, the Court must 'share [the Commissioner's]*
27 *doubts'.*

28
29 *15. The first element is clearly a **subjective***

1 *requirement which, as is evidenced by the*
2 *Draft Decision, has already been fulfilled."*

3
4 That seems to be an assertion of some protection from
5 scrutiny, which would be unique, I think, in our 12:59
6 system. Of *course* she has to consider - so there's the
7 subjective element - but *even* if it is demonstrated
8 that the subjective consideration is based on an
9 incorrect legal basis, is based on a failure to take
10 account of relevant considerations and is 13:00
11 objectively -- sorry, or excludes principles or
12 material that ought to have been taken into account and
13 adopts the incorrect methodology, the court isn't bound
14 by that. The court would say 'You did arrive at a
15 subjective consideration, but you arrived at that 13:00
16 through a way that was incorrect in law'.

17
18 The only other matter is to ask the court to decide
19 whether it shares the doubts. And they say that's
20 straightforward. And as you know, the drum beat, or 13:00
21 beaten at the very beginning is 'There's an easy way
22 out for this, Judge. Just look at this and say "This
23 locks horrendously complicated. I *undoubtedly* share
24 the doubts. I have, I've found a doubt and I can send
25 it".' well, it's not the -- 13:01

26 **MS. JUSTICE COSTELLO:** I think the answer is get behind
27 me Satan. But anyway.

28 **MR. GALLAGHER:** Exactly. It's *not* the approach
29 actually that *is* the easiest - you can't do that - but

1 it would be a formidable task to prepare a reference
2 that could share doubts that are manifestly wrong, but
3 even if you got over that hurdle, that would identify
4 all the material that would have to be sent to the
5 court to determine something of such momentous
6 importance, not just to the parties before this court,
7 but to everybody else.

13:01

8
9 And for all of the reasons, as I said, the idea of the
10 court sending a reference and saying 'I share the
11 doubts, because that's what paragraph 65 tells me, and
12 I have a few of my own, of the Ombudsperson' -- or,
13 sorry, 'of the DPC, even though the DPC didn't do what
14 she's obliged by law to do, take account of the
15 decision' - the answer that she didn't want to wait for
16 it is not an answer - 'even though the Commission has
17 found this, even though she hasn't addressed the
18 material in the Adequacy Decision' and send that off,
19 that's not a cost-free exercise or an easy or
20 appropriate thing to do.

13:01

13:02

13:02

21
22 Judge, I'll leave it there. I'll be five minutes, if
23 that's okay, and then that's it.

13:02

24
25
26 **(LUNCHEON ADJOURNMENT)**
27
28
29

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

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

5 **REGISTRAR:** Data Protection Commissioner -v- Facebook 14:05
6 Ireland Ltd. and another.

7 **MR. GALLAGHER:** Judge, on Book 12 at paragraph 21 page
8 10, just for a moment.

9 **MS. JUSTICE COSTELLO:** 10, yes.

10 **MR. GALLAGHER:** At paragraph 32 in particular: "*The* 14:05
11 *Draft Decision is unassailable*" it is said because it
12 correctly applies the Directive. It doesn't. "*It*
13 *correctly identifies the criteria against which the*
14 *adequacy of US law is to be assessed.*" It doesn't.

15 "*It correctly identifies the standard of protection* 14:05
16 *against which the adequacy of US law is to be*
17 *addressed.*" It doesn't. "*It correctly understands the*
18 *requirement of Article 47 of the Charter.*" It doesn't.
19 "*It correctly assesses US law and the preliminary view*
20 *expressed therein is supported by the evidence filed in* 14:06
21 *the proceedings*" and we say it's not, and I just want
22 to deal briefly with some of those points.

23
24 If you go to page 27, they identify the correct
25 understanding of the legal requirements of Article 47, 14:06
26 most of the other points I have dealt with to date.
27 But they say:

28
29 "*(i) An aggregate assessment is required.*"

1 78. The Commissioner does not dispute - contrary to
2 FBI's suggestion - that remedies ought to be assessed
3 in aggregate, and while the Commissioner is criticised
4 for concluding that the remedies are 'fragmented', it
5 is manifestly obvious from the Draft Decision that she 14:06
6 both reviewed the remedies in aggregate and that her
7 conclusion that they were 'fragmented' could only have
8 been reached as a result of an 'aggregate' analysis."
9

10 well, she didn't look. Firstly she didn't identify the 14:06
11 proper standard of Article 47, and we very much adopt
12 Ms. Barrington's submissions in that with regard to
13 what is required by Article 47. The fragmented
14 conclusion was based on the Directive which doesn't
15 apply. There was not a proper aggregate review, as we 14:07
16 contend.
17

18 Then the next heading is "Exclusions will Render the
19 Remedy Ineffective". This is an extraordinary
20 proposition. What's quoted is paragraph 95 of Schrems: 14:07
21

22 "Likewise, legislation not providing **for any**
23 **possibility** for an individual to pursue legal remedies
24 **in order to have the access to personal data relating**
25 **to him, or to obtain the rectification or erasure of** 14:07
26 **such data, does not respect the essence of the**
27 **fundamental right.**"
28

29 That supports the proposition that if there is no

1 possibility for an individual to pursue a remedy the
2 essence is not respected.

3
4 The paragraph is adverted to but it is misconstrued.
5 It is now authority for a proposition that exclusions 14:07
6 from relief will fail to satisfy the requirements of
7 Article 47. There is no authority for that proposition
8 whatsoever.

9
10 Then the next statement: "*Unjustified Immunities will 14:08*
11 *Render the Remedy Ineffective*". And it then says: "A
12 *remedy which precludes a 'procedural disadvantage'.*"
13 Sorry: "*Requires an effective remedy which precludes a*
14 *'procedural disadvantage'.*"

15 14:08
16 As a matter of law that's incorrect, as Ms. Barrington
17 has pointed out in her submission. The next contention
18 is:

19
20 "*A remedy that imposes an Excessively Difficult Burden 14:08*
21 *is not Effective*" and the **San Giorgio** case in a tax
22 context is referred to, which of course doesn't address
23 the issues that arise in this context at all, a common
24 thread or failure on the part of the DPC.

25 14:08
26 The next proposition is: "*A remedy that requires the*
27 *law to be broken to test it is not effective*", and they
28 rely on **unibet**. well, **unibet** supports our contentions
29 with regard to Article 47, as Ms. Barrington has shown.

1 The fact that there are criminal offences during which
2 the surveillance may be disclosed is not a remedy that
3 is dependent or requires the law to be broken. It is a
4 due process protection in a criminal context
5 independent of and in addition to the civil remedies. 14:09

6
7 Then: "*Access to an independent authority is*
8 *required*". They refer to the Advocate General in
9 Schrems. Well, there are independent authorities,
10 there's the court and there's of course also the FISC 14:09
11 court.

12
13 "*Notification of processing is required*". This again
14 is a failure to reflect the position in the decided
15 cases in the Council of Europe. There is a reliance on 14:09
16 Watson which self-evidently relates to criminal
17 proceedings and the distinction between those
18 proceedings is specifically adverted to in the footnote
19 to which I drew your attention yesterday by the
20 Commission that, criminal proceedings once they are 14:10
21 over or during the course of them because they involve
22 an individual, you can notify, they are completely
23 different to surveillance in a national security
24 context.

25 14:10
26 And then it says: "*Standing must be available to those*
27 *within the scope ratione personae*". That's not correct
28 as stated therein and it ignores in any event that the
29 alleged difficulty with standing derives from the lack

1 of notification, and Ms. Hyland will deal with standing
2 in any event.

3
4 Then the next proposition, not one reflected in the
5 analysis of the DPC but now plucked out to justify it 14:10
6 retrospectively: "*The essence must be preserved before*
7 *balancing is considered*". That's true, but there is no
8 such analysis conducted by the DPC and nothing to
9 suggest or support a proposition the essence has been
10 impaired. 14:10

11
12 And 92 just asserts that the exercise of the right, the
13 *essence* of the right has been impaired without
14 establishing a basis for that.

15 14:11
16 And then if you would go to page 34 and 99: "*The legal*
17 *remedies that are available are not complete.*"

18
19 There is some criticism of the Privacy Act and the
20 Judicial Redress Act. That is not essential to the 14:11
21 adequacy of the remedies as the Privacy Shield
22 discloses. In any event they don't have to be
23 complete.

24
25 The next heading on the next page is "*Unjustified* 14:11
26 *Immunities*", that state immunity is unjustified. well,
27 you have seen the limitations on that, the ways around
28 that. But how it could be suggested that the presence
29 of state immunity in respect of certain remedies where

1 other remedies are provided derives somebody of an
2 adequate remedy under Article 47 is difficult to
3 understand.

4
5 Then again repeated at 36 "*Remedies that imposes* 14:12
6 *excessively difficult burdens*", and that is a statement
7 that is then supported by the wilfulness requirement
8 which is not an excessively difficult burden and, if it
9 is, then EU law, as I have indicated to you, is
10 defective in terms of the remedies it provides. Again 14:12
11 there's an expansion of the remedies that require the
12 law to be broken on the next page.

13
14 On that page, 37, at 110: "*There will be no guarantee*
15 *of access to an independent authority, even after the* 14:12
16 *implementation of the Privacy Shield.*"

17
18 well, this is remarkable. The DPC didn't consider it.
19 She can't through submissions make any such point, it's
20 not in issue in the proceedings. And in any event it's 14:12
21 a misunderstanding of the significance of the
22 Ombudsperson procedure, and you will see they attempt
23 to make this point realising the significance of that
24 in the next number of paragraphs.

25
26 The standing position is then dealt with in 116, and
27 I have said much on that. And then in 120, it is said:

28
29 "*It is Commissioner's provisional view, as set out in*

1 *the Draft Decision, that this host of frailties is such*
2 *that the US law impairs the essence."*

3
4 As I say that's not justified by anything in the
5 decision.

14:13

6
7 In 124, they say: "*Given the lack of knowledge noted*
8 *above of unlawful processing, and in the absence of*
9 *proof of same, the remedy contemplated by Clause 6 may*
10 *not be available to a complainant like Mr. Schrems in*
11 *any event, because the relevant data controller would*
12 *unquestionably contend that it could not be shown that*
13 *it had even breached the SCCs, such as to trigger a*
14 *remedy under the SCCs."*

14:13

15
16 Again that's a misunderstanding of the position at law
17 in terms of the notification and the constraints on
18 that. It's a misunderstanding of the rights that are
19 given where you can prove that your data has been
20 intercepted, which may arise in many instances, and in
21 any event the issue of what level of proof you require
22 in that regard would be a matter for Irish law because
23 the proceedings would be brought in Ireland against the
24 exporter claiming that there had been a breach. So
25 there's a failure to distinguish between the
26 substantive remedies given in the SCC that are
27 specifically governed, as you know under the model
28 clauses, by Irish law and the jurisdiction of the Irish
29 court and there is also a mediation process.

14:13

14:14

14:14

1 And in 125, it says: *"In any event, there is a certain*
2 *tension in the position adopted by FB-I, DE and BSA:*
3 *anxious to highlight the inadequacies of the systems of*
4 *protections in the Member States, while claiming that*
5 *remedies for breach of the SCCs in national courts* 14:14
6 *pursuant will address any concerns."*

7
8 There is of course *no* inconsistencies, and that's a
9 misunderstanding of the SCCs. The SCCs provide their
10 *own* remedies as a matter of contract, independent of 14:15
11 the legal system. And that just demonstrates, with the
12 greatest of respect, the level of confusion on the part
13 of the DPC with regard to the SCCs.

14
15 Moving to page 48, paragraph 148, it says that: *"The* 14:15
16 *processing powers in respect of which the remedies are*
17 *inadequate extend beyond the national security context.*
18 *For example, FBI's own expert, Professor Swire, accepts*
19 *that the relevant processing occurs beyond the national*
20 *security context, noting that 'when the US government* 14:15
21 *conducts a wiretap or otherwise against access to*
22 *personal data in the US, the investigation within the*
23 *US is governed primarily by either foreign negligence*
24 *of criminal rules'. The remedial deficiencies arising*
25 *are no less pressing in such situations."* 14:16
26

27 Again a remarkable proposition. There is nothing in
28 the decision that deals with the criminal law, it just
29 doesn't address it. It is explicit in addressing

1 national surveillance. Process Prof. Swire, in giving
2 a complete account of the law, drew attention to
3 criminal enforcement and that is *now* stated to be some
4 basis for supporting the concerns in relation to
5 national surveillance. And of course, in any event, 14:16
6 excludes any consideration of the protections in a
7 criminal law sphere which haven't been even considered
8 and the recognition in Watson and Digital Rights that
9 criminal law enforcement can, in and of itself, provide
10 a justified basis for a curtailment of the rights. 14:16

11
12 And two final points. When I was dealing with standing
13 in the context of the US law, I did of course urge that
14 it really came down to the question of notice. What
15 I neglected to mention to you was there was another 14:16
16 what I would call, with respect, not meaning to be in
17 any way derogatory about the position, but there was a
18 confusing factor, this question of FAA -v- Cooper, and
19 the decision that, in the context of the Privacy Act,
20 as you will remember it said the court had interpreted 14:17
21 damage as requiring it to be pecuniary damage.

22
23 Firstly, the Privacy Act isn't relevant for the reasons
24 that we have said, or of any prime importance is
25 perhaps a better way of putting it, but in any event 14:17
26 that only speaks to the type of remedy, you can't get
27 damages, it doesn't preclude other remedies. And, as
28 the submissions on Article 47 demonstrate, damages do
29 not always have to be available.

1 The nature of the remedy is not a standing point in any
2 event, it deals with the merits; what remedy do you get
3 if you succeed, but there was no suggestion in FAA -v-
4 Cooper you couldn't get another remedy, it was just a
5 requirement for the damages. 14:18

6
7 And the final matter, subject to you, I, having spoken
8 with Ms. Donnelly, agreed to defer. We, Judge, are
9 very concerned about what was said with regard to the
10 evidence of the experts and the criticisms that were 14:18
11 made that we believe are *wholly* unjustified. It's not
12 something I'm going to get into now, we have delivered
13 the affidavits. I'm going to hand into you a book that
14 contains all of the correspondence and the affidavits
15 because we would be very anxious that you would see 14:18
16 them. We are awaiting a response, they were demanded
17 by lunchtime on Friday, we gave them til Friday. We
18 haven't a response yet, but we are evidently expecting
19 a response and if and when something arises I do want
20 to reserve the right to deal with that shortly. 14:18

21
22 It's, I think, the only going to arise if there is some
23 criticism of the witness as opposed to anything more
24 substantive, but obviously it was of very significant
25 concern to us that there be a criticism that we believe 14:18
26 is wholly unjustified. I don't want to say anymore or
27 take anybody short at the moment. I did mention to
28 Ms. Donnelly that I would just preserve my position on
29 it and I think the Commissioner would prefer that we

1 have the response and deal with it in those
2 circumstances, if it needs to be dealt with. That's
3 subject to you, Judge.

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

5 **MR. GALLAGHER:** Thanks. 14:19

6 **MS. JUSTICE COSTELLO:** Ms. Hyland?

7

8 **SUBMISSION BY MS. HYLAND:**

9

10 **MS. HYLAND:** Yes, Judge. Judge, you have heard a great 14:19
11 deal about the US and what happens in the US, and the
12 question of the comparator has been mentioned but not,
13 I think, dealt with in any detail. Judge, it seems
14 that a useful exercise that I might now do is to give
15 the court some material to consider how similar issues 14:19
16 are treated in Europe by way of comparison.

17

18 Because I think sometimes one could have been forgiven
19 for thinking, listening to the discussion that it was
20 only in the US that (a) this type of surveillance took 14:19
21 place and (b) these type of restrictions were in
22 existence, and that is far from the case, Judge, and
23 I hope that the material that I'm going to open to the
24 court will show you a number of things.

25

14:20

26 First of all, Judge, I hope it will show you that
27 surveillance takes place in Europe also, both
28 traditional and bulk surveillance, and often on a very
29 significant scale. I hope to show the very similar

1 issues, or in fact the very same issues arise in an EU
2 context as in a US context in relation to matters such
3 as the conditions under which surveillance should take
4 place, the controls, the oversight provisions, both
5 internally and externally, the question of the inherent 14:20
6 limitations on notification to the subject of
7 surveillance, the remedies to the persons affected and
8 the particular role of oversight having regard to the
9 limitations on notification.

10
11 The court knows that the Data Protection Directive does
12 not apply in this national surveillance area because of
13 the national security exemption. And however one
14 characterises that, and there has obviously been
15 various submissions made to the court, and the court 14:21
16 has to make a decision on that, but however one
17 characterises it, it is quite clear that the Data
18 Protection Directive itself does not apply squarely in
19 the area of national security for very obvious reasons.

20
21 In those circumstances one turns to the Member State
22 law, the law of the Member States. Because all of the
23 Member States are signatories to the Convention on
24 Human Rights, and because the Convention on Human
25 Rights does deal with this area, it does come within 14:21
26 its scope, there is important and significant
27 Convention jurisprudence, so I will look at that.

28
29 I will also look at a document that I think is very

1 helpful to the court. It's a report on surveillance in
2 the Member States commissioned in 2015 from an agency
3 called the Fundamental Rights Agency. And I have to
4 admit that I was not aware of that agency until this
5 case, but in fact it is an agency that was set up by a 14:21
6 EU regulation and it is specifically charged under the
7 EU structure with providing research and assistance on
8 human rights. They carried out a report at the request
9 of the European Parliament following the Snowden
10 revelations. 14:22

11
12 It is a report which is done by way of a questionnaire
13 format to all 28 Member States. There is also
14 representatives of the from a in the various Member
15 States and there was the assistance of experts. So 14:22
16 it's a very authoritative report and it does what
17 I think probably no individual expert before this court
18 could do, it identifies a position in each of the 28
19 Member States in this area. So I think that will give
20 the court a very helpful basis upon which to 14:22
21 evidentially understand what is the position in respect
22 of surveillance in the Member States.

23
24 Judge, I'll also take a closer look at the United
25 Kingdom and Ireland because they are jurisdictions that 14:22
26 this court is familiar with, not in huge detail, but
27 I think it's no harm for the court just to hone in on
28 what it looks like in two particular Member States.
29 I'll also briefly then look at Article 47 itself and

1 particularly in respect of remedies and standing in an
2 EU context. Because the court may be familiar with the
3 fact that in fact the standing rules before the General
4 Court and the Court of Justice, insofar as direct
5 actions are concerned; in other words, if a person is 14:23
6 seeking to challenge the legality of an EU measure, are
7 in fact extraordinarily restrictive for individuals.
8 Institutions of the communities are entitled to do that
9 and Member States are entitled to do that, but
10 effectively individual challenges can only go through 14:23
11 the national courts and a reference if that is
12 ultimately decided.

13
14 There's effectively no direct access unless a decision
15 is addressed to you, like a competition decision or 14:23
16 something of that kind, but, absent that, if a person
17 is simply trying to challenge a piece of EU law they
18 really cannot do it by way of a direct action, and
19 I think that's relevant in this discussion of standing.
20 It's more restrictive I think than anything we have 14:24
21 seen in the US context.

22
23 And I'll finish then, Judge, by just dealing with the
24 SCCs, and I will not repeat what the court has heard
25 about the SCCs. There is a few discrete points I want 14:24
26 to make, but apart from that I won't go over old
27 ground.

28
29 So, Judge, I'm going to ask the court to look at some

1 of the case law of the Court of Human Rights, and it is
2 going to be a gallop through it because in a sense I'm
3 trying to do in an afternoon what we have spent a
4 number of weeks doing in respect of the US but this
5 time in respect of, if you like, various different 14:24
6 Member States. But nonetheless I think one can get a
7 flavour from the case law of the court about a number
8 of points. I'll just identify you the themes, if you
9 like, that one will see when we look at the case law.
10 There's a number of themes that I think are relevant 14:24
11 having regard to what you have been hearing on the US
12 side.

13
14 First, the notion of prior judicial authorisation in
15 respect of a surveillance measure. It's been stated by 14:24
16 the court - and when I say the court now I'm referring
17 to the Court of Human Rights - it's desirable but it's
18 not mandatory. In respect of notification to a person
19 who's been surveilled, the court accepts that
20 notification cannot be given during surveillance as 14:25
21 otherwise the purpose of the surveillance is likely to
22 be defeated.

23
24 The court has identified that it is desirable to give
25 notification once surveillance is finished, but only if 14:25
26 that is possible. It recognises it may not be possible
27 and it accepts that in certain instances other remedies
28 may substitute for the notification obligations, and
29 there are other ways of ensuring control over the

1 exercise of surveillance powers apart from notification
2 and direct judicial actions by individuals.

3
4 In that context the court has noted that oversight by
5 both what it describes as internal and external bodies 14:26
6 is absolutely crucial, and one sees the court giving
7 some considerable time and weight to the manner in
8 which a Member State has set up their oversight
9 controls. And when one understands that in the
10 surveillance context often a person cannot be notified, 14:26
11 it becomes clear why it is so important that the
12 control must come in a different way and that is
13 through oversight.

14
15 The court tends to treat evaluation of the substantive 14:26
16 right and the remedy in a holistic way. It doesn't
17 separate them out in a formalistic way. So when the
18 court is looking to see whether or not there's been
19 compliance with Article 8 of the Convention, which is
20 how all of these cases come before the court - and the 14:26
21 court will be aware that Article 8 is effectively very
22 similar to what the court has been looking in the
23 context, this court has been look at in the context of
24 Charter, 7 and 8.

25 **MS. JUSTICE COSTELLO:** Hmm. 14:26

26 **MS. HYLAND:** And the court then also looks at the
27 entire picture from start to finish, if you like, when
28 considering if there's a breach of Article 8. It will
29 look at the nature, the scope, the duration of

1 measures, the grounds required for ordering them, the
2 authorities competent to authorise them, the carrying
3 out of them, the supervision of them, the remedy
4 provided; in other words, the whole picture will be
5 looked at from start to finish. There won't be one 14:27
6 aspect, if you like, of the exercise hived off and
7 considered in isolation. When an Article 8 breach is
8 asserted the court will look at the whole picture.

9
10 In relation to standing, standing is - I suppose there 14:27
11 is two points to be made. First, there are the courts
12 own rules about standing. And obviously they are not,
13 if you like, the direct comparator here because any
14 individual who is complaining about surveillance has to
15 exhaust domestic remedies. As the court will be aware 14:27
16 that's a requirement of the Convention, but nonetheless
17 it is of some importance, I think, how the court treats
18 standing. And essentially the court has dealt with
19 standing is as follows, there's two different
20 approaches. If actual interception is alleged, if a 14:28
21 person is coming to the court and saying they have been
22 the subject of interception, then the court has held
23 that there must be a reasonable likelihood that
24 surveillance measures were applied to the applicant.

25 14:28
26 On the other hand, if the individual is simply
27 challenging an interference with Article 8 on the basis
28 of the legislation in question, i.e. let us say there
29 is a particular legislative structure which permits

1 secret surveillance measures and in that situation the
2 court will exceptionally allow a person to challenge
3 the particular legislation even if they haven't been
4 able to show that they themselves have been surveyed.

14:28

5
6 If the national remedies will make it effectively
7 impossible for a person to challenge at domestic level,
8 it's a somewhat involved test, but what the court will
9 do is it will look at what happens at domestic level,
10 it will see whether it's possible to bring a challenge
11 and if it's not possible at domestic level then the
12 court has said there's a greater need for scrutiny and
13 in those circumstances one sees the court giving
14 standing to people in that situation.

14:29

15
16 And I wonder, Judge, could I start by asking the court
17 then to look at Book 13, and the tabs that I'll be
18 looking at, Judge, are from Tab 39 onwards. And
19 there's about, I think there's six cases.

14:29

20 **MS. JUSTICE COSTELLO:** 39 onwards?

14:29

21 **MS. HYLAND:** 39 onwards, exactly.

22 **MS. JUSTICE COSTELLO:** Just a moment. Yes, I have it.

23 **MS. HYLAND:** well, they are all together in my book,
24 they may not be in the court's book. So the first
25 case, Judge, I'll spend a bit of time on this one
26 because, although it's a case from 1978, in fact it's
27 still being relied upon by the court today. It's still
28 the foundation of much of the court's case law, so
29 I will spend the most time on this case because one

14:29

1 sees the findings being repeated over and over again
2 right up until 2016.

3
4 This was a case where there was five German citizens
5 that had launched the challenge to the relevant German 14:30
6 legislation and they asserted that it was a breach of
7 Article 8. Just in relation to this whole standing
8 point, if I could ask the court to look please at page
9 4 of the decision. You'll see there at tab or
10 paragraph 13, I beg your pardon, they say there that 14:30
11 they claimed that they had been subject to surveillance
12 measures. They didn't know whether the G10 had
13 actually been applied to them and in fact the
14 government made a statement saying that in fact they
15 had not been the subject of surveillance measures. 14:30

16
17 And if I could just ask the court then to turn on
18 please to page 14, you'll see there the comments of the
19 court in respect of whether or not they had the
20 necessary entitlement to bring the case. 14:31

21
22 You'll see there the top of page 14: *"The question*
23 *arises in the present proceedings whether an individual*
24 *is to be deprived of the opportunity of lodging an*
25 *application with the Commission because, owing to the 14:31*
26 *secrecy of measures objected to, he cannot point to any*
27 *concrete measure specifically affecting him. In the*
28 *Court's view, the effectiveness of the Convention*
29 *implies in such circumstances some possibility of*

1 *having access to the Commission. If this were not so,*
2 *the efficiency of the Convention's enforcement*
3 *machinery would be materially weakened. The procedural*
4 *provisions of the Convention must, in view of the fact*
5 *that the Convention and its institutions were set up to*
6 *protect the individual, be applied in a manner which*
7 *serves to make the system of individual applications*
8 *efficacious.*

9
10 *The Court therefore accepts that an individual may,* 14:31
11 *under certain conditions, claim to be the victim of a*
12 *violation occasioned by the mere existence of secret*
13 *measures or of legislation permitting secret measures,*
14 *without having to allege that such measures were in*
15 *fact applied to him. The relevant conditions are to be* 14:31
16 *determined in each case according to the Convention*
17 *right or rights alleged to have been infringed, the*
18 *secret character of the measures objected to, and the*
19 *connection between the applicant and those measures."*

20
21 And the court then goes on to consider whether or not
22 Article 8 is to be infringed.

23
24 And asking the court then to turn over, Judge, to page
25 16 you will see the test and the test that they 14:32
26 identify here is a test that is then used throughout
27 all of the cases that we will see. There is a quote
28 there at paragraph 39, top of page 16, of Article 8 of
29 the Convention, and I think the court is probably

1 familiar with that.

2
3 You'll see at subparagraph 2 the test whereby:

4
5 *"There shall be no interference with the exercise of* 14:32
6 *this right except such as in accordance with the law*
7 *and is necessary in a democratic society in the*
8 *interests of national security, public safety or the*
9 *economic well-being of the country."*

10
11 And, Judge, I can tell the court that much of the
12 discussion is not so much about whether or not it's in
13 accordance with law, because once something is
14 published in a statute or in some other identifiable
15 provision it's treated as being in accordance with law. 14:32
16 The justification is not usually at issue in these
17 cases either because usually there is a national
18 security justification and the court accepts that.

19
20 The real, if you like, I suppose, issue between the 14:33
21 parties tends to be whether it's necessary in a
22 democratic society, is it the minimum required in order
23 to advance the aims sought to be achieved, and that's
24 where one tends to see the discussions.

25
26 Judge, can I ask you then, you'll see then at paragraph 14:33
27 40 there was various restrictions under Article 10 of
28 the basic law and of a law known as the G10 and this
29 permitted surveillance. Paragraph 41, the first

1 question was whether the contested legislation
2 constituted an interference with the exercise of the
3 right.

4
5 And you'll see, going on down the page: "*The* 14:33
6 *Commission expressed the opinion that the secret*
7 *surveillance amounted to an interference with the*
8 *exercise of the right. Neither before the Commission*
9 *nor before the Court did the Government --"*

10 **MS. JUSTICE COSTELLO:** I am sorry, I have lost you, 14:33
11 where are you on that?

12 **MS. HYLAND:** I am so sorry, Judge. It is just about
13 two thirds of the way down the page, where it starts
14 with the words "*in its report*".

15 **MS. JUSTICE COSTELLO:** Oh, yes, thank you. 14:33

16 **MS. HYLAND:** Yes. You will see that there was no
17 contesting of the issue as to whether or not there was
18 an interference with 8.1 and the justification was
19 that:

20 14:34
21 "*Any of the permitted surveillance measures would*
22 *result in an interference by a public authority with*
23 *the exercise of that individual's right to respect for*
24 *his private and family life and correspondence.*"

25 14:34
26 There was then a reference to: "*In the mere existence*
27 *of the legislation there was involved a menace of*
28 *surveillance; this menace necessarily strikes at*
29 *freedom of communication between users of the P&T*

1 *services and constitutes an 'interference'.*"

2
3 So that is the fixed position, if you like, throughout
4 all of the cases, one sees that and one sees the
5 discussion being about 8.2. 14:34

6
7 Then moving over the page to paragraph 42 you'll see
8 there: "*The cardinal issue arising under Article 8 is*
9 *whether the interference so found is justified by the*
10 *terms of paragraph 2. This paragraph, since it* 14:34
11 *provides for an exception to a right guaranteed by the*
12 *Convention, is to be narrowly interpreted. Powers of*
13 *secret surveillance of citizens, characterising as they*
14 *do the police state, are tolerable under the Convention*
15 *only insofar as strictly necessary for safeguarding the* 14:34
16 *democratic institutions."*

17
18 Can I ask the court to go down please - sorry well 43
19 you will see there in respect of "*in accordance with*
20 *the law*", that requirement was fulfilled because the 14:35
21 interference results from "*Acts passed by the*
22 *Parliament*". And that's the point I just made when
23 that requirement was considering to be complied with.

24
25 Then going to the bottom of the page, paragraph 46: 14:35
26 "*The Court, sharing the view the Government and the*
27 *Commission, finds that the aim of the G10 is indeed to*
28 *safeguard national security and/or to prevent disorder*
29 *or crime in pursuance of Article 8.2. In those*

1 *circumstances."*

2
3 And the court says it doesn't need to go and look at
4 any other purposes.

5
6 But then it goes on to say: "*On the other hand, it has*
7 *to be ascertained whether the means provided under the*
8 *impugned legislation for the achievement of the*
9 *above-mentioned aim remain in all respects within the*
10 *bounds of what is necessary in a democratic society."*

14:35

14:35

11
12 Then going on to 48, the court takes judicial notice of
13 two important facts: "*Technical advances made in the*
14 *means of espionage and, correspondingly, of*
15 *surveillance; the second is the development of*
16 *terrorism in Europe in recent years. Democratic*
17 *societies nowadays find themselves threatened by highly*
18 *sophisticated forms of espionage and by terrorism, with*
19 *the result that the State must be able, in order*
20 *effectively to counter such threats, to undertake the*
21 *secret surveillance of subversive elements operating*
22 *within its jurisdiction. The Court has therefore to*
23 *accept that the existence of some legislation granting*
24 *powers of secret surveillance [over the mail, post and*
25 *telecommunications] is, under exceptional conditions,*
26 *necessary in a democratic society."*

14:36

27
28 Then paragraph 49, this is an important paragraph
29 because again one sees this throughout the case law:

1 *"As concerns the fixing of the conditions under which*
2 *the system of surveillance is to be operated, the Court*
3 *points out that the domestic legislature enjoys a*
4 *certain discretion. It is certainly not for the Court*
5 *to substitute for the assessment of the national* 14:36
6 *authorities any other assessment of what might be the*
7 *best policy in this field."*

8
9 And then the court goes on to say: *"Nevertheless, the*
10 *Court stresses that this does not mean the contracting* 14:36
11 *states enjoy an unlimited discretion to subject persons*
12 *within their jurisdiction to secret surveillance. The*
13 *Court, being aware of the danger such a law poses of*
14 *undermining, even destroying democracy on the ground of*
15 *defending it, affirms that the Contracting States may* 14:36
16 *not, in the name of the struggle against espionage and*
17 *terrorism, adopt whatever measures they deem*
18 *appropriate.*

19
20 50. *The court must be satisfied there are adequate and* 14:37
21 *effective guarantees against abuse. This assessment*
22 *has only a relative character: it depends on all the*
23 *circumstances."*

24
25 And this is the point, Judge, I made about, if you 14:37
26 like, the holistic assessment: *"It depends on all the*
27 *circumstances of the case, such as the nature, scope*
28 *and duration of the possible measures, the grounds*
29 *required for ordering such measures, the authorities*

1 *competent to permit, carry out and supervise such*
2 *measures, and the kind of remedy provided by the*
3 *national law."*

4
5 Judge, just then moving on to the second paragraph and, 14:37
6 sorry, the second part of paragraph 51, it's about half
7 way down that same page.

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

9 **MS. HYLAND:** You will see there, they are just talking
10 about the conditions under which surveillance may be 14:37
11 ordered and here they may be done by a:

12
13 *"Federal Minister empowered for the purpose by the*
14 *Chancellor or, where appropriate, by the supreme land*
15 *authority."* 14:37

16
17 So there is an administrative procedure in place. And
18 then turning over to page 20 at paragraph 53:

19
20 *"Under the G10, while recourse to the courts in respect 14:37*
21 *of the ordering and implementation of measures of*
22 *surveillance is excluded, subsequent control or review*
23 *is provided instead, in accordance with 10.2, by two*
24 *bodies appointed by the people's elected*
25 *representatives, namely, the Parliamentary Board and 14:38*
26 *the G10 Commission."*

27
28 And the court then gives some detail about the nature
29 of those bodies and the Minister's relationship with

1 those bodies. And can I ask the court then to go on
2 down to paragraph 55.

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

4 **MS. HYLAND:** *"Review of surveillance may intervene at*
5 *three stages: when the surveillance is first ordered,*
6 *while it is being carried out, or after it has been*
7 *terminated. As regards the first two stages, the very*
8 *nature and logic of secret surveillance dictate that*
9 *not only the surveillance itself but also the*
10 *accompanying review should be effected without the*
11 *individual's knowledge. Consequently, since the*
12 *individual will necessarily be prevented from seeking*
13 *an effective remedy of his own accord or from taking a*
14 *direct part in any review proceedings, it is essential*
15 *that the procedures established should themselves*
16 *provide adequate and equivalent guarantees safeguarding*
17 *the individual's rights. In addition, the values of a*
18 *democratic society must be followed as faithfully as*
19 *possible in the supervisory procedures if the bounds of*
20 *necessity are not to be exceeded. One of the*
21 *fundamental principles of a democratic society is the*
22 *rule of law."*

14:39

23
24 And then, looking at 56: *"within the system of*
25 *surveillance established by the G10, judicial control*
26 *and excluded, being replaced by an initial control*
27 *effected by an official qualified for judicial office.*
28 *The Court considers that, in a case where abuse is*
29 *potentially so easy in individual cases and could have*

14:39

1 *such harmful consequences, it is in principle desirable*
2 *to entrust supervisory control to a judge.*

3
4 *Nevertheless, having regard to the nature of the*
5 *supervisory and other safeguards provided for by the* 14:39
6 *G10, the Court concludes that the exclusion of judicial*
7 *control does not exceed the limits of what may be*
8 *deemed necessary in a democratic society. The*
9 *Parliamentary Board and the G10 Commission are*
10 *independent of the authorities carrying out the*
11 *surveillance, and are vested with sufficient powers and*
12 *competence to exercise an effective and continuous*
13 *control. Furthermore, the democratic character is*
14 *reflected in the balanced membership of the*
15 *Parliamentary Board. The opposition is represented on*
16 *this body and is therefore able to participate in the*
17 *control of the measures ordered by the competent*
18 *Minister. The two supervisory bodies may, in the*
19 *circumstances of the case, be regarded as enjoying*
20 *sufficient independence to give an objective ruling."* 14:40

21
22 And then the court goes on to consider the issue of
23 notification, it says: "*The Court notes in addition*
24 *that an individual believing himself to be under*
25 *surveillance has the opportunity of complaining to the* 14:40
26 *G10 Commission and of having recourse to the*
27 *constitutional court. However, as the Government*
28 *conceded, these are remedies which can come into play*
29 *only in exceptional circumstances."*

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"As regards", I'm looking at 57 here, Judge.

MS. JUSTICE COSTELLO: Hmm.

MS. HYLAND: *"As regards review a posteriori, it is necessary to determine whether judicial control, in particular with the individual's participation, should continue to be excluded even after surveillance has ceased. Inextricably linked to this issue is the question of subsequent notification, since there is in principle little scope for recourse to the courts by the individual concerned unless he is advised of the measures taken without his knowledge and thus able retrospectively to challenge their legality.*

The applicants' main complaint is in fact that the person concerned is not always subsequently informed after the suspension of surveillance and is not therefore in a position to seek an effective remedy before the courts. Their preoccupation is the danger of measures being improperly implemented without the individual knowing or being able to verify the extent to which his rights have been interfered with. In their view, effective control by the courts after the suspension of surveillance measures is necessary in a democratic society to ensure against abuses; otherwise adequate control of secret surveillance is lacking.

14:40

In the Government's view, the subsequent notification which must be given since the Federal Constitutional

1 *Court's judgment corresponds to the requirements of*
2 *Article 8.2. In their submission, the whole efficacy*
3 *of secret surveillance requires that, both before and*
4 *after the event, information cannot be divulged if*
5 *thereby the purpose of the investigation is, or would* 14:41
6 *be retrospectively, thwarted."*

7
8 And then going to paragraph 58: "*In the opinion of the*
9 *Court, it has to be ascertained whether it is even*
10 *feasible in practice to require subsequent notification* 14:41
11 *in all cases.*

12
13 *The activity or danger against which a particular*
14 *series of surveillance measures is directed may*
15 *continue for years, even decades, after the suspension*
16 *of those measures. Subsequent notification to each*
17 *individual affected by a suspended measure might well*
18 *jeopardise the long-term purpose that originally*
19 *prompted the surveillance. Furthermore, as the Federal*
20 *Constitutional Court rightly observed, such* 14:41
21 *notification might serve to reveal the working methods*
22 *and fields of operation of the intelligence services*
23 *and even possibly to identify their agents. In the*
24 *court's view, insofar as 'the interference' resulting*
25 *from a contested legislation is in principle justified* 14:42
26 *under 8.2, the fact of not informing the individual*
27 *once surveillance has ceased cannot itself be*
28 *incompatible with this provision since it is this very*
29 *fact which ensures the efficacy of the 'interference'.*

1 *Moreover, it is to be recalled that, in pursuance of*
2 *the Federal Constitutional Court's judgment of 1970,*
3 *the person concerned must be informed after the*
4 *termination of the surveillance measures as soon as*
5 *notification can be made without jeopardising the* 14:42
6 *purpose of the restriction."*

7
8 And the court then goes on to say, turning over the
9 page: "*The Court has examined the contested*
10 *legislation in the light of the provision of the* 14:42
11 *considerations. The Court notes that the G10 contains*
12 *various provisions designed to reduce the effect of*
13 *surveillance measures to an unavoidable minimum and to*
14 *ensure that the surveillance is carried out in strict*
15 *accordance with the law. In the absence of any* 14:42
16 *evidence or indication that the actual practice*
17 *followed is otherwise, the court must assume that in*
18 *the democratic society of Germany the relevant*
19 *authorities are properly applying the legislation at*
20 *issue."* 14:43

21
22 And at paragraph 60 the court then concludes that the
23 German legislature was: "*Justified to consider the*
24 *interference resulting from the legislation as being*
25 *necessary in a democratic society"* and no breach of 14:43
26 Article 8 is found.

27
28 Then, Judge, Article 13 is considered. And Article 13,
29 you'll see at paragraph 61 there, it's the remedies and

1 it's the, I suppose, equivalent or at least the genesis
2 of Article 47 that this court is considering. And you
3 will see it says: *"Everyone whose rights and freedoms
4 as set forth in this Convention are violated shall have
5 an effective remedy before a national authority
6 notwithstanding that the violation has been committed
7 by persons acting in an official capacity."*

14:43

8
9 The court considers generally Article 13. And then
10 asking the court please to look at paragraph 65, the
11 court says: *"Although the court has found no breach of
12 the right guaranteed by Article 8, it falls to be
13 ascertained whether German law afforded the applicants
14 an 'effective remedy before a national authority'
15 within Article 13."*

14:43

14:44

16
17 And, turning over the page, Judge, you will see there
18 at paragraph 67, which is about two thirds of the way
19 down, you will see the second paragraph of 67 says:

20
21 *"In the Court's opinion, the authority referred to in
22 Article 13 may not necessarily in all instances be a
23 judicial authority in the strict sense. Nevertheless,
24 the powers and procedural guarantees an authority
25 possesses are relevant in determining whether the
26 remedy before it is effective."*

14:44

14:44

27
28 68. *The concept of a remedy, an 'effective remedy' in
29 the applicants' submission, presupposes that the person*

1 concerned should be placed in a position, by means of
2 subsequent information, to defend himself against any
3 inadmissible encroachment upon his guaranteed rights.
4 Both the Government and the Commission were agreed that
5 no unrestricted right to notification of surveillance
6 measures can be deduced from Article 13 once the
7 contested legislation, including the lack of
8 information, has been held to be 'necessary in a
9 democratic society'."

10 14:44

11 And the court then goes on to say at the bottom of that
12 page: "The Court has already pointed out that it is
13 the secrecy of the measures which renders it difficult,
14 if not impossible, for the person concerned to seek any
15 remedy of his own accord, particularly while
16 surveillance is in progress. Secret surveillance and
17 its implications are facts that the Court, albeit to
18 its regret, has held to be necessary, in modern-day
19 conditions in a democratic society, in the interests of
20 national security. The Convention is to be read as a
21 whole and therefore, as the Commission indicated in its
22 report, any interpretation of Article 13 must be in
23 harmony with the logic of the Convention. The Court
24 cannot interpret or apply Article 13 so as to arrive at
25 a result tantamount in fact to nullifying its
26 conclusion that the absence of notification to the
27 person concerned is compatible with Article 8 in order
28 to ensure the efficacy of surveillance measures.
29 Consequently, the Court, consistently with its

14:45

1 *conclusions concerning Article 8, holds that the lack*
2 *of notification does not, in the circumstances of the*
3 *case, entail a breach of Article 13.*

4
5 *69. For the purpose of the present proceedings, an* 14:45
6 *'effective remedy' under Article 13 must mean a remedy*
7 *that is as effective as can be having regard to the*
8 *restricted scope for resource inherent in any system of*
9 *secret surveillance. It therefore remains to examine*
10 *the various remedies available to the applicants under* 14:46
11 *and German law in order to see whether they are*
12 *'effective' in this limited sense."*

13
14 Judge, we do place particular emphasis on that
15 paragraph because it just show that one cannot in this 14:46
16 sphere simply pull out the notion of a remedy, ignore
17 the difficulties in respect of notification, ignore the
18 requirement of surveillance and identify the remedy as
19 flawed without even looking at those issues which we
20 say that is precisely what the DPC did. 14:46

21
22 Just going back then to the case. At paragraph 70:
23 *"Although, according to the G10, there can be no*
24 *recourse to the courts in respect of the ordering and*
25 *implementation of restrictive measures, certain other* 14:46
26 *remedies are nevertheless open to the individual*
27 *believing himself to be under surveillance: He has the*
28 *opportunity of complaining to the G10 Commission and to*
29 *the Constitutional Court. Admittedly, the*

1 *effectiveness of these remedies is limited and they*
2 *will in principle apply only in exceptional cases.*
3 *However, in the circumstances of the present*
4 *proceedings, it is hard to conceive of more effective*
5 *remedies being possible."*

14:46

6
7 So, Judge, that's the case of Klass. As I said it
8 still remains one of *the* most important, if not the
9 most important case and is frequently cited by the
10 court as the court will see.

14:47

11
12 Can I ask the court then to go on a case that I only
13 need to spend a very short amount of time on and that's
14 at Tab 40, it's the case of Silver. This was a case, a
15 little bit different to a surveillance case, it was a
16 case about prisoners whose letters had been intercepted
17 by the prison authorities and they were complaining
18 that that was a breach of their Article 8 rights. And
19 there is just one part of this case I would like the
20 court to look at and that's at page 28.

14:47

14:47

21
22 In fact it's in the context, just at the bottom of page
23 27 you will see the heading is "*Article 13 taken in*
24 *conjunction with Article 8*", so again we're looking at
25 the remedies. I should say that the court had already
26 concluded that there had been a violation of Article 8
27 in some cases but not in others in relation to the
28 treatment of individual letters. And then going to the
29 Article 13 point you'll see there that the court,

14:47

1 turning over the page, at paragraph 113:

2
3 *"The principles that emerge from the Court's*
4 *jurisprudence on the interpretation of Article 13*
5 *include the following."* 14:48

6
7 And then there's a number of principles. The first is
8 that: *"where an individual has an arguable claim to be*
9 *the victim of a violation of the rights set forth in*
10 *the Convention, he should have a remedy before a* 14:48
11 *national authority."*

12
13 And (b): *"The authority referred to in Article 13 may*
14 *not necessarily be a judicial authority."*

15 14:48
16 I think you have already seen that in the previous
17 case.

18
19 And then, importantly, this is the part that I would
20 like to draw the court's attention to: *"Although no* 14:48
21 *single remedy may itself entirely satisfy the*
22 *requirements of Article 13, the aggregate of remedies*
23 *provided for under domestic law may do so."*

24
25 And the court will be familiar that one of the DPC's 14:48
26 complaints was that there was a fragmentation of
27 remedies, and we say that that is not problematic in
28 the European context, an aggregate of different
29 remedies is permissible and again in Leander, the next

1 case I'm about to come up, we see the court saying the
2 same thing again. So there isn't a requirement under
3 the Convention at least to have one sole unified route
4 and remedy and it is permissible to have an aggregate.

14:49

5
6 Judge, can I then ask the court please to turn on to
7 the Leander case that I have just mentioned. And again
8 this was a case, not so much about surveillance in the
9 sense that this court has been looking at it, but
10 rather it was in relation to information that had been
11 kept about the applicant which he was not permitted to
12 see in the context of a job application.

14:49

13
14 So just turning then to Tab 41 you'll see the case of
15 Leander -v- Sweden. This was a person who had got a
16 job as a museum technician with the Naval museum. He
17 was then refused permanent employment with that museum
18 on account of certain secret information which
19 allegedly made him a security risk. He said that the
20 vetting that had taken place on him involved an attack
21 on his reputation and he should have had the
22 opportunity of defending himself before a tribunal, and
23 the question was whether or not there was a breach of
24 Article 8 and of Article 13 in that respect.

14:49

14:49

25
26 And if I can ask the court just to turn please to page
27 15, and again we see the test that already the court is
28 becoming familiar with, i.e. whether or not the
29 restriction was necessary in a democratic society in

14:50

1 the interests of national security. And if I could ask
2 the court to take it up at paragraph 58 at the top of
3 page 15.

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

5 **MS. HYLAND:** And he says there, I beg your pardon, the 14:50
6 court says there:

7
8 *"The notion of necessity implies that the interference*
9 *corresponds to a pressing social need and, in*
10 *particular, that it is proportionate to the legitimate*
11 *aim pursued.*

12
13 *59. However, the Court recognises that the national*
14 *authorities enjoy a margin of appreciation, the*
15 *scope of which will depend not only on the nature of*
16 *the legitimate aim pursued but also on the*
17 *particular nature of the interference involved. In the*
18 *instant case, the interest of the respondent State*
19 *in protecting its national security must be balanced*
20 *against the seriousness of the interference with*
21 *the applicant's right to respect for his private life.*

22
23 *There can be no doubt as to the necessity, for the*
24 *purpose of protecting national security, for the*
25 *Contracting States to have laws granting the competent*
26 *domestic authorities power, firstly, to collect*
27 *and store in registers not accessible to the public*
28 *information on persons and, secondly, to use this*
29 *information when assessing suitability."*

1 And then the court notes in the next paragraph that the
2 contested interference adversely affected his
3 legitimate interests in respect of access to certain
4 sensitive posts.

5
6 And the court then went on to say: "*In these*
7 *circumstances, the Court accepts that the margin of*
8 *appreciation available to the respondent State in*
9 *assessing the pressing social need in the present case,*
10 *and in particular in choosing the means for achieving*
11 *the legitimate aim of protecting national security, was*
12 *a wide one.*"

13
14 60. *Nevertheless, in view of the risk that a system of*
15 *secret surveillance for the protection of national*
16 *security poses of undermining or even destroying*
17 *democracy on the ground of defending it, the Court*
18 *must be satisfied that there exist adequate and*
19 *effective guarantees against abuse."*

20
21 And the court will recognise that from **Klass**.

22
23 "*61. The applicant maintained that such guarantees*
24 *were not provided to him under the Swedish*
25 *personnel control system, notably because he was*
26 *refused any possibility of challenging the*
27 *correctness of the information concerning him.*"

28
29 62. *The Government invoked twelve different*

1 *safeguards, which, in their opinion, provided adequate*
2 *protection when taken together:*

3
4 *(i) the existence of personnel control as such is made*
5 *public;*

6 *(ii) there is a division of sensitive posts into*
7 *different security classes;*

8 *(iii) only relevant information may be collected and*
9 *released;*

10 *(iv) a request for information may only be made with*
11 *regard to the person whom it is intended to appoint;*

14:52

12 *(v) parliamentarians are members of the National Police*
13 *Board."*

14
15 And, sorry, the National Police Board were the body,
16 Judge, that had compiled the information and provided
17 the information.

14:52

18
19 "*Information may be communicated to the person in*
20 *question; the Government did, however, concede that no*
21 *such communication had ever been made, at least under*
22 *the provisions in force before 1983;*

14:52

23 *(vii) the decision whether or not to appoint the person*
24 *in question rests with the requesting authority and not*
25 *with the National Police Board;*

14:52

26 *(viii) an appeal against this decision can be lodged*
27 *with the government;.*

28 *(ix) the supervision effected by the Minister of*
29 *Justice; Chancellor of Justice, Parliamentary Ombudsman*

1 *and the Parliamentary Committee on Justice.*

2
3 63. *The Court first points out that some of these*
4 *safeguards are irrelevant in the present case, since,*
5 *for example, there was never any appealable appointment* 14:53
6 *decision.*

7
8 64. *The Personnel Control Ordinance contains a number*
9 *of provisions designed to reduce the effects*
10 *of the personnel control procedure to an unavoidable*
11 *minimum. Furthermore, the use of the information on*
12 *the secret police register in areas outside personnel*
13 *control is limited, as a matter of practice, to cases*
14 *of public prosecution and cases concerning the*
15 *obtaining of Swedish citizenship."* 14:53

16
17 Then they go on to say, importantly: *"The supervision*
18 *of the proper implementation of the system is, leaving*
19 *aside the controls exercised by the Government itself,*
20 *entrusted both to Parliament and to independent*
21 *institutions.*

22
23 65. *The Court attaches particular importance to the*
24 *presence of parliamentarians on the National*
25 *Police Board and to the supervision effected by the*
26 *Chancellor of Justice and the Parliamentary*
27 *Ombudsman as well as the Parliamentary Committee on*
28 *Justice."*

1 And then the court identifies the involvement of the
2 parliamentary members of the board and their
3 participation.

4
5 And the court then goes on to say: "*The supervision* 14:53
6 *carried out - two paragraphs down - the supervision*
7 *carried out by the Parliamentary Ombudsman constitutes*
8 *a further significant guarantee against abuse,*
9 *especially in cases where individuals feel that their*
10 *rights and freedoms have been encroached upon.* 14:54

11
12 *As far as the Chancellor of Justice is concerned, it*
13 *may be in some matters he is the highest legal*
14 *adviser of the Government. However, it is the Swedish*
15 *Parliament which has given him his mandate to* 14:54
16 *supervise, amongst other things, the functioning of the*
17 *personnel control system. In doing so, he acts in much*
18 *the same way as the Ombudsperson and is, at least in*
19 *practice, independent of the government.*

20 14:54
21 *66. The fact that the information released to the*
22 *military authorities was not communicated to*
23 *Mr. Leander cannot by itself warrant the conclusion*
24 *that the interference was not 'necessary in a*
25 *democratic society in the interests of national*
26 *security', as it is the very absence of such*
27 *communication which, at least partly, ensures the*
28 *efficacy of the personnel control procedure.*
29

1 *The Court notes, however, that various authorities*
2 *consulted before the issue of the Ordinance of*
3 *1969, including the Chancellor of Justice and the*
4 *Parliamentary Ombudsman, considered it desirable*
5 *that the rule of communication to the person concerned,*
6 *as contained in section 13 of the Ordinance, should be*
7 *effectively applied in so far as it did not jeopardise*
8 *the purpose of the control.*

9
10 *67. The court, like the Commission, thus reaches the* 14:54
11 *conclusion that the safeguards contained in the Swedish*
12 *personnel control system meet the requirements of*
13 *paragraph 2 of Article 8. Having regard to the wide*
14 *margin of appreciation available to it, the respondent*
15 *State was entitled to consider that in the present case* 14:55
16 *the interests of national security prevailed over the*
17 *individual interests of the applicant. The*
18 *interference to which Mr. Leander was subjected cannot*
19 *therefore be said to have been disproportionate to the*
20 *legitimate aim pursued."* 14:55

21
22 And, Judge, we say that that's a very important case
23 from an *oversight* point of view. Because what one sees
24 there is that Mr. Leander was not entitled to look at
25 the information, he wasn't allowed to challenge it, he 14:55
26 wanted to do that and he couldn't do that. But there
27 were other bodies who were conducting an oversight
28 function and in particular the court identified the
29 Parliamentary Ombudsman, the Parliamentary Committee on

1 Justice and the Chancellor of Justice. And the court
2 accepted that these controls were effective restraint
3 on abuse and that, therefore, was sufficient so that
4 the decision was not held to be in breach of Article 8.

14:55

5
6 We say that the reason that's so important in this
7 context is because one cannot assume, as the DPC did,
8 that one simply looks at one particular remedy and once
9 that remedy, on her account, was held to be inadequate,
10 if you like the inquiry ends there. We say that,
11 consistent with the approach of the court in this case
12 and in all the cases we see, you must look at the
13 totality of the picture and that's what we see here.

14:56

14
15 Then just turning over, Judge, in relation to the
16 Article 13 point. Again we see Article 13 being
17 invoked by Mr. Leander. Turning over the page to page
18 18, just two paragraphs there. You'll see paragraph
19 78:

14:56

20
21 *"The court has held that Article 8 did not in the*
22 *circumstances require the communication to Mr. Leander*
23 *of the information on him released by the National*
24 *Police Board. The Convention is to be read as a whole*
25 *and any interpretation must be in harmony with the*
26 *logic of the Convention. Consequently, the Court,*
27 *consistently with its conclusion concerning Article 8,*
28 *holds that the lack of communication of this*
29 *information does not, of itself and in the*

14:56

1 *circumstances of the case, entail a breach of*
2 *Article 13."*

3
4 And then there is a reference to Article 13 and whether
5 or not there was an effective remedy. And you'll see 14:57
6 there that the court, going to paragraph 84, concludes
7 that: "*An effective remedy must be a remedy as*
8 *effective as can be, having regard to the restricted*
9 *scope for recourse inherent in any system of secret*
10 *surveillance for the protection of national security."* 14:57
11 And the court holds there was no breach of Article 13.

12
13 And can I ask the court then to turn on please to the
14 case of Weber and that's at Tab 42. Again this is
15 another German case and it's about the same law that 14:57
16 the court already looked at in the context of Klass,
17 but that law had been amended and extended in respect
18 of the possibilities of surveillance, and there was a
19 fresh, and this is now in 2006, and there was a fresh
20 challenge to that law. 14:58

21
22 Just looking at the first page of that case, Judge,
23 you'll see there that the first applicant Ms. Gabriele
24 Weber, is a German national, The second applicant,
25 Mr. Saravia, is a Uruguayan national. They both live 14:58
26 in Uruguay.

27
28 Then turning over, Judge, please, there's a description
29 of them, but essentially they worked for, oh yes,

1 turning over the page to page 2 paragraph 5.

2
3 *"5. The first applicant is a freelance journalist who*
4 *works for various German and foreign newspapers, radio*
5 *and television stations on a regular basis. In*
6 *particular, she investigates matters that are subject*
7 *to the surveillance of the Federal Intelligence*
8 *Service, notably armaments, preparations for war, drug*
9 *and arms trafficking and money laundering. In order to*
10 *carry out her investigations, she regularly travels to*
11 *different countries in Europe and South and Central*
12 *America, where she also meets the persons she wants to*
13 *interview.*

14
15 *6. The second applicant, an employee of Montevideo*
16 *City Council, submitted that he took messages for the*
17 *first applicant when she was on assignments, both from*
18 *her telephone and from his own telephone. He then*
19 *transmitted these messages to wherever she was."*

20
21 And if I could just ask the court then to skip on a
22 number of pages to page 9. I'm just going to identify
23 a few of the characteristics of the law in question
24 which are quite similar to what you have already seen
25 in the US context. So, looking at paragraph 32 of that 14:59
26 decision, you'll see there that:

27
28 *"The Federal Intelligence Service was only authorised*
29 *to carry out monitoring measures with the aid of*

1 *catchwords which served and were suitable for the*
2 *investigation of the dangers described in the*
3 *monitoring order. The second sentence of the provision*
4 *prohibited the catchwords from containing*
5 *distinguishing features allowing the interception of* 14:59
6 *specific telecommunications."*

7
8 A little bit like what you have already seen in the US
9 context. And then: "*However, this rule did not apply*
10 *to telephone connections situated abroad if it could be* 14:59
11 *ruled out that connections concerning German nationals*
12 *or German companies were deliberately being monitored*
13 *(third sentence). The catchwords had to be listed in*
14 *the monitoring order."*

15
16 And so one sees there that there is a different rule
17 applying depending on whether or not German nationals
18 are at issue or whether that's not the case. That's a
19 little bit like some of the minimisation procedures you
20 saw in the US context. I think the stenographers wish 15:00
21 to change, thank you.

22
23 Then just going on with the conditions:

24
25 "*The execution of the monitoring process as such had to*
26 *be recorded in minutes by technical means and was*
27 *subject to supervision by the G 10 Commission. The*
28 *data contained in these minutes could be used only for*
29 *the purposes of reviewing data protection and had to be*

1 *deleted at the end of the year following their*
2 *recording."*

3
4 So I'm not trying to draw an absolute parallel, because
5 the detail of that would be impossible in the time, but 15:01
6 just to show that the same kind of themes and the same
7 kind of issues arise in the context of this legislation
8 here as we've already been dealing with in the context
9 of the US system.

10
11 Then, Judge, can I ask the court to skip on please and
12 the court will see then that -- could I ask the court
13 to look please at paragraph 114? And it's at page 26.
14 And this was in the context of the court looking at the
15 purpose and necessity of the interference, going back 15:01
16 to the core question again. And starting at paragraph
17 114:

18
19 *"The Court is aware that the 1994 amendments to the*
20 *G 10 Act considerably extended the range of subjects in*
21 *respect of which so-called strategic monitoring could*
22 *be carried out under section 3(1), the central*
23 *provision at issue here. Whereas initially such*
24 *monitoring was permitted only in order to detect and*
25 *avert the danger of an armed attack on Germany, section*
26 *3(1) now also allowed strategic monitoring in order to*
27 *avert further serious offences listed in points 2 - 6*
28 *of that section. Moreover, technical progress now made*
29 *it possible to identify the telephone connections*

1 *involved in intercepted communications.*

2
3 *115. while the range of subjects in the amended G 10*
4 *Act is very broadly defined, the Court observes that...*
5 *a series of restrictive conditions had to be satisfied*
6 *before a measure entailing strategic monitoring could*
7 *be imposed. It was merely in respect of certain*
8 *serious criminal acts... that permission for strategic*
9 *monitoring could be sought."*

10
11 Then there's a description of what kind of permission
12 is required. And the permission is where there is a
13 reasoned application by the President of the Federal
14 Intelligence Service or his Deputy. And the decision
15 to monitor had to be taken by the federal minister 15:02
16 empowered for the purpose by the Chancellor - in fact a
17 little bit like the previous provisions in **Klass** that
18 we've already seen.

19
20 Then, Judge, turning over to paragraph 117, again we 15:02
21 see the supervision and monitoring. Again a bit like
22 **Klass**, there was still the Parliamentary Supervisory
23 Board and there was still the G10 Commission, which had
24 to authorise surveillance measures and had substantial
25 power in relation to all stages of interception. And 15:03
26 the court noted that in **Klass** it upheld that system of
27 supervision and it saw no reason to reach a different
28 conclusion.

1 Then again an issue that you saw in the context of the
2 US system, paragraph 124, the transmission of data to
3 various authorities. And you'll see here that the
4 authority, they say the Office For the Protection of
5 the Constitution as well as to other authorities, and 15:03
6 the applicants contended that this was an interference
7 with their rights.

8
9 If one turns over to page 30 and paragraph 128, you'll
10 see there that the court analyses the decision to 15:03
11 transfer, looks at the controls and decides the control
12 is sufficient. At paragraph 128 the court says:

13
14 *"... the decision to transmit data had to be taken by a*
15 *staff member of the Federal Intelligence Service*
16 *qualified to hold judicial office, who was particularly*
17 *well trained to verify whether the conditions for*
18 *transmission were met. Moreover, as clarified in the*
19 *Federal Constitutional Court's judgment, the*
20 *independent G 10 Commission's powers of review extended*
21 *to verifying that the statutory conditions for data*
22 *transmission were complied with."*

23
24 So again we're looking the an oversight body. Then,
25 Judge, in relation to this question of notification, if 15:04
26 I could ask the court to turn over to the next page,
27 page 31. And there is a long quote at paragraph 135
28 from Klass and from Leander, which the court has
29 already seen. And at paragraph 136 the court looks at

1 the situation under this legislation and notes that:

2
3 *"... individuals monitored were to be informed that*
4 *their telecommunications had been intercepted as soon*
5 *as notification could be carried out without*
6 *jeopardising the purpose of monitoring."*

7
8 The Court noted that:

9
10 *"The Federal Constitutional Court again strengthened*
11 *the safeguards against abuse... by preventing the duty*
12 *of notification from being circumvented."*

13
14 Then just going to the bottom of that paragraph, we're
15 still at the top -- sorry, we're top of page 32, but 15:05
16 just towards the bottom of that first paragraph:

17
18 *"The Court finds that the provision in question, as*
19 *interpreted by the Federal Constitutional Court,*
20 *therefore effectively ensured that the persons*
21 *monitored were notified in cases where notification*
22 *could be carried out without jeopardising the purpose*
23 *of the restriction of the secrecy of*
24 *telecommunications."*

25
26 Then the conclusion was that the respondent state,
27 within what the court described as its fairly wide
28 margin of appreciation in that sphere, was entitled to
29 consider the interferences with the secrecy as being

1 necessary in a democratic society.

2
3 Then just to ask the court to turn to page 36. We see
4 a somewhat different treatment of Article 13 which
5 appears to be now the present approach of the court 15:05
6 where they don't in fact have a separate analysis of
7 Article 13 any more; once they've looked at it in the
8 context of Article 8, they simply say that 'we have
9 done the analysis in an overall context and we don't
10 have a separate analysis'. And we see that here at 15:05
11 page 36. And at paragraph 156 at the bottom of the
12 page:

13
14 *"The Court has found that the substantive complaints*
15 *under Articles 8 and 10 of the Convention are*
16 *manifestly ill-founded. For similar reasons, the*
17 *applicants did not have an 'arguable claim' for the*
18 *purposes of Article 13, which is therefore not*
19 *applicable to their case."*

20
21 And they rejected the Article 13 claim on that basis.
22 Then if I could ask the court to look at an important
23 case, Kennedy. I suppose important from two respects;
24 first of all, I think it's a case --

25 **MS. JUSTICE COSTELLO:** Sorry, what number is Kennedy? 15:06

26 **MS. HYLAND:** I'm sorry, Judge, it's at tab 44. It's
27 just the one --

28 **MS. JUSTICE COSTELLO:** It's the next book for me.

29 **MS. HYLAND:** Oh, sorry, it's the next? Very good,

1 Judge. Apologies.

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

3 **MS. HYLAND:** And I suppose this case, we would identify
4 it as important for two reasons. First, it does give
5 some considerable detail, I think, to the standing 15:07
6 requirements of the court itself, the Court of Human
7 Rights itself, and the level of interest a person is
8 required to have in order to be allowed to bring their
9 case to the court.

10 15:07

11 And it's also relevant because it identifies the
12 situation in which a Member State - in this case the UK
13 - where they had no notification provisions, but
14 nonetheless their system was held to be compliant with
15 Article 8 because there was an entitlement to make a 15:07
16 complaint to the IPT, the Investigative Powers
17 Tribunal, which I suppose in some ways can be
18 analogised to FISA or to FISC; it's a court -- I will
19 ask the court to look at a judgment later on of that
20 court. One doesn't see -- it's certainly not as -- 15:07
21 only in recent years one is able to see the judgments.
22 There wouldn't be, I think, as many judgments available
23 as we've seen in the US context. But it is not
24 *dissimilar* in certain respects. So we say that the
25 case of Kennedy is important from that point of view. 15:07

26
27 The facts of this case were somewhat strange, Judge -
28 you can see them at page two. But essentially what had
29 happened was the applicant had been arrested for

1 drunkenness, had been put in a cell and in the morning
2 his cellmate was dead and he was charged with murder.
3 And that conviction was quashed, he was then retried
4 and he was convicted of manslaughter. He served, I
5 think, some nine years. He then was released and he
6 started a campaign for victims of miscarriage of
7 justice.

15:08

8
9 He was running a business called Small Moves, a removal
10 business, and he then began to experience interference
11 with his phone calls. He said he was getting hoax
12 calls and he was getting calls not being put through to
13 him and he said that he was being intercepted by the
14 police because of his history and also because of his
15 lobbying on behalf of victims of miscarriages of
16 justice. And it was in those circumstances he brought
17 a case challenging the surveillance that he alleged was
18 taking place in respect of him. And ultimately the
19 case made its way to the Court of Human Rights.

15:08

15:08

20
21 Can I just ask the court please to look at page six of
22 that judgment? And you'll see that his complaint --
23 well, sorry, I beg your pardon, could I ask the court
24 just, I beg your pardon, just to look at page three
25 first, just to see how it came about that he came
26 before the IPT? So paragraph eight at page three. He
27 made subject access requests to MI5 and GCHQ and the
28 object of the request was to discover whether
29 information about him was being processed by the

15:09

15:09

1 agencies and to obtain access to the content of the
2 information. And you'll see he made the access
3 requests under the Data Protection Act, which I think
4 is the first time in this case law we see that showing
5 up.

15:09

6
7 *"Both requests were refused on the basis that the*
8 *information requested was exempt from the disclosure*
9 *requirements of the 1998 Act on the grounds of national*
10 *security under certificates."*

15:09

11
12 He then lodged two complaints with the Investigatory
13 Powers Tribunal, the IPT. Then, Judge, asking the
14 court to turn on to page six at paragraph 20:

15
16 *"On 17 January 2005, the IPT notified the applicant*
17 *that no determination had been made in his favour in*
18 *respect of his complaints. This meant either that*
19 *there had been no interception or that any interception*
20 *which took place was lawful."*

21
22 You'll see then, going on, Judge, that there is a
23 reference to, at paragraph 22:

24
25 *"Under section 28 DPA, personal data is exempt from*
26 *disclosure under section 7(1) if an exemption is*
27 *required for the purpose of safeguarding national*
28 *security."*

29

1 Then, Judge, if I could ask the court to turn on to
2 page 36. And one sees a detailed discussion of the
3 standing issue. And taking it up at paragraph 122,
4 you'll see there:

5
6 *"Following Klass... and Malone, the former Commission,*
7 *in a number of cases against the United Kingdom in*
8 *which the applicants alleged actual interception of*
9 *their communications, emphasised that the test in Klass*
10 *and Others could not be interpreted so broadly as to*
11 *encompass every person in the United Kingdom who feared*
12 *that the security services may have conducted*
13 *surveillance of him. Accordingly, the Commission*
14 *required applicants to demonstrate that there was a*
15 *'reasonable likelihood' that the measures had been*
16 *applied to them."*

17
18 Then paragraph 123:

19
20 *"In cases concerning general complaints about*
21 *legislation and practice permitting secret surveillance*
22 *measures, the Court has reiterated the Klass and Others*
23 *approach on a number of occasions... where actual*
24 *interception was alleged, the Court has held that in*
25 *order for there to be an interference, it has to be*
26 *satisfied that there was a reasonable likelihood that*
27 *surveillance measures were applied to the applicant...*
28 *The Court will make its assessment in light of all the*
29 *circumstances of the case and will not limit its review*

1 to the existence of direct proof that surveillance has
2 taken place given that such proof is generally
3 difficult or impossible to obtain.
4

5 124. Sight should not be lost of the special reasons
6 justifying the Court's departure, in cases concerning
7 secret measures, from its general approach which denies
8 individuals the right to challenge a law in abstracto.
9 The principal reason was to ensure that the secrecy of
10 such measures did not result in the measures being
11 effectively unchallengeable and outside the supervision
12 of the national judicial authorities and the Court...
13 In order to assess, in a particular case, whether an
14 individual can claim an interference as a result of the
15 mere existence of legislation permitting secret
16 surveillance measures, the Court must have regard to
17 the availability of any remedies at the national level
18 and the risk of secret surveillance measures being
19 applied to him."
20

21 So this is the test, I think I described it earlier on
22 as somewhat involved. So in other words, this is the
23 test applicable when an applicant is challenging, if
24 you like, an across-the-board piece of legislation.
25 And the question as to whether or not the person is
26 allowed to do that before the Court of Human Rights
27 will depend on what the availability of remedies at the
28 national level looks like and also the risk of secret
29 surveillance measures being applied to him.

15:12

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In this particular case you'll see, Judge, that at paragraph 126 he said that calls were not put through to him and that he received hoax calls and this demonstrated a reasonable likelihood his communications were being intercepted. The Court disagreed that such allegations were sufficient to support the applicant's contention that his communications have been intercepted and it concluded that he had failed to demonstrate a reasonable likelihood there was actual interception in *his* case.

But then at paragraph 128, on a different basis, the court decided that he *should* be allowed to challenge. He says that under the provisions of RIPA - that was the relevant legislation:

"... any person within the United Kingdom may have his communications intercepted if interception is deemed necessary on one or more of the grounds [identified]. The applicant has alleged that he is at particular risk of having his communications intercepted as a result of his high-profile murder case, in which he made allegations of police impropriety... and his subsequent campaigning against miscarriages of justice. The Court observes that neither of these reasons would appear to fall within the grounds... However, in light of the applicant's allegations that any interception is taking place without lawful basis in order to intimidate

1 *him... the Court considers that it cannot be excluded*
2 *that secret surveillance measures were applied to him*
3 *or that he was... potentially at risk of being*
4 *subjected to such measures."*

5
6 So he was allowed to proceed. And I'll ask the court
7 then to go to page 51 please. Judge, there's an
8 important passage at 166, page 51, in relation to
9 oversight and the review of oversight under the Act and
10 under the system. And I'll just read that long 15:15
11 passage, because I think it is interesting in the
12 context of the UK system of legislation just to see the
13 level of, I suppose, detail the court goes into and
14 also what it thinks is important in terms of oversight.
15 So they note that: 15:15

16
17 *"As regards supervision of the RIPA regime, the Court*
18 *observes that apart from the periodic review of*
19 *interception warrants and materials by intercepting*
20 *agencies and, where appropriate, the Secretary of*
21 *State, the Interception of Communications Commissioner*
22 *established under RIPA is tasked with overseeing the*
23 *general functioning of the surveillance regime and the*
24 *authorisation of interception warrants in specific*
25 *cases. He has described his role as one of protecting*
26 *members of the public from unlawful intrusion into*
27 *their private lives, of assisting the intercepting*
28 *agencies in their work, of ensuring that proper*
29 *safeguards are in place to protect the public and of*

1 *advising the Government and approving the safeguard*
2 *documents... The Court notes that the Commissioner is*
3 *independent of the executive and the legislature and is*
4 *a person who holds or has held high judicial office...*
5 *He reports annually to the Prime Minister and his*
6 *report is a public document (subject to the*
7 *non-disclosure of confidential annexes) which is laid*
8 *before Parliament... In undertaking his review of*
9 *surveillance practices, he has access to all relevant*
10 *documents, including closed materials and all those*
11 *involved in interception activities have a duty to*
12 *disclose to him any material he requires".*

13 **MS. JUSTICE COSTELLO:** "Closed material", I presume,
14 that would be classified?

15 **MS. HYLAND:** I beg your pardon, Judge?

15:16

16 **MS. JUSTICE COSTELLO:** "Closed material", I presume, is
17 classified?

18 **MS. HYLAND:** Yes, exactly. That's right. Different
19 terminology, but the same principle.

20
21 *"The obligation on intercepting agencies to keep*
22 *records ensures that the Commissioner has effective*
23 *access to details of surveillance activities*
24 *undertaken. The Court further notes that, in practice,*
25 *the Commissioner reviews, provides advice on and*
26 *approves the section 15 arrangements... The Court*
27 *considers that the Commissioner's role in ensuring that*
28 *the provisions of RIPA and the Code are observed and*
29 *applied correctly is of particular value and his*

1 *biannual review of a random selection of specific cases*
2 *in which interception has been authorised provides an*
3 *important control of the activities of the intercepting*
4 *agencies and of the Secretary of State himself."*

5
6 And so many of the aspects of the activity there of the
7 Interception of Communications Commissioner echoes what
8 the court has already heard in the US context. For
9 example, if you look at the end: His biannual review of
10 a random selection of specific cases; I think the 15:17
11 precise same thing was done, is done in the US context.

12
13 Then, Judge, going on to paragraph 167, the court
14 refers to the desirability of supervisory controls to a
15 judge, you've seen that already in Klass. But the 15:18
16 court then goes on to say:

17
18 *"... the Court highlights the extensive jurisdiction of*
19 *the IPT to examine any complaint of unlawful*
20 *interception. Unlike in many other domestic systems" -*
21 *and the court refers to the G10 - "any person who*
22 *suspects that his communications have been or are being*
23 *intercepted may apply to the IPT... The jurisdiction*
24 *of the IPT does not, therefore, depend on notification*
25 *to the interception subject that there has been an*
26 *interception of his communications. The Court*
27 *emphasises that the IPT is an independent and impartial*
28 *body, which has adopted its own rules of procedure.*
29 *The members of the tribunal must hold or have held high*

1 *judicial office or be experienced lawyers... In*
2 *undertaking its examination of complaints by*
3 *individuals, the IPT has access to closed material" -*
4 the same point there, Judge - "*and has the power to*
5 *require the Commissioner to provide it with any*
6 *assistance it thinks fit and the power to order*
7 *disclosure by those involved in the authorisation and*
8 *execution of a warrant of all documents it considers*
9 *relevant... In the event that the IPT finds in the*
10 *applicant's favour, it can, inter alia, quash any*
11 *interception order, require destruction of intercept*
12 *material and order compensation to be paid... The*
13 *publication of the IPT's legal rulings further enhances*
14 *the level of scrutiny afforded to secret surveillance*
15 *activities in the United Kingdom."*

16
17 Judge, there is, I think, a parallel to be drawn
18 between that and the Ombudsman, or the Ombudsperson in
19 the Privacy Shield context. Because the Ombudsperson
20 again is independent, independent of the Intelligence 15:19
21 Community, it is the Under Secretary, it is entitled
22 when receiving a complaint to go to other bodies,
23 including, I think, PCLOB and the inspectors, who have
24 access to classified information, who must give it
25 assistance and there is no requirement for the 15:19
26 complainant to the Ombudsman to prove or to establish
27 that they have been the subject of interception or
28 surveillance.

1 So it's a very similar type approach. Rather than
2 putting a notification requirement in place, which the
3 court has seen in Klass may be some many years after
4 the event when it is eventually safe, considered safe
5 to notify people - so there is inherent limitations, if 15:20
6 you like, on the notification itself given the subject
7 matter; on the other hand, there is, if you like, a
8 closed procedure which the applicant or the complainant
9 doesn't have access into the workings of, but on the
10 other hand doesn't require to show that they have been 15:20
11 the subject of the surveillance and, by making a
12 complaint, sets in train a process which allows an
13 investigation done which safeguards the secrecy of the
14 information, but nonetheless, I suppose, permits a
15 control or a view of what has taken place. 15:20

16
17 So there are different ways to approach this issue, but
18 it's interesting to see that the court in this case
19 were satisfied with the method of control by the IPT.

20 15:21
21 And if one goes on, you'll see at paragraph 168 the
22 court observes the reports of the Commissioner
23 scrutinise any errors which have occurred in the
24 operation of the legislation. And I drew your
25 attention to the fact that that, in the US context, 15:21
26 also takes place.

27
28 *"In his 2007 report, the Commissioner commented that*
29 *none of the breaches or errors identified were*

1 *deliberate and that, where interception had, as a*
2 *consequence of human or technical error, unlawfully*
3 *taken place, any intercept material was destroyed as*
4 *soon as the error was discovered... There is therefore*
5 *no evidence that any deliberate abuse of interception*
6 *powers is taking place."*

7
8 And you'll see there then that the court goes on to
9 say:

10
11 *"... domestic law on interception... together with the*
12 *clarifications brought by the publication of the Code*
13 *indicate... the procedures... The Court further*
14 *observes that there is no evidence of any significant*
15 *shortcomings in the application and operation of the*
16 *surveillance regime. On the contrary, the various*
17 *reports of the Commissioner have highlighted the*
18 *diligence with which the authorities implement RIPA and*
19 *correct any technical or human errors... Having regard*
20 *to the safeguards against abuse in the procedures as*
21 *well as the more general safeguards offered by the*
22 *supervision of the Commissioner and the review of the*
23 *IPT, the impugned surveillance measures... are*
24 *justified under 8(2)."*

25
26 And there was no violation. Then just turning to 58,
27 just to close off the article -- oh, sorry, before I
28 deal with Article 13, can I just identify something of
29 interest in the context of Article 6? Now, Article 6 is

1 not something that this court is concerned with, it's
2 the right to a fair trial and I don't believe it's been
3 part of this case at all. But when the court was
4 looking at *that* alleged breach in this context, I think
5 there is something of interest.

15:22

6
7 At page 58 you will see there - and it's a little bit
8 like the suppression remedy in Article 1806 that the
9 court heard so much about - asking the court to take it
10 up please at paragraph 187, which is just at the bottom
11 of page 57.

15:22

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

13 **MS. HYLAND:** You'll see the court says:

14
15 *"... the Court recalls that the entitlement to*
16 *disclosure of relevant evidence is not an absolute*
17 *right. The interests of national security or the need*
18 *to keep secret methods of investigation of crime must*
19 *be weighed against the general right to adversarial*
20 *proceedings... The Court notes that the prohibition on*
21 *disclosure set out in Rule 6(2) admits of exceptions,*
22 *set out in Rules 6(3) and (4). Accordingly, the*
23 *prohibition is not an absolute one. The Court further*
24 *observes that documents submitted to the IPT in respect*
25 *of a specific complaint, as well as details of any*
26 *witnesses who have provided evidence, are likely to be*
27 *highly sensitive, particularly when viewed in light of*
28 *the Government's 'neither confirm nor deny' policy.*
29 *The Court agrees with the Government that, in the*

1 *circumstances, it was not possible to disclose redacted*
2 *documents or to appoint special advocates as these*
3 *measures would not have achieved the aim of preserving*
4 *the secrecy of whether any interception had taken*
5 *place. It is also relevant that where the IPT finds in*
6 *the applicant's favour, it can exercise its discretion*
7 *to disclose such documents and information under Rule*
8 *6(4)."*

9
10 And it *is* interesting there that the special advocates 15:23
11 were held *not* to be possible to appoint. In fact, as
12 you've seen in the US context, now in the US there *is*
13 special advocates being appointed before the FISC.

14
15 Then just finishing off, Judge, the last page, page 60, 15:24
16 you'll see there that there's a reference to Article 6
17 and there's -- I beg your pardon, Article 13. And
18 there's no separate identification of breach of Article
19 13.

20 15:24
21 Then the last two cases, Judge, cases of Zakharov and
22 Zabo. This was a Russian and a Hungarian case
23 respectively. And if I could just ask the court to
24 look at tab 45? This was a Russian lawyer who was
25 challenging the -- I beg your pardon, he was not a 15:24
26 Russian lawyer, I think he was in fact, he was a
27 journalist in fact, I beg your pardon, he was being
28 represented by an NGO. But if I can ask the court just
29 to turn to page two, you'll see there was the

1 editor-in-chief of a publishing company and of an
2 aviation magazine and he was chairperson of Glasnost
3 Defence Foundation, an NGO monitoring the state of
4 media freedom in the Russian regions which promotes the
5 independence of the regional mass media.

6
7 Interestingly, Judge, his initial challenge was against
8 mobile network operators, not the government as such.
9 You'll see paragraph 10:

10
11 *"... he brought judicial proceeding against three*
12 *mobile network operators, claiming that there had been*
13 *an interference with his right to the privacy of his*
14 *telephone communications. He claimed that pursuant to*
15 *Order no. 70... the mobile network operators had*
16 *installed equipment which permitted the... the FSB to*
17 *intercept all telephone communications without prior*
18 *judicial authorisation. The applicant argued that*
19 *Order no. 70, which had never been published, unduly*
20 *restricted his right to privacy."*

21
22 And he sought an injunction. And I wonder can I ask
23 the court please to go then to paragraph one hundred
24 and -- no, sorry, that's not the one. Could I ask the
25 court to look at page 24? And the paragraph number is
26 paragraph 118. And you'll see there a description of
27 the type of interception, two types of interception -
28 total interception and statistical monitoring:
29

15:25

1 *"Total interception is the real-time interception of*
2 *communications data and of the contents of all*
3 *communications to or by the interception subject.*
4 *Statistical monitoring is real-time monitoring of*
5 *communications data only, with no interception of the*
6 *content of communications. Communications data include*
7 *the telephone number called, the start and end times...*
8 *supplementary services used, location of the*
9 *interception subject and his or her connection status."*

10
11 And the court will be very familiar with that, the
12 difference between content-based interception and, if
13 you like, meta-data, which is something the court has
14 seen again already in the US context.

15
16 Then if I could ask the court to move on please to
17 paragraph 147. And I'm just showing the court there
18 that there's a reference by the court to the Digital
19 Rights decision. Then I don't think I need to open
20 that, the court is familiar with that, but just to show 15:26
21 that the court is looking at Digital Rights there.

22
23 Then moving on to paragraph 167. And we're back then
24 to the standing point. And the court has already
25 looked at the dicta in Klass and in Kennedy. 15:27

26
27 Can I ask the court to look at paragraph 171? And
28 you'll see there the court says:
29

1 *"In the Court's view the Kennedy approach is best*
2 *tailored to the need to ensure that the secrecy of*
3 *surveillance measures does not result in the measures*
4 *being effectively unchallengeable and outside the*
5 *supervision of the national judicial authorities and of*
6 *the Court."*

7
8 Then the court repeats its analysis in Kennedy. And
9 then at the bottom of the page, paragraph 172:

10
11 *"The Kennedy approach therefore provides the Court with*
12 *the requisite degree of flexibility to deal with a*
13 *variety of situations which might arise in the context*
14 *of secret surveillance, taking into account the*
15 *particularities of the legal systems in the member*
16 *States, namely the available remedies, as well as the*
17 *different personal situations of applicants."*

18
19 Then, Judge, if I could ask the court to go on to page
20 57? And you'll see at paragraph 231 the court
21 identifies that:

15:27

22
23 *"In its case-law on secret measures of surveillance,*
24 *the Court has developed the following minimum*
25 *safeguards that should be set out in law in order to*
26 *avoid abuses of power: The nature of offences which may*
27 *give rise to an interception order; a definition of the*
28 *categories of people liable to have their telephones*
29 *tapped; a limit on the duration of telephone tapping;*

1 *the procedure to be followed for examining, using and*
2 *storing the data obtained; the precautions to be taken*
3 *when communicating the data to other parties; and the*
4 *circumstances in which recordings may or must be erased*
5 *or destroyed."*

6
7 Then, Judge, turning on to page 62, a curiosity in this
8 case. Because ultimately the court found that the
9 Russian system was very deficient and was *not* in
10 compliance with Article 8(2). But at paragraph 249 15:28
11 there *was* in fact a *judicial* authorisation system for
12 warrants, which again I think shows the importance of
13 not taking any particular aspect of the scheme out of
14 context. Because you might've said, or you might've
15 expected that where you had judicial authorisation, the 15:29
16 court has already said in Klass it's desirable but not
17 required and that, therefore, judicial authorisation
18 would tick the box, as it were, because in Russia that
19 *was* a requirement. But in fact the court went on to
20 look at the practice in Russia and it became clear that 15:29
21 in fact the judicial authorisation was *not* sufficient,
22 because the judges were not sufficiently independent
23 and did not have the information they needed to *make*
24 the decision, so it was effectively a tick-box
25 exercise. So that was as a result of the court looking 15:29
26 in some considerable detail at the practice in Russia,
27 as well as the actual legislative requirements.

28
29 Judge, can I then ask the court to move on please to

1 page 256 -- I beg your pardon, paragraph 256? Paragraph
2 256 identifies some of the concerns that the court has.
3 You'll see there that the court noted a concern that:

4
5 *"Russian law allows unlimited discretion to the trial*
6 *judge to store or to destroy the data used in evidence*
7 *after the end of the trial... Russian law does not*
8 *give citizens any indication as to the circumstances in*
9 *which the intercept material may be stored after the*
10 *end of the trial. The court therefore considers that*
11 *the domestic law is not sufficiently clear on this*
12 *point."*

13
14 I think I can also just tell the court that at
15 paragraph 255 the court was concerned there was no 15:30
16 obligation to destroy irrelevant data and, at paragraph
17 252, there was no indication as to when measures were
18 to be discontinued. And these were causes for concern.

19
20 Paragraph 265; the courts had concerns because there 15:30
21 was no limitations on the authorisation measures. If I
22 could ask the court just to look at paragraph 265,
23 halfway down the paragraph:

24
25 *"... the OSAA does not contain any requirements either*
26 *with regard to the content of the request for*
27 *interception or to the content of the interception*
28 *authorisation... courts sometimes grant...*
29 *authorisations which do not mention a specific person*

1 *or telephone number to be tapped, but authorise*
2 *interception of all... communications in the area where*
3 *a criminal offence has been committed. [They] do not*
4 *mention the duration... such authorisations, which are*
5 *not clearly prohibited... grant a very wide discretion*
6 *to the law-enforcement authorities as to which*
7 *communications to intercept, and for how long."*

8
9 Then, Judge, at paragraph 275 the court repeated its
10 point about non-judicial bodies being acceptable, but 15:31
11 as long as they were sufficiently independent and had
12 sufficient powers and competence.

13
14 The court then went on at paragraph 279 to express
15 concern about Russian prosecutors who supervised 15:31
16 interceptions. But you'll see there at 279 the court
17 noted that:

18
19 "*... in Russia prosecutors are appointed and dismissed*
20 *by the Prosecutor General after consultation... This*
21 *fact may raise doubts as to their independence from the*
22 *executive."*

23
24 Then paragraph 284; the court noted that it was for the
25 government to show the practical effectiveness of 15:32
26 supervision arrangements. And again this goes to
27 practice, as opposed to law, or as opposed to
28 legislation. Paragraph 284:

1 in particular the control, what we're looking at here,
2 the supervision arrangements and the prosecutors'
3 ability to access classified material, that's obviously
4 a very important point.

5
6 Then, Judge, you'll see in relation to notification,
7 paragraph 287, there is a point about Klass and I think
8 there's a quote from Klass that the court has already
9 seen in relation to the difficulties of notification
10 and how it may be many, many years before one can
11 actually be notified.

12
13 Then at paragraph 288 the court indicates that in
14 certain circumstances though the absence of a
15 requirement to notify may cause a breach of 8(2). And
16 one sees in all of these cases there are no per se
17 rules, the court always looks at the totality of the
18 circumstances. So at paragraph 288 there's quotations
19 from the various cases that the court has already seen
20 and about two-thirds of the way down the paragraph
21 there's a reference to a case the court hasn't seen --
22 I'm sorry, about halfway down the paragraph, reference
23 to a case the court hasn't seen, Association For
24 European Integration on Human Rights and Popescu:

25
26 "... the court found that the absence of a requirement
27 to notify the subject of interception at any point was
28 incompatible with the Convention, in that it deprived
29 the interception subject of an opportunity to seek

1 *redress for unlawful interferences with his or her*
2 *Article 8 rights and rendered the remedies... [illusory*
3 *and theoretical]... The national law thus eschewed an*
4 *important safeguard against the improper use of special*
5 *means of surveillance... By contrast, in the case of*
6 *Kennedy" - and that's a case the court has looked at -*
7 *"the absence of a requirement to notify the subject of*
8 *interception at any point in time was compatible with*
9 *the Convention, because in the United Kingdom any*
10 *person who suspected that his communications were being*
11 *or had been intercepted could apply to the*
12 *Investigatory Powers Tribunal, whose jurisdiction did*
13 *not depend on notification to the interception subject*
14 *that there had been an interception of his or her*
15 *communications."*

16
17 The court then, at paragraph 289:

18
19 *"Turning now to the circumstances of the present case,*
20 *the Court observes that in Russia persons whose*
21 *communications have been intercepted are not notified*
22 *of this fact at any point or under any circumstances.*
23 *It follows that, unless criminal proceedings have been*
24 *opened... and the intercepted data have been used in*
25 *evidence, or unless there has been a leak, the person*
26 *concerned is unlikely ever to find out if his or her*
27 *communications have been intercepted."*

28
29 The court then went on to note that there was an

1 entitlement to seek information, but noted that in
2 order to lodge such a request, you had to be in
3 possession of the facts of the search measures. So
4 again that was conditional on the person's ability to
5 prove his or her communications were intercepted. 15:36

6
7 At paragraph 291 the court says:

8
9 *"The Court will bear the above factors - the absence of*
10 *notification and the lack of an effective possibility*
11 *to request and obtain information about interceptions*
12 *from the authorities - in mind when assessing the*
13 *effectiveness of remedies available under Russian law."*

14
15 Then there is a reference at paragraph 292 to a 15:36
16 hierarchical appeal to a direct supervisor did not meet
17 the requisite standards of independence. And at
18 paragraph 293, the Russian government put forward some
19 other judicial procedures, the court went through them.
20 But ultimately the court decided that at paragraph 300: 15:36

21
22 *"... the Court finds that Russian law does not provide*
23 *for effective remedies to a person who suspects that he*
24 *or she has been subjected to secret surveillance. By*
25 *depriving the subject of interception of the effective*
26 *possibility of challenging interceptions*
27 *retrospectively, Russian law thus eschews an important*
28 *safeguard against the improper use of secret*
29 *surveillance measures."*

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In those circumstances, in *all* of the circumstances, all of the various different points that the court has already looked at, some of which I've identified to you, the court found that there was a violation of Article 8. They didn't, the court didn't go on to identify a separate violation of Article 13, having regard to its findings on remedies at 286 to 300 that I've identified to the court.

15:37

15:37

Can I just ask then the court finally to look at Zabo? And that's at tab 46. Zabo, I suppose, is of particular interest because it refers to the Venice Commission. And I think the court has heard once about the Venice Commission report on surveillance by Prof. Swire - it's a 2007 report. And the Venice Commission is a body of the Council of Europe and it, I think, has been set up to promote democracy, particularly -- I think it was originally set up to promote democracy in former communist countries and it carries out research and studies and makes recommendations. And it has, as I say, done a 2007 report. And there are important extracts from that report in the case of Zabo which I'm going to just ask the court to look at.

15:37

15:38

15:38

But just to deal with the facts in Zabo. There were two Hungarians. They were a member of an NGO which voiced criticism of the government - and again I think

1 it's striking how much the cases and the people who are
2 taking these cases mirror what the court has already
3 seen in the US context, the ACLU, Amnesty, Privacy, all
4 of these different bodies, the NGOs seeking to identify
5 challenges to surveillance measures. And one sees it 15:38
6 on both sides of the Atlantic.

7
8 If I could ask the court then to look first then at the
9 summary on the Venice Commission, and that may be found
10 at paragraph 21 of the judgment, which is in fact to be 15:38
11 found at page 15. Judge, you'll see there at paragraph
12 21 "*The Report on the Democratic oversight of the*
13 *Security Services adopted by the Venice Commission*" and
14 it contains the following passages. And there's a
15 reference at paragraphs 81 and 82 to national security 15:39
16 policy.

17
18 Then at paragraph 130, "*Internal and Governmental*
19 *Controls as part of overall accountability systems.*"
20 and this is very important, in my submission, how the 15:39
21 Venice Commission characterise the primary guarantee
22 against abuse of power, not litigation, not remedies by
23 individuals, but rather, at paragraph 130:

24
25 "*Internal control of security services is the primary*
26 *guarantee against abuses of power, when the staff*
27 *working in the agencies are committed to the democratic*
28 *values of the State and to respecting human rights.*
29 *External controls are essentially to buttress the*

1 *internal controls and periodically ensure these are*
2 *working properly."*

3
4 Then moving on, Judge, to Parliamentary accountability:

5
6 *"There are several reasons why parliamentarians should*
7 *be involved in the oversight of security agencies.*
8 *Firstly, the ultimate authority... of security agencies*
9 *is derived from legislative approval of their powers,*
10 *operations and expenditure. Secondly, there is a risk*
11 *that the agencies may serve narrow political or*
12 *sectional interests, rather than the State as a*
13 *whole... if democratic scrutiny does not extend to*
14 *them."*

15
16 Then paragraph 153:

17
18 *"... the most frequent arrangement is for parliament to*
19 *establish a single oversight body for all the major*
20 *security and intelligence agencies, rather than having*
21 *multiple oversight bodies."*

22
23 Then the next heading, "Judicial Review and
24 Authorisation":

25
26 *"195. Judicial control over internal security services*
27 *can take different forms. First, there is prior*
28 *authorisation... and/or post hoc review, of special*
29 *investigative measures, such as telephone tapping,*

1 *bugging and video surveillance. This is the normal*
2 *practice in European States."*

3
4 Then "Accountability to Expert Bodies"; they can serve
5 either as a supplement or replacement for parliamentary 15:40
6 bodies or judicial accountability and the Venice
7 Commission then weighs up the pros and cons of having
8 this type of expert body.

9
10 Then under the heading "Complaints Mechanisms": 15:41

11
12 "*... it is necessary for individuals who claim to have*
13 *been adversely affected by the exceptional powers of*
14 *security and intelligence agencies, such as*
15 *surveillance or security clearance, to have some avenue*
16 *for redress. Quite apart from strengthening*
17 *accountability, complaints may also help to lead to*
18 *improved performance by the agencies through*
19 *highlighting administrative failings. The requirements*
20 *of human rights treaties, and especially the European*
21 *Convention... with its protections of fair trial,*
22 *respect for private life and the requirement of an*
23 *effective remedy must obviously also be borne in mind."*

24
25 Then, Judge, paragraph 242: 15:41

26
27 "*Plainly, though, legitimate targets of a security or*
28 *intelligence agency should not be able to use a*
29 *complaints system to find out about the agency's work.*

1 *A complaints system should balance, on the one hand,*
2 *independence, robustness and fairness, and, on the*
3 *other hand, sensitivity to security needs. Designing*
4 *such a system is difficult but not impossible."*

5
6 So again -- well, I'll go on to finish and then I'll
7 comment on that. Paragraph 243:

8
9 *"Individuals who allege wrongdoing by the State in*
10 *other fields routinely have a right of action for*
11 *damages before the courts. The effectiveness of this*
12 *right depends, however, on the knowledge of the*
13 *individual of the alleged wrongful act, and proof to*
14 *the satisfaction of the courts. As already mentioned,*
15 *for a variety of reasons, the capacity of the ordinary*
16 *courts to serve as an adequate remedy in security*
17 *fields is limited. The case law of the European Court*
18 *of Human Rights ... makes it very clear that a remedy*
19 *must not simply be on paper."*

20
21 Judge, in our submission, that is terribly important.
22 It's an inescapable fact that the capacity of the
23 ordinary courts to serve as an adequate remedy in this
24 field is limited. And that cannot be ignored. And we
25 say that overwhelmingly obvious fact was ignored by the 15:42
26 DPC, and that rendered her draft decision hugely
27 problematic, because she didn't engage with the subject
28 matter.

1 Paragraph 244:
2

3 *"An alternative is to allow an investigation and report*
4 *into a complaint against an agency by an independent*
5 *official, such as an ombudsman...*

6
7 *245. In these ombudsman-type systems, the emphasis is*
8 *on an independent official investigating on behalf of*
9 *the complainant. These independent offices usually*
10 *exist to deal with an administrative failure by public*
11 *bodies, rather than a legal error. Their*
12 *investigations may give less emphasis to the*
13 *complainant's own participation in the process and to*
14 *transparency than would be the case with legal*
15 *proceedings. Typically an investigation of this type*
16 *will conclude not with a judgment and formal remedies,*
17 *but with a report, and (if the complaint is upheld) a*
18 *recommendation for putting matters right and future*
19 *action...*

20
21 *246. A less common variation is for a State to use a*
22 *parliamentary or expert oversight body to deal with*
23 *complaints and grievances of individuals... There may*
24 *be a benefit for a parliamentary oversight body in*
25 *handling complaints brought against security and*
26 *intelligence agencies since this will give an insight*
27 *into potential failures of policy, legality and*
28 *efficiency. On the other hand, if the oversight body*
29 *is too closely identified with the agencies it oversees*

1 *or operates within the ring of secrecy, the complainant*
2 *may feel that the complaints process is insufficiently*
3 *independent. In cases where a single body handles*
4 *complaints and oversight it is best if there are quite*
5 *distinct legal procedures for these different roles."*

6
7 Then just turning on to the conclusion of Zabo, because
8 I'm conscious of time, Judge, and if I could ask the
9 court to look please at paragraph 86. And you'll see
10 there, Judge, that there is a question of remedies and 15:44
11 notification - again we come back to the same point.
12 At paragraph 86, you'll see at the bottom of paragraph
13 86 there's a reference to Weber and Zakharov and then
14 there's a point taken that in Hungarian law:

15
16 *"No notification, of any kind, of the measures is*
17 *foreseen. This fact, coupled with the absence of any*
18 *formal remedies in case of abuse, indicates that the*
19 *legislation falls short of securing adequate*
20 *safeguards."*

21
22 So in that case the *absence* of notification, *along* with
23 the absence of formal remedies in case of abuse
24 indicated that the legislation fell short.

25
26 Paragraph 88:

27
28 *"... the Court notes that is for the Government to*
29 *illustrate the practical effectiveness of the*

1 *supervision arrangements with appropriate examples...*
2 *However, the Government were not able to do so in the*
3 *instant case.*

4
5 *89. In total sum, the Court is not convinced that the*
6 *Hungarian legislation on 'section 7/E(3) surveillance'*
7 *provides safeguards sufficiently precise, effective and*
8 *comprehensive on the ordering, execution and potential*
9 *redressing of such measures."*

10
11 And I've just brought the court to the end, but there
12 is other flaws in the legislation that have been
13 identified. And, Judge, ultimately the court held that
14 there was a breach of 8(2).

15
16 Now, Judge, in the time that we have left, I wonder can
17 I ask the court to start looking at the FRA report? And
18 I know the court has heard a great deal about it and I
19 think there may be time to let the court actually look
20 at it. And it may be found, Judge, in book - sorry, I
21 just want to make sure I have the right book,
22 because...

23 **MS. JUSTICE COSTELLO:** well, the tab will help.

24 **MS. HYLAND:** The tab will help, exactly. It's
25 exhibited to the affidavit of Jeffrey Robertson.

26 **MR. GALLAGHER:** 61.

27 **MS. HYLAND:** Tab 61, yes. Judge, I'm sorry, there's
28 another -- it can be found, certainly in my book,
29 Judge, at tab 11. So this is the early books of the

1 affidavits and it's Jeffrey Robertson.

2 **MS. JUSTICE COSTELLO:** Well, if this is the
3 "Surveillance By Intelligence Services: Fundamental
4 Safeguards and Remedies in the EU", I have that.
5 Thanks. 15:46

6 **MS. HYLAND:** Exactly. That's right, exactly, Judge.
7 Just before I open it, can I just identify for the
8 court please who the FRA are and the legal basis
9 pursuant to which they were set up? And I'm just going
10 to hand in to the court the regulation whereby they 15:46
11 were set up in 2007 (Same Handed). And I don't need to
12 detain the court on this, but I think it's just to show
13 the court, as I already mentioned, that they are an
14 official body of the European Union.

15 15:47
16 You'll see that it was a Council Regulation that set
17 them up on 15th February 2007. And just turning to
18 page four of that document, you'll see that the
19 objective is set out at Article 2. And the objective
20 is to provide the relevant institutions, bodies, 15:47
21 offices and agencies of the Community and its Member
22 States, when implementing Community law, with
23 assistance and expertise relating to fundamental rights
24 in order to support them when they take measures or
25 formulate courses of action within their respective 15:47
26 spheres of competence to fully respect fundamental
27 rights.

28
29 So that is what they are charged with doing. And the

1 council determines a multi-annual framework for the FRA
2 in five-year increments. And this increment is 2013 to
3 2017. And the respect for private life and protection
4 of personal data was selected as one of the thematic
5 areas, which I suppose is fortunate for us in this 15:48
6 particular context.

7
8 There's a number of different activities they're tasked
9 with; they're tasked with collecting, analysing and
10 disseminating reliable and comparable information and 15:48
11 data, they're tasked with formulating and publishing
12 conclusions on particular topics and also with raising
13 public awareness of fundamental rights.

14
15 If I could just ask the court then to look at the 15:48
16 introduction to this report and just to see the context
17 in which the report was done. And as I said, they had
18 been specifically asked to do so by the European
19 Parliament following the Snowden disclosures. And just
20 looking at the foreword, you'll see that it's the first 15:48
21 part of the FRA's response to the European Parliament
22 request. It was the subject of -- you'll see in the
23 third paragraph:

24
25 *"The European Parliament responded with a resolution*
26 *which... calls on the [FRA] to research thoroughly*
27 *fundamental rights protection in the context of*
28 *surveillance, in particular in terms of available*
29 *remedies."*

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And this report is the first part. It aims to support the adoption and meaningful implementation of oversight mechanisms in the EU and its Member States. And again those words "oversight mechanisms", immediately we see them jumping out.

15:49

"It does so by analysing the legal frameworks on surveillance in place in EU Member States, focusing on so-called 'mass surveillance', which carries a particularly high potential for abuse. The report does not assess the implementation of the respective laws; instead, it maps the relevant legal frameworks in the Member States. It also details oversight mechanisms... outlines the work of entities... and presents the various remedies available to individuals."

The next page, Judge, is the country codes. It just shows that each of the 28 Member States has been the subject of the investigation. And then the introduction - I think I've already identified to you the context in which the request was made.

15:49

Then turning over the page -- Judge, the page numbers, by the way, are at the bottom of the page, variously the left-hand side and the right-hand side. Rather unfortunately, they're in a kind of a coloured band which makes it a bit hard to see then, but I hope the court can see them.

15:50

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Then, Judge, if I could ask the court to turn on please to page nine. And you'll see there that there's a reference to the European Court of Human Rights on the right-hand side, on the right hand column. And there's a reference to what you've already looked at, Article 8 and Article 13. 15:50

Then turning over the page, at page ten there's a reference to European Union law and there's a reference on the left-hand column to the Data Protection Directive, the E-Privacy Directive and the Framework Decision, all of which I think the court's attention has been drawn. And you'll see there that, at the bottom of that column: 15:51

"According to Article 52 (1) of the Charter, any limitation to this right must be necessary and proportionate, genuinely meet objectives of general interest recognised by the Union, be provided by law, and respect the essence of such rights."

Then on the right-hand column they deal with the national security exemption. And you'll see there it's stated: 15:51

"Applicability of these instruments" - and they're the instruments that have just been mentioned - "in the field of security is, however, subject to the specific

1 *legal and policy framework in the area and particularly*
2 *to the national security exemption. Article 4(2) of*
3 *the TEU provides that 'national security remains the*
4 *sole responsibility of each EU Member State'. This*
5 *exemption is reiterated both in Article 3(2) of the*
6 *Data Protection Directive and in Article 1(4) of*
7 *Framework Decision... which excludes 'essential*
8 *national security interests and specific intelligence*
9 *activities in the field of national security' from the*
10 *rules applicable to 'regular' law enforcement action."*

11
12 Judge, just in respect of that Framework Decision, in
13 2018, on the same date, I think, as the GDPR is coming
14 into effect, that will become the Law Enforcement
15 Directive. Because as the court knows, criminal law -- 15:52
16 that deals with criminal law and surveillance in the
17 criminal law context. It was in the form of a
18 Framework Decision because it was outside the four
19 walls of the EU. Its now, criminal law has now been
20 brought in and that's why it's now possible to make 15:52
21 that a Law Enforcement Directive, as opposed to being a
22 Framework Decision, which it previously was. And that
23 goes to the point that Mr. Gallagher made yesterday
24 whereby criminal law has now moved from being outside
25 the tent, as it were, to within the tent. And that's 15:52
26 not the case with national security.

27
28 *"The limits of the national security exemption are*
29 *subject to debate, including in relation to the*

1 *activities of intelligence services. Although*
2 *international guidelines exist, there is no uniform*
3 *understanding of 'national security' across the EU.*
4 *The concept is not further defined in EU legislation or*
5 *in CJEU case law, although the CJEU has stated that*
6 *exceptions to fundamental rights must be interpreted*
7 *narrowly and justified...*

8
9 *The lack of clarity on the precise scope of the*
10 *national security exemption goes hand in hand with the*
11 *varied and seldom clearly drawn line between the areas*
12 *of law enforcement and national security in individual*
13 *Member States. This is particularly true with*
14 *counter-terrorism."*

15
16 Then the court goes on -- the FRA goes on in the last
17 paragraph:

18
19 *"It falls outside the scope of this report to analyse*
20 *in great detail the extent of EU competence in this*
21 *field. However, the current situation is relevant not*
22 *only to surveillance and the rights of privacy and*
23 *personal data protection, but also to efforts at the EU*
24 *level in the area of internal security, in accordance*
25 *with Article 4(2)(j) of the TFEU, which defines the*
26 *area of freedom, security and justice as an area of*
27 *shared competences between the EU and the Member*
28 *States."*

1 Then, Judge, at the bottom of the column on the next
2 page:

3
4 *"This unclear delineation of 'national security' also*
5 *has repercussions for the applicability of EU law,*
6 *which depends both on the interpretation of the*
7 *national security exemption's scope and on the specific*
8 *characteristics of the various surveillance programmes*
9 *carried out by intelligence services. Although the*
10 *existence of such programmes remains largely unknown,*
11 *even in light of the Snowden revelations, some contain*
12 *elements that can justify the full applicability of EU*
13 *law. For instance, when EU companies transfer data to*
14 *intelligence services, including those of third*
15 *countries, they are considered under the Data*
16 *Protection Directive as data controllers who collect*
17 *and process data for their own commercial purposes.*
18 *Any subsequent data processing activities, such as the*
19 *transfer of personal data to intelligence services for*
20 *the purpose of the protection of national security,*
21 *will therefore fall within the scope of EU law. Any*
22 *limitations of the rights to privacy and personal data*
23 *protection should be examined according to Article 13*
24 *of the Data Protection Directive and Article 15 of the*
25 *e-Privacy Directive, as well as Article 52(1) of the*
26 *Charter."*

27
28 Judge, then:
29

1 *"The essence of the right to privacy and protection of*
2 *personal data shall at any rate be respected. The*
3 *'national security' exception thus cannot be seen as*
4 *entirely excluding the applicability of EU law. As the*
5 *UK Independent Reviewer of Terrorism Legislation*
6 *recently put it" - Judge, that's David Anderson, whose*
7 *report I'll be coming to briefly tomorrow - "'National*
8 *security remains the sole responsibility of each Member*
9 *State: But subject to that, any UK legislation*
10 *governing interception or communications data is likely*
11 *to have to comply with the EU Charter because it would*
12 *constitute a derogation from the EU directives in the*
13 *field'."*

14
15 Then, Judge, in relation to methodology - I think this 15:55
16 is particularly important - you'll see it was done
17 through desk research in all 28 EU Member States based
18 on a questionnaire submitted to the network.

19
20 *"Additional information was gathered through desk*
21 *research and exchanges with key partners, including a*
22 *number of FRA's national liaison officers in the Member*
23 *States and individual experts."*

24
25 Then there's an identification of the individual 15:55
26 experts. Can I ask the court then to turn to page 15
27 please? And we'll see there that there's some
28 descriptions of surveillance measures. And one of the
29 particularly helpful things about this report is that

1 there are diagrams, and I think that is perhaps a
2 useful way to understand some of the concepts.

3
4 But can I just ask you, before looking at the diagram,
5 just at the bottom of page 15, a very important point 15:55
6 that I think possibly has not been stressed
7 sufficiently:

8
9 *"For intelligence services, one of the key challenges*
10 *of collection is the quantity of data available. As*
11 *Lowenthal puts it, '[A]s of 2013, there are some 7*
12 *billion telephones worldwide [...] generating some 12.4*
13 *billion calls every day. Newer communications channels*
14 *add to the total. In the United States alone, 2.2*
15 *trillion text messages were sent in 2012, as well as*
16 *400 million tweets...' This requires important*
17 *budgetary investments that not all countries can*
18 *afford. Cousseran and Hayez identify the following EU*
19 *countries as having services with important capacities*
20 *that can afford SIGINT collection: The UK (5,500 staff*
21 *working at GCHQ), France (2,100 staff working at the*
22 *Directorate General of External Security... and 700*
23 *staff working at the Directorate of Military*
24 *Intelligence... Germany (1,000 staff working at the*
25 *BND) and Sweden... Brown et al. Add the Netherlands,*
26 *Italy and Spain to the list of Member States performing*
27 *SIGINT. The US National Research Council's analysis*
28 *shows that SIGINT requires discriminants (or selectors)*
29 *to make it possible to filter the data before its*

1 *storage, and further analysis by the intelligence*
2 *services... Figure 1 illustrates this process."*

3
4 And there's a helpful diagram, I think, Judge, which
5 identifies there that there's the signal extract, 15:57
6 filter, discriminant, store, query, analyse and
7 disseminate. So it's, if you like, an iterative
8 process, it's not simply one set of search terms, it is
9 continually being reduced downwards to make it
10 manageable. 15:57

11
12 Then, Judge, can I ask you to go please to page 20? And
13 page 20 differentiates between what the court is now
14 well familiar with, targeted surveillance and signals
15 intelligence. Different terms are used, I suppose, in 15:57
16 different reports by different agencies in different
17 jurisdictions, but the format that's used here is,
18 targeted surveillance is identified here as the
19 targeting of a particular individual, I think that is
20 what they are intending to mean by that. If the court 15:57
21 just looks there at the second paragraph headed
22 "Targeted Surveillance":

23
24 *"Targeted surveillance as regulated in the Member*
25 *States' laws refers to concrete targets upon suspicion*
26 *that an act falling within the remit of the*
27 *intelligence services' tasks could be committed before*
28 *a surveillance measure can be initiated. In several*
29 *Member States, such targets may either be a group of*

1 *people (defined through their relation to an*
2 *organisation or a legal person) or an individual."*

3
4 Then turning to 1.3.1.2, "Signals Intelligence":

5
6 *"FRA's analysis of the legal frameworks that regulate*
7 *surveillance methods used by intelligence services*
8 *shows that five Member States (France, Germany, the*
9 *Netherlands, Sweden and the United Kingdom) detail the*
10 *conditions that permit the use of both targeted*
11 *surveillance and signals intelligence. This report*
12 *focuses on these five Member States due to the*
13 *existence of detailed legislation on SIGINT. This does*
14 *not mean that this list is in any way exhaustive.*
15 *FRA's selection is based on the fact that this type of*
16 *collection is prescribed, in detail, in the law.*

17
18 *Three examples illustrate where the accessible law of a*
19 *Member State provides insufficient details to allow for*
20 *a legal analysis of the exact procedure in place on how*
21 *signals intelligence is collected."*

22
23 And there's then an identification of Italy, some of
24 the SIGINT activities in Germany and in France, the
25 French bill. So it's clear that the analysis is being
26 done where the FRA can do it, where there is
27 sufficiently clear legislative provisions in relation
28 to the collection of signals intelligence. But they
29 are clearly identifying that that is not necessarily

15:59

1 the case in all of the Member States and that there may
2 be situations where they -- sorry, they're saying there
3 are situations where they simply are not in a position
4 to carry out that analysis. And that is, of course,
5 hugely important. That goes to the very first of the 15:59
6 conditions you looked at under the Convention - in
7 accordance with law. In other words, it's something
8 identifiable in law so a person can actually identify
9 its existence and know of its provisions. And the FRA
10 is identifying there that that's not the case in 16:00
11 certain Member States.

12
13 Judge, I'm conscious that it's just coming up to four
14 o'clock and...

15 **MS. JUSTICE COSTELLO:** Yes. well, perhaps we'll take 16:00
16 it up tomorrow then.

17 **MS. HYLAND:** Very good. Thank you.

18
19 **THE HEARING WAS THEN ADJOURNED UNTIL THURSDAY, 9TH**
20 **MARCH AT 11:00** 16:00

21
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23
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27
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29

'**Actually**' [1] - 54:19
'**aggregate**' [1] - 84:8
'**all**' [1] - 11:20
'**Are**' [1] - 69:16
'**arguable**' [1] - 134:17
'**consider**' [1] - 80:24
'**effective**' [3] - 114:14, 114:28, 116:6
'**effective**' [1] - 116:12
'**essential**' [1] - 172:7
'**even**' [1] - 82:16
'**fragmented**' [2] - 84:4, 84:7
'**if**' [1] - 51:20
'**mass**' [1] - 170:10
'**national**' [5] - 172:3, 173:3, 174:4, 175:3, 175:7
'**necessary**' [2] - 115:8, 124:24
'**neither**' [1] - 148:28
'**No**' [1] - 69:17
'**of**' [1] - 82:13
'**procedural**' [2] - 85:12, 85:14
'**reasonable**' [1] - 138:15
'**regular**' [1] - 172:10
'**section**' [1] - 167:6
'**share**' [1] - 80:26
'**the**' [1] - 112:24
'**We**' [1] - 134:8
'**well**' [3] - 33:28, 42:17, 80:25
'**when**' [1] - 90:20
'**You**' [1] - 81:14

1

1 [6] - 3:5, 3:10, 14:26, 80:24, 171:17, 177:2
1(4) [1] - 172:6
1,000 [1] - 176:24
1.3.1.2 [1] - 178:4
10 [10] - 30:2, 83:8, 83:9, 103:27, 129:27, 130:20, 131:3, 132:20, 134:15, 150:9
10.2 [1] - 108:23
107 [1] - 39:16
10th [1] - 36:13
11 [4] - 14:10, 63:14, 63:19, 167:29

11.10 [1] - 38:21
11.2 [1] - 38:8
110 [1] - 88:14
113 [1] - 118:1
114 [2] - 130:13, 130:17
115 [1] - 131:3
116 [1] - 88:26
117 [1] - 131:20
118 [1] - 150:26
11:00 [1] - 179:20
12 [6] - 30:4, 30:5, 45:26, 53:24, 83:7
12.4 [1] - 176:12
120 [1] - 88:27
122 [1] - 138:3
123 [1] - 138:18
12333 [3] - 6:9, 79:13, 79:26
124 [3] - 89:7, 132:2, 139:5
125 [1] - 90:1
126 [2] - 48:12, 141:3
127 [1] - 49:8
128 [3] - 132:9, 132:12, 141:13
13 [40] - 3:10, 21:1, 32:22, 32:24, 53:12, 64:28, 100:17, 101:10, 113:28, 114:9, 114:15, 114:22, 115:6, 115:22, 115:24, 116:3, 116:6, 117:23, 117:29, 118:4, 118:13, 118:22, 119:24, 125:6, 126:16, 127:2, 127:4, 127:11, 134:4, 134:7, 134:18, 134:21, 147:28, 149:17, 149:19, 160:7, 171:7, 174:23
130 [2] - 161:18, 161:23
131 [1] - 6:1
132 [2] - 50:8, 50:22
133 [1] - 50:23
135 [1] - 132:27
136 [1] - 132:29
14 [3] - 80:18, 101:18, 101:22
14(2) [1] - 36:7
147 [1] - 151:17
148 [1] - 90:15
15 [8] - 80:29, 119:27, 120:3, 143:26, 161:11, 174:24, 175:26, 176:5
153 [1] - 162:16

156 [1] - 134:11
15th [1] - 168:17
16 [3] - 76:4, 102:25, 102:28
166 [1] - 142:8
167 [2] - 144:13, 151:23
168 [1] - 146:21
17 [4] - 1:18, 38:3, 69:26, 137:16
171 [1] - 151:27
172 [1] - 152:9
18 [7] - 38:16, 56:29, 57:21, 57:26, 76:4, 126:18
1806 [1] - 148:8
1810 [3] - 50:12, 51:4, 58:3
187 [1] - 148:10
19 [1] - 78:22
1908 [1] - 35:22
195 [1] - 162:26
1969 [1] - 125:3
1970 [1] - 113:2
1978 [1] - 100:26
1983 [1] - 122:22
1994 [1] - 130:19
1998 [1] - 137:9
1ST [1] - 2:10

2

2 [16] - 2:8, 2:19, 2:25, 2:29, 2:29, 14:22, 15:3, 16:6, 38:1, 80:26, 103:3, 105:10, 125:13, 128:1, 130:27, 168:19
2(b) [1] - 16:1
2,100 [1] - 176:21
2.2 [1] - 176:14
20 [6] - 35:25, 65:15, 108:18, 137:14, 177:12, 177:13
2005 [1] - 137:16
2006 [1] - 127:19
2006/24 [2] - 11:24, 12:2
2007 [5] - 146:28, 160:16, 160:22, 168:11, 168:17
2010 [1] - 53:23
2011 [3] - 5:18, 21:12, 156:21
2012 [1] - 176:15
2013 [2] - 169:2, 176:11
2015 [3] - 20:22, 20:23, 95:2

2016 [1] - 101:2
2016/4809P [1] - 1:5
2017 [3] - 1:18, 5:2, 169:3
2018 [1] - 172:13
21 [4] - 36:9, 83:7, 161:10, 161:12
21(2) [1] - 29:6
22 [3] - 36:13, 38:17, 137:23
23 [2] - 36:19, 48:13
231 [1] - 152:20
24 [3] - 36:27, 38:19, 150:25
242 [1] - 163:25
243 [1] - 164:7
244 [1] - 165:1
245 [1] - 165:7
246 [1] - 165:21
249 [1] - 153:10
25 [13] - 10:10, 10:29, 17:5, 28:5, 28:17, 37:10, 37:11, 39:20, 73:2, 73:13, 74:21, 74:22, 75:3
252 [1] - 154:17
2520 [1] - 57:26
255 [1] - 154:15
256 [3] - 154:1, 154:2
26 [10] - 10:29, 17:5, 28:5, 28:13, 29:17, 29:20, 39:20, 73:4, 74:23, 130:13
26(2) [3] - 28:20, 28:22, 31:4
26(4) [1] - 29:3
263 [1] - 71:24
265 [2] - 154:20, 154:22
27 [3] - 75:12, 83:24, 117:23
27.5% [1] - 38:11
2707 [1] - 57:21
2712 [3] - 56:29, 57:18
275 [1] - 155:9
279 [2] - 155:14, 155:16
28 [9] - 3:4, 36:20, 39:9, 95:13, 95:18, 117:20, 137:25, 170:19, 175:17
28(3) [1] - 65:23
284 [2] - 155:24, 155:28
286 [1] - 160:8
287 [1] - 157:7
288 [2] - 157:13, 157:18
289 [1] - 158:17

29 [2] - 1:2, 75:7
291 [1] - 159:7
292 [1] - 159:15
293 [1] - 159:18
2ND [1] - 2:16

3

3 [2] - 11:23, 18:26
3(1) [2] - 130:22, 130:26
3(2) [1] - 172:5
3.7 [1] - 38:15
30 [1] - 132:9
300 [2] - 159:20, 160:8
31 [3] - 39:10, 51:14, 132:27
31.7% [1] - 38:11
32 [6] - 14:22, 22:17, 51:14, 83:10, 128:25, 133:15
34 [1] - 87:16
340 [1] - 57:8
35 [2] - 6:1, 6:15
36 [5] - 64:29, 88:5, 134:3, 134:11, 138:2
37 [2] - 53:22, 88:14
37-42 [1] - 2:24
38 [1] - 75:20
39 [6] - 69:24, 75:29, 100:18, 100:20, 100:21, 102:28

4

4 [12] - 2:14, 23:16, 28:20, 30:18, 31:4, 37:7, 37:26, 61:10, 61:25, 62:14, 74:18, 101:9
4(1) [1] - 32:5
4(2) [1] - 172:2
4(2)(j) [1] - 173:25
4 [1] - 148:22
40 [6] - 69:24, 69:25, 69:26, 76:7, 103:27, 117:14
400 [1] - 176:16
41 [7] - 23:16, 23:24, 23:25, 32:8, 68:10, 103:29, 119:14
42 [3] - 76:12, 105:7, 127:14
43 [3] - 68:11, 76:18, 105:18
44 [4] - 8:12, 8:15, 76:24, 134:26

45 [4] - 32:8, 46:15,
69:26, 149:24
46 [4] - 24:13, 69:24,
105:25, 160:12
47 [14] - 7:28, 10:5,
17:27, 24:15, 83:18,
83:25, 84:11, 84:13,
85:7, 85:29, 88:2,
91:28, 95:29, 114:2
47.. [1] - 65:24
48 [2] - 90:15, 106:12
49 [1] - 106:28

5

5 [6] - 2:19, 4:4, 30:5,
53:21, 128:1, 128:3
5,500 [1] - 176:20
50 [1] - 107:20
51 [3] - 108:6, 142:7,
142:8
52 [5] - 9:4, 9:24,
24:22, 78:9, 171:17
52(1) [2] - 9:6, 174:25
53 [3] - 18:9, 18:10,
108:18
55 [1] - 109:2
56 [2] - 11:29, 109:24
57 [4] - 11:29, 111:2,
148:11, 152:20
58 [4] - 112:8, 120:2,
147:26, 148:7
59 [1] - 120:13

6

6 [6] - 89:9, 128:15,
130:27, 147:29,
149:16
6(2) [1] - 148:21
6(3) [1] - 148:22
6(4) [1] - 149:8
60 [3] - 113:22,
121:14, 149:15
61 [7] - 18:6, 53:13,
66:2, 113:29, 121:23,
167:26, 167:27
62 [3] - 66:3, 121:29,
153:7
62nd [1] - 36:22
63 [2] - 45:26, 123:3
64 [7] - 64:28, 65:15,
65:18, 67:24, 70:26,
77:12, 123:8
65 [11] - 64:28,
65:15, 66:14, 67:24,
70:28, 70:29, 77:13,
80:20, 82:11, 114:10,

123:23
66 [1] - 124:21
67 [4] - 53:10,
114:18, 114:19,
125:10
68 [1] - 114:28
69 [2] - 78:22, 116:5

7

7 [4] - 7:27, 18:25,
98:24, 176:11
7(1) [1] - 137:26
7/8 [1] - 2:8
7/E(3) [1] - 167:6
70 [2] - 116:22,
150:19
70.. [1] - 150:15
700 [1] - 176:22
702 [4] - 5:19, 56:5,
56:17, 56:19
75 [5] - 10:11, 79:20,
79:22, 79:23
78 [2] - 84:1, 126:19

8

8 [30] - 7:27, 30:20,
98:19, 98:21, 98:24,
98:28, 99:7, 99:27,
101:7, 102:22,
102:28, 105:8,
113:26, 114:12,
115:27, 116:1,
117:18, 117:24,
117:26, 119:24,
125:13, 126:4,
126:21, 126:27,
134:8, 134:15,
135:15, 158:2, 160:6,
171:6
8(2) [4] - 147:24,
153:10, 157:15,
167:14
8(3) [1] - 66:24
8.1 [1] - 104:18
8.2 [4] - 105:5,
105:29, 112:2, 112:26
81 [1] - 161:15
82 [1] - 161:15
84 [1] - 127:6
86 [3] - 166:9,
166:12, 166:13
88 [1] - 166:26
89 [1] - 167:5
8th [1] - 1:18
8TH [1] - 5:1

9

9 [1] - 128:22
90 [1] - 47:22
92 [1] - 87:12
9259 [1] - 75:20
93 [1] - 4:5
95 [4] - 8:18, 8:23,
79:22, 84:20
95/46 [1] - 35:28
99 [1] - 87:16
9TH [1] - 179:19

A

A&L [1] - 3:3
Ajs [1] - 176:11
abandoning [1] -
37:9
ability [5] - 22:2,
22:13, 55:18, 157:3,
159:4
able [19] - 13:14,
23:2, 23:3, 42:8, 44:6,
48:4, 50:15, 50:19,
55:18, 66:24, 100:4,
106:19, 110:16,
111:12, 111:21,
135:21, 140:6,
163:28, 167:2
above-mentioned
[1] - 106:9
above-named [1] -
1:26
abridged [1] - 7:23
abridgment [3] -
7:26, 8:2, 17:29
abroad [2] - 54:3,
129:10
absence [11] - 89:8,
113:15, 115:26,
124:26, 157:14,
157:26, 158:7, 159:9,
166:17, 166:22,
166:23
absent [1] - 96:16
absolute [5] - 10:16,
130:4, 148:16,
148:23, 156:27
absolutely [10] -
16:22, 16:25, 28:13,
29:1, 40:8, 51:27,
52:19, 60:4, 73:18,
98:6
abstract [3] - 10:5,
17:26, 61:1
abstracto [1] - 139:8
abuse [12] - 42:28,
107:21, 109:28,
121:19, 124:8, 126:3,
147:5, 147:20,
161:22, 166:18,
166:23, 170:11
Abuse [1] - 58:17
abuse.. [1] - 133:11
abused [1] - 140:20
abuses [3] - 111:25,
152:26, 161:26
abusing [1] - 17:23
academic [1] - 63:2
accept [1] - 106:23
acceptability [1] -
26:20
acceptable [2] -
45:19, 155:10
accepted [11] -
15:12, 22:23, 43:1,
47:5, 47:13, 48:12,
49:8, 49:18, 55:17,
57:18, 126:2
accepting [2] - 7:15,
16:18
accepts [7] - 15:18,
90:18, 97:19, 97:27,
102:10, 103:18, 121:7
access [22] - 11:17,
19:27, 46:18, 47:17,
65:24, 84:24, 86:7,
88:15, 90:21, 96:14,
102:1, 121:3, 136:27,
137:1, 137:2, 143:9,
143:23, 145:3,
145:24, 146:9,
156:12, 157:3
accessed [2] - 46:24,
78:29
accessible [2] -
120:27, 178:18
accident [1] - 25:21
accompanying [1] -
109:10
accord [2] - 109:13,
115:15
accordance [12] -
11:23, 23:5, 29:5,
66:21, 103:6, 103:13,
103:15, 105:19,
108:23, 113:15,
173:24, 179:7
according [3] -
102:16, 116:23,
174:23
According [2] -
76:24, 171:17
accordingly [2] - 9:3,
24:4
Accordingly [2] -
138:13, 148:22

account [17] - 10:1,
10:13, 11:3, 17:27,
27:6, 27:7, 27:21,
60:8, 62:23, 68:26,
81:10, 81:12, 82:14,
91:2, 119:18, 126:9,
152:14
accountability [4] -
161:19, 162:4, 163:6,
163:17
Accountability [1] -
163:4
accountable [1] -
20:9
accounting [1] -
38:11
accusations [1] -
63:20
achieve [2] - 20:10,
28:27
achieved [3] - 45:19,
103:23, 149:3
achievement [1] -
106:8
achieving [2] - 64:3,
121:10
acknowledge [1] -
12:26
acknowledged [1] -
58:5
acknowledgment [2]
- 79:21, 79:26
ACLU [6] - 41:11,
44:2, 44:11, 47:23,
51:15, 161:3
acquisition [1] -
50:17
acquittal [2] - 75:29,
76:19
across-the-board [1]
- 139:24
act [4] - 15:9, 49:25,
164:13, 177:26
Act [18] - 5:20, 48:28,
53:21, 57:28, 58:4,
58:17, 58:18, 67:9,
87:19, 87:20, 91:19,
91:23, 130:20, 131:4,
137:3, 137:9, 142:9
acted [1] - 54:4
acting [1] - 114:7
action [17] - 1:27,
24:25, 25:5, 25:6,
30:22, 41:23, 41:24,
42:14, 42:15, 43:17,
61:29, 62:16, 77:5,
96:18, 164:10,
168:25, 172:10
action.. [1] - 165:19
actions [4] - 57:3,

57:6, 96:5, 98:2
activities [12] -
10:19, 16:5, 78:25,
143:11, 143:23,
144:3, 145:15, 169:8,
172:9, 173:1, 174:18,
178:24
activity [6] - 15:4,
24:19, 45:15, 45:16,
112:13, 144:6
actor [2] - 22:14,
61:5
actors [2] - 17:23,
22:1
acts [1] - 124:17
Acts [1] - 105:21
acts.. [1] - 131:8
actual [17] - 41:17,
42:27, 43:5, 46:5,
46:13, 52:1, 52:10,
58:21, 77:5, 78:24,
99:20, 113:16, 138:8,
138:23, 140:22,
141:10, 153:27
add [3] - 28:7,
176:14, 176:25
added [1] - 54:12
addition [2] - 109:17,
110:23
additional [1] - 86:5
Additional [1] -
175:20
address [6] - 28:26,
29:21, 75:1, 85:22,
90:6, 90:29
addressed [5] -
72:21, 78:4, 82:17,
83:17, 96:15
addresses [1] -
28:22
addressing [3] -
31:23, 70:19, 90:29
adduce [1] - 29:20
adduced [1] - 31:2
adduces [1] - 28:23
adequacy [17] - 13:7,
29:17, 39:21, 45:1,
45:13, 63:1, 73:2,
73:3, 73:4, 74:2, 74:4,
74:21, 75:2, 79:12,
83:14, 83:16, 87:21
Adequacy [10] -
21:1, 34:12, 34:13,
45:3, 58:7, 64:5,
77:15, 79:23, 79:25,
82:18
adequate [16] -
28:23, 29:2, 37:14,
39:23, 60:26, 74:16,
74:28, 88:2, 107:20,
109:16, 111:26,
121:18, 122:1,
164:16, 164:23,
166:19
adequately [1] -
62:24
ADJOURNED [1] -
179:19
ADJOURNMENT [2]
- 82:26, 83:1
adjudicate [1] -
24:24
administrative [3] -
108:17, 163:19,
165:10
Administrative [2] -
53:15, 54:6
admissibility [1] -
76:16
admissible [1] -
54:10
admit [2] - 63:25,
95:4
admits [1] - 148:21
admittedly [2] -
12:24, 116:29
Admittedly [1] - 76:7
adopt [3] - 37:17,
84:11, 107:17
adopted [5] - 7:10,
30:23, 90:2, 144:28,
161:13
adopting [3] - 7:14,
7:19, 9:26
adoption [1] - 170:3
adopts [2] - 19:17,
81:13
advance [1] - 103:23
advanced [1] - 66:18
advances [1] -
106:13
advantages [1] -
19:10
adversarial [1] -
148:19
adverse [2] - 33:3,
33:8
adversely [3] -
65:26, 121:2, 163:13
advert [1] - 61:6
adverted [3] - 56:8,
85:4, 86:18
advice [1] - 143:25
ADVICE [1] - 3:9
advised [1] - 111:11
adviser [1] - 124:14
advising [1] - 143:1
Advocate [1] - 86:8
advocates [3] -
149:2, 149:10, 149:13
affairs [2] - 7:25,
58:11
affect [1] - 37:18
affected [8] - 44:3,
44:15, 54:1, 54:11,
94:7, 112:17, 121:2,
163:13
affecting [2] - 65:26,
101:27
affidavit [2] - 39:15,
167:25
affidavits [3] - 92:13,
92:14, 168:1
affirms [1] - 107:15
afford [3] - 70:18,
176:18, 176:20
afforded [2] -
114:13, 145:14
afraid [1] - 18:4
afresh [1] - 69:8
AFTER [1] - 83:1
afternoon [2] - 83:4,
97:3
afterthought [1] -
14:18
agencies [20] - 7:3,
17:13, 54:21, 55:1,
137:1, 142:20,
142:28, 143:21,
144:4, 161:27, 162:7,
162:8, 162:11,
162:20, 163:14,
163:18, 165:26,
165:29, 168:21,
177:16
agency [6] - 54:18,
95:2, 95:4, 95:5,
163:28, 165:4
Agency [1] - 95:3
agency's [1] - 163:29
agents [1] - 112:23
aggregate [7] -
83:29, 84:3, 84:6,
84:15, 118:22,
118:28, 119:4
agree [2] - 50:11,
71:16
agreed [9] - 16:14,
18:5, 34:27, 41:13,
47:6, 47:15, 60:17,
92:8, 115:4
agreeing [1] - 67:20
agrees [1] - 148:29
AHERN [1] - 2:18
aid [2] - 33:17,
128:29
aim [7] - 105:27,
106:9, 120:11,
120:16, 121:11,
125:20, 149:3
aims [2] - 103:23,
170:2
al [1] - 176:25
albeit [1] - 115:17
alia [1] - 145:10
alided [1] - 60:4
all.. [2] - 52:27, 155:2
allegations [3] -
141:7, 141:24, 141:28
allege [3] - 76:8,
102:14, 164:9
alleged [10] - 86:29,
99:20, 102:17,
136:17, 138:8,
138:24, 140:13,
141:21, 148:4, 164:13
allegedly [1] -
119:19
Alliance [1] - 2:27
allided [1] - 60:10
allow [5] - 34:11,
68:3, 100:2, 165:3,
178:19
allowed [6] - 125:25,
130:26, 135:8,
139:26, 141:14, 142:6
allowing [1] - 129:5
allows [2] - 146:12,
154:5
alone [1] - 176:14
alternative [1] -
165:3
amazing [1] - 33:14
amended [2] -
127:17, 131:3
Amendment [8] -
42:4, 42:7, 42:16,
61:13, 61:15, 61:18,
61:26, 61:28
amendment [1] -
61:10
amendments [1] -
130:19
America [1] - 128:12
AMERICA [1] - 2:21
American [1] - 5:23
amicus [1] - 34:4
Amnesty [6] - 43:25,
44:18, 47:25, 47:26,
47:28, 161:3
amount [1] - 117:13
amounted [1] - 104:7
analagised [1] -
135:18
analogue [2] - 32:26,
65:8
analogy [2] - 5:23,
5:25
analyse [3] - 60:24,
173:19, 177:6
analyses [2] - 70:14,
132:10
analysing [2] -
169:9, 170:8
analysis [45] - 7:2,
9:4, 9:5, 9:23, 10:9,
11:5, 11:8, 12:14,
13:28, 15:18, 15:19,
28:19, 41:2, 42:5,
56:5, 60:15, 62:29,
67:14, 67:19, 68:13,
68:14, 68:18, 68:23,
69:2, 69:5, 69:20,
70:8, 70:22, 71:6,
72:3, 73:26, 74:1,
84:8, 87:5, 87:8,
134:6, 134:9, 152:8,
176:27, 177:1, 178:6,
178:20, 178:25, 179:4
analysis' [1] - 134:10
AND [1] - 1:13
and.. [1] - 179:14
Anderson [1] - 175:6
annexes [1] - 143:7
annual [1] - 169:1
annually [1] - 143:5
answer [14] - 28:27,
29:29, 30:20, 31:5,
33:13, 34:23, 42:19,
49:18, 64:26, 73:29,
77:8, 81:26, 82:15,
82:16
answered [1] - 42:10
anxious [2] - 90:3,
92:15
anyway [2] - 73:28,
81:27
APA [8] - 42:17,
51:4, 56:13, 56:15,
56:16, 56:19, 57:19,
63:4
apart [9] - 27:11,
39:1, 39:3, 63:6,
77:26, 96:26, 98:1,
142:18, 163:16
apologies [1] - 135:1
apparent [4] - 35:28,
36:13, 65:22, 80:20
appeal [2] - 122:26,
159:16
appealable [1] -
123:5
appear [2] - 72:7,
141:26
APPEARANCES [1] -
2:3
appellant [1] - 3:24
appellants [1] -
51:21
applicability [4] -

171:27, 174:5,
174:12, 175:4
applicable [4] - 33:9,
134:19, 139:23,
172:10
applicant [16] -
99:24, 102:19,
119:11, 121:23,
125:17, 127:23,
127:24, 128:3,
128:15, 128:17,
135:29, 137:16,
139:23, 141:21,
146:8, 150:18
applicant's [5] -
120:21, 141:7,
141:28, 145:10, 149:6
applicant.. [1] -
138:27
applicants [7] -
114:13, 116:10,
132:6, 134:17, 138:8,
138:14, 152:17
applicants' [2] -
111:15, 114:29
application [9] -
32:19, 43:11, 43:24,
59:5, 101:25, 119:12,
131:13, 140:13,
147:15
applications [3] -
102:7, 156:20, 156:22
applied [14] - 11:20,
34:21, 99:24, 101:13,
102:6, 102:15, 125:7,
138:16, 138:27,
139:19, 139:29,
140:5, 142:2, 143:29
applies [8] - 14:26,
31:19, 32:24, 51:5,
57:23, 62:10, 79:27,
83:12
apply [11] - 15:3,
79:5, 79:10, 84:15,
94:12, 94:18, 115:24,
117:2, 129:9, 144:23,
158:11
applying [3] - 9:3,
113:19, 129:17
appoint [4] - 122:11,
122:23, 149:2, 149:11
appointed [3] -
108:24, 149:13,
155:19
appointment [1] -
123:5
appreciation [4] -
120:14, 121:8,
125:14, 133:28
approach [25] - 7:10,
7:19, 9:1, 9:26, 9:29,
10:12, 19:6, 22:12,
23:29, 27:7, 27:10,
27:12, 28:18, 29:16,
37:10, 54:21, 81:28,
126:11, 134:5,
138:23, 139:7, 146:1,
146:17, 152:1, 152:11
approaches [3] -
19:9, 24:3, 99:20
appropriate [11] -
42:22, 66:12, 69:20,
70:18, 71:22, 82:20,
107:18, 108:14,
142:20, 156:3, 167:1
approval [1] - 162:9
approved [2] - 37:21,
37:22
approves [1] -
143:26
approving [1] -
143:1
are.. [1] - 54:19
area [14] - 20:1, 22:9,
24:4, 45:2, 60:28,
94:12, 94:19, 94:25,
95:19, 155:2, 172:1,
173:24, 173:26
areas [3] - 123:12,
169:5, 173:11
arguable [1] - 118:8
argued [2] - 53:29,
150:18
arguing [1] - 16:23
argument [4] - 7:14,
7:15, 9:27, 15:19
arguments [2] -
65:20, 71:9
arise [13] - 28:28,
38:6, 43:20, 52:12,
76:15, 78:5, 85:23,
89:20, 92:22, 94:1,
130:7, 152:13
arisen [1] - 63:26
arises [3] - 78:11,
92:19, 101:23
arising [4] - 63:26,
78:6, 90:24, 105:8
armaments [1] -
128:8
armed [1] - 130:25
arms [1] - 128:9
arose [1] - 6:9
arrangement [1] -
162:18
arrangements [5] -
24:2, 155:26, 156:2,
157:2, 167:1
arrangements.. [1] -
143:26
arrest [1] - 25:8
arrested [1] - 135:29
arrive [2] - 81:14,
115:24
arrived [1] - 81:15
article [1] - 147:27
Article [125] - 9:4,
9:6, 9:24, 10:5, 10:10,
10:29, 11:23, 14:22,
17:5, 17:27, 28:5,
28:13, 28:17, 28:20,
29:6, 29:17, 29:20,
30:18, 32:22, 32:24,
36:7, 36:20, 37:7,
37:10, 37:11, 39:20,
57:8, 61:10, 61:24,
61:25, 62:14, 65:23,
65:24, 66:23, 71:24,
73:2, 73:4, 73:13,
74:18, 74:21, 75:3,
75:7, 83:18, 83:25,
84:11, 84:13, 85:7,
85:29, 88:2, 91:28,
95:29, 98:19, 98:21,
98:28, 99:7, 99:27,
101:7, 102:22,
102:28, 103:27,
105:8, 105:29, 112:2,
113:26, 113:28,
114:2, 114:9, 114:12,
114:15, 114:22,
115:6, 115:22,
115:24, 115:27,
116:1, 116:3, 116:6,
117:18, 117:23,
117:24, 117:26,
117:29, 118:4,
118:13, 118:22,
119:24, 125:13,
126:4, 126:16,
126:21, 126:27,
127:2, 127:4, 127:11,
134:4, 134:7, 134:8,
134:18, 134:21,
135:15, 147:28,
147:29, 148:8,
149:16, 149:17,
149:18, 153:10,
158:2, 160:6, 160:7,
168:19, 171:6, 171:7,
171:17, 172:2, 172:5,
172:6, 173:25,
174:23, 174:24,
174:25
Articles [1] - 134:15
articles [1] - 61:16
AS [2] - 5:1, 83:1
ascertained [3] -
106:7, 112:9, 114:13
aside [3] - 28:18,
55:10, 123:19
aspect [7] - 27:12,
37:5, 37:6, 53:9,
77:28, 99:6, 153:13
aspects [3] - 24:19,
28:19, 144:6
asserted [2] - 99:8,
101:6
assertion [1] - 81:4
asserts [1] - 87:12
assess [2] - 139:13,
170:12
assessed [3] - 79:6,
83:14, 84:2
assesses [1] - 83:19
assessing [6] -
26:19, 27:19, 62:22,
120:29, 121:9, 159:12
assessment [17] -
7:2, 7:4, 10:3, 12:20,
12:21, 13:7, 21:19,
29:18, 61:2, 73:5,
74:4, 83:29, 107:5,
107:6, 107:21,
107:26, 138:28
assignments [1] -
128:17
assistance [5] -
95:7, 95:15, 145:6,
145:25, 168:23
assisting [1] -
142:27
associate [1] - 39:4
associated [1] - 7:24
Association [1] -
157:23
assume [3] - 26:27,
113:17, 126:7
assuming [1] - 46:21
assumption [1] -
41:4
assumptions [1] -
13:18
astounding [1] -
21:16
AT [1] - 179:20
Atlantic [1] - 161:6
attaches [1] - 123:23
attack [2] - 119:20,
130:25
attempt [6] - 8:27,
15:22, 27:25, 59:6,
63:17, 88:22
attention [14] -
11:11, 16:1, 19:25,
20:29, 30:7, 38:1,
39:16, 65:3, 80:13,
86:19, 91:2, 118:20,
146:25, 171:13
Authorisation [1] -
162:24
authorisation [16] -
19:24, 19:26, 21:9,
21:11, 26:5, 26:11,
97:14, 142:24, 145:7,
150:18, 153:11,
153:15, 153:17,
153:21, 154:21,
156:20
authorisation.. [2] -
154:28, 162:28
authorisations [4] -
154:29, 155:4,
156:22, 156:24
authorise [4] - 99:2,
131:24, 155:1, 156:23
authorised [2] -
128:28, 144:2
authorising [1] -
24:27
authoritative [1] -
95:16
authorities [22] -
30:24, 35:24, 36:19,
36:28, 86:9, 99:2,
107:6, 107:29,
110:10, 113:19,
117:17, 120:14,
120:26, 124:22,
125:1, 132:3, 132:5,
139:12, 147:18,
152:5, 155:6, 159:12
authority [19] -
65:19, 66:17, 66:21,
66:27, 85:5, 85:7,
86:7, 88:15, 104:22,
108:15, 114:5,
114:21, 114:23,
114:24, 118:11,
118:13, 118:14,
122:24, 132:4
authority' [1] -
114:14
authority.. [1] -
162:8
automated [2] -
14:27, 14:28
automatic [1] - 52:27
availability [2] -
139:17, 139:27
available [22] - 8:18,
17:6, 44:1, 60:6, 61:4,
61:29, 62:19, 62:20,
63:12, 86:26, 87:17,
89:10, 91:29, 116:10,
121:8, 125:14,
135:22, 152:16,
159:13, 169:28,
170:16, 176:10
avenue [1] - 163:15

avert [2] - 130:25,
130:27
aviation [1] - 150:2
avoid [1] - 152:26
awaiting [1] - 92:16
aware [6] - 63:26,
95:4, 98:21, 99:15,
107:13, 130:19
awareness [1] -
169:13

B

backtracked [1] -
63:15
balance [3] - 11:2,
36:29, 164:1
balanced [3] - 10:26,
110:14, 120:19
balancing [2] -
10:13, 87:7
band [1] - 170:27
BANK [1] - 2:13
banks [1] - 26:14
Barrington [2] -
85:16, 85:29
BARRINGTON [1] -
2:21
Barrington's [1] -
84:12
BARROW [1] - 2:14
based [7] - 75:22,
81:8, 81:9, 84:14,
151:12, 175:17,
178:15
basic [1] - 103:28
basis [24] - 7:6, 28:1,
31:23, 32:2, 43:12,
57:7, 62:15, 62:18,
64:25, 67:6, 74:26,
81:9, 87:14, 91:4,
91:10, 95:20, 99:27,
128:5, 134:21, 137:7,
140:25, 141:13,
141:29, 168:8
Bates [2] - 21:12,
156:18
bear [1] - 159:9
bears [1] - 77:4
beat [1] - 81:20
beaten [1] - 81:21
became [2] - 52:8,
153:20
because.. [2] -
67:21, 167:22
become [1] - 172:14
becomes [1] - 98:11
becoming [1] -
119:28

bed [1] - 26:21
BEFORE [1] - 1:17
beg [9] - 101:10,
120:5, 136:23,
136:24, 143:15,
149:17, 149:25,
149:27, 154:1
began [1] - 136:10
beginning [3] -
14:17, 77:26, 81:21
behalf [2] - 136:15,
165:8
behind [2] - 20:1,
81:26
belief [4] - 48:26,
50:18, 51:1, 63:21
believes [1] - 45:29
below [1] - 30:6
benefit [1] - 165:24
best [6] - 19:6,
23:29, 27:22, 107:7,
152:1, 166:4
better [4] - 5:26,
21:23, 35:6, 91:25
between [20] - 21:20,
36:4, 36:29, 41:21,
43:15, 55:14, 59:26,
60:5, 67:3, 67:19,
86:17, 89:25, 102:19,
103:20, 104:29,
145:18, 151:12,
173:11, 173:27,
177:13
beyond [8] - 24:17,
32:21, 32:27, 32:29,
33:6, 34:17, 90:17,
90:19
biannual [2] - 144:1,
144:9
bill [1] - 178:25
billion [2] - 176:12,
176:13
binding [3] - 67:12,
77:27, 79:17
bis [1] - 75:14
bit [14] - 14:15, 18:9,
34:19, 56:23, 61:10,
71:15, 100:25,
117:15, 129:8,
129:19, 131:17,
131:21, 148:7, 170:28
Bivens [1] - 62:2
BL [7] - 2:6, 2:11,
2:17, 2:22, 2:27, 3:2,
3:8
BND [3] - 53:22,
54:4, 176:25
board [2] - 124:2,
139:24
Board [9] - 108:25,

110:9, 110:15,
122:13, 122:15,
122:25, 123:25,
126:24, 131:23
boat [2] - 14:12,
14:14
Bodies [2] - 19:21,
163:4
bodies [17] - 19:23,
24:22, 24:27, 75:7,
98:5, 108:24, 108:29,
109:1, 110:18,
125:27, 145:22,
155:10, 161:4,
162:21, 163:6,
165:11, 168:20
body [19] - 23:3,
23:10, 25:28, 34:4,
45:4, 45:6, 110:16,
122:15, 132:24,
144:28, 160:17,
162:19, 163:8,
165:22, 165:24,
165:28, 166:3, 168:14
Book [3] - 37:26,
83:7, 100:17
book [15] - 14:9,
18:5, 18:12, 18:13,
53:12, 64:28, 75:12,
80:8, 92:13, 100:23,
100:24, 134:28,
167:20, 167:21,
167:28
books [1] - 167:29
border [3] - 38:4,
38:23, 62:10
borne [1] - 163:23
bothered [1] - 55:16
bottom [18] - 20:4,
22:17, 24:13, 38:8,
50:22, 105:25,
115:11, 117:22,
133:14, 133:16,
134:11, 148:10,
152:9, 166:12,
170:25, 171:15,
174:1, 176:5
bound [6] - 14:1,
76:25, 77:15, 77:16,
78:10, 81:13
bounds [2] - 106:10,
109:19
box [2] - 153:18,
153:24
boy [1] - 62:13
breach [19] - 56:25,
89:24, 90:5, 98:28,
99:7, 101:6, 113:25,
114:11, 116:3,
117:18, 119:23,

126:4, 127:1, 127:11,
148:4, 149:18, 156:6,
157:15, 167:14
breached [1] - 89:13
breaches [1] -
146:29
BRIAN [1] - 2:5
briefly [13] - 14:2,
18:18, 26:24, 29:26,
39:2, 39:21, 39:22,
41:9, 61:6, 80:7,
83:22, 95:29, 175:7
bring [4] - 100:10,
101:20, 135:8, 140:27
bringing [3] - 25:5,
25:6, 79:15
brings [1] - 71:4
broad [1] - 78:24
broadly [3] - 48:28,
131:4, 138:10
broken [3] - 85:27,
86:3, 88:12
brought [10] - 25:19,
29:24, 57:6, 89:23,
136:16, 147:12,
150:11, 165:25,
167:11, 172:20
Brown [1] - 176:25
BSA [2] - 2:27, 90:2
budgetary [1] -
176:17
bugging [1] - 163:1
bulk [3] - 19:26,
26:13, 93:28
Burden [1] - 85:20
burden [2] - 54:13,
88:8
burdens [1] - 88:6
business [4] - 10:21,
54:24, 136:9, 136:10
busy [1] - 35:9
but.. [1] - 31:12
butress [1] - 161:29
BY [5] - 1:17, 4:4,
4:5, 5:8, 93:8
bypassing [1] -
70:16

C

CAHILL [1] - 3:2
campaign [1] - 136:6
campaigning [1] -
141:25
CANAL [1] - 2:29
cannot [24] - 17:26,
22:20, 22:25, 22:28,
31:18, 31:20, 37:14,
71:24, 78:5, 96:18,

97:20, 98:10, 101:26,
112:4, 112:27,
115:24, 116:15,
124:23, 125:18,
126:7, 140:21, 142:1,
164:24, 175:3
capable [2] - 42:18,
42:19
capacities [1] -
176:19
capacity [3] - 114:7,
164:15, 164:22
captured [1] - 12:18
cardinal [1] - 105:8
carefully [1] - 34:11
carried [17] - 9:11,
9:23, 10:9, 20:15,
67:14, 68:9, 68:13,
73:5, 95:8, 109:6,
113:14, 124:6, 124:7,
130:22, 133:5,
133:22, 174:9
carries [3] - 73:4,
160:21, 170:10
carry [9] - 10:2, 10:9,
22:20, 29:23, 68:23,
108:1, 128:10,
128:29, 179:4
carrying [8] - 13:7,
16:5, 22:6, 70:8,
70:20, 70:21, 99:2,
110:10
Case [1] - 1:5
case [132] - 7:4, 8:26,
11:2, 11:12, 13:1,
13:21, 15:8, 17:1,
26:22, 27:5, 31:4,
32:10, 33:13, 37:15,
42:18, 43:25, 47:3,
48:4, 48:5, 48:6,
50:19, 53:3, 53:4,
53:19, 55:21, 57:11,
58:25, 58:26, 58:27,
59:6, 62:4, 62:5, 62:6,
62:7, 62:10, 63:27,
66:2, 66:7, 67:8,
72:17, 72:18, 73:3,
76:24, 76:28, 77:24,
78:10, 85:21, 93:22,
95:5, 97:1, 97:7, 97:9,
100:25, 100:26,
100:28, 100:29,
101:4, 101:20,
102:16, 106:29,
107:27, 109:28,
110:19, 116:3,
116:22, 117:7, 117:9,
117:12, 117:14,
117:15, 117:16,
117:19, 118:17,

119:1, 119:7, 119:8,
119:14, 120:18,
121:9, 123:4, 125:15,
125:22, 126:11,
127:1, 127:14,
127:15, 127:22,
129:18, 134:19,
134:23, 134:24,
135:3, 135:9, 135:12,
135:25, 135:27,
136:17, 136:19,
137:4, 138:29,
139:13, 140:25,
140:28, 140:29,
141:2, 141:11,
141:23, 146:18,
148:3, 149:22,
152:23, 153:8,
157:21, 157:23,
158:5, 158:6, 158:19,
160:24, 164:17,
165:14, 166:18,
166:22, 166:23,
167:3, 172:26, 173:5,
179:1, 179:10
case-law [3] - 66:2,
76:24, 152:23
cases [36] - 9:21,
13:23, 25:12, 27:14,
49:24, 55:11, 72:28,
86:15, 98:20, 100:19,
102:27, 103:17,
105:4, 109:29,
112:11, 117:2,
117:27, 123:13,
123:14, 124:9,
126:12, 133:21,
138:7, 138:20, 139:6,
140:21, 142:25,
144:1, 144:10,
149:21, 157:16,
157:19, 161:1, 161:2,
166:3
catastrophic [1] -
34:9
catches [1] - 38:29
catchwords [3] -
129:1, 129:4, 129:13
categories [1] -
152:28
caught [3] - 17:6,
53:2, 53:23
causal [1] - 41:21
causation [6] -
41:20, 48:10, 51:8,
51:25, 52:4, 52:11
caused [4] - 49:24,
51:9, 51:10, 57:10
causes [1] - 154:18
caution [1] - 24:5
ceased [2] - 111:8,
112:27
cell [1] - 136:1
cellmate [1] - 136:2
CENTER [1] - 3:8
Central [1] - 128:11
central [1] - 130:22
CENTRE [1] - 3:9
certain [15] - 29:6,
56:10, 87:29, 90:1,
97:27, 102:11, 107:4,
116:25, 119:18,
121:3, 131:7, 135:24,
156:21, 157:14,
179:11
certainly [9] - 31:9,
41:6, 46:17, 49:11,
55:10, 72:15, 107:4,
135:20, 167:28
certificates [1] -
137:10
certify [1] - 1:22
chairperson [1] -
150:2
challenge [28] - 25:7,
25:11, 25:24, 29:4,
43:9, 59:19, 59:22,
59:23, 60:2, 65:25,
73:21, 74:8, 77:23,
96:6, 96:17, 100:2,
100:7, 100:10, 101:5,
111:13, 125:25,
127:20, 139:8, 140:4,
140:7, 140:10,
141:14, 150:7
challenged [7] -
13:13, 37:29, 41:23,
59:14, 59:15, 74:16,
77:18
challenges [5] -
25:19, 75:4, 96:10,
161:5, 176:9
challenging [12] -
28:1, 40:27, 61:8,
65:28, 74:8, 99:27,
121:26, 136:17,
139:23, 140:13,
149:25, 159:26
chance [1] - 43:22
Chancellor [7] -
108:14, 122:29,
123:26, 124:12,
125:3, 126:1, 131:16
change [6] - 6:9,
29:11, 29:13, 43:3,
55:12, 129:21
changed [4] - 5:25,
6:8, 6:10, 6:12
channels [1] -
176:13
chapter [1] - 23:16
Chapter [1] - 16:6
character [3] -
102:18, 107:22,
110:13
characterise [1] -
161:21
characterises [2] -
94:14, 94:17
characterising [1] -
105:13
characteristics [2] -
128:23, 174:8
charged [4] - 74:6,
95:6, 136:2, 168:29
Charter [17] - 7:1,
7:6, 7:13, 7:23, 7:26,
7:27, 9:4, 10:20, 11:8,
15:20, 17:29, 66:24,
83:18, 98:24, 171:17,
174:26, 175:11
chief [1] - 150:1
choosing [1] -
121:10
CIA [1] - 6:4
circles [2] - 5:28,
5:29
Circuit [1] - 71:5
circumstance [1] -
140:16
circumstances [35] -
8:25, 22:27, 43:19,
49:16, 50:26, 50:29,
56:22, 69:6, 70:9,
76:27, 93:2, 94:21,
100:13, 101:29,
106:1, 107:23,
107:27, 110:19,
110:29, 116:2, 117:3,
121:7, 126:22, 127:1,
136:16, 138:29,
149:1, 153:4, 154:8,
157:14, 157:18,
158:19, 158:22, 160:2
circumvented [1] -
133:12
cited [2] - 66:2,
117:9
citizen [5] - 42:6,
42:15, 45:29, 60:6,
61:11
citizens [7] - 16:21,
59:26, 60:2, 62:1,
101:4, 105:13, 154:8
citizenship [1] -
123:15
City [1] - 128:16
civil [1] - 86:5
CJEU [7] - 68:4,
69:27, 73:23, 73:26,
74:1, 173:5
claim [14] - 29:24,
31:26, 45:28, 46:20,
62:15, 65:20, 65:22,
66:10, 66:18, 102:11,
118:8, 134:21,
139:14, 163:12
claim' [1] - 134:17
claimed [2] - 101:11,
150:14
claiming [3] - 89:24,
90:4, 150:12
claims [3] - 25:3,
57:23, 61:5
Clapper [8] - 41:11,
43:25, 44:2, 44:12,
44:18, 47:23, 47:28,
51:15
CLARE [1] - 2:19
clarifications [2] -
5:13, 147:12
clarified [1] - 132:18
clarity [2] - 6:18,
173:9
Clarke [2] - 15:29,
21:29
Clarke's [1] - 13:11
classes [1] - 122:7
classified [6] -
20:16, 143:14,
143:17, 145:24,
156:12, 157:3
Clause [2] - 30:5,
89:9
Clauses [1] - 73:10
clauses [7] - 29:7,
29:10, 29:11, 29:13,
30:14, 31:1, 89:28
clear [18] - 15:28,
16:2, 16:12, 16:26,
17:15, 28:13, 29:1,
55:15, 60:26, 72:12,
75:18, 94:17, 98:11,
153:20, 154:11,
164:18, 178:25,
178:27
clearance [1] -
163:15
clearer [1] - 29:3
clearly [14] - 20:25,
27:6, 27:7, 27:22,
51:5, 59:19, 65:16,
69:5, 70:26, 80:29,
155:5, 156:27,
173:11, 178:29
clever [1] - 30:15
close [2] - 61:12,
147:27
closed [5] - 143:10,
143:13, 143:16,
145:3, 146:8
closely [1] - 165:29
closer [1] - 95:24
Code [2] - 143:28,
147:12
codes [1] - 170:18
coherent [1] - 33:12
collapse [1] - 51:28
collateral [1] - 73:21
collaterally [1] - 78:2
collect [2] - 120:26,
174:16
collected [5] - 46:1,
48:1, 54:15, 122:8,
178:21
collecting [1] - 169:9
collection [7] - 6:3,
26:12, 46:10, 176:10,
176:20, 178:16,
178:28
collections [1] - 6:3
COLLINS [2] - 2:5,
2:27
Collins [4] - 31:9,
37:29, 77:20, 78:21
COLM [1] - 3:8
coloured [1] - 170:27
column [7] - 51:19,
51:20, 171:5, 171:11,
171:15, 171:23, 174:1
coming [7] - 14:5,
32:11, 70:16, 99:21,
172:13, 175:7, 179:13
comment [2] - 64:18,
164:7
commented [1] -
146:28
comments [1] -
101:18
Commerce [1] - 58:9
commercial [1] -
174:17
COMMERCIAL [1] -
1:3
Commission [46] -
7:11, 7:20, 9:1, 9:23,
10:10, 25:16, 27:8,
28:1, 29:4, 34:25,
35:12, 39:17, 45:3,
45:6, 65:4, 67:12,
73:4, 74:5, 79:19,
79:20, 82:16, 86:20,
101:25, 102:1, 104:6,
104:8, 105:27,
108:26, 110:9,
110:26, 115:4,
115:21, 116:28,
125:10, 129:27,
131:23, 138:6,
138:13, 160:14,

160:15, 160:17,
161:9, 161:13,
161:21, 163:7
Commission's [1] -
132:20
commissioned [1] -
95:2
Commissioner [17] -
5:6, 70:11, 80:24,
83:5, 84:1, 84:3,
92:29, 142:21, 143:2,
143:22, 143:25,
144:7, 145:5, 146:22,
146:28, 147:17,
147:22
COMMISSIONER [1]
- 1:7
Commissioner's [4]
- 72:18, 80:26, 88:29,
143:27
committed [4] -
114:6, 155:3, 161:27,
177:27
Committee [3] -
123:1, 123:27, 125:29
committees [4] -
24:14, 24:15, 24:17,
24:18
common [7] - 15:26,
16:8, 41:13, 55:20,
85:23, 165:21
commonly [1] - 26:5
communicated [2] -
122:19, 124:22
communicating [1] -
153:3
communication [11]
- 11:21, 12:3, 47:18,
57:22, 57:27, 104:29,
122:21, 124:27,
125:5, 126:22, 126:28
Communications [4]
- 48:28, 142:21,
144:7, 151:6
communications
[33] - 12:18, 19:27,
26:6, 26:7, 49:11,
52:28, 53:20, 53:23,
54:2, 54:6, 131:1,
138:9, 141:5, 141:8,
141:19, 141:22,
144:22, 144:26,
150:14, 150:17,
151:2, 151:3, 151:5,
151:6, 155:2, 155:7,
158:10, 158:15,
158:21, 158:27,
159:5, 175:10, 176:13
communist [1] -
160:20
communities [1] -
96:8
Community [10] -
10:22, 36:16, 57:5,
75:26, 76:22, 76:27,
77:4, 145:21, 168:21,
168:22
companies [4] -
39:3, 59:18, 129:12,
174:13
company [2] - 39:4,
150:1
comparable [1] -
169:10
comparator [4] -
26:17, 60:1, 93:12,
99:13
comparison [2] -
61:3, 93:16
comparisons [1] -
156:27
compatible [2] -
115:27, 158:8
compensation [1] -
145:12
competence [4] -
110:12, 155:12,
168:26, 173:20
competences [1] -
173:27
competent [5] -
30:24, 99:2, 108:1,
110:17, 120:25
competition [1] -
96:15
compiled [1] -
122:16
complainant [9] -
23:6, 53:29, 71:4,
71:10, 89:10, 145:26,
146:8, 165:9, 166:1
complainant's [1] -
165:13
complainants [1] -
54:11
complained [3] -
35:12, 35:15, 41:22
complaining [4] -
99:14, 110:25,
116:28, 117:17
complaint [17] -
17:22, 23:2, 33:25,
53:19, 54:7, 67:5,
67:20, 71:4, 111:15,
135:16, 136:22,
144:19, 145:22,
146:12, 148:25,
165:4, 165:17
complaints [14] -
54:8, 118:26, 134:14,
137:12, 137:18,
138:20, 145:2,
163:17, 163:29,
164:1, 165:23,
165:25, 166:2, 166:4
Complaints [2] -
24:29, 163:10
complete [10] -
13:19, 13:26, 24:16,
28:27, 31:19, 31:27,
87:17, 87:23, 91:2,
140:15
completely [3] -
8:16, 22:9, 86:22
complex [3] - 25:12,
50:26, 59:16
complexity [2] -
49:3, 60:25
compliance [8] -
20:27, 21:2, 21:4,
21:22, 26:29, 30:23,
98:19, 153:10
compliant [3] - 20:9,
21:10, 135:14
complicated [1] -
81:23
complication [1] -
74:5
complied [2] -
105:23, 132:22
comply [4] - 20:28,
27:4, 68:3, 175:11
component [1] -
36:23
components [1] -
49:22
comports [2] - 19:1,
23:20
comprehensive [2] -
59:17, 167:8
Computer [1] - 58:17
computer [2] -
19:28, 26:13
concede [1] - 122:20
conceded [1] -
110:28
conceive [3] - 39:9,
74:29, 117:4
concept [4] - 22:19,
41:25, 114:28, 173:4
concepts [1] - 176:2
concern [9] - 15:14,
32:17, 64:22, 76:26,
92:25, 140:19, 154:3,
154:18, 155:15
concerned [17] -
66:27, 78:27, 78:28,
79:1, 92:9, 96:5,
111:11, 111:16,
113:3, 115:1, 115:14,
115:27, 124:12,
125:5, 148:1, 154:15,
158:26
concerning [10] -
11:16, 35:27, 66:19,
116:1, 121:27,
123:14, 126:27,
129:11, 138:20, 139:6
concerns [13] - 32:2,
38:27, 63:10, 64:14,
64:25, 67:10, 67:29,
68:8, 90:6, 91:4,
107:1, 154:2, 154:20
concessions [1] -
45:24
conclude [3] - 29:11,
63:10, 165:16
concluded [2] -
117:26, 141:9
concludes [3] -
110:6, 113:22, 127:6
concluding [1] - 84:4
conclusion [12] -
10:4, 65:19, 67:4,
84:7, 84:14, 115:26,
124:23, 125:11,
126:27, 131:28,
133:26, 166:7
conclusions [2] -
116:1, 169:12
concrete [15] -
41:16, 42:29, 44:4,
46:2, 46:3, 46:7,
46:10, 47:19, 51:22,
51:24, 52:11, 53:18,
55:14, 101:27, 177:25
condition [2] - 32:15,
33:7
conditional [1] -
159:4
conditions [15] -
37:14, 76:28, 94:3,
102:11, 102:15,
106:25, 107:1,
108:10, 115:19,
129:23, 131:5,
132:17, 132:21,
178:10, 179:6
conduct [4] - 10:24,
23:4, 41:21, 74:6
conducted [6] - 7:2,
7:21, 78:26, 79:11,
87:8, 138:12
conducting [1] -
125:27
conducts [1] - 90:21
conferred [2] -
33:22, 35:20
confidential [1] -
143:7
confined [5] - 9:15,
71:6, 71:17, 71:18,
71:28
confirm [4] - 54:19,
54:29, 76:29, 148:28
confirmed [2] - 5:17,
20:16
confronted [1] -
53:17
confuse [2] - 15:10,
15:23
confusing [2] - 6:8,
91:18
confusion [1] - 90:12
conjectural [2] -
41:18, 43:5
conjunction [1] -
117:24
connection [5] -
41:21, 61:12, 102:19,
151:9, 156:10
connections [3] -
129:10, 129:11,
130:29
cons [1] - 163:7
conscious [3] -
14:18, 166:8, 179:13
consequence [3] -
33:21, 70:1, 147:2
consequences [2] -
38:2, 110:1
Consequently [3] -
109:11, 115:29,
126:26
consider [12] -
12:12, 37:28, 66:5,
81:6, 88:18, 93:15,
102:21, 110:22,
113:23, 125:15,
133:29, 156:20
considerable [3] -
98:7, 135:5, 153:26
considerably [1] -
130:20
consideration [4] -
78:11, 81:8, 81:15,
91:6
considerations [3] -
9:20, 81:10, 113:11
considered [9] -
36:22, 53:25, 71:26,
91:7, 99:7, 113:28,
125:4, 146:4, 174:15
considered" [1] -
87:7
considering [5] -
12:9, 24:5, 98:28,
105:23, 114:2
considers [8] -
66:17, 66:28, 109:28,

114:9, 142:1, 143:27, 145:8, 154:10
consistent [2] - 37:8, 126:11
consistently [3] - 21:24, 115:29, 126:27
constitute [1] - 175:12
constituted [1] - 104:2
constitutes [2] - 105:1, 124:7
Constitution [2] - 61:14, 132:5
constitution [1] - 10:15
constitutional [4] - 24:1, 59:19, 59:24, 110:27
Constitutional [7] - 111:29, 112:20, 113:2, 116:29, 132:19, 133:10, 133:19
constitutionality [1] - 59:21
constrain [1] - 59:6
constraints [8] - 44:5, 59:10, 61:5, 61:7, 61:8, 79:14, 79:18, 89:17
consultation.. [1] - 155:20
consulted [3] - 77:20, 77:22, 125:2
contacts [1] - 54:3
contain [2] - 154:25, 174:11
contained [3] - 125:6, 125:11, 129:28
containing [1] - 129:4
contains [5] - 31:22, 92:14, 113:11, 123:8, 161:14
contemplated [1] - 89:9
contend [4] - 17:4, 39:23, 84:16, 89:12
contended [1] - 132:6
content [8] - 13:2, 30:14, 46:25, 137:1, 151:6, 151:12, 154:26, 154:27
content-based [1] - 151:12
contention [2] - 85:17, 141:8
contentions [1] - 85:28
contents [5] - 12:28, 47:16, 47:18, 49:10, 151:2
contested [6] - 39:14, 104:1, 112:25, 113:9, 115:7, 121:2
contesting [1] - 104:17
context [89] - 7:22, 10:29, 14:2, 16:19, 17:16, 17:20, 18:4, 20:28, 22:21, 23:14, 27:15, 27:16, 29:15, 29:17, 34:20, 37:24, 38:6, 41:7, 44:25, 46:5, 47:1, 47:3, 50:11, 50:13, 51:14, 52:15, 55:8, 57:5, 58:5, 63:6, 63:12, 63:24, 66:10, 66:12, 67:7, 69:1, 70:26, 70:27, 74:2, 75:3, 85:22, 85:23, 86:4, 86:24, 90:17, 90:20, 91:13, 91:19, 94:2, 96:2, 96:21, 98:4, 98:10, 98:23, 117:22, 118:28, 119:12, 126:7, 127:16, 128:25, 129:9, 129:20, 130:7, 130:8, 130:14, 132:1, 134:8, 134:9, 135:23, 142:12, 144:8, 144:11, 145:19, 146:25, 147:29, 148:4, 149:12, 151:14, 152:13, 153:14, 156:19, 161:3, 169:6, 169:16, 169:27, 170:22, 172:17
contexts [2] - 24:3, 24:26
continually [1] - 177:9
continue [3] - 76:12, 111:7, 112:15
continuing [4] - 10:23, 42:21, 56:24
continuous [1] - 110:12
contract [1] - 90:10
contracting [1] - 107:10
Contracting [2] - 107:15, 120:25
Contractual [1] - 73:10
contractual [5] - 29:7, 29:10, 37:13, 57:8
contradiction [1] - 8:28
contrary [6] - 21:16, 21:27, 36:16, 74:25, 84:1, 147:16
contrast [2] - 26:10, 158:5
contrasting [1] - 156:18
control [27] - 97:29, 98:12, 108:22, 109:25, 109:26, 110:2, 110:7, 110:13, 110:17, 111:5, 111:23, 111:26, 121:25, 122:4, 123:10, 123:13, 124:17, 124:28, 125:8, 125:12, 132:11, 144:3, 146:15, 146:19, 157:1, 161:25, 162:26
Control [1] - 123:8
controlled [1] - 13:2
controller [4] - 28:23, 28:26, 29:20, 89:11
controllers [1] - 174:16
Controls [2] - 20:4, 161:19
controls [10] - 20:5, 20:21, 94:4, 98:9, 123:19, 126:2, 132:11, 144:14, 161:29, 162:1
controversy [2] - 41:27, 42:1
convenient [1] - 39:26
Convention [25] - 26:29, 94:23, 94:24, 94:27, 98:19, 99:16, 101:28, 102:4, 102:5, 102:16, 102:29, 105:12, 105:14, 114:4, 115:20, 115:23, 118:10, 119:3, 126:24, 126:26, 134:15, 140:3, 157:28, 158:9, 179:6
Convention's [1] - 102:2
Convention.. [1] - 163:21
conversation [1] - 47:17
converse [2] - 66:16, 67:8
conveyance [1] - 54:26
conveyed [1] - 63:18
convicted [1] - 136:4
conviction [1] - 136:3
convinced [1] - 167:5
Cooper [2] - 91:18, 92:4
copy [1] - 40:10
copying [1] - 24:6
COPYRIGHT [1] - 3:23
core [1] - 130:16
corners [1] - 5:28
corporations [1] - 59:14
correct [13] - 13:17, 37:12, 46:20, 46:25, 46:28, 47:20, 49:23, 50:20, 79:4, 83:24, 86:27, 140:2, 147:19
corrected [2] - 5:24, 61:23
correctly [6] - 83:12, 83:13, 83:15, 83:17, 83:19, 143:29
correctness [1] - 121:27
correspondence [2] - 92:14, 104:24
correspondingly [1] - 106:14
corresponds [2] - 112:1, 120:9
cost [2] - 35:18, 82:19
cost-free [1] - 82:19
COSTELLO [80] - 1:17, 5:4, 5:16, 5:22, 5:27, 6:12, 6:16, 8:21, 8:24, 14:5, 14:12, 14:14, 16:12, 16:17, 16:23, 16:26, 17:7, 18:14, 20:22, 21:5, 23:23, 23:25, 23:27, 27:2, 28:15, 31:13, 31:16, 35:1, 35:3, 35:8, 40:5, 40:9, 47:8, 52:17, 52:21, 52:27, 53:1, 60:1, 61:13, 61:16, 61:20, 67:17, 67:22, 70:28, 71:1, 71:9, 71:12, 71:14, 73:6, 73:15, 73:20, 73:27, 74:22, 78:15, 79:22, 79:24, 80:4, 81:26, 83:4, 83:9, 93:4, 93:6, 98:25, 100:20, 100:22, 104:10, 104:15, 108:8, 109:3, 111:3, 120:4, 134:25, 134:28, 135:2, 143:13, 143:16, 148:12, 167:23, 168:2, 179:15
Council [15] - 18:15, 18:25, 18:29, 23:17, 24:4, 25:4, 26:16, 26:28, 40:24, 44:26, 55:3, 86:15, 128:16, 160:17, 168:16
council [2] - 18:22, 169:1
Council's [1] - 176:27
counter [2] - 106:20, 173:14
counter-terrorism [1] - 173:14
countries [15] - 22:2, 30:26, 31:14, 31:29, 32:3, 33:20, 34:12, 37:18, 55:5, 55:7, 128:11, 160:20, 174:15, 176:17, 176:19
country [11] - 30:10, 30:13, 31:5, 31:6, 31:10, 31:24, 32:6, 37:16, 55:2, 103:9, 170:18
country's [2] - 31:21, 34:15
coupled [1] - 166:17
course [38] - 7:7, 8:29, 10:17, 12:9, 12:26, 13:15, 15:3, 20:28, 21:14, 21:27, 23:12, 27:20, 29:28, 30:9, 34:9, 37:21, 39:1, 42:2, 43:28, 46:14, 49:13, 50:4, 59:4, 59:8, 59:22, 62:26, 71:24, 73:18, 77:28, 79:16, 81:6, 85:22, 86:10, 86:21, 90:8, 91:5, 91:13, 179:4
courses [1] - 168:25
Court [85] - 22:23, 22:28, 53:15, 54:7, 66:4, 71:6, 71:23, 73:11, 76:25, 77:1, 77:7, 80:26, 96:4,

97:1, 97:17, 102:10,
104:9, 105:26,
106:22, 107:2, 107:4,
107:10, 107:13,
109:28, 110:6,
110:23, 112:9,
112:20, 113:9,
113:11, 115:12,
115:17, 115:23,
115:29, 116:29,
120:13, 121:7,
121:17, 123:3,
123:23, 125:1,
126:26, 130:19,
131:4, 133:8, 133:10,
133:18, 133:19,
134:14, 135:6,
136:19, 138:22,
138:24, 138:28,
139:16, 139:26,
140:23, 141:6,
141:25, 142:1,
142:17, 143:2,
143:24, 143:26,
144:18, 144:26,
147:13, 148:15,
148:20, 148:23,
148:29, 152:6,
152:11, 152:24,
154:10, 156:9,
157:26, 158:20,
159:9, 159:22,
164:17, 166:28,
167:5, 171:4
COURT [2] - 1:2
court [317] - 8:5,
9:27, 9:28, 10:14,
11:1, 11:13, 12:14,
13:6, 13:16, 13:19,
13:26, 13:29, 14:11,
15:13, 21:6, 21:8,
21:11, 21:20, 21:27,
22:19, 28:8, 32:1,
33:17, 33:28, 35:23,
37:6, 37:26, 37:27,
39:24, 40:1, 40:13,
41:9, 41:25, 42:18,
42:20, 44:14, 45:21,
47:25, 52:25, 53:3,
54:11, 55:4, 60:13,
60:15, 60:16, 62:25,
62:26, 63:9, 64:14,
64:16, 64:23, 64:24,
65:12, 65:13, 65:15,
66:11, 67:7, 67:14,
68:2, 68:7, 68:12,
68:16, 68:19, 68:26,
68:27, 69:1, 69:4,
69:6, 69:15, 69:17,
69:26, 70:3, 70:5,
70:16, 70:18, 70:24,

71:14, 71:18, 71:19,
71:20, 71:24, 72:5,
72:12, 74:3, 74:28,
76:4, 76:8, 76:15,
76:29, 77:3, 77:16,
78:21, 81:13, 81:14,
81:18, 82:5, 82:6,
82:10, 86:10, 86:11,
89:29, 91:20, 93:15,
93:24, 94:11, 94:15,
95:1, 95:17, 95:20,
95:26, 95:27, 96:2,
96:24, 96:29, 97:7,
97:16, 97:19, 97:24,
98:4, 98:6, 98:15,
98:18, 98:20, 98:21,
98:22, 98:23, 98:26,
99:8, 99:15, 99:17,
99:18, 99:21, 99:22,
100:2, 100:8, 100:12,
100:13, 100:16,
100:27, 101:8,
101:17, 101:19,
102:21, 102:24,
102:29, 103:11,
103:18, 105:18,
106:3, 106:12, 107:9,
107:20, 108:28,
109:1, 110:22,
110:27, 113:8,
113:17, 113:22,
114:2, 114:9, 114:10,
114:11, 115:11,
117:10, 117:12,
117:20, 117:25,
117:29, 118:25,
119:1, 119:6, 119:9,
119:26, 119:27,
120:2, 120:6, 121:1,
121:6, 121:21, 124:1,
124:5, 125:10,
125:28, 126:1,
126:11, 126:21,
127:6, 127:11,
127:13, 127:16,
128:21, 130:11,
130:12, 130:14,
131:26, 132:10,
132:12, 132:26,
132:28, 132:29,
133:27, 134:3, 134:5,
134:22, 135:6, 135:9,
135:18, 135:19,
135:20, 136:21,
136:23, 137:14,
138:1, 140:8, 140:12,
140:17, 140:26,
140:29, 141:14,
142:6, 142:13, 144:8,
144:13, 144:16,
144:21, 146:3,

146:18, 146:22,
147:8, 148:1, 148:3,
148:9, 148:13,
149:23, 149:28,
150:23, 150:25,
151:11, 151:13,
151:16, 151:17,
151:18, 151:20,
151:21, 151:24,
151:27, 151:28,
152:8, 152:19,
152:20, 153:8,
153:16, 153:19,
153:25, 153:29,
154:2, 154:3, 154:14,
154:15, 154:22,
155:9, 155:14,
155:16, 155:24,
156:19, 156:21,
157:8, 157:13,
157:17, 157:19,
157:21, 157:23,
158:6, 158:17,
158:29, 159:7,
159:19, 159:20,
160:3, 160:5, 160:6,
160:9, 160:11,
160:14, 160:25,
161:2, 161:8, 166:9,
167:11, 167:13,
167:17, 167:18,
167:19, 168:8,
168:10, 168:12,
168:13, 169:15,
170:29, 171:2,
172:15, 173:16,
175:26, 177:13,
177:20
Court's [9] - 76:24,
101:28, 112:1, 113:2,
114:21, 118:3,
132:19, 139:6, 152:1
court's [12] - 26:22,
33:27, 64:22, 70:2,
70:10, 71:2, 100:24,
100:28, 112:24,
118:20, 156:28,
171:13
COURT [1] - 6:24
Court. [1] - 139:12
courts [26] - 24:24,
25:10, 25:25, 40:27,
52:14, 62:4, 65:26,
66:3, 66:29, 75:16,
75:17, 75:23, 90:5,
96:11, 99:11, 108:20,
111:10, 111:19,
111:23, 116:24,
154:20, 154:28,
164:11, 164:14,

164:16, 164:23
court's [1] - 76:14
Cousseran [1] -
176:18
cover [2] - 24:19,
58:13
covered [2] - 49:5,
58:14
covers [3] - 11:24,
12:2, 74:20
create [1] - 45:8
created [1] - 25:28
creates [2] - 26:26,
41:6
crime [5] - 12:6,
21:28, 22:10, 105:29,
148:18
crimes [1] - 21:29
criminal [18] - 75:23,
86:1, 86:4, 86:16,
86:20, 90:24, 90:28,
91:3, 91:7, 91:9,
131:8, 155:3, 158:23,
172:15, 172:16,
172:17, 172:19,
172:24
criteria [3] - 44:22,
68:26, 83:13
critical [4] - 17:8,
19:21, 20:25, 34:16
criticised [1] - 84:3
criticism [7] - 27:26,
55:26, 56:1, 87:19,
92:23, 92:25, 160:29
criticisms [2] -
27:11, 92:10
cross [5] - 38:4,
38:23, 55:23, 55:24,
64:11
cross-border [2] -
38:4, 38:23
cross-examination
[1] - 64:11
cross-examined [2]
- 55:23, 55:24
crucial [1] - 98:6
culture [2] - 20:11,
20:27
curiosity [1] - 153:7
curious [1] - 63:14
CURRAN [1] - 2:13
current [1] - 173:21
curtailment [1] -
91:10
CUSH [1] - 3:2
customers [1] - 39:7

D

d'être [2] - 10:22,
10:23
damage [4] - 22:14,
57:9, 91:21
damages [12] -
42:22, 49:26, 51:11,
57:4, 57:7, 57:28,
57:29, 62:2, 91:27,
91:28, 92:5, 164:11
damages" [1] -
49:29
DAMIEN [1] - 2:7
danger [5] - 63:29,
107:13, 111:19,
112:13, 130:25
dangers [3] - 63:4,
64:12, 129:2
data [7] - 8:16,
11:15, 12:4, 12:24,
12:25, 14:27, 14:29,
15:24, 16:14, 16:20,
17:3, 17:24, 19:27,
25:11, 26:14, 30:6,
30:26, 32:17, 32:19,
33:10, 36:3, 36:4,
36:9, 36:25, 37:3,
38:5, 38:16, 38:19,
39:5, 39:6, 39:11,
42:28, 44:14, 45:29,
46:10, 47:29, 50:17,
52:15, 52:29, 54:15,
66:20, 73:12, 79:5,
84:24, 84:26, 89:11,
89:19, 90:22, 129:28,
129:29, 132:2,
132:14, 132:21,
137:25, 151:2, 151:5,
151:6, 151:13, 153:2,
153:3, 154:6, 154:16,
158:24, 169:4,
169:11, 173:23,
174:13, 174:16,
174:17, 174:18,
174:19, 174:22,
175:2, 175:10,
176:10, 176:29
DATA [1] - 1:7
Data [16] - 5:5,
10:27, 32:10, 34:25,
35:12, 35:14, 65:5,
65:6, 83:5, 94:11,
94:17, 137:3, 171:11,
172:6, 174:15, 174:24
date [3] - 78:28,
83:26, 172:13
David [1] - 175:6
DAY [1] - 1:18

DE [1] - 90:2
dead [1] - 136:2
deal [26] - 24:14, 26:24, 29:26, 29:28, 30:12, 39:20, 45:24, 52:19, 60:12, 62:24, 78:18, 80:8, 83:22, 87:1, 92:20, 93:1, 93:11, 94:25, 147:28, 152:12, 160:27, 165:10, 165:22, 167:18, 171:23
dealing [11] - 17:21, 22:1, 22:9, 33:21, 33:22, 34:11, 38:17, 59:17, 91:12, 96:23, 130:8
deals [6] - 17:16, 38:20, 53:4, 90:28, 92:2, 172:16
dealt [13] - 6:20, 24:22, 29:29, 30:13, 38:16, 75:3, 79:9, 80:14, 83:26, 88:26, 93:2, 93:13, 99:18
debate [1] - 172:29
decades [1] - 112:15
decide [2] - 66:12, 81:18
decided [6] - 62:5, 62:7, 86:14, 96:12, 141:14, 159:20
decides [2] - 132:11, 140:26
deciding [1] - 72:1
Decision [21] - 8:10, 9:17, 9:18, 21:1, 34:12, 34:14, 41:6, 45:3, 58:7, 64:5, 77:15, 79:23, 79:25, 81:2, 83:11, 84:5, 89:1, 171:13, 172:12, 172:18, 172:22
decision [53] - 8:16, 8:29, 10:27, 14:1, 27:28, 28:1, 28:16, 30:2, 30:18, 30:19, 33:19, 34:24, 35:11, 41:29, 44:27, 45:7, 60:16, 62:24, 65:25, 65:29, 67:12, 67:16, 67:28, 68:24, 70:4, 70:11, 70:21, 73:23, 75:11, 75:13, 77:17, 77:28, 79:7, 79:20, 89:5, 90:28, 91:19, 94:16, 96:14, 96:15, 101:9, 122:23, 122:26, 123:6, 126:4, 128:26, 131:14, 132:10, 132:14, 151:19, 153:24, 164:26
decision' [1] - 82:15
Decision' [1] - 82:18
Decision.. [1] - 172:7
decisions [6] - 31:10, 31:28, 33:19, 55:15, 74:2, 156:5
declaration [4] - 42:21, 56:9, 56:11, 56:21
declaratory [1] - 51:12
declare [2] - 67:11, 75:23
declared [4] - 73:10, 74:13, 74:14, 74:26
deduced [1] - 115:6
deem [1] - 107:17
deemed [2] - 110:8, 141:19
defeated [1] - 97:22
defeating [3] - 59:3, 59:5
defect [1] - 70:21
defective [3] - 10:8, 11:9, 88:10
Defence [1] - 150:3
defend [1] - 115:2
Defendant [1] - 41:23
DEFENDANT [2] - 2:10, 2:16
defendant [2] - 49:25, 62:9
DEFENDANTS [1] - 1:13
defendants [2] - 76:7, 76:20
defending [3] - 107:15, 119:22, 121:17
defer [1] - 92:8
deference [1] - 67:15
deficiencies [2] - 62:29, 90:24
deficiency [3] - 37:20, 37:22
deficient [1] - 153:9
deficit [1] - 156:29
defined [4] - 48:28, 131:4, 173:4, 178:1
defines [1] - 173:25
definition [3] - 27:18, 28:25, 152:27
degree [2] - 59:27, 152:12
delay [1] - 37:27
deleted [2] - 54:16, 130:1
deliberate [3] - 20:20, 147:1, 147:5
deliberately [1] - 129:12
delineation [1] - 174:4
deliverable [1] - 38:18
delivered [1] - 92:12
DeLong [8] - 5:14, 13:13, 15:28, 20:14, 20:26, 21:4, 55:23, 59:29
DeLong's [3] - 13:7, 13:11, 20:19
demand [1] - 92:16
democracy [4] - 107:14, 121:17, 160:18, 160:20
democratic [22] - 18:21, 32:21, 34:18, 103:7, 103:22, 105:16, 106:10, 106:26, 109:18, 109:21, 110:8, 110:13, 111:25, 113:18, 113:25, 115:9, 115:19, 119:29, 124:25, 134:1, 161:27, 162:13
Democratic [2] - 106:16, 161:12
demonstrate [4] - 91:28, 138:14, 141:10, 156:7
demonstrated [2] - 81:7, 141:5
demonstrates [1] - 90:11
denies [1] - 139:7
deny [1] - 54:29
deny' [1] - 148:28
Department [3] - 58:9, 58:10, 58:12
departments [1] - 58:8
departure [1] - 139:6
dependent [1] - 86:3
deposition [1] - 49:26
deprived [2] - 101:24, 157:28
depriving [1] - 159:25
Deputy [1] - 131:14
derived [1] - 162:9
derives [2] - 86:29, 88:1
derogate [1] - 32:19
derogation [1] - 175:12
derogatory [1] - 91:17
described [7] - 22:14, 55:25, 76:3, 129:2, 133:27, 139:21, 142:25
describes [1] - 98:5
description [3] - 127:28, 131:11, 150:26
descriptions [1] - 175:28
designed [2] - 113:12, 123:9
Designing [1] - 164:3
desirability [1] - 144:14
desirable [5] - 97:17, 97:24, 110:1, 125:4, 153:16
desk [2] - 175:17, 175:20
destroy [3] - 12:8, 154:6, 154:16
destroyed [2] - 147:3, 153:5
destroying [2] - 107:14, 121:16
destruction [1] - 145:11
detail [15] - 13:3, 13:4, 14:11, 20:26, 74:5, 93:13, 95:26, 108:28, 130:5, 135:5, 142:13, 153:26, 173:20, 178:9, 178:16
detailed [4] - 12:14, 59:16, 138:2, 178:13
details [4] - 143:23, 148:25, 170:14, 178:19
detain [1] - 168:12
detect [1] - 130:24
detected [1] - 156:6
detention [1] - 25:8
determination [3] - 39:25, 59:21, 137:17
determine [4] - 72:17, 72:18, 82:5, 111:5
determined [2] - 73:1, 102:16
determines [1] - 169:1
determining [1] - 114:25
develop [1] - 62:4
developed [1] - 152:24
development [1] - 106:15
developments [1] - 20:2
devices [1] - 26:9
diagram [2] - 176:4, 177:4
diagrams [1] - 176:1
dicta [1] - 151:25
dictate [1] - 109:8
dictates [1] - 15:17
differ [1] - 9:28
difference [4] - 28:10, 55:14, 67:19, 151:12
different [35] - 5:17, 22:10, 28:9, 28:17, 37:9, 52:13, 55:7, 56:17, 63:19, 79:10, 86:23, 97:5, 98:12, 99:19, 117:15, 118:28, 121:29, 122:7, 128:11, 129:16, 131:27, 134:4, 141:13, 143:18, 146:17, 152:17, 160:3, 161:4, 162:27, 166:5, 169:8, 177:15, 177:16
differentiate [1] - 59:25
differentiates [1] - 177:13
differentiation [1] - 12:4
differently [1] - 78:4
Difficult [1] - 85:20
difficult [11] - 39:9, 50:27, 73:25, 74:13, 75:5, 88:2, 88:6, 88:8, 115:13, 139:3, 164:4
difficulties [7] - 44:23, 44:24, 45:8, 53:16, 116:17, 157:9
difficulty [4] - 49:3, 50:14, 72:20, 86:29
Digital [7] - 11:11, 12:27, 13:23, 52:17, 91:8, 151:18, 151:21
DIGITAL [1] - 3:2
digitally [1] - 38:18
diligence [1] - 147:18
direct [11] - 21:12, 21:13, 44:12, 96:4, 96:14, 96:18, 98:2, 99:13, 109:14, 139:1,

159:16
directed [1] - 112:14
directions [1] - 70:10
directive [2] - 14:8, 36:3
Directive [29] - 7:8, 11:14, 11:24, 12:1, 17:6, 28:14, 28:17, 29:5, 30:24, 32:6, 35:28, 36:23, 60:3, 65:23, 66:23, 69:29, 83:12, 84:14, 94:11, 94:18, 171:12, 172:6, 172:15, 172:21, 174:16, 174:24, 174:25
directives [4] - 21:10, 59:13, 59:18, 175:12
directly [1] - 13:16
Directorate [2] - 176:22, 176:23
disadvantage' [2] - 85:12, 85:14
disagreed [1] - 141:6
disagreeing [1] - 67:19
disagreement [2] - 44:10
disappears [1] - 60:25
disclose [4] - 21:2, 143:12, 149:1, 149:7
disclosed [3] - 48:21, 57:27, 86:2
discloses [1] - 87:22
disclosing [1] - 22:4
disclosure [9] - 44:19, 48:27, 50:13, 137:8, 137:26, 143:7, 145:7, 148:16, 148:21
disclosures [2] - 44:16, 169:19
discontinued [5] - 5:15, 5:18, 5:21, 21:13, 154:18
discover [1] - 136:28
discovered.. [1] - 147:4
discovery [3] - 43:18, 43:21, 58:29
discrete [1] - 96:25
discretion [7] - 72:16, 72:26, 107:4, 107:11, 149:6, 154:5, 155:5
discriminant [1] - 177:6
discriminants [2] - 12:16, 176:28
discussed [4] - 19:3, 19:23, 24:11, 63:24
discussion [6] - 51:15, 93:19, 96:19, 103:12, 105:5, 138:2
discussions [1] - 103:24
dismiss [4] - 20:25, 43:15, 58:28, 59:4
dismissal [1] - 43:10
dismissed [1] - 155:19
disorder [1] - 105:28
disposes [1] - 72:19
disproportionate [2] - 54:5, 125:19
dispute [2] - 46:9, 84:1
disseminate [1] - 177:7
disseminating [1] - 169:10
dissimilar [1] - 135:24
distinct [1] - 166:5
distinction [11] - 18:1, 60:5, 65:16, 67:3, 67:25, 67:26, 69:9, 69:22, 70:25, 72:12, 86:17
distinguish [1] - 89:25
distinguished [1] - 66:13
distinguishing [1] - 129:5
Distorted [1] - 27:14
Diverse [1] - 24:1
divide [6] - 14:10, 18:6, 30:2, 53:13, 64:29, 75:12
dividends [1] - 59:8
division [1] - 122:6
divulged [1] - 112:4
doctrine [1] - 46:6
document [7] - 18:3, 20:22, 20:23, 39:29, 94:29, 143:6, 168:18
documents [8] - 14:2, 58:15, 143:10, 145:8, 148:24, 149:2, 149:7, 156:10
documents.. [1] - 143:2
DOHERTY [1] - 2:17
domestic [12] - 54:10, 99:15, 100:7, 100:9, 100:11, 107:3, 118:23, 120:26, 140:14, 144:20,
147:11, 154:11
don't' [1] - 69:18
done [20] - 10:4, 13:2, 51:28, 61:3, 68:18, 68:21, 69:8, 69:13, 69:21, 75:5, 95:12, 108:11, 134:9, 144:11, 146:13, 160:22, 169:17, 175:16, 178:26
Donnelly [2] - 92:8, 92:28
DONNELLY [2] - 2:6, 40:6
DORSET [1] - 3:10
doubt [5] - 24:7, 49:3, 52:11, 81:24, 120:23
doubts [13] - 67:1, 68:20, 68:28, 69:16, 72:2, 72:6, 76:15, 81:19, 81:24, 82:2, 82:11, 155:21, 156:13
doubts' [3] - 69:19, 72:4, 80:27
down [13] - 60:23, 73:17, 91:14, 104:5, 104:13, 105:18, 108:7, 109:2, 114:19, 124:6, 154:23, 157:20, 157:22
downwards [1] - 177:9
DPA [1] - 137:25
DPC [50] - 6:23, 11:6, 12:11, 15:14, 27:29, 29:12, 32:7, 32:9, 32:12, 32:29, 33:14, 33:25, 34:21, 35:20, 37:17, 45:9, 63:5, 63:29, 64:12, 65:29, 67:10, 67:11, 67:29, 68:15, 68:18, 68:20, 68:25, 69:6, 69:21, 69:28, 70:1, 70:14, 70:15, 70:17, 70:19, 71:3, 71:6, 71:26, 72:13, 77:18, 82:13, 85:24, 87:5, 87:8, 88:18, 90:13, 116:20, 126:7, 164:26
DPC's [5] - 15:10, 17:9, 67:19, 72:4, 118:25
draft [1] - 164:26
Draft [8] - 8:10, 9:16, 9:17, 41:6, 81:2, 83:11, 84:5, 89:1
dragnet [2] - 53:23, 54:1
draw [11] - 6:21, 11:11, 16:1, 65:16, 67:24, 70:24, 72:12, 80:13, 118:20, 130:4
drawn [7] - 19:25, 65:3, 67:3, 69:10, 145:17, 171:14, 173:11
drew [7] - 20:29, 30:7, 37:29, 39:16, 86:19, 91:2, 146:24
drug [1] - 128:8
drum [1] - 81:20
drunkenness [1] - 136:1
DUBLIN [7] - 2:8, 2:14, 2:19, 2:25, 2:29, 3:5, 3:10
due [2] - 86:4, 178:12
duration [3] - 98:29, 107:28, 152:29
duration.. [1] - 155:4
during [4] - 42:2, 86:1, 86:21, 97:20
duties [1] - 57:10
duty [4] - 70:7, 70:8, 133:11, 143:11
dwelling [1] - 26:10

E

e-mail [3] - 11:17, 47:16, 54:2
e-mails [4] - 46:18, 46:19, 46:24, 53:24
E-Privacy [1] - 171:12
e-Privacy [1] - 174:25
early [1] - 167:29
eased [1] - 54:13
easier [1] - 44:16
easiest [1] - 81:29
easy [4] - 54:20, 81:21, 82:19, 109:29
echoes [1] - 144:7
economic [4] - 17:3, 38:4, 38:9, 103:9
economy [1] - 38:24
ECPA [6] - 48:13, 48:19, 49:5, 51:4, 56:29, 57:21
editor [1] - 150:1
editor-in-chief [1] - 150:1
effect [9] - 22:5, 33:4, 33:9, 34:9, 39:10, 52:22, 79:18, 113:12, 172:14
effected [4] - 109:10, 109:27, 122:28, 123:25
effective [31] - 18:21, 22:20, 22:26, 23:10, 24:9, 30:15, 54:12, 68:24, 85:13, 85:27, 107:21, 109:13, 110:12, 111:18, 111:23, 114:5, 114:26, 116:7, 117:4, 121:19, 126:2, 127:5, 127:7, 127:8, 143:22, 156:9, 159:10, 159:23, 159:25, 163:23, 167:7
Effective [1] - 85:21
effectively [10] - 96:10, 96:14, 98:21, 100:6, 106:20, 125:7, 133:20, 139:11, 152:4, 153:24
effectiveness [8] - 101:28, 117:1, 155:25, 156:2, 156:14, 159:13, 164:11, 166:29
effects [1] - 123:9
efficacious [1] - 102:8
efficacy [7] - 19:18, 21:25, 22:22, 112:2, 112:29, 115:28, 124:28
efficiency [2] - 102:2, 165:28
efforts [1] - 173:23
eight [9] - 46:15, 47:22, 48:12, 49:8, 50:8, 50:22, 80:2, 80:6, 136:26
eighth [1] - 35:29
EILEEN [1] - 2:21
either [9] - 7:5, 22:24, 51:11, 90:23, 103:17, 137:18, 154:25, 163:5, 177:29
elaborates [1] - 140:29
elected [1] - 108:24
electronic [3] - 11:21, 12:3, 57:27
ELECTRONIC [1] - 3:7
Electronic [1] - 48:27
element [8] - 11:3, 48:8, 51:7, 51:8, 58:22, 61:23, 80:29,

81:7
elements [9] - 41:12, 46:21, 48:10, 51:23, 51:29, 52:2, 80:22, 106:21, 174:12
elided [1] - 17:8
elimination [1] - 140:15
elucidates [1] - 34:29
embark [4] - 72:3, 73:26, 74:1, 74:29
embodiment [1] - 30:19
embrace [1] - 72:11
embracing [1] - 12:23
emerge [1] - 118:3
emerged [1] - 64:11
eminent [1] - 10:17
emphasis [7] - 13:21, 28:9, 28:10, 116:14, 165:7, 165:12
emphasise [3] - 15:11, 16:28, 38:26
emphasised [4] - 12:28, 18:29, 23:28, 138:9
emphasises [3] - 32:9, 32:11, 144:27
emphatically [1] - 64:26
employee [1] - 128:15
employees [1] - 39:6
employment [1] - 119:17
employes [1] - 38:14
empowered [2] - 108:13, 131:16
enabling [2] - 65:25, 66:26
encompass [1] - 138:11
encroached [1] - 124:10
encroachment [1] - 115:3
end [6] - 130:1, 144:9, 151:7, 154:7, 154:10, 167:11
ends [1] - 126:10
enforcement [8] - 9:19, 22:10, 91:3, 91:9, 102:2, 155:6, 172:10, 173:12
Enforcement [2] - 172:14, 172:21
engage [4] - 59:17, 60:16, 66:24, 164:27
engaged [5] - 38:24, 54:23, 63:5, 64:12, 68:3
engaging [2] - 63:4, 64:14
enhances [1] - 145:13
enhancing [1] - 19:18
enjoy [2] - 107:11, 120:14
enjoying [1] - 110:19
enjoys [1] - 107:3
enormous [2] - 22:2, 39:18
enshrined [2] - 69:29
ensure [12] - 23:4, 30:23, 36:4, 36:16, 36:28, 71:21, 111:25, 113:14, 115:28, 139:9, 152:2, 162:1
ensured [1] - 133:20
ensures [3] - 112:29, 124:27, 143:22
ensuring [4] - 20:8, 97:29, 142:28, 143:27
entail [2] - 116:3, 127:1
entailing [1] - 131:6
entails [1] - 11:25
enterprises [1] - 38:28
entire [4] - 11:27, 33:13, 74:10, 98:27
entirely [8] - 9:18, 11:5, 15:13, 37:8, 56:5, 62:26, 118:21, 175:4
entities [1] - 32:25
entities.. [1] - 170:15
entitled [11] - 27:27, 28:2, 75:9, 75:29, 96:8, 96:9, 125:15, 125:24, 133:28, 140:27, 145:21
entitlement [6] - 48:7, 72:15, 101:20, 135:15, 148:15, 159:1
entrust [1] - 110:2
entrusted [1] - 123:20
envisage [1] - 72:5
envisaged [10] - 10:10, 10:11, 28:25, 31:8, 68:17, 69:5, 70:6, 70:15, 72:7, 73:22
envisages [1] - 9:4
EO12333 [3] - 78:21, 78:26, 79:2
EOIN [1] - 2:16
equally [1] - 23:28
equipment [1] - 150:16
equivalent [2] - 109:16, 114:1
erased [1] - 153:4
erasure [1] - 84:25
error [3] - 147:2, 147:4, 165:11
errors [3] - 80:15, 146:23, 146:29
errors.. [1] - 147:19
eschewed [1] - 158:3
eschews [1] - 159:27
especially [2] - 124:9, 163:20
espionage [3] - 106:14, 106:18, 107:16
essence [19] - 6:28, 8:4, 8:5, 8:7, 8:11, 8:15, 8:26, 9:2, 9:10, 11:13, 12:8, 84:26, 85:2, 87:6, 87:9, 87:13, 89:2, 171:21, 175:1
essential [4] - 20:6, 36:23, 87:20, 109:14
essentially [4] - 99:18, 127:29, 135:28, 161:29
establish [17] - 33:16, 42:8, 42:18, 42:26, 44:6, 44:17, 44:18, 48:15, 48:20, 49:15, 50:13, 50:27, 54:24, 54:25, 56:10, 145:26, 162:19
established [15] - 32:16, 33:1, 33:2, 34:1, 37:21, 37:22, 52:24, 55:11, 56:25, 56:27, 75:24, 109:15, 109:25, 142:22
establishing [3] - 58:21, 62:18, 87:14
establishment [1] - 36:5
et [1] - 176:25
etc [1] - 78:5
EU [46] - 15:12, 16:20, 18:5, 38:4, 38:9, 38:10, 38:12, 38:14, 38:17, 42:6, 42:15, 45:29, 60:2, 60:6, 61:7, 71:21, 71:25, 72:14, 77:27, 88:9, 94:1, 95:6, 95:7, 96:2, 96:6, 96:17, 168:4, 170:4, 170:9, 172:4, 172:19, 173:3, 173:4, 173:20, 173:23, 173:27, 174:5, 174:12, 174:13, 174:21, 175:4, 175:11, 175:12, 175:17, 176:18
EUROPE [1] - 3:2
Europe [21] - 18:16, 18:22, 18:26, 23:17, 24:4, 25:4, 26:16, 26:28, 39:4, 39:18, 40:24, 44:24, 44:26, 55:3, 70:6, 86:15, 93:16, 93:27, 106:16, 128:11, 160:17
European [33] - 10:23, 10:27, 11:1, 11:27, 15:7, 15:16, 16:9, 17:15, 18:29, 32:1, 32:10, 34:24, 34:25, 35:12, 35:14, 36:16, 57:5, 65:4, 65:5, 71:22, 75:12, 95:9, 118:28, 157:24, 163:2, 163:20, 164:17, 168:14, 169:18, 169:21, 169:25, 171:4, 171:10
Europeans [1] - 38:15
evaluation [1] - 98:15
evasion [1] - 20:20
event [19] - 13:29, 16:2, 17:17, 74:19, 75:5, 79:9, 86:28, 87:2, 87:22, 88:20, 89:11, 89:21, 90:1, 91:5, 91:25, 92:2, 112:4, 145:9, 146:4
eventually [1] - 146:4
everyday [1] - 11:23
evidence [44] - 13:1, 13:11, 13:12, 13:16, 13:22, 15:25, 15:28, 17:2, 20:14, 37:28, 40:20, 41:10, 42:2, 43:13, 43:22, 43:28, 44:1, 44:2, 44:4, 44:9, 44:12, 44:13, 45:23, 52:26, 53:18, 55:22, 59:16, 60:17, 60:18, 63:23, 72:1, 76:21, 78:5, 80:2, 83:20, 92:10, 113:16, 147:5, 147:14, 148:16, 148:26, 154:6, 158:25
evidenced [1] - 81:1
evident [1] - 54:10
evidentially [1] - 95:21
evidently [3] - 75:18, 86:16, 92:18
exact [1] - 178:20
exactly [10] - 14:7, 53:2, 74:24, 81:28, 100:21, 143:18, 167:24, 168:6
examination [5] - 13:1, 47:4, 47:12, 64:11, 145:2
examine [4] - 68:15, 76:28, 116:9, 144:19
examined [5] - 37:19, 55:23, 55:24, 113:9, 174:23
examining [1] - 153:1
example [4] - 26:11, 90:18, 123:5, 144:9
examples [3] - 24:6, 24:11, 178:18
examples.. [2] - 156:3, 167:1
exceed [1] - 110:7
exceeded [1] - 109:20
except [1] - 103:6
exception [4] - 12:5, 15:7, 105:11, 175:3
exceptional [5] - 76:27, 106:25, 110:29, 117:2, 163:13
exceptionally [1] - 100:2
exceptions [2] - 148:21, 173:6
Excessively [1] - 85:20
excessively [2] - 88:6, 88:8
exchanges [1] - 175:21
excluded [5] - 16:11, 108:22, 109:26, 111:7, 142:1
excludes [3] - 81:11, 91:6, 172:7
excluding [1] - 175:4
exclusion [1] - 110:6
Exclusions [1] - 84:18
exclusions [1] - 85:5
excuse [2] - 28:16, 61:15

execution [3] - 129:25, 145:8, 167:8
executive [2] - 143:3, 155:22
Executive [1] - 79:15
exempt [2] - 137:8, 137:25
exemption [7] - 94:13, 137:26, 171:24, 172:2, 172:5, 172:28, 173:10
exemption's [1] - 174:7
exercise [15] - 30:25, 63:5, 64:12, 82:19, 87:12, 93:14, 98:1, 99:6, 103:5, 104:2, 104:8, 104:23, 110:12, 149:6, 153:25
exercised [3] - 24:5, 33:26, 123:19
exhaust [1] - 99:15
exhaustive [1] - 178:14
exhibited [1] - 167:25
exist [7] - 45:18, 72:27, 72:28, 121:18, 165:10, 173:2
existence [13] - 36:21, 59:9, 79:13, 93:22, 102:12, 104:26, 106:23, 122:4, 139:1, 139:15, 174:10, 178:13, 179:9
existing [3] - 26:14, 30:25, 36:15
exists [3] - 26:25, 58:21, 60:10
expansion [1] - 88:11
expected [1] - 153:15
expecting [1] - 92:18
expenditure [1] - 162:10
expensive [1] - 64:15
experience [2] - 64:2, 136:10
experienced [1] - 145:1
expert [8] - 6:10, 19:15, 38:1, 64:1, 90:18, 95:17, 163:8, 165:22
Expert [1] - 163:4
expertise [4] - 64:2, 64:10, 68:12, 168:23
experts [6] - 41:12, 45:10, 92:10, 95:15, 175:23, 175:26
explain [1] - 47:2
explained [3] - 21:4, 21:29, 62:12
explaining [2] - 34:19, 68:27
explains [3] - 39:2, 39:8, 67:13
explanation [3] - 6:14, 13:5, 39:1
explanations [1] - 37:11
explicit [3] - 10:29, 25:23, 90:29
explicitly [1] - 45:3
exploitation [2] - 19:28, 26:13
exporter [3] - 29:24, 29:25, 89:24
exports [1] - 38:11
express [2] - 14:16, 155:14
expressed [2] - 83:20, 104:6
extend [3] - 16:3, 90:17, 162:13
extended [3] - 127:17, 130:20, 132:20
extensive [3] - 56:2, 63:11, 144:18
extent [9] - 12:24, 20:26, 21:19, 34:2, 37:13, 44:13, 58:20, 111:21, 173:20
External [2] - 161:29, 176:22
external [3] - 20:10, 26:4, 98:5
externally [1] - 94:5
extra [1] - 31:7
extract [1] - 177:5
extracts [1] - 160:23
extraordinarily [1] - 96:7
extraordinary [4] - 31:24, 41:5, 80:17, 84:19

F

FAA [2] - 91:18, 92:3
face [4] - 43:17, 44:24, 44:25, 53:16
FACEBOOK [1] - 1:12
Facebook [10] - 5:6, 13:25, 16:18, 16:21, 17:10, 46:2, 59:16, 64:17, 83:5
facial [2] - 43:9, 43:15
fact [59] - 7:21, 10:1, 12:16, 17:5, 19:25, 22:28, 34:3, 41:14, 41:15, 42:25, 46:22, 46:23, 46:26, 48:8, 48:24, 49:1, 49:12, 49:21, 51:7, 52:4, 52:24, 60:9, 62:13, 70:14, 79:13, 79:19, 86:1, 94:1, 95:5, 96:3, 96:7, 100:26, 101:13, 101:14, 102:4, 102:15, 111:15, 112:26, 112:29, 115:25, 117:22, 124:21, 131:16, 134:6, 146:25, 149:11, 149:26, 149:27, 153:11, 153:19, 153:21, 155:21, 158:22, 161:10, 164:22, 164:25, 166:17, 178:15
factor [2] - 60:8, 91:18
factors [2] - 10:6, 159:9
facts [12] - 44:17, 50:4, 50:16, 75:19, 76:3, 77:5, 77:24, 106:13, 115:17, 135:27, 159:3, 160:27
factual [1] - 77:7
factually [1] - 50:29
fail [1] - 85:6
failed [3] - 27:21, 68:23, 141:9
failings [1] - 163:19
fails [2] - 10:13, 41:7
failure [8] - 10:1, 11:7, 62:23, 81:9, 85:24, 86:14, 89:25, 165:10
failures [1] - 165:27
fair [5] - 36:29, 52:7, 60:13, 148:2, 163:21
fairly [4] - 27:25, 41:22, 69:3, 133:27
fairness [4] - 39:15, 45:10, 63:25, 164:2
faithfully [1] - 109:18
fall [3] - 16:5, 141:27, 174:21
falling [1] - 177:26
falls [4] - 15:4, 114:12, 166:19, 173:19
familiar [11] - 10:14, 41:26, 65:9, 95:26, 96:2, 103:1, 118:25, 119:28, 151:11, 151:20, 177:14
family [1] - 104:24
far [5] - 21:24, 44:29, 93:22, 124:12, 125:7
fatally [1] - 29:14
faulty [1] - 10:8
favour [4] - 42:13, 137:17, 145:10, 149:6
favourable [1] - 41:29
FB [1] - 90:2
FB-I [1] - 90:2
FBI [1] - 6:4
FBI's [2] - 84:2, 90:18
feared [1] - 138:11
feasible [1] - 112:10
feature [2] - 45:2, 59:24
features [1] - 129:5
February [1] - 168:17
federal [1] - 131:15
Federal [14] - 53:15, 53:21, 54:6, 108:13, 111:29, 112:19, 113:2, 128:7, 128:28, 131:13, 132:15, 132:19, 133:10, 133:19
fell [1] - 166:24
felt [2] - 9:3, 35:18
few [4] - 19:25, 82:12, 96:25, 128:23
field [5] - 107:7, 164:24, 171:29, 172:9, 173:21
field' [1] - 175:13
fields [3] - 112:22, 164:10, 164:17
fifth [1] - 28:22
fighting [1] - 12:6
Figure [1] - 177:2
figures [1] - 38:6
filed [2] - 80:12, 83:20
filing [2] - 14:29, 15:1
filter [2] - 176:29, 177:6
final [2] - 91:12, 92:7
finally [2] - 27:10, 160:11
Financial [1] - 58:18
findings [3] - 35:22, 101:1, 160:8
finish [5] - 78:13, 96:23, 98:27, 99:5, 164:6
finishing [1] - 149:15
firm [1] - 46:1
first [34] - 14:9, 18:20, 24:16, 26:2, 40:16, 41:13, 43:7, 45:23, 66:22, 67:4, 80:29, 93:26, 97:14, 99:11, 100:24, 103:29, 109:5, 109:7, 118:7, 123:3, 127:22, 127:23, 128:3, 128:17, 133:16, 134:24, 135:4, 136:25, 137:4, 161:8, 169:20, 170:2, 179:5
First [2] - 80:24, 162:27
firstly [5] - 28:22, 58:27, 84:10, 91:23, 120:26
Firstly [1] - 162:8
FISA [5] - 5:20, 50:12, 51:5, 59:13, 135:18
FISC [9] - 20:29, 21:2, 21:6, 21:8, 21:11, 86:10, 135:18, 149:13, 156:19
fisted [1] - 14:7
fit [1] - 145:6
FITZGERALD [1] - 2:23
five [8] - 67:23, 80:6, 80:9, 82:22, 101:4, 169:2, 178:8, 178:12
five-year [1] - 169:2
fixed [2] - 11:16, 105:3
fixing [1] - 107:1
flavour [1] - 97:7
flawed [2] - 29:14, 116:19
flaws [1] - 167:12
flexibility [1] - 152:12
flow [2] - 31:23, 38:16
flows [2] - 30:26, 32:3
focus [2] - 20:6, 24:26
focused [1] - 56:7
focuses [1] - 178:12
focusing [1] - 170:9

focussed [1] - 37:16
focussing [1] - 27:12
folder [1] - 34:26
follow [1] - 11:7
followed [4] - 65:11, 109:18, 113:17, 153:1
Following [1] - 138:6
following [16] - 1:23, 42:10, 47:5, 47:13, 47:22, 48:12, 50:8, 50:23, 51:15, 95:9, 118:5, 130:1, 152:24, 161:14, 169:19, 176:18
FOLLOWS [2] - 5:1, 83:2
follows [3] - 99:19, 156:7, 158:23
football [1] - 5:24
footnote [2] - 30:3, 86:18
FOR [4] - 2:21, 2:27, 3:2, 3:7
force [1] - 122:22
foreign [10] - 7:3, 7:24, 15:26, 16:8, 29:22, 58:11, 59:22, 61:11, 90:23, 128:4
foreigners [1] - 59:26
foreseen [1] - 166:17
foreword [1] - 169:20
forgiven [1] - 93:18
forgot [1] - 21:5
form [7] - 14:29, 15:1, 22:14, 24:14, 24:21, 25:21, 172:17
formal [3] - 165:16, 166:18, 166:23
formalistic [1] - 98:17
format [2] - 95:13, 177:17
former [2] - 138:6, 160:20
formidable [1] - 82:1
forms [3] - 70:11, 106:18, 162:27
formulate [1] - 168:25
formulating [1] - 169:11
forth [2] - 114:4, 118:9
fortunate [1] - 169:5
forward [15] - 64:14, 65:20, 66:6, 66:13, 66:27, 67:8, 68:16, 69:21, 70:9, 71:9, 72:4, 72:6, 72:27, 73:9, 159:18
foundation [1] - 100:28
Foundation [1] - 150:3
founded [14] - 32:17, 63:10, 64:14, 66:8, 66:21, 66:28, 67:11, 68:1, 69:16, 69:17, 70:4, 72:19, 76:19, 134:16
founded' [1] - 80:25
four [7] - 35:1, 35:3, 53:12, 67:23, 168:18, 172:18, 179:13
Fourth [8] - 42:3, 42:7, 42:16, 61:13, 61:15, 61:18, 61:25, 61:28
fourth [1] - 18:5
FRA [7] - 167:17, 168:8, 169:1, 169:26, 173:16, 178:26, 179:9
FRA's [4] - 169:21, 175:22, 178:6, 178:15
fraction [1] - 12:17
fragmentation [1] - 118:26
fragmented [1] - 84:13
frailties [1] - 89:1
Framework [5] - 171:12, 172:7, 172:12, 172:18, 172:22
framework [2] - 169:1, 172:1
frameworks [3] - 170:8, 170:13, 178:6
France [3] - 176:21, 178:8, 178:24
FRANCIS [1] - 2:11
Fraud [1] - 58:17
free [4] - 36:4, 36:9, 37:2, 82:19
FREE [1] - 3:9
freedom [3] - 104:29, 150:4, 173:26
freedoms [5] - 9:13, 36:21, 66:19, 114:3, 124:10
freelance [1] - 128:3
freestanding [3] - 10:4, 69:2, 69:4
French [1] - 178:25
frequent [3] - 54:2, 58:22, 162:18
frequently [1] - 117:9
fresh [2] - 127:19
Friday [2] - 92:17
FRY [1] - 2:28
FSB [1] - 150:16
fulfilled [3] - 52:13, 81:2, 105:20
full [1] - 174:12
fully [1] - 168:26
function [2] - 69:7, 125:28
functioning [3] - 36:6, 124:16, 142:23
Fundamental [2] - 95:3, 168:3
fundamental [18] - 10:22, 11:26, 16:10, 18:1, 19:18, 36:17, 36:21, 37:1, 44:10, 75:15, 77:28, 84:27, 109:21, 168:23, 168:26, 169:13, 169:27, 173:6
fundamentally [1] - 11:9
Furthermore [2] - 110:13, 123:11
furthermore [1] - 112:19
future [1] - 165:18

G

G10 [14] - 101:12, 103:28, 105:27, 108:20, 108:26, 109:25, 110:6, 110:9, 110:26, 113:11, 116:23, 116:28, 131:23, 144:21
Gabriele [1] - 127:23
Gallagher [3] - 47:6, 47:15, 172:23
GALLAGHER [67] - 2:10, 4:4, 5:8, 5:10, 5:17, 5:23, 5:29, 6:14, 6:17, 8:23, 8:25, 14:7, 14:13, 14:15, 16:16, 16:22, 16:25, 16:27, 17:8, 18:15, 20:23, 21:8, 23:24, 23:26, 23:28, 27:3, 28:16, 31:15, 31:17, 35:2, 35:5, 35:10, 40:8, 40:10, 47:10, 52:19, 52:23, 52:28, 53:2, 56:14, 56:16, 56:19, 60:4, 61:15, 61:18, 61:22, 67:21, 67:27, 70:29, 71:8, 71:11, 71:13, 71:16, 73:14, 73:18, 73:25, 73:29, 74:24, 78:16, 79:23, 79:25, 80:6, 81:28, 83:7, 83:10, 93:5, 167:26
gallop [1] - 97:2
gangs [1] - 22:12
Gasparini [1] - 75:13
gathered [1] - 175:20
GCHQ [2] - 136:27, 176:21
GDP [1] - 39:18
GDPR [2] - 14:3, 172:13
General [4] - 86:8, 96:3, 155:20, 176:22
general [10] - 9:12, 9:20, 67:9, 138:20, 139:7, 140:19, 142:23, 147:21, 148:19, 171:19
generalised [1] - 12:2
generally [3] - 9:19, 114:9, 139:2
generate [1] - 42:1
generated [1] - 41:26
generating [1] - 176:12
genesis [1] - 114:1
genuine [1] - 14:16
genuinely [2] - 9:11, 171:19
German [14] - 35:13, 53:27, 55:4, 101:4, 101:5, 113:23, 114:13, 116:11, 127:15, 127:24, 128:4, 129:11, 129:12, 129:17
Germany [10] - 35:13, 35:16, 53:16, 54:18, 65:4, 113:18, 130:25, 176:24, 178:8, 178:24
giants [1] - 38:28
GILMORE [1] - 3:8
Giorgio [1] - 85:21
given [19] - 22:27, 37:7, 40:10, 65:14, 67:15, 68:11, 69:7, 69:11, 70:2, 72:27, 73:1, 89:7, 89:19, 89:26, 97:20, 111:29, 124:15, 139:2, 146:6
glad [1] - 14:8
Glasnost [1] - 150:2
global [1] - 38:20
GOODBODY [1] - 3:3
goods [2] - 75:25, 76:21
govern [1] - 31:10
governed [4] - 15:12, 16:23, 89:27, 90:23
governing [2] - 17:25, 175:10
government [11] - 35:14, 46:10, 47:2, 51:10, 90:20, 101:14, 124:19, 150:8, 155:25, 159:18, 160:29
Government [17] - 46:1, 64:17, 104:9, 105:26, 110:27, 115:4, 121:29, 122:20, 123:19, 124:14, 143:1, 148:29, 156:1, 156:4, 156:7, 166:28, 167:2
Government's [2] - 111:28, 148:28
government; [1] - 122:27
Governmental [1] - 161:18
GRAINNE [1] - 3:8
GRAND [1] - 2:29
grant [2] - 42:22, 155:5
grant.. [1] - 154:28
granting [2] - 106:23, 120:25
grapple [1] - 52:14
great [9] - 13:4, 20:26, 41:2, 41:3, 56:1, 60:12, 93:10, 167:18, 173:20
greater [2] - 100:12, 140:23
greatest [2] - 15:22, 90:12
grievances [1] - 165:23
ground [5] - 54:14, 74:17, 96:27, 107:14, 121:17
grounds [6] - 43:16, 66:6, 99:1, 107:28, 137:9, 141:20
grounds.. [1] - 141:27
group [1] - 177:29
groupings [1] - 22:13
growing [1] - 11:22
guarantee [5] - 36:27, 88:14, 124:8,

161:21, 161:26
guaranteed [4] -
36:15, 105:11,
114:12, 115:3
guarantees [7] -
33:4, 33:9, 107:21,
109:16, 114:24,
121:19, 121:23
guardian [1] - 70:2
guardians [1] - 36:20
guidelines [1] -
173:2

H

half [1] - 108:6
halfway [2] - 154:23,
157:22
ham [1] - 14:7
ham-fisted [1] - 14:7
hand [21] - 6:24,
34:24, 36:29, 39:29,
92:13, 99:26, 106:6,
146:7, 146:10, 164:1,
164:3, 165:28,
168:10, 170:26,
171:5, 171:11,
171:23, 173:10
handed [1] - 34:27
HANDED [1] - 6:24
Handed [1] - 168:11
handing [1] - 39:28
handles [1] - 166:3
handling [1] - 165:25
hard [2] - 117:4,
170:28
harm [6] - 42:20,
46:3, 46:4, 46:10,
46:20, 95:27
harmful [1] - 110:1
harmonisation [1] -
36:1
harmony [2] -
115:23, 126:25
HAYES [1] - 2:13
Hayez [1] - 176:18
head [1] - 16:13
headed [1] - 177:21
heading [6] - 19:13,
84:18, 87:25, 117:23,
162:23, 163:10
heard [13] - 28:6,
28:11, 29:14, 41:10,
47:1, 61:29, 63:24,
93:10, 96:24, 144:8,
148:9, 160:14, 167:18
HEARD [1] - 1:17
hearing [2] - 5:5,
97:11

HEARING [4] - 1:17,
5:1, 83:1, 179:19
held [15] - 12:8,
22:28, 54:7, 99:22,
115:8, 115:18, 126:4,
126:9, 126:21,
135:14, 138:24,
143:4, 144:29,
149:11, 167:13
help [4] - 40:13,
163:17, 167:23,
167:24
helpful [5] - 40:13,
95:1, 95:20, 175:29,
177:4
helpfully [1] - 79:29
hence [1] - 54:3
Hernandez [3] -
62:5, 62:8
Herr [1] - 13:12
herring [1] - 61:10
hierarchical [1] -
159:16
HIGH [1] - 1:2
high [5] - 36:16,
141:23, 143:4,
144:29, 170:11
high-profile [1] -
141:23
highest [1] - 124:13
highlight [2] - 19:8,
90:3
highlighted [1] -
147:17
highlighting [1] -
163:19
highlights [1] -
144:18
highly [2] - 106:17,
148:27
him.. [1] - 142:1
him/her [1] - 23:8
himself [5] - 110:24,
115:2, 116:27,
119:22, 144:4
historical [1] - 24:3
history [1] - 136:14
hitting [4] - 51:23,
51:25, 51:26, 51:29
hived [1] - 99:6
hmm [7] - 5:16, 5:22,
17:7, 98:25, 109:3,
111:3, 120:4
hoax [2] - 136:11,
141:4
hoc [1] - 162:28
hold [2] - 132:16,
144:29
holding [1] - 79:12
holds [5] - 13:29,

116:1, 126:28,
127:11, 143:4
holistic [3] - 10:9,
98:16, 107:26
Homeland [1] - 58:9
hone [1] - 95:27
hope [4] - 93:23,
93:26, 93:29, 170:28
hopefully [1] - 40:12
horrendously [1] -
81:23
horror [1] - 61:23
host [1] - 89:1
hostile [3] - 22:1,
22:12, 22:14
HOUSE [1] - 2:13
huge [1] - 95:26
hugely [2] - 164:26,
179:5
human [10] - 19:10,
19:19, 20:9, 20:12,
26:12, 95:8, 147:2,
147:19, 161:28,
163:20
Human [10] - 94:24,
97:1, 97:17, 135:6,
136:19, 139:26,
157:24, 164:18, 171:4
hundred [1] - 150:23
Hungarian [3] -
149:22, 166:14, 167:6
Hungarians [1] -
160:28
hurdle [1] - 82:3
Hyland [5] - 29:26,
53:8, 61:6, 87:1, 93:6
HYLAND [23] - 2:11,
4:5, 93:8, 93:10,
98:26, 100:21,
100:23, 104:12,
104:16, 108:9, 109:4,
111:4, 120:5, 134:26,
134:29, 135:3,
143:15, 143:18,
148:13, 167:24,
167:27, 168:6, 179:17
hypothesis [1] -
77:10
hypothetical [3] -
41:18, 43:6, 77:6

I

i.e [2] - 99:28, 119:28
idea [2] - 40:16, 82:9
idem [1] - 75:14
identifiable [2] -
103:14, 179:8
identification [3] -

149:18, 175:25,
178:23
identified [17] - 7:7,
9:21, 20:26, 21:3,
39:17, 68:27, 77:15,
97:24, 125:28,
146:29, 160:4, 160:9,
165:29, 167:13,
170:21, 177:18
identified [1] -
141:20
identifies [8] - 83:13,
83:15, 95:18, 124:1,
135:11, 152:21,
154:2, 177:5
identify [19] - 21:10,
69:27, 69:28, 82:3,
83:24, 84:10, 97:8,
102:26, 112:23,
116:18, 128:22,
130:29, 135:3,
147:28, 160:7, 161:4,
168:7, 176:18, 179:8
identifying [3] -
55:13, 178:29, 179:10
ignore [3] - 15:13,
116:16, 116:17
ignored [2] - 164:24,
164:25
ignores [1] - 86:28
ignoring [1] - 64:16
ii [1] - 122:6
iii [1] - 122:8
ill [1] - 134:16
ill-founded [1] -
134:16
illegality [1] - 56:26
illusory [1] - 158:2
illustrate [3] - 156:1,
166:29, 178:18
illustrates [2] -
53:16, 177:2
illustrating [1] -
156:11
image [1] - 41:5
immediately [2] -
54:15, 170:5
immense [1] - 22:5
imminent [7] - 41:17,
42:27, 43:5, 46:6,
46:13, 52:1, 52:10
Immunities [2] -
85:10, 87:26
immunity [5] - 57:18,
57:23, 57:29, 87:26,
87:29
impact [1] - 39:18
impair [2] - 12:8,
12:25
impaired [7] - 8:4,

8:6, 8:11, 9:3, 11:14,
87:10, 87:13
impairment [1] -
8:14
impairs [1] - 89:2
impartial [1] - 144:27
impediment [1] -
64:6
implement [1] -
147:18
implementation [6] -
88:16, 108:21,
116:25, 123:18,
170:3, 170:12
implemented [1] -
111:20
implementing [1] -
168:22
implicated [1] -
73:23
implications [1] -
115:17
implies [2] - 101:29,
120:8
importance [15] -
11:22, 12:13, 12:23,
13:25, 32:9, 35:20,
38:4, 39:14, 65:7,
69:28, 82:6, 91:24,
99:17, 123:23, 153:12
importances [1] -
38:19
important [45] -
10:21, 12:20, 13:10,
18:1, 20:24, 23:13,
28:9, 28:24, 37:5,
38:10, 38:26, 39:23,
40:28, 56:9, 58:25,
58:26, 59:9, 69:22,
79:15, 94:26, 98:11,
106:13, 106:28,
117:8, 117:9, 125:22,
126:6, 134:22,
134:23, 135:4,
135:25, 142:8,
142:14, 144:3, 157:4,
158:4, 159:27,
160:23, 161:20,
164:21, 175:16,
176:5, 176:16,
176:19, 179:5
importantly [4] -
29:15, 50:22, 118:19,
123:17
importation [1] -
24:6
importer [3] - 29:23,
30:6, 32:18
imports [1] - 38:12
imposed [2] - 32:25,

131:7
imposes [4] - 32:18, 37:9, 85:20, 88:5
imposition [1] - 49:28
impossible [6] - 100:7, 115:14, 130:5, 139:3, 156:26, 164:4
impression [1] - 41:7
imprimatur [1] - 33:27
improper [2] - 158:4, 159:28
improperly [1] - 111:20
impropriety.. [1] - 141:24
improved [1] - 163:18
improving [1] - 19:19
impugned [2] - 106:8, 147:23
in.. [1] - 28:14
inability [1] - 156:11
inadequacies [1] - 90:3
inadequacy [5] - 70:17, 70:19, 70:20, 74:17, 74:26
inadequate [5] - 60:19, 60:27, 61:1, 90:17, 126:9
inadmissible [2] - 54:8, 115:3
inbuilt [1] - 34:14
Inc [3] - 16:18, 16:21, 17:10
incidents [1] - 21:4
inclined [1] - 75:8
include [3] - 26:5, 118:5, 151:6
included [1] - 59:12
including [9] - 57:29, 75:7, 115:7, 125:3, 143:10, 145:23, 172:29, 174:14, 175:21
incompatible [2] - 112:28, 157:28
inconsistencies [1] - 90:8
inconsistent [5] - 8:14, 8:29, 29:16, 35:19, 76:2
incorrect [5] - 10:12, 81:9, 81:13, 81:16, 85:16
increasingly [2] - 19:16, 59:15
increment [1] - 169:2
increments [1] - 169:2
incumbent [1] - 66:25
indeed [5] - 8:11, 11:12, 57:4, 64:17, 105:27
indent [1] - 66:22
independence [7] - 35:24, 65:7, 110:20, 150:5, 155:21, 159:17, 164:2
Independent [2] - 19:13, 175:5
independent [23] - 35:16, 41:24, 42:13, 71:20, 86:5, 86:7, 86:9, 88:15, 90:10, 110:10, 123:20, 124:19, 132:20, 143:3, 144:27, 145:20, 153:22, 155:11, 165:4, 165:8, 165:9, 166:3
INDEX [1] - 4:1
index [1] - 34:27
Indian [1] - 34:4
indicate.. [1] - 147:13
indicated [5] - 9:6, 72:25, 88:9, 115:21, 166:24
indicates [2] - 157:13, 166:18
indication [3] - 113:16, 154:8, 154:17
individual [36] - 15:29, 20:7, 25:5, 25:13, 25:20, 37:16, 54:14, 84:23, 85:1, 86:22, 95:17, 96:10, 99:14, 99:26, 101:23, 102:6, 102:7, 102:10, 109:12, 109:29, 110:24, 111:11, 111:21, 112:17, 112:26, 116:26, 117:28, 118:8, 125:17, 139:14, 164:13, 173:12, 175:23, 175:25, 177:19, 178:2
individual's [4] - 104:23, 109:11, 109:17, 111:6
individuals [14] - 30:27, 32:14, 36:2, 36:24, 53:16, 96:7, 98:2, 124:9, 133:3, 139:8, 145:3, 161:23, 163:12, 170:16
Individuals [1] - 164:9
individuals.. [1] - 165:23
Ineffective" [2] - 84:19, 85:11
inescapable [1] - 164:22
inevitable [1] - 61:5
inevitably [1] - 17:28
Inextricably [1] - 111:8
inference [2] - 52:21, 52:24
INFORMATION [1] - 3:8
information [36] - 13:20, 22:3, 26:12, 48:21, 48:23, 49:5, 71:22, 112:4, 115:2, 115:8, 119:10, 119:18, 120:28, 120:29, 121:27, 122:8, 122:10, 122:16, 122:17, 122:19, 123:11, 124:21, 125:25, 126:23, 126:29, 136:29, 137:2, 137:8, 145:24, 146:14, 149:7, 153:23, 159:1, 159:11, 169:10, 175:20
informed [5] - 22:29, 54:14, 111:16, 113:3, 133:3
informing [2] - 23:6, 112:26
infringed [2] - 102:17, 102:22
infringements [1] - 25:13
inherent [9] - 45:2, 45:15, 45:16, 45:17, 71:23, 94:5, 116:8, 127:9, 146:5
inhibition [1] - 63:24
initial [5] - 43:10, 44:19, 62:27, 109:26, 150:7
initiated [1] - 177:28
injunction [3] - 56:9, 56:11, 150:22
injunctive [1] - 51:12
injury [21] - 41:14, 41:15, 41:21, 41:22, 41:29, 42:12, 42:25, 46:22, 46:23, 46:25, 48:8, 48:24, 48:29, 49:12, 49:21, 49:24, 49:25, 51:7, 51:25, 52:4, 62:13
injury' [1] - 51:22
injury-in-fact [6] - 41:14, 41:15, 42:25, 51:7, 52:4, 62:13
injustice [2] - 40:19, 77:29
input [1] - 75:6
inquiry [1] - 126:10
insight [1] - 165:26
insofar [3] - 96:4, 105:15, 112:24
inspection [1] - 156:4
inspectors [1] - 145:23
installation [1] - 26:9
installed [1] - 150:16
instance [5] - 43:7, 68:9, 69:20, 75:2, 174:13
instances [4] - 69:27, 89:20, 97:27, 114:22
instant [2] - 120:18, 167:3
instead [2] - 108:23, 170:13
institution [1] - 73:1
Institutions [1] - 19:13
institutions [8] - 19:15, 57:7, 57:9, 96:8, 102:5, 105:16, 123:21, 168:20
instructed [4] - 2:18, 2:23, 2:28, 3:9
Instructed [3] - 2:7, 2:12, 3:3
instructions [1] - 29:24
instruments [2] - 171:27, 171:28
insufficient [2] - 76:20, 178:19
insufficiently [1] - 166:2
integral [1] - 39:7
Integration [1] - 157:24
Intelligence [8] - 53:21, 128:7, 128:28, 131:14, 132:15, 145:20, 168:3, 178:4
intelligence [23] - 22:4, 53:27, 54:18, 54:21, 78:25, 112:22, 162:20, 163:14, 163:28, 165:26, 172:8, 173:1, 174:9, 174:14, 174:19, 176:9, 177:1, 177:15, 177:27, 178:7, 178:11, 178:21, 178:28
Intelligence.. [1] - 176:24
intend [1] - 37:27
intended [3] - 15:1, 34:10, 122:11
intending [1] - 177:20
intentional [1] - 57:21
intentionally [1] - 57:28
inter [2] - 54:20, 145:10
interaction [4] - 47:22, 50:8, 50:23, 51:16
intercept [5] - 145:11, 147:3, 150:17, 154:9, 155:7
intercepted [18] - 26:8, 49:12, 57:27, 89:20, 117:16, 131:1, 133:4, 136:13, 141:6, 141:9, 141:19, 141:22, 144:23, 158:11, 158:21, 158:24, 158:27, 159:5
intercepting [4] - 142:19, 142:27, 143:21, 144:3
interception [46] - 26:6, 47:16, 51:10, 99:20, 99:22, 129:5, 131:25, 137:19, 138:8, 138:24, 141:11, 141:19, 141:28, 142:19, 142:24, 143:11, 144:2, 144:20, 144:25, 144:26, 145:11, 145:27, 147:1, 147:5, 149:4, 150:27, 150:28, 151:1, 151:3, 151:5, 151:9, 151:12, 152:27, 154:27, 155:2, 157:27, 157:29, 158:8, 158:13, 158:14, 159:25, 175:10
Interception [2] - 142:21, 144:7

interception.. [1] - 147:11
interceptions [3] - 155:16, 159:11, 159:26
interceptions.. [1] - 156:13
interest [10] - 9:12, 9:20, 38:2, 41:16, 120:18, 135:7, 147:29, 148:5, 160:13, 171:20
interesting [4] - 34:16, 142:11, 146:18, 149:10
interestingly [1] - 150:7
interests [11] - 37:2, 103:8, 115:19, 120:1, 121:3, 124:25, 125:16, 125:17, 148:17, 162:12, 172:8
interfere [1] - 36:10
interfered [2] - 52:29, 111:22
interference [25] - 11:26, 12:24, 35:19, 42:27, 99:27, 103:5, 104:2, 104:7, 104:18, 104:22, 105:9, 105:21, 113:24, 120:8, 120:17, 120:20, 121:2, 124:24, 125:18, 130:15, 132:6, 136:10, 138:25, 139:14, 150:13
interference' [3] - 105:1, 112:24, 112:29
interferences [2] - 133:29, 158:1
interferes [1] - 46:18
Internal [3] - 20:4, 161:18, 161:25
internal [7] - 20:5, 20:11, 36:6, 98:5, 162:1, 162:26, 173:24
internally [1] - 94:5
international [4] - 27:4, 38:24, 54:2, 173:2
internationally [2] - 19:2, 23:21
internet [4] - 11:16, 11:17, 38:20
interposition [1] - 57:17
interpret [1] - 115:24
interpretation [7] - 76:26, 77:4, 77:12, 115:22, 118:4, 126:25, 174:6
interpreted [5] - 91:20, 105:12, 133:19, 138:10, 173:6
interpreting [2] - 47:25, 75:17
interrogation [1] - 25:8
interrupted [1] - 39:12
interval [1] - 43:15
intervene [1] - 109:4
intervenes [1] - 32:29
intervenor [1] - 35:14
interview [1] - 128:13
intimidate [1] - 141:29
introduced [3] - 31:2, 34:11, 78:6
introduction [2] - 169:16, 170:21
intrusion [1] - 142:26
intrusions [2] - 17:19, 17:21
intrusive [3] - 19:24, 22:21, 24:27
invalid [4] - 73:11, 74:13, 74:14, 74:26
invalidate [2] - 31:11, 32:2
invalidated [2] - 31:18, 31:21
invalidates [1] - 10:3
invalidation [2] - 33:19, 34:7
invalidity [1] - 66:6
invasion [1] - 41:15
invention [1] - 26:25
investigates [1] - 128:6
investigating [1] - 165:8
investigation [9] - 68:9, 90:22, 112:5, 129:2, 146:13, 148:18, 165:3, 165:15, 170:20
investigations [3] - 23:4, 128:10, 165:12
investigative [1] - 162:29
Investigative [1] - 135:16
Investigatory [3] - 26:1, 137:12, 158:12
investment [1] - 38:14
investments [1] - 176:17
invoked [2] - 121:29, 126:17
involve [2] - 37:9, 86:21
involved [14] - 13:17, 62:28, 64:15, 64:16, 75:16, 100:8, 104:27, 119:20, 120:17, 131:1, 139:22, 143:11, 145:7, 162:7
involvement [1] - 124:1
involves [2] - 17:29, 74:4
involving [1] - 10:27
IPT [13] - 135:16, 136:26, 137:13, 137:16, 144:19, 144:24, 144:27, 145:3, 145:9, 146:19, 147:23, 148:24, 149:5
IPT's [1] - 145:13
IPT.. [1] - 144:23
Ireland [6] - 5:6, 16:18, 32:20, 83:6, 89:23, 95:25
IRELAND [1] - 1:12
Irish [5] - 61:8, 68:22, 89:22, 89:28
irrelevant [4] - 64:6, 77:13, 123:4, 154:16
isolation [1] - 99:7
issue [46] - 12:9, 19:3, 19:8, 19:17, 20:6, 26:23, 28:27, 40:18, 40:21, 42:23, 42:25, 45:7, 46:13, 48:19, 50:2, 52:8, 53:4, 58:14, 63:14, 64:3, 64:22, 64:23, 72:29, 75:2, 78:2, 78:3, 78:6, 78:11, 88:20, 89:21, 103:16, 103:20, 104:17, 105:8, 110:22, 111:8, 113:20, 125:2, 129:18, 130:23, 132:1, 138:3, 146:17
issues [11] - 5:11, 29:21, 43:19, 78:4, 78:5, 85:23, 93:15, 94:1, 116:19, 130:7
IT [2] - 22:2, 39:3
it" [1] - 81:25
it' [1] - 42:19
Italy [2] - 176:26, 178:23
item [2] - 18:26, 64:21
items [1] - 80:13
iterative [1] - 177:7
itself [21] - 8:14, 26:26, 30:2, 40:21, 44:29, 45:13, 46:19, 59:13, 91:9, 94:18, 95:29, 109:9, 112:27, 118:21, 123:19, 124:23, 126:29, 135:6, 135:7, 146:6, 156:21
iv [1] - 122:10
ix [1] - 122:28

J

JAMES [1] - 2:17
January [1] - 137:16
Jeffrey [2] - 167:25, 168:1
jeopardise [2] - 112:18, 125:7
jeopardising [3] - 113:5, 133:6, 133:22
job [2] - 119:12, 119:16
JOHN [1] - 2:24
joined [1] - 34:4
journalist [2] - 128:3, 149:27
judge [15] - 6:20, 82:22, 93:10, 110:2, 142:7, 144:15, 145:17, 153:29, 154:6, 161:11, 164:21, 167:27, 172:12, 174:28, 179:13
Judge [97] - 5:10, 5:29, 6:28, 8:23, 14:3, 14:21, 16:25, 23:16, 34:26, 35:11, 40:6, 42:1, 57:5, 60:7, 60:12, 61:19, 63:8, 64:21, 67:28, 69:24, 70:15, 70:24, 72:15, 72:23, 75:11, 77:12, 78:13, 80:1, 81:22, 83:7, 92:8, 93:3, 93:10, 93:13, 93:22, 93:26, 95:24, 96:23, 96:29, 100:16, 100:18, 100:25, 102:24, 103:11, 103:26, 104:12, 107:25, 108:5, 111:2, 113:28, 114:17, 116:14, 117:7, 119:6, 122:16, 125:22, 126:15, 127:22, 127:28, 130:11, 131:20, 132:25, 134:26, 135:1, 135:27, 137:13, 137:22, 138:1, 141:2, 143:15, 144:13, 145:4, 149:15, 149:21, 150:7, 152:19, 153:7, 155:9, 157:6, 162:4, 163:25, 166:8, 166:10, 167:13, 167:16, 167:20, 167:29, 168:6, 170:18, 170:24, 171:2, 174:1, 175:6, 175:15, 177:4, 177:12
judges [1] - 153:22
judgment [16] - 43:11, 43:24, 53:15, 55:12, 66:3, 75:17, 76:5, 76:9, 76:15, 112:1, 113:2, 132:19, 135:19, 136:22, 161:10, 165:16
judgment's [1] - 67:23
judgments [2] - 135:21, 135:22
Judicial [5] - 19:21, 58:4, 87:20, 162:23, 162:26
judicial [35] - 19:23, 19:26, 24:21, 24:27, 26:10, 27:17, 27:18, 27:20, 65:24, 67:6, 71:5, 97:14, 98:2, 106:12, 109:25, 109:27, 110:6, 111:5, 114:23, 118:14, 132:16, 139:12, 143:4, 145:1, 150:11, 150:18, 152:5, 153:11, 153:15, 153:17, 153:21, 155:10, 159:19, 163:6
July [1] - 73:5
jumping [3] - 73:6, 73:19, 170:6
jurisdiction [8] - 29:25, 77:1, 89:28, 106:22, 107:12, 144:18, 144:23, 158:12
jurisdictions [2] - 95:25, 177:17

jurisprudence [2] - 94:27, 118:4
justice [4] - 136:7, 136:16, 141:25, 173:26
Justice [12] - 58:12, 73:11, 96:4, 122:29, 123:1, 123:26, 123:28, 124:12, 125:3, 126:1
JUSTICE [80] - 1:17, 5:4, 5:16, 5:22, 5:27, 6:12, 6:16, 8:21, 8:24, 14:5, 14:12, 14:14, 16:12, 16:17, 16:23, 16:26, 17:7, 18:14, 20:22, 21:5, 23:23, 23:25, 23:27, 27:2, 28:15, 31:13, 31:16, 35:1, 35:3, 35:8, 40:5, 40:9, 47:8, 52:17, 52:21, 52:27, 53:1, 60:1, 61:13, 61:16, 61:20, 67:17, 67:22, 70:28, 71:1, 71:9, 71:12, 71:14, 73:6, 73:15, 73:20, 73:27, 74:22, 78:15, 79:22, 79:24, 80:4, 81:26, 83:4, 83:9, 93:4, 93:6, 98:25, 100:20, 100:22, 104:10, 104:15, 108:8, 109:3, 111:3, 120:4, 134:25, 134:28, 135:2, 143:13, 143:16, 148:12, 167:23, 168:2, 179:15
justification [4] - 27:14, 103:16, 103:18, 104:18
justified [8] - 9:3, 64:25, 89:4, 91:10, 105:9, 112:25, 113:23, 147:24
justified.. [1] - 173:7
justify [7] - 7:26, 8:1, 8:2, 8:28, 55:22, 87:5, 174:12
justifying [1] - 139:6

K

Kavanagh [2] - 35:8, 35:10
keep [5] - 51:19, 61:17, 65:5, 143:21, 148:18
KELLEY [1] - 2:27
Kennedy [8] -

134:23, 134:25, 135:25, 151:25, 152:1, 152:8, 152:11, 158:6
kept [1] - 119:11
key [3] - 38:1, 175:21, 176:9
KIERAN [1] - 2:11
kind [9] - 18:20, 51:28, 96:16, 108:2, 130:6, 130:7, 131:11, 166:16, 170:27
Kingdom [7] - 95:25, 138:7, 138:11, 141:18, 145:15, 158:9, 178:9
KINGSTON [1] - 2:22
Klass [15] - 117:7, 121:21, 127:16, 131:17, 131:22, 131:26, 132:28, 138:9, 138:22, 144:15, 146:3, 151:25, 153:16, 157:7, 157:8
Klass.. [1] - 138:6
knowing [1] - 111:21
knowledge [7] - 40:22, 40:25, 64:1, 89:7, 109:11, 111:12, 164:12
known [3] - 23:7, 26:8, 103:28
knows [2] - 94:11, 172:15

L

labyrinth [1] - 73:9
lack [10] - 6:18, 45:15, 79:12, 86:29, 89:7, 115:7, 116:1, 126:28, 159:10, 173:9
lacked [1] - 42:7
lacking [1] - 111:26
lags [1] - 20:1
laid [1] - 143:7
lame [1] - 27:25
lamely [1] - 35:7
land [1] - 108:14
largely [1] - 174:10
larger [1] - 55:7
last [8] - 18:3, 23:17, 23:26, 34:19, 51:3, 149:15, 149:21, 173:16
late [2] - 14:16, 34:5
latter [1] - 36:14
launched [1] - 101:5

laundering [1] - 128:9
law [125] - 9:9, 9:19, 13:21, 15:5, 15:9, 15:12, 15:16, 17:22, 17:24, 20:1, 23:5, 27:4, 28:27, 29:11, 29:13, 29:18, 29:22, 32:17, 32:20, 37:16, 39:21, 46:9, 50:18, 54:10, 55:12, 57:11, 59:24, 60:13, 60:25, 60:28, 61:7, 61:8, 64:2, 66:2, 68:1, 68:22, 71:21, 72:14, 74:16, 76:24, 76:27, 77:4, 77:27, 79:16, 82:14, 83:14, 83:16, 83:19, 85:16, 85:27, 86:3, 88:9, 88:12, 89:2, 89:16, 89:22, 89:28, 90:28, 91:2, 91:7, 91:9, 91:13, 94:22, 96:17, 97:1, 97:7, 97:9, 100:28, 103:6, 103:13, 103:15, 103:28, 105:20, 106:29, 107:13, 108:3, 109:22, 113:15, 114:13, 116:11, 118:23, 127:15, 127:17, 127:20, 128:23, 137:4, 139:8, 147:11, 152:23, 152:25, 154:5, 154:7, 154:11, 155:6, 155:27, 156:6, 158:3, 159:13, 159:22, 159:27, 164:17, 166:14, 168:22, 171:10, 171:20, 172:10, 172:15, 172:16, 172:17, 172:19, 172:24, 173:5, 173:12, 174:5, 174:13, 174:21, 175:4, 178:16, 178:18, 179:7, 179:8
Law [2] - 172:14, 172:21
law' [1] - 81:16
law-enforcement [1] - 155:6
lawful [3] - 46:11, 137:20, 141:29
laws [9] - 31:21, 32:26, 34:15, 37:19, 57:15, 79:4, 120:25, 170:12, 177:25

lawyer [3] - 54:3, 149:24, 149:26
lawyers.. [1] - 145:1
lead [2] - 71:29, 163:17
leak [2] - 44:13, 158:25
Leander [9] - 118:29, 119:7, 119:15, 124:23, 125:18, 125:24, 126:17, 126:22, 132:28
learned [2] - 40:19, 50:16
learning [1] - 41:3
learns [1] - 50:15
least [8] - 15:17, 34:27, 63:3, 114:1, 119:3, 122:21, 124:18, 124:27
leave [4] - 28:18, 43:2, 55:10, 82:22
leaving [1] - 123:18
led [1] - 64:18
LEE [1] - 2:7
left [4] - 5:12, 167:16, 170:26, 171:11
left-hand [2] - 170:26, 171:11
legal [28] - 23:8, 24:2, 25:22, 58:23, 59:25, 62:22, 66:24, 66:26, 77:7, 79:17, 81:9, 83:25, 84:23, 87:16, 90:11, 124:13, 145:13, 152:15, 165:11, 165:14, 166:5, 168:8, 170:8, 170:13, 172:1, 178:2, 178:6, 178:20
LEGAL [1] - 3:9
legality [3] - 96:6, 111:13, 165:27
legally [1] - 41:15
Legislation [1] - 175:5
legislation [31] - 70:1, 84:22, 99:28, 100:3, 101:6, 102:13, 104:1, 104:27, 106:8, 106:23, 112:25, 113:10, 113:19, 113:24, 115:7, 130:7, 133:1, 138:21, 139:15, 139:24, 141:16, 142:12, 146:24, 155:28, 166:19, 166:24, 167:6, 167:12, 173:4, 175:9, 178:13
legislative [5] - 99:29, 140:4, 153:27, 162:9, 178:27
legislature [4] - 66:26, 107:3, 113:23, 143:3
legitimate [8] - 7:25, 22:26, 120:10, 120:16, 121:3, 121:11, 125:20, 163:27
lend [1] - 33:17
lending [1] - 71:19
length [1] - 6:20
less [3] - 90:25, 165:12, 165:21
letters [2] - 117:16, 117:28
level [18] - 36:17, 70:15, 74:5, 75:12, 89:21, 90:12, 100:7, 100:9, 100:11, 135:7, 139:17, 139:28, 140:7, 140:10, 140:14, 142:13, 145:14, 173:24
liability [1] - 57:8
liable [2] - 36:10, 152:28
liaison [1] - 175:22
lies [1] - 30:1
life [7] - 10:19, 36:10, 37:1, 104:24, 120:21, 163:22, 169:3
light [12] - 12:5, 17:4, 44:16, 65:24, 66:23, 70:10, 76:14, 113:10, 138:28, 141:27, 148:27, 174:11
likelihood [5] - 99:23, 138:26, 140:9, 141:5, 141:10
likelihood' [1] - 138:15
likelihoods [1] - 54:25
likely [8] - 25:19, 33:3, 41:28, 47:18, 53:29, 97:21, 148:26, 175:10
likewise [1] - 84:22
limit [2] - 138:29, 152:29
limitation [11] - 7:27, 9:9, 10:16, 12:4, 26:19, 26:20, 26:23, 55:17, 55:19, 59:23, 171:18
limitations [16] - 8:7,

8:13, 9:25, 12:15,
12:21, 27:19, 45:18,
58:13, 60:7, 60:19,
87:27, 94:6, 94:9,
146:5, 154:21, 174:22
limited [8] - 7:23,
13:3, 56:23, 116:12,
117:1, 123:13,
164:17, 164:24
limits [2] - 110:7,
172:28
line [5] - 24:16,
28:22, 78:22, 80:6,
173:11
linguistic [1] - 28:19
linked [1] - 111:8
list [2] - 176:26,
178:14
listed [2] - 129:13,
130:27
listening [1] - 93:19
litigating [1] - 25:10
litigation [1] - 161:22
live [1] - 127:25
lives [2] - 11:23,
142:27
loaned [1] - 3:24
lobbying [1] - 136:15
location [1] - 151:8
locks [1] - 81:23
lodge [1] - 159:2
lodged [5] - 53:19,
65:22, 66:18, 122:26,
137:12
lodging [1] - 101:24
logic [3] - 109:8,
115:23, 126:26
long-term [1] -
112:18
look [54] - 13:6,
17:20, 17:26, 18:17,
18:18, 27:16, 29:12,
32:4, 40:16, 53:12,
55:29, 69:7, 69:24,
70:3, 80:10, 81:22,
84:10, 94:27, 94:29,
95:24, 95:29, 96:29,
97:9, 98:23, 98:29,
99:8, 100:9, 100:17,
101:8, 106:3, 114:10,
117:20, 125:24,
126:12, 130:13,
134:22, 135:19,
136:21, 136:24,
140:7, 140:8, 144:9,
149:24, 150:25,
151:27, 153:20,
154:22, 160:11,
160:25, 161:8, 166:9,
167:19, 169:15

looked [13] - 46:24,
60:20, 70:9, 71:29,
75:14, 99:5, 127:16,
134:7, 151:25, 158:6,
160:4, 171:6, 179:6
looking [27] - 17:19,
40:12, 56:6, 60:6,
60:7, 68:25, 73:2,
79:4, 98:18, 98:22,
100:18, 109:24,
111:2, 116:19,
117:24, 119:9,
127:22, 128:25,
130:14, 132:24,
148:4, 151:21,
153:25, 157:1,
167:17, 169:20, 176:4
looks [9] - 69:16,
95:28, 98:26, 126:8,
132:11, 132:29,
139:28, 157:17,
177:21
lost [3] - 73:9,
104:10, 139:5
low [1] - 140:22
Lowenthal [1] -
176:11
LOWER [1] - 3:10
LTD [1] - 1:12
Ltd [2] - 5:6, 83:6
lucidly [1] - 45:26
Lujan [1] - 41:11
lunch [1] - 80:10
LUNCHEON [2] -
82:26, 83:1
lunchtime [1] - 92:17

M

machinery [1] -
102:3
magazine [1] - 150:2
mail [4] - 11:17,
47:16, 54:2, 106:24
mails [4] - 46:18,
46:19, 46:24, 53:24
main [4] - 76:3, 76:8,
77:5, 111:15
maintained [1] -
121:23
major [4] - 26:18,
44:29, 45:12, 162:19
majority [2] - 55:13,
76:7
Malone [4] - 1:21,
3:23, 3:25, 138:6
MALONE [1] - 1:31
manageable [1] -
177:10

mandate [1] - 124:15
mandates [1] - 24:18
mandatory [6] -
29:22, 30:7, 30:9,
30:12, 37:15, 97:18
manifest [1] - 156:29
manifestly [3] - 82:2,
84:5, 134:16
manner [6] - 3:24,
12:2, 54:5, 79:26,
98:7, 102:6
manslaughter [1] -
136:4
maps [1] - 170:13
MARCH [3] - 1:18,
5:1, 179:20
margin [4] - 120:14,
121:7, 125:14, 133:28
mark [1] - 34:15
marked [1] - 35:9
marked-up [1] - 35:9
market [1] - 36:6
marshal [1] - 22:13
MASON [1] - 2:13
mass [1] - 150:5
material [17] - 14:10,
14:23, 62:29, 77:8,
81:12, 82:4, 82:18,
93:15, 93:23, 143:12,
143:13, 143:16,
145:3, 145:12, 147:3,
154:9, 157:3
materially [2] -
38:27, 102:3
materials [4] - 18:6,
142:19, 143:10,
156:12
matter [24] - 5:5,
27:6, 56:23, 62:26,
65:1, 67:18, 67:28,
68:25, 69:10, 70:10,
72:26, 75:16, 78:17,
79:9, 79:29, 80:7,
81:18, 85:16, 89:22,
90:10, 92:7, 123:13,
146:7, 164:28
matter [1] - 72:6
matters [9] - 14:21,
15:23, 71:26, 78:17,
78:18, 94:2, 124:13,
128:6, 165:18
MAURICE [1] - 2:27
MAXIMILLIAN [1] -
1:14
McCANN [1] - 2:23
McCULLOUGH [4] -
2:16, 56:13, 56:15,
56:17
McGovern [1] - 34:5
mean [14] - 32:3,

45:28, 46:23, 47:26,
54:13, 56:13, 61:13,
63:18, 67:22, 74:20,
107:10, 116:6,
177:20, 178:14
meaning [3] - 22:20,
58:27, 91:16
meaningful [1] -
170:3
means [11] - 11:21,
12:3, 14:27, 14:28,
50:17, 106:7, 106:14,
115:1, 121:10,
129:26, 158:5
meant [5] - 40:10,
40:12, 69:2, 75:19,
137:18
measure [9] - 13:24,
37:17, 96:6, 97:15,
101:27, 112:17,
131:6, 140:4, 177:28
measures [68] -
19:25, 19:27, 20:2,
22:21, 22:22, 22:24,
23:4, 23:7, 25:20,
26:4, 99:1, 99:24,
100:1, 101:12,
101:15, 101:26,
102:13, 102:14,
102:18, 102:19,
104:21, 107:17,
107:28, 107:29,
108:2, 108:21,
110:17, 111:12,
111:20, 111:24,
112:14, 112:16,
113:4, 113:13, 115:6,
115:13, 115:28,
116:25, 128:29,
131:24, 138:15,
138:22, 138:27,
139:7, 139:10,
139:16, 139:18,
139:29, 142:2, 142:4,
149:3, 152:3, 152:23,
154:17, 154:21,
156:6, 156:9, 159:3,
159:29, 161:5,
162:29, 166:16,
167:9, 168:24, 175:28
measures.. [1] -
147:23
mechanism [2] -
67:9, 68:2
Mechanisms [1] -
163:10
mechanisms [3] -
8:17, 170:4, 170:5
mechanisms.. [1] -
170:14

media [2] - 150:4,
150:5
mediation [1] - 89:29
medium [1] - 38:27
meet [6] - 9:11,
31:21, 44:21, 125:12,
159:16, 171:19
meeting [1] - 32:5
meets [2] - 9:24,
128:12
Meltzer [3] - 17:2,
37:25, 39:8
member [5] - 19:1,
77:19, 132:15,
152:15, 160:28
Member [42] - 15:29,
16:3, 18:26, 26:18,
30:25, 32:25, 36:4,
36:22, 75:23, 90:4,
94:21, 94:22, 94:23,
95:2, 95:13, 95:14,
95:19, 95:22, 95:28,
96:9, 97:6, 98:8,
135:12, 168:21,
170:4, 170:9, 170:14,
170:19, 172:4,
173:13, 173:27,
175:8, 175:17,
175:22, 176:26,
177:24, 177:29,
178:8, 178:12,
178:19, 179:1, 179:11
members [7] - 18:23,
20:7, 20:11, 122:12,
124:2, 142:26, 144:29
membership [1] -
110:14
memorandum [2] -
63:16, 64:1
memorise [1] - 40:13
menace [2] - 104:27,
104:28
mention [4] - 91:15,
92:27, 154:29, 155:4
mentioned [10] -
6:10, 25:9, 39:27,
73:7, 93:12, 106:9,
119:7, 164:14,
168:13, 171:28
mere [4] - 52:18,
102:12, 104:26,
139:15
merely [3] - 14:11,
41:28, 131:7
merits [3] - 61:28,
62:15, 92:2
mesmerising [1] -
40:2
messages [3] -
128:16, 128:19,

176:15
met [2] - 46:22,
132:18
meta [2] - 44:14,
151:13
meta-data [2] -
44:14, 151:13
metadata [2] - 12:27,
51:21
method [1] - 146:19
methodology [2] -
81:13, 175:15
methods [4] - 22:4,
112:21, 148:18, 178:7
MI5 [1] - 136:27
MICHAEL [2] - 2:5,
3:2
might [18] - 22:3,
28:28, 43:19, 43:28,
54:26, 56:18, 56:22,
58:8, 61:4, 71:5, 78:4,
93:14, 107:6, 112:17,
112:21, 140:5, 152:13
might've [2] - 153:14
mild [1] - 27:26
military [1] - 124:22
Military [1] - 176:23
million [3] - 38:15,
53:22, 176:16
mind [2] - 159:12,
163:23
mine [1] - 64:28
minimisation [2] -
6:5, 129:19
minimum [4] -
103:22, 113:13,
123:11, 152:24
Minister [4] - 108:13,
110:18, 122:28, 143:5
minister [1] - 131:15
Minister's [1] -
108:29
minute [1] - 60:15
minutes [5] - 80:9,
80:10, 82:22, 129:26,
129:28
mirror [2] - 41:5,
161:2
miscarriage [1] -
136:6
miscarriages [2] -
136:15, 141:25
misconceived [2] -
33:18, 74:17
misconception [1] -
31:20
misconstrued [1] -
85:4
misread [1] - 76:9
missed [1] - 23:23
missing [3] - 13:22,
47:11, 80:1
mistake [2] - 18:8,
61:19
mistaken [1] - 13:17
misunderstanding
[5] - 31:27, 88:21,
89:16, 89:18, 90:9
mobile [4] - 11:16,
150:8, 150:12, 150:15
model [3] - 30:14,
31:1, 89:27
models [1] - 24:8
modern [1] - 115:18
modern-day [1] -
115:18
modes [1] - 54:25
moment [6] - 37:25,
45:5, 45:25, 83:8,
92:27, 100:22
moment's [1] - 30:16
momentous [1] -
82:5
money [1] - 128:9
monitor [1] - 131:15
monitored [3] -
129:12, 133:3, 133:21
monitoring [15] -
128:29, 129:3,
129:14, 129:25,
130:21, 130:24,
130:26, 131:6, 131:9,
131:21, 133:6, 150:3,
150:28, 151:4
Montevideo [1] -
128:15
moot [3] - 73:16,
73:28, 74:11
mootness [1] - 75:12
Moreover [3] - 113:1,
130:28, 132:18
morning [4] - 5:4,
5:10, 5:12, 136:1
most [13] - 20:8,
25:3, 25:12, 26:10,
27:20, 38:10, 40:25,
80:14, 83:26, 100:29,
117:8, 117:9, 162:18
mostly [1] - 53:24
motion [6] - 43:15,
59:3, 66:8, 66:13,
70:26, 77:11
motion.. [1] - 71:14
move [5] - 28:5,
48:9, 78:16, 151:16,
153:29
moved [1] - 172:24
movement [3] - 36:4,
36:9, 37:2
Moves [1] - 136:9
moving [5] - 90:15,
105:7, 108:5, 151:23,
162:4
MR [81] - 2:5, 2:5,
2:7, 2:10, 2:11, 2:12,
2:16, 2:17, 2:17, 2:27,
3:2, 3:8, 4:4, 5:8,
5:10, 5:17, 5:23, 5:29,
6:14, 6:17, 8:23, 8:25,
14:7, 14:13, 14:15,
16:16, 16:22, 16:25,
16:27, 17:8, 18:15,
20:23, 21:8, 23:24,
23:26, 23:28, 27:3,
28:16, 31:15, 31:17,
35:2, 35:5, 35:10,
40:8, 40:10, 47:10,
52:19, 52:23, 52:28,
53:2, 56:13, 56:14,
56:15, 56:16, 56:17,
56:19, 60:4, 61:15,
61:18, 61:22, 67:21,
67:27, 70:29, 71:8,
71:11, 71:13, 71:16,
73:14, 73:18, 73:25,
73:29, 74:24, 78:16,
79:23, 79:25, 80:6,
81:28, 83:7, 83:10,
93:5, 167:26
MS [110] - 1:17, 2:6,
2:11, 2:21, 2:22, 2:27,
3:2, 3:8, 4:5, 5:4,
5:16, 5:22, 5:27, 6:12,
6:16, 8:21, 8:24, 14:5,
14:12, 14:14, 16:12,
16:17, 16:23, 16:26,
17:7, 18:14, 20:22,
21:5, 23:23, 23:25,
23:27, 27:2, 28:15,
31:13, 31:16, 35:1,
35:3, 35:8, 40:5, 40:6,
40:9, 47:8, 52:17,
52:21, 52:27, 53:1,
60:1, 61:13, 61:16,
61:20, 67:17, 67:22,
70:28, 71:1, 71:9,
71:12, 71:14, 73:6,
73:15, 73:20, 73:27,
74:22, 78:15, 79:22,
79:24, 80:4, 81:26,
83:4, 83:9, 93:4, 93:6,
93:8, 93:10, 98:25,
98:26, 100:20,
100:21, 100:22,
100:23, 104:10,
104:12, 104:15,
104:16, 108:8, 108:9,
109:3, 109:4, 111:3,
111:4, 120:4, 120:5,
134:25, 134:26,
134:28, 134:29,
135:2, 135:3, 143:13,
143:15, 143:16,
143:18, 148:12,
148:13, 167:23,
167:24, 167:27,
168:2, 168:6, 179:15,
179:17
multi [1] - 169:1
multi-annual [1] -
169:1
multiple [1] - 162:21
murder [2] - 136:2,
141:23
Murray [5] - 31:25,
39:27, 47:4, 47:12,
63:1
MURRAY [1] - 2:5
museum [3] -
119:16, 119:17
must [54] - 3:23,
7:20, 7:22, 9:9, 11:2,
12:1, 17:20, 23:9,
23:28, 32:16, 36:28,
41:14, 41:20, 41:28,
45:18, 54:13, 56:6,
57:9, 57:12, 65:22,
66:3, 66:11, 66:21,
68:4, 72:1, 80:24,
80:26, 86:26, 87:6,
98:12, 99:23, 102:4,
106:19, 107:20,
109:18, 111:29,
113:3, 113:17,
115:22, 116:6,
120:19, 121:18,
126:12, 126:25,
127:7, 139:16,
144:29, 145:24,
148:18, 153:4,
163:23, 164:19,
171:18, 173:6

N

name [2] - 71:19,
107:16
named [1] - 1:26
namely [3] - 76:19,
108:25, 152:16
narrow [1] - 162:11
narrowly [2] -
105:12, 173:7
Nasscom [1] - 34:3
national [90] - 6:20,
6:28, 7:3, 7:21, 7:24,
8:2, 9:15, 9:18, 10:2,
10:18, 15:15, 16:19,
16:24, 17:12, 17:28,
18:22, 27:10, 28:26,
30:23, 34:20, 36:1,
36:15, 44:25, 55:6,
55:20, 59:22, 64:2,
65:18, 65:26, 66:16,
66:25, 66:27, 76:4,
76:8, 76:14, 76:29,
77:3, 86:23, 90:5,
90:17, 90:19, 91:1,
91:5, 94:12, 94:13,
94:19, 96:11, 100:6,
103:8, 103:17,
105:28, 107:5, 108:3,
114:5, 114:14,
115:20, 118:11,
120:1, 120:13,
120:19, 120:24,
121:11, 121:15,
124:25, 125:16,
127:10, 127:24,
127:25, 137:9,
137:27, 139:12,
139:17, 139:28,
140:7, 140:10,
148:17, 152:5, 158:3,
161:15, 171:24,
172:2, 172:8, 172:9,
172:26, 172:28,
173:10, 173:12,
174:7, 174:20, 175:22
National [7] - 18:25,
122:12, 122:15,
122:25, 123:24,
126:23, 176:27
nationals [2] -
129:11, 129:17
nature [12] - 12:25,
42:11, 77:27, 92:1,
98:29, 107:27,
108:28, 109:8, 110:4,
120:15, 120:17,
152:26
Naval [1] - 119:16
ne [1] - 75:14
neat [1] - 33:13
necessarily [5] -
104:28, 109:12,
114:22, 118:14,
178:29
necessary [29] - 9:5,
9:11, 9:26, 10:13,
12:12, 13:28, 15:17,
32:21, 33:7, 34:17,
36:5, 72:17, 77:8,
101:20, 103:7,
103:21, 105:15,
106:10, 106:26,
110:8, 111:5, 111:24,
113:25, 115:18,
119:29, 134:1,
141:20, 163:12,
171:18

necessitate [1] - 24:3
necessity [4] - 109:20, 120:8, 120:23, 130:15
need [15] - 22:26, 40:8, 56:27, 74:21, 74:23, 100:12, 106:3, 117:13, 120:9, 121:9, 140:23, 148:17, 151:19, 152:2, 168:11
needed [1] - 153:23
needn't [2] - 75:19, 76:12
needs [4] - 10:26, 55:8, 93:2, 164:3
neglected [1] - 91:15
negligence [1] - 90:23
NESSA [1] - 3:2
Netherlands [2] - 176:25, 178:9
network [6] - 19:28, 26:13, 150:8, 150:12, 150:15, 175:18
never [12] - 29:29, 33:25, 34:10, 37:12, 62:6, 63:23, 63:26, 72:9, 72:10, 74:15, 123:5, 150:19
Nevertheless [1] - 19:7
nevertheless [6] - 79:17, 107:9, 110:4, 114:23, 116:26, 121:14
new [2] - 14:23, 77:22
Newer [1] - 176:13
newspapers [1] - 128:4
next [24] - 14:5, 19:12, 51:19, 51:20, 64:21, 71:29, 78:16, 84:18, 85:10, 85:17, 85:26, 87:4, 87:25, 88:12, 88:24, 118:29, 121:1, 132:26, 134:28, 134:29, 162:23, 170:18, 174:1
NGO [3] - 149:28, 150:3, 160:28
NGOs [1] - 161:4
NIAMH [1] - 2:11
niche [1] - 24:17
nine [5] - 47:4, 47:12, 80:1, 136:5, 171:3
nobody [3] - 17:4, 53:4, 64:13
non [7] - 21:2, 21:4, 27:17, 27:18, 57:8, 143:7, 155:10
non-compliance [2] - 21:2, 21:4
non-contractual [1] - 57:8
non-disclosure [1] - 143:7
non-judicial [3] - 27:17, 27:18, 155:10
none [4] - 13:12, 45:10, 146:29, 156:26
nonetheless [4] - 97:6, 99:16, 135:14, 146:14
normal [4] - 68:17, 68:21, 72:20, 163:1
normally [3] - 52:16, 69:8, 69:12
NORTH [2] - 3:4, 3:4
notably [2] - 121:25, 128:8
note [9] - 6:23, 15:10, 20:6, 47:11, 79:29, 140:12, 142:15, 156:10, 158:29
noted [10] - 12:1, 21:1, 89:7, 98:4, 131:26, 133:8, 154:3, 155:17, 155:24, 159:1
notes [15] - 1:25, 39:28, 52:25, 58:1, 80:5, 110:23, 113:11, 121:1, 125:1, 133:1, 140:17, 143:2, 143:24, 148:20, 166:28
noteworthy [2] - 56:4, 70:24
nothing [5] - 29:2, 62:14, 68:25, 87:8, 90:27
notice [15] - 44:6, 44:21, 44:22, 45:14, 46:14, 49:13, 51:6, 52:9, 55:19, 60:24, 60:25, 91:14, 106:12
notification [37] - 25:21, 86:13, 87:1, 89:17, 94:6, 94:9, 97:18, 97:20, 97:25, 97:28, 98:1, 110:23, 111:9, 111:28, 112:10, 112:16, 112:21, 113:5, 115:5, 115:26, 116:2, 116:17, 132:25, 133:5, 133:12, 133:21, 135:13, 144:24, 146:2, 146:6, 157:6, 157:9, 158:13, 159:10, 166:11, 166:16, 166:22
notified [6] - 25:25, 98:10, 133:21, 137:16, 157:11, 158:21
notify [6] - 23:8, 86:22, 146:5, 157:15, 157:27, 158:7
noting [2] - 79:20, 90:20
notion [3] - 97:14, 116:16, 120:8
notional [1] - 61:1
notwithstanding [3] - 22:11, 31:1, 114:6
nowadays [2] - 39:8, 106:17
nowhere [1] - 26:25
NSA [3] - 6:4, 21:2, 58:6
NSA's [1] - 6:5
nullifying [1] - 115:25
number [19] - 8:17, 8:21, 53:8, 88:24, 93:24, 97:4, 97:7, 97:10, 118:7, 123:8, 128:22, 134:25, 138:7, 138:23, 150:25, 151:7, 155:1, 169:8, 175:22
numbers [1] - 170:24

O

o'clock [1] - 179:14
O'DWYER [1] - 3:8
O'Dwyer [1] - 39:15
O'SULLIVAN [1] - 2:17
object [1] - 136:28
objected [2] - 101:26, 102:18
objection [4] - 17:9, 17:11, 45:1, 45:12
objections [3] - 66:17, 66:28, 80:25
objective [5] - 12:5, 45:18, 110:20, 168:19
objectively [1] - 81:11
objectives [5] - 7:25, 9:12, 22:7, 35:27, 171:19
obligation [8] - 63:20, 68:4, 71:21, 72:14, 72:16, 73:2, 143:21, 154:16
obligations [3] - 27:5, 30:5, 97:28
obliged [1] - 82:14
observance [1] - 36:29
observed [2] - 112:20, 143:28
observes [7] - 131:4, 141:26, 142:18, 146:22, 147:14, 148:24, 158:20
obstacles [1] - 25:9
obtain [5] - 84:25, 137:1, 139:3, 156:12, 159:11
obtained [2] - 56:4, 153:2
obtaining [1] - 123:15
obvious [7] - 13:10, 28:8, 30:15, 77:3, 84:5, 94:19, 164:25
obviously [18] - 9:15, 13:24, 16:13, 16:29, 21:9, 27:3, 42:14, 43:19, 44:5, 55:5, 56:20, 60:12, 79:27, 92:24, 94:14, 99:12, 157:3, 163:23
occasioned [1] - 102:12
occasions [1] - 156:21
occasions.. [1] - 138:23
occurred [5] - 46:4, 50:9, 50:23, 51:16, 146:23
occurs [2] - 47:23, 90:19
OF [1] - 2:21
offence [2] - 75:24, 155:3
offences [3] - 86:1, 130:27, 152:26
offer [4] - 19:9, 25:4, 29:7, 29:9
offered [1] - 147:21
office [4] - 35:18, 109:27, 132:16, 145:1
Office [1] - 132:4
office.. [1] - 143:4
officer [1] - 57:24
officers [1] - 175:22
offices [2] - 165:9, 168:21
official [5] - 109:27, 114:7, 165:5, 165:8, 168:14
often [4] - 25:9, 58:29, 93:28, 98:10
old [1] - 96:26
Ombudsman [8] - 27:21, 122:29, 123:27, 124:7, 125:4, 125:29, 145:18, 145:26
ombudsman [1] - 165:7
ombudsman-type [1] - 165:7
ombudsman.. [1] - 165:5
Ombudsperson [5] - 23:12, 88:22, 124:18, 145:18, 145:19
Ombudsperson' [1] - 82:12
omitted [1] - 56:5
ON [2] - 1:18, 5:1
once [9] - 23:6, 86:20, 97:25, 103:13, 112:27, 115:6, 126:8, 134:7, 160:14
one [84] - 6:12, 14:1, 14:5, 14:11, 15:18, 18:8, 23:6, 23:29, 26:27, 27:12, 28:6, 28:13, 30:4, 31:21, 31:25, 34:28, 36:29, 37:25, 40:16, 40:21, 40:27, 41:26, 47:10, 48:9, 60:16, 61:25, 66:6, 72:10, 72:23, 72:25, 73:7, 73:15, 78:17, 78:24, 80:12, 87:4, 93:18, 94:13, 94:16, 94:21, 97:6, 97:9, 98:6, 98:9, 99:5, 100:13, 100:25, 100:29, 103:24, 105:4, 106:29, 116:15, 117:8, 117:19, 118:25, 119:3, 121:12, 125:23, 126:7, 126:8, 129:16, 132:9, 134:27, 135:20, 135:21, 138:2, 140:27, 141:20, 142:25, 146:21, 148:23, 150:23, 150:24, 156:27, 157:10, 157:16, 161:5, 164:1, 169:4, 175:28, 176:9, 177:8
One [1] - 109:20

ONE ^[1] - 2:23
onerous ^[1] - 44:24
ones ^[1] - 35:9
ongoing ^[1] - 22:25
onwards ^[3] -
 100:18, 100:20,
 100:21
open ^[5] - 21:15,
 93:23, 116:26,
 151:19, 168:7
opened.. ^[1] - 158:24
opening ^[4] - 6:1,
 28:24, 38:26, 39:15
operated ^[1] - 107:2
operates ^[2] - 13:21,
 166:1
operating ^[1] -
 106:21
operation ^[3] -
 112:22, 146:24,
 147:15
operations ^[1] -
 162:10
operators ^[3] -
 150:8, 150:12, 150:15
opinion ^[6] - 21:13,
 104:6, 112:8, 114:21,
 122:1, 156:18
opinions ^[1] - 38:1
opportunities ^[1] -
 38:20
opportunity ^[9] -
 38:23, 40:11, 64:18,
 70:19, 101:24,
 110:25, 116:28,
 119:22, 157:29
opposed ^[7] - 41:28,
 43:5, 70:16, 92:23,
 155:27, 172:21
opposite ^[1] - 33:24
opposition ^[1] -
 110:15
oral ^[1] - 57:26
order ^[27] - 8:1,
 30:27, 32:14, 66:29,
 76:29, 84:24, 103:22,
 106:19, 115:27,
 116:11, 128:9, 129:3,
 129:14, 130:24,
 130:26, 135:8,
 138:25, 139:13,
 141:29, 145:6,
 145:11, 145:12,
 152:25, 152:27,
 159:2, 168:24
Order ^[3] - 79:15,
 150:15, 150:19
ordered ^[3] - 108:11,
 109:5, 110:17
ordering ^[6] - 99:1,

107:29, 108:21,
 116:24, 156:5, 167:8
orders ^[1] - 21:6
Ordinance ^[3] -
 123:8, 125:2, 125:6
ordinary ^[5] - 22:3,
 25:24, 63:18, 164:15,
 164:23
organisation ^[1] -
 178:2
organised ^[2] -
 21:29, 22:11
organising ^[2] -
 19:6, 23:29
organs ^[1] - 78:10
original ^[1] - 10:22
originally ^[2] -
 112:18, 160:19
OSAA ^[1] - 154:25
otherwise ^[5] - 23:9,
 90:21, 97:21, 111:25,
 113:17
ought ^[3] - 60:16,
 81:12, 84:2
outlier ^[1] - 55:26
outlines ^[1] - 170:15
output ^[1] - 24:25
outset ^[1] - 26:8
outside ^[16] - 6:29,
 15:4, 15:9, 15:16,
 17:14, 38:10, 75:25,
 76:21, 78:25, 79:11,
 123:12, 139:11,
 152:4, 172:18,
 172:24, 173:19
overall ^[2] - 134:9,
 161:19
overemphasised ^[1]
 - 60:22
overload ^[1] - 14:10
overriding ^[1] -
 72:14
overseeing ^[1] -
 142:22
oversees ^[1] -
 165:29
oversensitivity ^[1] -
 63:2
oversight ^[36] -
 18:21, 19:1, 19:7,
 19:15, 19:19, 19:21,
 20:10, 21:22, 23:3,
 23:20, 24:1, 24:14,
 24:21, 40:28, 94:4,
 94:8, 98:4, 98:8,
 98:13, 125:23,
 125:27, 132:24,
 142:9, 142:14,
 161:12, 162:7,
 162:19, 162:21,

165:22, 165:24,
 165:28, 166:4, 170:3,
 170:5, 170:14
Oversight ^[1] - 19:13
overstepped ^[1] -
 34:15
overwhelmingly ^[1] -
 164:25
owing ^[1] - 101:25
own ^[27] - 10:15,
 21:28, 22:6, 52:13,
 63:20, 64:13, 66:8,
 66:13, 69:4, 70:26,
 71:14, 72:3, 72:6,
 77:1, 77:11, 77:29,
 82:12, 90:10, 90:18,
 99:12, 99:13,
 115:15, 128:18,
 140:8, 144:28,
 165:13, 174:17

P

P&T ^[1] - 104:29
page ^[120] - 5:29,
 6:1, 6:15, 14:22,
 18:20, 18:25, 19:12,
 22:17, 23:16, 23:23,
 24:13, 24:15, 24:22,
 26:2, 30:4, 30:5,
 30:20, 35:22, 38:1,
 38:3, 38:8, 38:16,
 38:17, 38:19, 39:9,
 39:10, 45:26, 46:15,
 47:8, 47:22, 48:12,
 49:8, 50:8, 50:22,
 50:23, 51:20, 53:10,
 58:3, 65:15, 69:26,
 75:20, 78:22, 80:2,
 80:6, 80:17, 83:7,
 83:24, 87:16, 87:25,
 88:12, 88:14, 90:15,
 101:8, 101:18,
 101:22, 102:24,
 102:28, 104:5,
 104:13, 105:7,
 105:25, 108:7,
 108:18, 113:9,
 114:17, 115:12,
 117:20, 117:22,
 118:1, 119:26, 120:3,
 126:17, 127:22,
 128:1, 128:22,
 130:13, 132:9,
 132:26, 132:27,
 133:15, 134:3,
 134:11, 134:12,
 135:28, 136:21,
 136:24, 136:26,
 137:14, 138:2, 142:7,
 142:8, 148:7, 148:11,
 149:15, 149:29,
 150:25, 152:9,
 152:19, 153:7, 154:1,
 161:11, 168:18,
 170:18, 170:24,
 170:25, 171:3, 171:9,
 174:2, 175:26, 176:5,
 177:12, 177:13
PAGE ^[1] - 4:2
pages ^[2] - 51:14,
 128:22
paid.. ^[1] - 145:12
paper ^[5] - 19:4,
 19:8, 19:17, 20:6,
 164:19
papers ^[1] - 37:26
paragraph ^[125] -
 8:12, 8:15, 8:18, 8:21,
 10:11, 11:29, 16:1,
 18:27, 23:18, 23:26,
 26:2, 35:25, 39:16,
 45:5, 52:2, 67:23,
 70:26, 75:20, 78:9,
 79:20, 80:18, 82:11,
 83:7, 83:10, 84:20,
 85:4, 90:15, 101:10,
 102:28, 103:26,
 103:29, 105:7,
 105:10, 105:25,
 106:28, 108:5, 108:6,
 108:18, 109:2, 112:8,
 113:22, 113:29,
 114:10, 114:18,
 114:19, 116:15,
 116:22, 118:1, 120:2,
 121:1, 125:13,
 126:18, 127:6, 128:1,
 128:25, 130:13,
 130:16, 131:20,
 132:2, 132:9, 132:12,
 132:27, 132:29,
 133:14, 133:16,
 134:11, 136:26,
 137:14, 137:23,
 138:3, 138:18, 141:3,
 141:13, 144:13,
 146:21, 148:10,
 150:9, 150:23,
 150:25, 150:26,
 151:17, 151:23,
 151:27, 152:9,
 152:20, 153:10,
 154:1, 154:15,
 154:16, 154:20,
 154:22, 154:23,
 155:9, 155:14,
 155:24, 155:28,
 157:7, 157:13,
 157:18, 157:20,
 157:22, 158:17,
 159:7, 159:15,
 159:18, 159:20,
 161:10, 161:11,
 161:18, 161:23,
 162:16, 163:25,
 164:7, 165:1, 166:9,
 166:12, 166:26,
 169:23, 173:17,
 177:21
paragraphs ^[11] -
 32:8, 64:27, 66:2,
 68:10, 69:24, 69:25,
 76:4, 88:24, 124:6,
 126:18, 161:15
parallel ^[2] - 130:4,
 145:17
pardon ^[9] - 101:10,
 120:5, 136:23,
 136:24, 143:15,
 149:17, 149:25,
 149:27, 154:1
Parliament ^[8] -
 15:8, 17:15, 95:9,
 123:20, 124:15,
 169:19, 169:21,
 169:25
parliament ^[1] -
 162:18
Parliament" ^[1] -
 105:22
Parliament.. ^[1] -
 143:8
parliamentarians ^[3]
 - 122:12, 123:24,
 162:6
Parliamentary ^[13] -
 108:25, 110:9,
 110:15, 122:29,
 123:1, 123:26,
 123:27, 124:7, 125:4,
 125:29, 131:22, 162:4
parliamentary ^[6] -
 24:15, 35:17, 124:2,
 163:5, 165:22, 165:24
parliaments ^[1] -
 24:18
part ^[29] - 14:29,
 15:1, 16:9, 16:10,
 27:22, 27:28, 27:29,
 29:28, 29:29, 30:13,
 30:19, 39:7, 39:26,
 45:17, 58:6, 59:7,
 62:16, 65:12, 85:24,
 90:12, 108:6, 109:14,
 117:19, 118:19,
 148:3, 161:19,
 169:21, 170:2
partial ^[1] - 63:5
participate ^[1] -

110:16
participation [3] - 111:6, 124:3, 165:13
particular [39] - 19:8, 37:15, 38:23, 48:4, 48:5, 48:6, 56:27, 66:23, 72:19, 73:3, 79:14, 83:10, 94:8, 95:28, 99:29, 100:3, 111:6, 112:13, 116:14, 120:10, 120:17, 121:10, 123:23, 125:28, 126:8, 128:6, 139:13, 140:8, 141:2, 141:21, 143:29, 153:13, 156:23, 157:1, 160:13, 169:6, 169:12, 169:28, 177:19
particularised [9] - 41:17, 43:1, 46:7, 46:26, 47:19, 51:22, 51:25, 52:11, 55:14
particularities [1] - 152:15
particularity [1] - 41:2
particularly [13] - 44:3, 55:1, 57:4, 96:1, 115:15, 132:16, 148:27, 160:19, 170:11, 172:1, 173:13, 175:16, 175:29
parties [4] - 66:7, 82:6, 103:21, 153:3
partly [2] - 14:27, 124:27
partner [1] - 38:10
partners [1] - 175:21
Party [3] - 75:8, 77:19, 77:21
party [4] - 3:24, 37:18, 39:27, 41:24
passage [5] - 53:11, 53:13, 77:16, 142:8, 142:11
passages [2] - 65:3, 161:14
passed [2] - 79:29, 105:21
passing [1] - 31:9
patterns [1] - 54:25
PAUL [1] - 2:10
pause [1] - 30:16
PCLOB [4] - 6:2, 13:4, 20:17, 145:23
pecuniary [1] - 91:21
people [12] - 20:27, 22:3, 39:6, 40:25, 54:22, 54:23, 75:8, 100:14, 146:5, 152:28, 161:1, 178:1
people's [2] - 11:22, 108:24
per [2] - 17:10, 157:16
performance [2] - 57:10, 163:18
performing [1] - 176:26
perhaps [12] - 6:21, 13:4, 14:18, 26:21, 28:7, 55:6, 56:12, 56:21, 69:25, 91:25, 176:1, 179:15
periodic [1] - 142:18
periodically [1] - 162:1
permanent [1] - 119:17
permissible [2] - 118:29, 119:4
permission [4] - 3:25, 131:8, 131:11, 131:12
permit [2] - 108:1, 178:10
permits [2] - 99:29, 146:14
permitted [6] - 73:12, 103:29, 104:21, 119:11, 130:24, 150:16
permitting [3] - 102:13, 138:21, 139:15
person [44] - 22:28, 25:7, 32:7, 32:27, 32:28, 49:10, 65:21, 66:18, 68:10, 68:13, 69:7, 69:11, 70:7, 75:28, 96:5, 96:16, 97:18, 98:10, 99:21, 100:2, 100:7, 111:16, 113:3, 114:29, 115:14, 115:27, 119:15, 122:11, 122:19, 122:23, 125:5, 135:7, 138:11, 139:25, 140:26, 141:18, 143:4, 144:21, 154:29, 158:10, 158:25, 159:23, 178:2, 179:8
person's [1] - 159:4
person/organisation [1] - 26:7
personae" [1] - 86:27
personal [17] - 14:27, 14:29, 16:20, 36:3, 36:9, 37:3, 38:5, 66:20, 84:24, 90:22, 137:25, 152:17, 169:4, 173:23, 174:19, 174:22, 175:2
personnel [7] - 121:25, 122:4, 123:10, 123:12, 124:17, 124:28, 125:12
Personnel [1] - 123:8
persons [10] - 12:2, 25:23, 57:26, 94:7, 107:11, 114:7, 120:28, 128:12, 133:20, 158:20
perspective [1] - 19:10
PHILIP [1] - 2:7
phone [3] - 52:18, 52:25, 136:11
photocopied [1] - 3:23
pick [1] - 54:20
picture [4] - 98:27, 99:4, 99:8, 126:13
piece [2] - 96:17, 139:24
pillar [1] - 41:20
pitch [2] - 5:24, 5:26
place [23] - 30:9, 35:27, 75:6, 78:25, 93:21, 93:27, 94:4, 108:17, 116:14, 119:20, 136:18, 137:20, 139:2, 141:29, 142:29, 146:2, 146:15, 146:26, 147:3, 147:6, 149:5, 170:9, 178:20
placed [1] - 115:1
Plainly [1] - 163:27
PLAINTIFF [2] - 1:7, 2:5
plaintiff [2] - 41:14, 52:16
Plaintiff's [1] - 80:11
plaintiff's [1] - 42:13
planning [1] - 65:10
play [3] - 19:16, 20:7, 110:28
playing [1] - 73:9
plead [4] - 43:8, 43:10, 58:25, 59:18
pleaded [1] - 58:28
pleadings [3] - 43:17, 63:21, 78:3
pleas [2] - 43:13, 43:23
plucked [1] - 87:5
point [27] - 7:16, 13:10, 14:22, 88:19, 88:23, 92:1, 101:8, 101:26, 105:22, 107:25, 117:29, 125:23, 126:16, 135:25, 145:4, 151:24, 154:12, 155:10, 157:4, 157:7, 157:27, 158:8, 158:22, 166:11, 166:14, 172:23, 176:5
pointed [2] - 85:17, 115:12
points [12] - 6:25, 28:7, 83:22, 83:26, 91:12, 96:25, 97:8, 99:11, 107:3, 123:3, 130:27, 160:3
Police [5] - 122:12, 122:15, 122:25, 123:25, 126:24
police [4] - 105:14, 123:12, 136:14, 141:24
policy [8] - 15:27, 16:9, 24:19, 107:7, 148:28, 161:16, 165:27, 172:1
political [2] - 24:2, 162:11
Popescu [1] - 157:24
population [1] - 11:27
Portugal [1] - 75:18
Portugal] [1] - 76:10
Portuguese [1] - 76:15
pose [1] - 74:27
poses [2] - 107:13, 121:16
posited [1] - 42:5
position [32] - 6:11, 6:21, 6:28, 6:29, 7:5, 7:15, 7:16, 8:28, 13:14, 27:15, 35:20, 39:21, 40:7, 58:3, 59:26, 62:23, 64:19, 68:11, 68:22, 70:14, 86:14, 88:26, 89:16, 90:2, 91:17, 92:28, 95:18, 95:21, 105:3, 111:18, 115:1, 179:3
possesses [1] - 114:25
possession [2] - 52:18, 159:3
possibilities [1] - 127:18
possibility [12] - 8:19, 25:5, 40:26, 84:23, 85:1, 101:29, 121:26, 140:13, 140:15, 140:16, 159:10, 159:26
possible [13] - 57:24, 97:26, 100:10, 100:11, 107:28, 109:19, 117:5, 130:29, 149:1, 149:11, 172:20, 176:29
possibly [3] - 73:27, 112:23, 176:6
post [2] - 106:24, 162:28
posteriori [1] - 111:4
postpone [1] - 75:2
posts [2] - 121:4, 122:6
posture [1] - 58:26
potential [4] - 16:20, 165:27, 167:8, 170:11
potentially [2] - 109:29, 142:3
power [8] - 37:7, 120:26, 131:25, 145:4, 145:6, 152:26, 161:22, 161:26
Powers [5] - 26:1, 105:12, 135:16, 137:13, 158:12
powers [18] - 21:14, 30:22, 30:25, 32:8, 33:15, 33:22, 33:25, 90:16, 98:1, 106:24, 110:11, 114:24, 132:20, 140:20, 147:6, 155:12, 162:9, 163:13
PPD-28 [1] - 79:14
practical [4] - 13:5, 155:25, 156:2, 166:29
practically [1] - 11:27
practice [16] - 13:5, 13:22, 27:16, 27:23, 112:10, 113:16, 123:13, 124:19, 138:21, 143:24, 153:20, 153:26, 155:27, 156:9, 156:15, 163:2
Practices [1] - 18:25
practices [5] - 19:3,

19:9, 23:22, 24:8, 143:9
pre [2] - 10:17, 26:14
pre-eminent [1] - 10:17
pre-existing [1] - 26:14
preamble [1] - 35:29
precautions [1] - 153:2
precise [3] - 144:11, 167:7, 173:9
precisely [1] - 116:20
preclude [2] - 23:2, 91:27
precludes [2] - 85:12, 85:13
prefer [1] - 92:29
prejudice [1] - 30:22
preliminary [3] - 66:5, 77:2, 83:19
premise [2] - 11:6, 75:28
promised [3] - 9:18, 17:2, 41:3
premiss [3] - 75:22, 76:2, 76:18
preoccupation [1] - 111:19
preparations [1] - 128:8
prepare [1] - 82:1
prepared [2] - 6:22, 74:29
preponderance [1] - 55:11
prescribed [1] - 178:16
presence [2] - 87:28, 123:24
present [12] - 66:3, 76:5, 76:22, 80:22, 101:23, 116:5, 117:3, 121:9, 123:4, 125:15, 134:5, 158:19
presented [1] - 60:14
presents [1] - 170:15
preserve [1] - 92:28
preserved [1] - 87:6
preserving [1] - 149:3
President [1] - 131:13
press [1] - 77:21
pressing [3] - 90:25, 120:9, 121:9
pressure [1] - 46:5
presume [2] - 143:13, 143:16
presumed [2] - 26:28, 27:4
presupposes [1] - 114:29
prevailed [1] - 125:16
prevent [2] - 47:28, 105:28
prevented [1] - 109:12
preventing [1] - 133:11
previous [3] - 39:2, 118:16, 131:17
previously [1] - 172:22
primarily [2] - 19:23, 90:23
primary [6] - 6:29, 7:5, 7:16, 70:7, 161:21, 161:25
prime [1] - 91:24
Prime [1] - 143:5
principal [1] - 139:9
principally [1] - 36:3
principle [20] - 7:26, 65:1, 67:18, 67:25, 67:27, 69:10, 70:13, 72:10, 72:11, 75:14, 75:15, 76:25, 77:10, 77:27, 78:24, 110:1, 111:10, 112:25, 117:2, 143:19
principled [1] - 67:18
principles [6] - 19:3, 23:21, 81:11, 109:21, 118:3, 118:7
PRISM [1] - 6:2
prison [1] - 117:17
prisoners [1] - 117:16
Privacy [20] - 7:11, 9:1, 58:4, 58:7, 58:18, 73:13, 73:21, 74:15, 74:19, 74:27, 79:9, 87:19, 87:21, 88:16, 91:19, 91:23, 145:19, 161:3, 171:12, 174:25
privacy [6] - 54:6, 150:13, 150:20, 173:22, 174:22, 175:1
PRIVACY [1] - 3:7
private [13] - 17:21, 17:22, 17:23, 36:10, 37:1, 46:17, 47:1, 61:4, 104:24, 120:21, 142:27, 163:22, 169:3
privilege [1] - 43:20
problem [7] - 26:26, 44:4, 49:13, 58:20, 63:8, 74:27, 77:6
problematic [2] - 118:27, 164:27
problems [1] - 21:28
procedural [3] - 53:17, 102:3, 114:24
procedure [21] - 23:12, 27:21, 29:5, 65:10, 65:11, 65:12, 65:14, 67:5, 68:1, 68:15, 68:17, 69:3, 70:6, 88:22, 108:17, 123:10, 124:28, 144:28, 146:8, 153:1, 178:20
procedures [12] - 6:6, 21:21, 40:28, 59:17, 67:3, 78:1, 109:15, 109:19, 129:19, 147:20, 159:19, 166:5
procedures.. [1] - 147:13
proceed [1] - 142:6
proceeding [2] - 63:29, 150:11
proceedings [21] - 13:25, 25:22, 37:19, 59:6, 66:4, 66:25, 76:3, 76:8, 83:21, 86:17, 86:18, 86:20, 88:20, 89:23, 101:23, 109:14, 116:5, 117:4, 140:27, 158:23, 165:15
proceedings.. [1] - 148:20
process [17] - 32:18, 59:7, 59:20, 64:15, 71:24, 72:27, 77:22, 86:4, 89:29, 91:1, 129:25, 146:12, 165:13, 166:2, 174:17, 177:2, 177:8
processed [2] - 78:29, 136:29
processing [26] - 7:2, 7:13, 7:21, 8:2, 14:26, 14:28, 15:8, 15:13, 15:14, 15:15, 16:14, 16:20, 17:5, 17:12, 17:14, 17:16, 30:28, 32:15, 36:2, 36:25, 66:20, 86:13, 89:8, 90:16, 90:19, 174:18
produce [2] - 43:22, 44:2
produced [2] - 53:4, 53:5
Prof [36] - 13:11, 15:29, 17:2, 18:16, 20:15, 21:29, 22:15, 25:17, 37:25, 39:8, 43:1, 44:9, 44:15, 45:24, 45:25, 46:15, 47:2, 47:5, 47:13, 47:23, 50:9, 50:24, 51:16, 55:22, 55:24, 56:8, 58:24, 60:23, 61:24, 62:1, 62:12, 62:27, 63:16, 63:22, 91:1, 160:16
professional [1] - 54:3
Professor [2] - 46:27, 90:18
profile [1] - 141:23
program [1] - 51:21
programme [5] - 5:15, 5:18, 5:19, 21:13, 44:14
programmes [3] - 22:6, 174:8, 174:10
progress [2] - 115:16, 130:28
prohibit [1] - 30:26
prohibited [1] - 129:4
prohibited.. [1] - 155:5
prohibition [2] - 148:20, 148:23
prominence [1] - 64:4
prominent [1] - 19:16
promote [2] - 160:18, 160:20
promotes [1] - 150:4
prompted [1] - 112:19
prong [4] - 42:4, 42:11, 46:6, 46:7
pronounce [3] - 62:6, 62:9, 71:25
pronouncement [1] - 68:5
proof [8] - 49:15, 54:13, 60:27, 89:9, 89:21, 139:1, 139:2, 164:13
proofs [1] - 56:10
proper [7] - 68:23, 69:20, 70:22, 84:11, 84:15, 123:18, 142:28
properly [6] - 23:13, 58:25, 69:12, 69:13, 113:19, 162:2
property [1] - 26:9
proportionality [3] - 12:22, 26:19, 60:9
proportionate [3] - 9:10, 120:10, 171:19
proposition [9] - 45:23, 84:20, 84:29, 85:5, 85:7, 85:26, 87:4, 87:9, 90:27
pros [1] - 163:7
prosecution [1] - 123:14
Prosecutor [1] - 155:20
prosecutors [4] - 155:15, 155:19, 156:5, 156:14
prosecutors' [3] - 156:8, 156:11, 157:2
protect [4] - 30:27, 32:14, 102:6, 142:29
protected [2] - 41:16, 42:27
protecting [5] - 21:24, 120:19, 120:24, 121:11, 142:25
Protection [16] - 5:5, 10:28, 34:25, 35:12, 35:15, 65:5, 65:6, 83:5, 94:11, 94:18, 132:4, 137:3, 171:11, 172:6, 174:16, 174:24
PROTECTION [1] - 1:7
protection [25] - 31:7, 32:20, 33:10, 34:14, 36:2, 36:14, 36:17, 36:24, 36:28, 37:14, 52:15, 66:19, 81:4, 83:15, 86:4, 121:15, 122:2, 127:10, 129:29, 169:3, 169:27, 173:23, 174:20, 174:23, 175:1
protections [4] - 30:8, 90:4, 91:6, 163:21
prove [9] - 48:22, 49:10, 49:15, 52:10, 53:18, 55:18, 89:19, 145:26, 159:5
proven [2] - 48:29, 50:4
provide [13] - 17:25, 23:10, 31:2, 37:14, 38:23, 66:26, 90:9, 91:9, 109:16, 145:5, 159:22, 168:20
provided [17] - 9:9,

32:22, 33:9, 36:19,
67:9, 88:1, 99:4,
106:7, 108:2, 108:23,
110:5, 118:23,
121:24, 122:1,
122:16, 148:26,
171:20
provides [10] -
33:13, 57:26, 88:10,
105:11, 143:25,
144:2, 152:11, 167:7,
172:3, 178:19
providing [3] - 53:18,
84:22, 95:7
proving [3] - 46:2,
46:3, 46:13
provision [9] - 5:20,
48:18, 58:23, 103:15,
112:28, 113:10,
129:3, 130:23, 133:18
provisional [2] -
10:3, 88:29
provisions [26] -
15:27, 16:8, 29:22,
30:23, 32:4, 36:1,
37:15, 40:3, 40:14,
48:27, 50:28, 51:3,
56:1, 60:3, 62:20,
94:4, 102:4, 113:12,
122:22, 123:9,
131:17, 135:13,
141:15, 143:28,
178:27, 179:9
public [16] - 17:24,
21:15, 28:27, 29:11,
29:13, 103:8, 104:22,
120:27, 122:5,
123:14, 140:20,
142:26, 142:29,
143:6, 165:10, 169:13
publication [2] -
145:13, 147:12
published [3] -
21:21, 103:14, 150:19
publishing [2] -
150:1, 169:11
pull [1] - 116:16
punitive [1] - 57:29
purpose [17] - 15:19,
21:17, 77:6, 97:21,
108:13, 112:5,
112:18, 113:6, 116:5,
120:24, 125:8,
130:15, 131:16,
133:6, 133:22,
137:27, 174:20
purposes [5] - 75:24,
106:4, 129:29,
134:18, 174:17
pursuance [2] -

105:29, 113:1
pursuant [6] - 30:24,
73:13, 78:26, 90:6,
150:14, 168:9
pursue [2] - 84:23,
85:1
pursued [3] - 120:11,
120:16, 125:20
put [27] - 13:18,
26:21, 34:28, 35:8,
45:25, 47:6, 47:15,
54:22, 55:8, 56:3,
65:20, 66:6, 66:12,
66:27, 67:13, 71:9,
71:22, 72:26, 77:21,
78:2, 78:3, 80:4,
136:1, 136:12, 141:3,
159:18, 175:6
puts [1] - 176:11
putting [8] - 13:26,
35:9, 64:13, 72:4,
72:5, 91:25, 146:2,
165:18

Q

qualified [2] -
109:27, 132:16
quantitative [1] -
39:10
quantity [1] - 176:10
quash [1] - 145:10
quashed [1] - 136:3
QUAY [2] - 2:24, 3:4
queried [1] - 59:15
query [1] - 177:6
questionnaire [2] -
95:12, 175:18
questions [1] - 76:26
quickly [4] - 28:5,
63:15, 78:17, 78:19
QUIGLEY [1] - 2:18
Quite [1] - 163:16
quite [5] - 56:21,
77:3, 94:17, 128:24,
166:4
quotations [1] -
157:18
quote [4] - 25:16,
102:27, 132:27, 157:8
quoted [3] - 20:19,
25:17, 84:20
quoting [1] - 11:18

R

radio [1] - 128:4
raise [2] - 23:2,
155:21

raised [6] - 45:8,
63:15, 64:22, 64:24,
65:13, 66:7
raises [1] - 156:13
raising [2] - 64:3,
169:12
raison [2] - 10:22,
10:23
random [2] - 144:1,
144:10
range [3] - 24:3,
130:20, 131:3
rate [1] - 175:2
rather [9] - 12:27,
63:14, 119:10, 146:1,
161:23, 162:12,
162:20, 165:11,
170:26
ratione [1] - 86:27
Ratzel's [1] - 13:12
raw [1] - 6:3
re [2] - 47:4, 47:12
re-examination [2] -
47:4, 47:12
reach [1] - 131:27
reached [1] - 84:8
reaches [1] - 125:10
read [6] - 53:11,
65:23, 66:23, 115:20,
126:24, 142:10
reader [1] - 63:19
reading [2] - 76:14,
76:18
real [6] - 52:8, 60:27,
74:27, 103:20, 151:1,
151:4
real-time [2] - 151:1,
151:4
realise [1] - 21:27
realising [1] - 88:23
reality [1] - 9:28
really [13] - 35:11,
40:20, 41:3, 42:25,
55:29, 60:23, 63:17,
63:18, 69:24, 78:17,
78:27, 91:14, 96:18
reason [9] - 31:20,
36:13, 71:18, 72:13,
72:23, 77:14, 126:6,
131:27, 139:9
reasonable [4] -
99:23, 138:26, 141:5,
141:10
reasoned [1] -
131:13
reasons [17] - 8:5,
17:3, 17:4, 22:26,
40:27, 59:1, 72:25,
73:15, 82:9, 91:23,
94:19, 134:16, 135:4,

139:5, 141:26, 162:6,
164:15
recalled [1] - 113:1
receipt [1] - 16:21
received [1] - 141:4
receiving [1] -
145:22
recent [2] - 106:16,
135:21
recently [1] - 175:6
recital [2] - 36:14,
36:23
recitals [1] - 35:29
recognise [3] - 41:7,
74:4, 121:21
recognised [19] -
10:20, 10:27, 15:7,
19:2, 22:19, 23:21,
24:21, 34:6, 36:11,
40:25, 41:1, 44:26,
45:2, 45:9, 55:1, 55:3,
55:5, 72:11, 171:20
recognises [4] -
31:8, 34:6, 97:26,
120:13
recognising [2] -
9:27, 10:5
recognition [6] -
11:1, 30:3, 30:8, 37:6,
79:10, 91:8
recommendation [1]
- 165:18
recommendations
[1] - 160:22
record [1] - 13:26
recorded [1] -
129:26
recording [2] - 26:9,
130:2
recordings [1] -
153:4
records [1] - 143:22
recourse [6] - 23:9,
108:20, 110:26,
111:10, 116:24, 127:9
rectification [1] -
84:25
red [1] - 61:10
redacted [1] - 149:1
Redress [2] - 58:4,
87:20
redress [6] - 8:17,
8:20, 26:24, 56:26,
158:1, 163:16
redressability [9] -
41:27, 42:4, 42:11,
42:22, 48:10, 51:9,
51:26, 52:5, 52:12
redressed [4] -
41:29, 42:12, 49:26,

51:11
redressing [2] -
42:19, 167:9
reduce [2] - 113:12,
123:9
reduced [1] - 177:9
refer [7] - 14:2, 18:3,
28:20, 37:24, 53:9,
75:11, 86:8
reference [38] - 5:14,
7:5, 7:13, 10:4, 15:19,
17:27, 18:15, 19:23,
30:6, 33:18, 34:3,
40:3, 47:8, 63:22,
64:25, 66:4, 68:20,
72:2, 73:11, 80:1,
80:21, 82:1, 82:10,
96:11, 104:26, 127:4,
137:23, 149:16,
151:18, 157:21,
157:22, 159:15,
161:15, 166:13,
171:4, 171:6, 171:10
references [1] - 58:1
referred [16] - 12:14,
14:4, 20:17, 29:6,
38:29, 39:3, 50:28,
51:4, 52:26, 53:8,
53:11, 76:28, 77:2,
85:22, 114:21, 118:13
referring [5] - 10:28,
14:7, 48:24, 80:20,
97:16
refers [6] - 38:8,
45:4, 144:14, 144:21,
160:13, 177:25
reflect [2] - 62:25,
86:14
reflected [2] - 87:4,
110:14
reflection [1] - 30:16
refuse [1] - 77:1
refused [6] - 34:5,
71:3, 119:17, 121:26,
137:7, 156:21
regard [42] - 6:28,
7:20, 7:22, 9:2, 11:13,
13:25, 21:21, 22:3,
27:10, 28:28, 29:22,
30:27, 32:14, 33:14,
35:18, 36:2, 36:24,
43:20, 45:22, 58:14,
61:8, 63:11, 64:7,
66:2, 66:20, 84:12,
85:29, 89:22, 90:13,
92:9, 94:8, 97:11,
110:4, 116:7, 122:11,
125:13, 127:8,
139:16, 147:19,
154:26, 160:8

regarded [6] - 23:13, 24:8, 27:22, 64:4, 79:14, 110:19
regarding [1] - 25:3
regards [4] - 109:7, 111:2, 111:4, 142:17
regime [5] - 27:13, 142:17, 142:23, 147:16, 156:29
regional [1] - 150:5
regionally [2] - 19:2, 23:21
regions [1] - 150:4
register [1] - 123:12
registered [1] - 11:25
registers [1] - 120:27
REGISTRAR [2] - 5:5, 83:5
regret [2] - 14:16, 115:18
regular [1] - 128:5
regularly [1] - 128:10
regulate [1] - 178:6
regulated [1] - 177:24
regulation [5] - 14:3, 14:9, 14:23, 95:6, 168:10
Regulation [4] - 14:26, 15:3, 16:2, 168:16
reinforced [1] - 29:3
reinforces [1] - 37:10
reiterated [2] - 138:22, 172:5
rejected [3] - 66:10, 71:3, 134:21
rejecting [1] - 71:7
rejects [1] - 65:21
relate [1] - 31:28
related [1] - 35:11
relates [2] - 46:14, 86:16
relating [3] - 84:24, 156:12, 168:23
relation [27] - 6:9, 6:23, 31:13, 31:14, 31:17, 31:18, 34:23, 72:14, 77:5, 77:20, 78:6, 91:4, 94:2, 99:10, 101:7, 117:27, 119:10, 126:15, 131:25, 132:25, 142:8, 157:6, 157:9, 172:29, 175:15, 178:1, 178:27
relationship [2] - 38:9, 108:29
relative [1] - 107:22
release [1] - 77:21
released [4] - 122:9, 124:21, 126:23, 136:5
relevance [1] - 18:7
relevant [29] - 9:17, 13:20, 23:14, 27:19, 34:19, 38:5, 39:24, 40:13, 54:9, 71:26, 81:10, 89:11, 90:19, 91:23, 96:19, 97:10, 101:5, 102:15, 113:18, 114:25, 122:8, 135:11, 141:16, 143:9, 148:16, 149:5, 168:20, 170:13, 173:21
relevant' [1] - 53:25
relevant.. [1] - 145:9
reliable [1] - 169:10
reliance [1] - 86:15
relied [1] - 100:27
relief [3] - 48:7, 51:12, 85:6
relies [1] - 60:3
reluctance [1] - 62:27
rely [3] - 61:12, 62:16, 85:28
remain [1] - 106:9
remaining [1] - 22:22
remains [8] - 6:16, 6:17, 49:13, 116:9, 117:8, 172:3, 174:10, 175:8
remarkable [3] - 64:9, 88:18, 90:27
remedial [2] - 8:17, 90:24
Remedies [2] - 88:5, 168:4
remedies [72] - 8:12, 8:13, 17:26, 22:26, 27:13, 27:17, 27:20, 45:1, 45:13, 56:3, 56:7, 56:10, 57:1, 57:16, 58:20, 59:9, 60:6, 60:18, 60:21, 60:26, 61:2, 61:4, 62:3, 63:11, 65:25, 66:26, 84:2, 84:4, 84:6, 84:23, 86:5, 87:17, 87:21, 87:29, 88:1, 88:10, 88:11, 89:26, 90:5, 90:10, 90:16, 91:27, 94:7, 96:1, 97:27, 99:15, 100:6, 110:28, 113:29, 116:10, 116:26, 117:1, 117:5, 117:25, 118:22, 118:27, 118:29, 139:17, 139:27, 152:16, 159:13, 159:23, 160:8, 161:22, 165:16, 166:10, 166:18, 166:23, 169:29, 170:16
remedies.. [1] - 158:2
Remedy [2] - 84:19, 85:11
remedy [49] - 22:20, 23:10, 25:6, 27:18, 27:19, 54:12, 56:27, 59:4, 59:7, 85:1, 85:12, 85:13, 85:20, 85:26, 86:2, 88:2, 89:9, 89:14, 91:26, 92:1, 92:2, 92:4, 98:16, 99:3, 108:2, 109:13, 111:18, 114:5, 114:14, 114:26, 114:28, 115:15, 116:6, 116:16, 116:18, 118:10, 118:21, 119:4, 126:8, 126:9, 127:5, 127:7, 148:8, 156:6, 163:23, 164:16, 164:18, 164:23
remedy' [2] - 114:28, 116:6
remember [9] - 8:18, 25:16, 30:3, 32:24, 40:3, 45:5, 59:13, 80:3, 91:20
remind [1] - 78:21
reminding [1] - 45:21
remit [1] - 177:26
remits [1] - 24:19
removal [1] - 136:9
Render [2] - 84:18, 85:11
rendered [2] - 158:2, 164:26
renders [1] - 115:13
repeat [1] - 96:24
repeated [3] - 88:5, 101:1, 155:9
repeats [1] - 152:8
repercussions [1] - 174:5
replaced [1] - 109:26
replacement [1] - 163:5
Report [1] - 161:12
report [41] - 5:14, 6:2, 13:4, 13:8, 18:16, 20:17, 20:19, 26:16, 27:2, 27:3, 37:25, 39:17, 40:24, 41:13, 50:5, 53:10, 55:4, 64:4, 64:13, 95:1, 95:8, 95:12, 95:16, 115:22, 143:6, 146:28, 160:15, 160:16, 160:23, 160:24, 165:3, 165:17, 167:17, 169:16, 169:17, 170:2, 170:11, 173:19, 175:7, 175:29, 178:11
report" [1] - 104:14
reported [1] - 53:22
reports [8] - 6:10, 21:3, 21:20, 143:5, 146:22, 147:17, 156:4, 177:16
representatives [2] - 95:14, 108:25
represented [2] - 110:15, 149:28
reproduced [2] - 3:24, 76:4
reputation [1] - 119:21
request [8] - 95:8, 122:10, 136:28, 154:26, 159:2, 159:11, 169:22, 170:22
requested [2] - 54:4, 137:8
requesting [1] - 122:24
requests [4] - 54:22, 136:27, 137:3, 137:7
require [11] - 19:26, 32:27, 32:28, 52:24, 88:11, 89:21, 112:10, 126:22, 145:5, 145:11, 146:10
required [19] - 10:3, 11:8, 11:14, 13:20, 15:20, 26:11, 33:16, 34:13, 80:21, 83:29, 84:13, 99:1, 103:22, 107:29, 131:12, 135:8, 137:27, 138:14, 153:17
required" [2] - 86:8, 86:13
requirement [23] - 23:8, 25:21, 35:23, 48:24, 49:1, 49:12, 57:14, 81:1, 83:18, 88:7, 92:5, 99:16, 105:20, 105:23, 116:18, 119:2, 145:25, 146:2, 153:19, 157:15, 157:26, 158:7, 163:22
requirements [18] - 9:24, 30:7, 30:10, 30:12, 31:22, 32:5, 32:19, 33:3, 83:25, 85:6, 112:1, 118:22, 125:12, 135:6, 137:9, 153:27, 154:25, 163:19
requires [10] - 13:6, 21:2, 29:17, 29:20, 85:13, 85:26, 86:3, 112:3, 176:16, 176:28
requires" [1] - 143:12
requiring [3] - 26:4, 37:2, 91:21
 requisite [2] - 152:12, 159:17
research [5] - 95:7, 160:21, 169:26, 175:17, 175:21
Research [1] - 176:27
reserve [2] - 40:6, 92:20
reserving [1] - 7:16
resides [1] - 6:4
resolution [2] - 40:18, 169:25
resolves [3] - 40:20, 45:13
resource [1] - 116:8
respect [43] - 9:9, 12:1, 15:23, 20:12, 31:6, 33:20, 47:23, 48:13, 49:5, 63:8, 67:15, 75:4, 84:26, 87:29, 90:12, 90:16, 91:16, 95:21, 96:1, 97:4, 97:5, 97:15, 97:18, 101:19, 104:23, 105:19, 108:20, 116:17, 116:24, 119:24, 120:21, 121:3, 127:17, 130:21, 131:7, 136:18, 137:18, 148:24, 163:22, 168:26, 169:3, 171:21, 172:12
respected [2] - 85:2, 175:2

respecting [1] - 161:28
respective [2] - 168:25, 170:12
respectively [1] - 149:23
respects [3] - 106:9, 134:23, 135:24
responded [1] - 169:25
respondent [5] - 3:24, 120:18, 121:8, 125:14, 133:26
response [6] - 6:22, 92:16, 92:18, 92:19, 93:1, 169:21
responsibility [2] - 172:4, 175:8
restraint [2] - 17:23, 126:2
restricted [3] - 116:8, 127:8, 150:20
restriction [3] - 113:6, 119:29, 133:23
restrictions [8] - 25:23, 32:21, 32:24, 32:29, 33:7, 34:17, 93:21, 103:27
restrictive [4] - 96:7, 96:20, 116:25, 131:5
rests [1] - 122:24
result [11] - 23:7, 41:24, 84:8, 104:22, 106:19, 115:25, 139:10, 139:14, 141:22, 152:3, 153:25
resulting [2] - 112:24, 113:24
results [1] - 105:21
RESUMED [2] - 5:1, 83:1
retained [1] - 12:28
retention [2] - 11:15, 12:25
retried [1] - 136:3
retrospectively [4] - 87:6, 111:13, 112:6, 159:27
reveal [1] - 112:21
revealed [2] - 22:25, 23:9
revelations [2] - 95:10, 174:11
review [24] - 20:16, 21:6, 21:9, 66:11, 67:6, 71:5, 74:7, 74:9, 75:6, 84:15, 108:22, 109:4, 109:10, 109:14, 111:4, 132:20, 138:29, 142:9, 142:18, 143:8, 144:1, 144:9, 147:22, 162:28
Review [1] - 162:23
reviewed [1] - 84:6
Reviewer [1] - 175:5
reviewing [1] - 129:29
reviews [2] - 21:8, 143:25
revolved [2] - 42:26, 43:6
revolves [2] - 40:20, 40:21
RICHARD [1] - 2:12
Richards [11] - 43:1, 45:24, 46:15, 47:5, 47:13, 47:23, 50:9, 50:24, 56:8, 61:24, 63:16
Richards' [1] - 80:2
right-hand [3] - 170:26, 171:5, 171:23
rightly [2] - 64:5, 112:20
Rights [18] - 11:12, 12:27, 13:23, 52:17, 91:8, 94:24, 94:25, 95:3, 97:1, 97:17, 135:7, 136:19, 139:26, 151:19, 151:21, 157:24, 164:18, 171:4
rights [55] - 7:23, 7:27, 8:3, 8:4, 8:6, 8:7, 8:11, 8:15, 9:2, 9:10, 9:12, 9:25, 10:14, 10:15, 10:17, 10:20, 11:26, 17:20, 17:29, 19:10, 19:19, 20:9, 20:12, 25:14, 26:20, 36:17, 36:21, 42:28, 59:19, 62:18, 66:19, 89:18, 91:10, 95:8, 102:17, 109:17, 111:22, 114:3, 115:3, 117:18, 118:9, 124:10, 132:7, 158:2, 161:28, 163:20, 168:23, 168:27, 169:13, 169:27, 171:21, 173:6, 173:22, 174:22
ring [1] - 166:1
RIPA [5] - 141:15, 142:17, 142:22, 143:28, 147:18
rise [1] - 152:27
risk [8] - 119:19, 121:14, 139:18, 139:28, 140:22, 141:21, 142:3, 162:10
RIVERSIDE [1] - 2:23
Robertson [2] - 167:25, 168:1
robustness [1] - 164:2
ROGERSON'S [1] - 2:24
role [14] - 19:16, 20:8, 24:26, 32:9, 65:6, 65:8, 69:28, 70:2, 70:3, 71:2, 94:8, 142:25, 143:27
roles [1] - 166:5
rooted [2] - 6:3, 70:13
round [1] - 60:21
route [1] - 119:3
routinely [1] - 164:10
RUDDEN [1] - 2:18
Rule [5] - 21:1, 63:14, 63:19, 148:21, 149:7
rule [5] - 77:1, 109:22, 125:5, 129:9, 129:16
ruled [1] - 129:11
Rules [1] - 148:22
rules [10] - 20:29, 36:15, 52:13, 53:17, 79:10, 96:3, 99:12, 144:28, 157:17, 172:10
rules' [1] - 90:24
ruling [5] - 42:12, 66:5, 76:25, 77:2, 110:20
rulings [1] - 145:13
running [1] - 136:9
Russia [5] - 153:18, 153:20, 153:26, 155:19, 158:20
Russian [14] - 149:22, 149:24, 149:26, 150:4, 153:9, 154:5, 154:7, 155:15, 156:3, 156:29, 159:13, 159:18, 159:22, 159:27

S

safe [2] - 146:4
safeguard [4] - 105:28, 143:1, 158:4, 159:28
safeguarding [3] - 105:15, 109:16, 137:27
safeguards [17] - 12:15, 29:7, 29:9, 29:21, 31:3, 110:5, 122:1, 123:4, 125:11, 133:11, 142:29, 146:13, 147:20, 147:21, 152:25, 166:20, 167:7
Safeguards [1] - 168:4
safeguards" [1] - 28:23
safety [1] - 103:8
sailed [2] - 14:12, 14:14
sake [3] - 7:14, 7:15, 9:27
SAME [1] - 6:24
San [1] - 85:21
sanctions [1] - 20:27
Saravia [1] - 127:25
Satan [1] - 81:27
satisfaction [1] - 164:14
satisfied [12] - 8:3, 48:9, 49:16, 49:22, 50:19, 51:1, 51:7, 107:20, 121:18, 131:5, 138:26, 146:19
satisfy [7] - 33:29, 42:4, 44:14, 48:29, 79:19, 85:6, 118:21
saw [7] - 20:29, 21:11, 77:20, 129:20, 131:27, 132:1, 156:19
SC [10] - 2:5, 2:5, 2:10, 2:11, 2:16, 2:17, 2:21, 2:27, 3:2, 3:8
scale [1] - 93:29
SCC [6] - 30:1, 31:10, 31:27, 33:19, 74:2, 89:26
SCCs [13] - 33:19, 34:7, 37:8, 74:13, 74:25, 89:13, 89:14, 90:5, 90:9, 90:13, 96:24, 96:25
scheme [1] - 153:13
SCHREMS [1] - 1:14
Schrems [24] - 7:11, 7:19, 8:19, 8:23, 9:29, 10:11, 10:12, 13:6, 13:18, 32:7, 33:24, 57:15, 64:27, 67:13, 72:29, 77:12, 77:16, 78:9, 80:20, 84:20, 86:9, 89:10
scope [20] - 7:1, 14:23, 15:4, 15:9, 15:16, 16:5, 17:14, 35:23, 86:27, 94:26, 98:29, 107:27, 111:10, 116:8, 120:15, 127:9, 173:9, 173:19, 174:7, 174:21
scrutinise [2] - 24:24, 146:23
scrutiny [7] - 7:12, 35:17, 81:5, 100:12, 140:23, 145:14, 162:13
se [2] - 17:10, 157:16
SEAN [1] - 2:17
search [6] - 26:8, 53:24, 54:1, 54:15, 159:3, 177:8
searching [1] - 26:14
second [17] - 5:23, 18:8, 18:26, 30:5, 35:27, 41:20, 65:22, 69:15, 69:18, 106:15, 108:5, 108:6, 114:19, 127:24, 128:15, 129:3, 177:21
Second [1] - 80:26
secondly [1] - 120:28
Secondly [1] - 162:10
secrecy [9] - 101:26, 115:13, 133:23, 133:29, 139:9, 146:13, 149:4, 152:2, 166:1
Secret [1] - 115:16
secret [37] - 21:15, 22:21, 22:23, 22:24, 25:24, 50:16, 100:1, 102:12, 102:13, 102:18, 104:6, 105:13, 106:21, 106:24, 107:12, 109:8, 111:26, 112:3, 116:9, 119:18, 121:15, 123:12, 127:9, 138:21, 139:7, 139:15, 139:18, 139:28, 140:20, 142:2, 145:14, 148:18, 152:14, 152:23, 156:8, 159:24, 159:28
Secretary [4] - 58:9, 142:20, 144:4, 145:21
Section [6] - 5:19, 50:11, 53:20, 56:5, 56:19, 56:29
section [13] - 7:6,

20:19, 24:26, 38:17, 39:2, 56:17, 125:6, 130:22, 130:25, 130:28, 137:25, 137:26, 143:26
sectional [1] - 162:12
sections [3] - 20:18, 40:1, 56:20
sector [1] - 46:17
sectors [1] - 54:26
securing [1] - 166:19
Security [3] - 24:29, 58:9, 161:13
security [76] - 6:21, 6:29, 7:3, 7:22, 7:24, 8:2, 10:19, 15:15, 15:27, 16:9, 16:19, 16:24, 17:12, 17:16, 17:28, 18:22, 19:7, 19:17, 20:5, 20:7, 20:8, 20:10, 24:1, 24:25, 25:3, 25:11, 27:11, 28:26, 86:23, 90:17, 90:20, 94:13, 94:19, 103:8, 103:18, 105:28, 115:20, 119:19, 120:1, 120:19, 120:24, 121:11, 121:16, 122:7, 125:16, 127:10, 137:10, 137:28, 138:12, 148:17, 161:15, 161:25, 162:7, 162:8, 162:20, 162:26, 163:14, 163:15, 163:27, 164:3, 164:16, 165:25, 171:24, 171:29, 172:2, 172:3, 172:8, 172:26, 172:28, 173:10, 173:12, 173:24, 173:26, 174:7, 174:20, 175:8
security' [5] - 124:26, 172:9, 173:3, 174:4, 175:3
Security.. [1] - 176:22
security/
intelligence [1] - 19:15
see [106] - 14:24, 18:21, 19:12, 24:13, 24:29, 30:20, 31:15, 31:28, 32:11, 33:15, 35:23, 40:23, 56:3, 68:10, 70:4, 73:25, 74:7, 74:14, 75:5, 75:20, 78:9, 88:22, 92:15, 97:9, 98:18, 100:10, 101:9, 101:18, 101:22, 102:25, 102:27, 103:3, 103:24, 103:26, 104:5, 104:16, 105:7, 105:19, 108:9, 113:29, 114:3, 114:17, 114:19, 116:11, 117:10, 117:23, 117:29, 119:1, 119:12, 119:14, 119:27, 126:12, 126:13, 126:16, 126:18, 127:5, 127:23, 128:26, 130:12, 131:21, 132:3, 132:10, 134:3, 134:10, 135:20, 135:21, 135:28, 136:22, 136:25, 137:2, 137:4, 137:22, 138:4, 141:2, 142:12, 146:18, 146:21, 147:8, 148:7, 148:13, 149:16, 149:29, 150:9, 150:26, 151:28, 152:20, 154:3, 155:16, 156:27, 157:6, 161:11, 166:9, 166:12, 168:16, 168:18, 169:16, 169:20, 169:22, 170:5, 170:28, 170:29, 171:3, 171:14, 171:24, 175:16, 175:27
seeing [2] - 12:23, 73:7
seek [7] - 15:10, 15:12, 25:5, 111:18, 115:14, 157:29, 159:1
seeking [5] - 25:24, 33:26, 96:6, 109:12, 161:4
seeks [5] - 19:8, 33:18, 36:3, 36:14, 67:15
sees [12] - 98:6, 100:13, 101:1, 105:4, 106:29, 125:23, 129:16, 138:2, 140:27, 157:16, 161:5
seizure [1] - 26:8
seldom [1] - 173:11
selected [1] - 169:4
selection [3] - 144:1, 144:10, 178:15
selective [1] - 27:12
selectors [1] - 176:28
self [1] - 86:16
self-evidently [1] - 86:16
send [4] - 40:11, 67:8, 81:24, 82:18
sending [1] - 82:10
sense [13] - 7:12, 21:15, 32:26, 33:24, 42:14, 55:16, 60:27, 61:21, 71:1, 97:2, 114:23, 116:12, 119:9
sensitive [4] - 55:6, 121:4, 122:6, 148:27
sensitivity [1] - 164:3
sent [3] - 82:4, 156:22, 176:15
sentence [3] - 24:16, 24:17, 129:3
sentence [1] - 129:13
separate [10] - 17:11, 17:13, 60:5, 62:17, 69:19, 98:17, 134:6, 134:10, 149:18, 160:7
separately [1] - 65:14
series [2] - 112:14, 131:5
seriou7s [1] - 21:28
serious [3] - 12:6, 130:27, 131:8
seriousness [1] - 120:20
serve [5] - 112:21, 162:11, 163:4, 164:16, 164:23
served [2] - 129:1, 136:4
serves [1] - 102:7
service [6] - 19:7, 20:9, 24:1, 24:19, 25:10, 25:11
Service [5] - 53:21, 128:8, 128:28, 131:14, 132:15
Services [6] - 1:22, 3:23, 3:25, 25:1, 161:13, 168:3
services [21] - 18:22, 19:17, 20:5, 20:7, 20:11, 24:25, 25:10, 38:18, 105:1, 112:22, 138:12, 151:8, 161:25, 162:26, 173:1, 174:9, 174:14, 174:19, 176:9, 176:19, 178:7
SERVICES [1] - 1:32
services' [1] - 177:27
services.. [1] - 177:2
Serwin [8] - 43:2, 45:25, 51:16, 56:7, 59:3, 63:15, 63:25, 64:10
set [20] - 13:3, 56:29, 57:23, 58:3, 88:29, 95:5, 98:8, 102:5, 114:4, 118:9, 148:21, 148:22, 152:25, 160:18, 160:19, 168:9, 168:11, 168:16, 168:19, 177:8
sets [3] - 38:3, 38:5, 146:12
settled [1] - 76:24
settlement [1] - 59:1
seventh [1] - 35:28
several [2] - 162:6, 177:28
shall [3] - 103:5, 114:4, 175:2
share [10] - 66:29, 68:8, 68:14, 68:20, 68:28, 69:17, 72:1, 81:23, 82:2, 82:10
shared [4] - 15:24, 15:26, 15:29, 173:27
shares [2] - 67:10, 81:19
sharing [1] - 105:26
Shield [12] - 7:12, 9:1, 58:7, 73:13, 73:22, 74:15, 74:19, 74:28, 79:10, 87:21, 88:16, 145:19
shooting [2] - 62:8, 62:9
short [5] - 9:6, 92:27, 117:13, 166:19, 166:24
shortcomings [1] - 147:15
shortly [2] - 62:7, 92:20
shot [2] - 31:25, 62:14
show [17] - 33:6, 44:2, 47:29, 48:4, 63:4, 64:11, 93:24, 93:26, 93:29, 100:4, 116:15, 130:6, 140:5, 146:10, 151:20, 155:25, 168:12
showing [3] - 64:13, 137:4, 151:17
shown [5] - 48:5, 48:6, 48:8, 85:29, 89:12
shows [6] - 15:8, 63:29, 153:12, 170:19, 176:28, 178:8
side [6] - 55:26, 78:1, 97:12, 170:26, 171:5
sides [1] - 161:6
Sight [1] - 139:5
SIGINT [5] - 176:20, 176:27, 176:28, 178:13, 178:24
signal [1] - 177:5
signals [4] - 177:14, 178:11, 178:21, 178:28
Signals [1] - 178:4
signatories [1] - 94:23
significance [3] - 26:18, 88:21, 88:23
significant [15] - 12:29, 13:15, 13:24, 19:9, 20:8, 21:14, 25:9, 44:5, 56:6, 62:22, 92:24, 93:29, 94:26, 124:8, 147:14
silver [1] - 117:14
similar [8] - 43:16, 70:11, 93:15, 93:29, 98:22, 128:24, 134:16, 146:1
similarly [1] - 47:3
simple [6] - 13:10, 14:22, 33:12, 40:18, 45:23, 69:3
simply [8] - 96:17, 99:26, 116:16, 126:8, 134:8, 164:19, 177:8, 179:3
single [3] - 118:21, 162:19, 166:3
SIR [1] - 2:24
situated [1] - 129:10
situation [12] - 31:7, 53:5, 65:18, 66:16, 71:3, 72:10, 100:1, 100:14, 133:1, 135:12, 140:9, 173:21
situations [5] - 90:25, 152:13, 152:17, 179:2, 179:3
six [5] - 80:9, 80:17, 100:19, 136:21, 137:14
skip [2] - 128:21, 130:11

skipping [1] - 35:25
slightest [1] - 13:13
slightly [1] - 28:8
slow [2] - 72:24, 72:26
Small [1] - 136:9
small [1] - 38:27
SMEs [2] - 38:24, 38:27
SMITH [1] - 2:27
smuggling [1] - 75:25
Snowden [4] - 44:16, 95:9, 169:19, 174:11
so-called [2] - 130:21, 170:10
soccer [1] - 5:26
social [2] - 120:9, 121:9
societies [1] - 106:17
society [16] - 32:22, 34:18, 103:7, 103:22, 106:10, 106:26, 109:18, 109:21, 110:8, 111:25, 113:18, 113:25, 115:19, 119:29, 124:25, 134:1
society' [1] - 115:9
Software [1] - 2:27
sole [3] - 119:3, 172:4, 175:8
SOLICITORS [2] - 2:7, 2:28
solution [3] - 30:1, 30:15, 33:12
someone [1] - 50:15
sometimes [3] - 25:23, 93:18, 154:28
somewhat [5] - 63:2, 100:8, 134:4, 135:27, 139:22
soon [3] - 113:4, 133:4, 147:4
sophisticated [3] - 22:1, 55:1, 106:18
sophistication [1] - 22:11
sorry [49] - 6:14, 14:13, 18:9, 18:10, 18:12, 18:14, 20:19, 23:23, 23:24, 28:16, 30:4, 35:2, 35:5, 43:2, 47:9, 51:18, 52:23, 56:14, 56:17, 56:19, 56:20, 61:15, 61:18, 64:23, 67:29, 69:25, 71:17, 72:24, 79:23, 79:29, 81:11, 82:13, 85:13, 104:10, 104:12, 105:18, 108:6, 122:15, 133:15, 134:25, 134:26, 134:29, 136:23, 147:27, 150:24, 157:22, 167:20, 167:27, 179:2
Sorry [1] - 6:17
sort [5] - 26:25, 31:7, 54:24, 63:3, 63:5
sorts [2] - 59:1, 71:25
sought [6] - 20:25, 34:4, 77:4, 103:23, 131:9, 150:22
sources [1] - 26:12
SOUTH [1] - 2:13
South [1] - 128:11
sovereign [3] - 57:18, 57:23, 57:29
Spain [2] - 75:16, 176:26
speaking [3] - 6:23, 15:10, 39:28
speaks [1] - 91:26
special [10] - 25:28, 68:11, 68:12, 70:13, 139:5, 149:2, 149:10, 149:13, 158:4, 162:28
species [1] - 79:16
specific [10] - 16:8, 129:6, 142:24, 144:1, 144:10, 148:25, 154:29, 171:29, 172:8, 174:7
specifically [10] - 17:15, 17:25, 28:22, 31:3, 74:6, 86:18, 89:27, 95:6, 101:27, 169:18
speculated [1] - 79:27
speculative [1] - 41:28
speedily [1] - 5:11
spend [4] - 60:12, 100:25, 100:29, 117:13
spent [2] - 34:18, 97:3
sphere [5] - 10:2, 17:22, 91:7, 116:16, 133:28
spheres [1] - 168:26
spoken [1] - 92:7
Spokeo [2] - 55:10, 55:12
SQUARE [1] - 2:29
squarely [1] - 94:18
staff [7] - 20:12, 132:15, 161:26, 176:20, 176:21, 176:23, 176:24
stage [8] - 8:27, 31:25, 44:19, 59:1, 60:14, 69:15, 69:18, 74:9
stages [3] - 109:5, 109:7, 131:25
stake [1] - 10:18
stand [4] - 48:29, 73:8, 73:24, 80:13
stand-out [1] - 80:13
Standard [1] - 73:10
standard [6] - 26:27, 29:6, 29:12, 37:13, 83:15, 84:11
standards [2] - 37:9, 159:17
standing [57] - 26:23, 40:17, 40:18, 41:12, 42:5, 42:7, 44:22, 45:7, 45:12, 45:22, 46:6, 46:21, 47:29, 48:9, 48:10, 48:16, 48:17, 48:19, 49:16, 50:2, 50:14, 50:19, 50:26, 51:1, 51:7, 51:23, 51:29, 52:2, 55:29, 58:21, 58:22, 59:20, 60:22, 61:7, 62:14, 62:17, 63:8, 86:26, 86:29, 87:1, 88:26, 91:12, 92:1, 96:1, 96:3, 96:19, 99:10, 99:12, 99:18, 99:19, 100:14, 101:7, 135:5, 138:3, 151:24
start [6] - 11:6, 98:27, 99:5, 100:16, 151:7, 167:17
started [1] - 136:6
starting [2] - 11:5, 130:16
starts [1] - 104:13
state [13] - 7:3, 17:25, 19:1, 22:1, 23:17, 43:20, 57:3, 58:27, 61:6, 87:26, 105:14, 133:26, 150:3
State [19] - 32:26, 58:10, 75:23, 87:29, 94:21, 98:8, 106:19, 120:18, 121:8, 125:15, 135:12, 142:21, 144:4, 161:28, 162:12, 164:9, 165:21, 175:9, 178:19
State' [1] - 172:4
statement [6] - 31:26, 34:29, 54:4, 85:10, 88:6, 101:14
statements [1] - 12:13
states [7] - 19:26, 22:12, 24:7, 25:4, 26:10, 27:3, 107:11
States [42] - 16:1, 16:3, 17:13, 18:26, 26:17, 26:18, 26:28, 30:25, 36:5, 36:22, 38:14, 90:4, 94:22, 94:23, 95:2, 95:13, 95:15, 95:19, 95:22, 95:28, 96:9, 97:6, 107:15, 120:25, 152:16, 163:2, 168:22, 170:4, 170:9, 170:14, 170:19, 173:13, 173:28, 175:17, 175:23, 176:14, 176:26, 177:29, 178:8, 178:12, 179:1, 179:11
STATES [1] - 2:21
States' [1] - 177:25
stating [1] - 47:25
stations [1] - 128:5
statistical [1] - 150:28
Statistical [1] - 151:4
status [2] - 53:19, 151:9
statute [5] - 42:17, 65:10, 65:11, 79:17, 103:14
statutory [9] - 49:26, 49:28, 50:27, 51:3, 62:19, 68:22, 69:7, 69:11, 132:21
stay [1] - 66:3
stenographers [2] - 43:2, 129:20
stenographic [1] - 1:25
Stenography [3] - 1:21, 3:23, 3:25
STENOGRAPHY [1] - 1:31
step [4] - 33:29, 70:18, 71:29
steps [2] - 33:16, 140:5
still [11] - 8:7, 15:7, 35:5, 72:16, 73:24, 100:27, 117:8, 131:22, 131:23, 133:15
stop [4] - 34:1, 42:20, 68:25, 156:6
stop' [1] - 34:1
stopping [1] - 32:3
stops [1] - 34:7
storage [1] - 177:1
store [3] - 120:27, 154:6, 177:6
stored [3] - 57:22, 79:6, 154:9
storing [1] - 153:2
straight [2] - 6:13, 61:17
straightforward [3] - 25:7, 69:3, 81:20
strange [2] - 45:17, 135:27
stranger [1] - 44:23
strategic [6] - 53:20, 54:8, 130:21, 130:26, 131:6, 131:8
STREET [3] - 2:14, 2:19, 3:10
strengthened [1] - 133:10
strengthening [1] - 163:16
stress [3] - 11:15, 13:10, 140:14
stressed [1] - 176:6
stresses [1] - 107:10
strict [3] - 53:17, 113:14, 114:23
strictly [5] - 9:5, 9:25, 13:28, 15:17, 105:15
strikes [1] - 104:28
striking [2] - 43:16, 161:1
struck [3] - 43:9, 43:25, 73:17
structure [2] - 95:7, 99:29
struggle [1] - 107:16
struggling [1] - 18:4
studies [1] - 160:21
subject [45] - 6:5, 7:4, 8:16, 9:16, 10:16, 22:25, 23:7, 30:9, 32:18, 35:17, 40:23, 43:8, 43:24, 43:29, 44:7, 54:26, 58:11, 92:7, 93:3, 94:6, 99:22, 101:11, 101:15, 107:11, 128:6, 129:27, 136:27, 143:6, 144:25, 145:27, 146:6, 146:11, 151:3,

151:9, 157:27,
157:29, 158:7,
158:13, 159:25,
164:27, 169:22,
170:20, 171:29,
172:29, 175:9
subjected [3] -
125:18, 142:4, 159:24
subjective [4] -
80:29, 81:7, 81:8,
81:15
subjects [2] -
130:20, 131:3
SUBMISSION [4] -
4:4, 4:5, 5:8, 93:8
submission [6] -
80:18, 85:17, 112:2,
114:29, 161:20,
164:21
submissions [15] -
16:29, 17:9, 27:26,
28:10, 39:26, 64:16,
67:16, 74:25, 80:8,
80:11, 80:12, 84:12,
88:19, 91:28, 94:15
submit [1] - 156:4
submitted [4] -
76:26, 128:16,
148:24, 175:18
submitted.. [1] -
156:11
subparagraph [3] -
65:23, 66:22, 103:3
subscribers [1] -
11:25
Subsequent [1] -
112:16
subsequent [8] -
63:16, 108:22, 111:9,
111:28, 112:10,
115:2, 141:24, 174:18
subsequently [1] -
111:16
subsidiary [1] - 39:4
substantial [5] -
33:3, 33:8, 60:18,
60:22, 131:24
substantiated [1] -
63:22
substantive [6] -
30:19, 56:1, 89:26,
92:24, 98:15, 134:14
substitute [2] -
97:28, 107:5
subversive [1] -
106:21
succeed [1] - 92:3
suffer [1] - 37:20
suffered [2] - 41:15,
51:21

suffice [2] - 48:28,
48:29
sufficient [16] - 29:2,
29:7, 29:9, 31:3,
43:12, 44:12, 52:18,
53:13, 79:18, 110:11,
110:20, 126:3,
132:12, 141:7,
153:21, 155:12
sufficiently [10] -
35:16, 42:29, 43:7,
153:22, 154:11,
155:11, 167:7, 176:7,
178:27
suggest [4] - 12:10,
63:1, 63:17, 87:9
suggested [1] -
87:28
suggesting [1] -
15:23
suggestion [4] -
21:22, 27:28, 84:2,
92:3
suitability [1] -
120:29
suitable [1] - 129:1
suits [1] - 57:24
sum [1] - 167:5
summarise [1] - 41:9
summarised [1] -
39:25
summarises [1] -
6:25
summary [6] - 23:17,
39:11, 40:1, 43:11,
43:24, 161:9
superior [1] - 75:17
supervise [3] -
11:20, 108:1, 124:16
supervised [1] -
155:15
supervision [21] -
19:16, 99:3, 122:28,
123:17, 123:25,
124:5, 124:6, 129:27,
131:21, 131:27,
139:11, 142:17,
147:22, 152:5,
155:26, 156:2, 156:8,
156:14, 156:17,
157:2, 167:1
Supervisor [6] -
10:28, 32:10, 34:25,
35:13, 35:15, 65:5
supervisor [4] -
11:1, 35:16, 37:7,
159:16
Supervisors [1] -
65:7
supervisory [14] -

35:24, 36:19, 36:28,
65:19, 66:17, 66:27,
70:3, 71:2, 71:15,
109:19, 110:2, 110:5,
110:18, 144:14
Supervisory [1] -
131:22
supplement [1] -
163:5
supplementary [1] -
151:8
supplied [1] - 3:24
support [6] - 43:13,
65:20, 87:9, 141:7,
168:24, 170:2
supported [2] -
83:20, 88:7
supporting [1] - 91:4
supports [4] - 43:22,
45:22, 84:29, 85:28
suppose [15] -
43:16, 65:8, 72:23,
99:10, 103:20, 114:1,
134:23, 135:3,
135:17, 142:13,
146:14, 156:18,
160:12, 169:5, 177:15
supposing [1] -
77:11
suppression [1] -
148:8
Supreme [1] - 76:9
supreme [1] - 108:14
surveillance [138] -
9:16, 9:18, 10:2,
10:18, 19:24, 19:27,
20:2, 21:25, 22:24,
23:1, 24:27, 25:3,
25:11, 25:24, 26:13,
34:20, 40:23, 43:8,
43:29, 44:7, 44:26,
51:10, 53:20, 54:9,
54:27, 55:6, 55:20,
58:5, 64:2, 86:2,
86:23, 91:1, 91:5,
93:20, 93:27, 93:28,
94:3, 94:7, 94:12,
95:1, 95:22, 97:15,
97:20, 97:21, 97:25,
98:1, 98:10, 99:14,
99:24, 100:1, 101:11,
101:15, 103:29,
104:7, 104:21,
104:28, 105:13,
106:15, 106:21,
106:24, 107:2,
107:12, 108:10,
108:22, 109:4, 109:5,
109:8, 109:9, 109:25,
110:11, 110:25,

111:7, 111:17,
111:24, 111:26,
112:3, 112:14,
112:19, 112:27,
113:4, 113:13,
113:14, 115:5,
115:16, 115:28,
116:9, 116:18,
116:27, 117:15,
119:8, 121:15,
127:10, 127:18,
128:7, 131:24,
136:17, 138:13,
138:21, 138:27,
139:1, 139:16,
139:18, 139:29,
140:20, 140:22,
142:2, 142:23, 143:9,
143:23, 145:14,
145:28, 146:11,
147:16, 147:23,
152:3, 152:14,
152:23, 156:8,
159:24, 159:29,
160:15, 161:5, 163:1,
163:15, 169:28,
170:9, 172:16,
173:22, 174:8,
175:28, 177:14,
177:18, 177:24,
177:28, 178:7, 178:11
Surveillance [2] -
168:3, 177:22
surveillance' [2] -
167:6, 170:10
surveillance.. [1] -
158:5
surveilled [1] - 97:19
surveyed [2] - 54:23,
100:4
survive [1] - 43:18
susceptibility [1] -
17:12
suspect [1] - 35:6
suspected [1] -
158:10
suspects [2] -
144:22, 159:23
suspend [4] - 30:26,
31:5, 31:23, 32:6
suspended [1] -
112:17
suspension [3] -
111:17, 111:24,
112:15
suspicion [2] -
140:19, 177:25
sustain [1] - 46:20
SUZANNE [1] - 2:22
Sweden [2] - 119:15,

178:9
Sweden.. [1] -
176:25
Swedish [4] -
121:24, 123:15,
124:14, 125:11
Swire [9] - 18:16,
20:15, 22:15, 25:17,
55:22, 58:1, 90:18,
91:1, 160:16
system [34] - 12:16,
14:29, 15:1, 19:1,
19:7, 23:20, 23:29,
55:20, 67:10, 69:9,
71:4, 81:6, 90:11,
102:7, 107:2, 109:24,
116:8, 121:14,
121:25, 123:18,
124:17, 125:12,
127:9, 130:9, 131:26,
132:2, 135:14,
142:10, 142:12,
153:9, 153:11,
163:29, 164:1, 164:4
systems [10] - 6:4,
24:2, 58:23, 59:25,
90:3, 144:20, 152:15,
161:19, 165:7

T

Tab [4] - 100:18,
117:14, 119:14,
127:14
tab [8] - 101:9,
134:26, 149:24,
160:12, 167:23,
167:24, 167:27,
167:29
table [2] - 40:1, 57:1
tabs [1] - 100:17
tailored [1] - 152:2
talks [1] - 18:16
tantamount [1] -
115:25
Tap [1] - 57:28
tapped [2] - 152:29,
155:1
tapping [2] - 152:29,
162:29
targeted [7] - 13:2,
25:26, 26:5, 37:17,
177:14, 177:18,
178:10
Targeted [2] -
177:22, 177:24
targeting [3] - 12:17,
21:21, 177:19
targets [3] - 163:27,

177:25, 177:29
task [3] - 60:14, 69:12, 82:1
tasked [5] - 29:4, 142:22, 169:8, 169:9, 169:11
tasks [1] - 177:27
tax [1] - 85:21
taxation [1] - 65:10
tease [1] - 67:17
technical [5] - 106:13, 129:26, 130:28, 147:2, 147:19
technician [1] - 119:16
telecommunication [5] - 54:9, 106:25, 129:6, 133:4, 133:24
telephone [12] - 47:17, 51:20, 128:18, 129:10, 130:29, 150:14, 150:17, 151:7, 152:29, 155:1, 162:29
telephones [2] - 152:28, 176:12
telephony [3] - 11:16, 11:17
television [1] - 128:5
ten [2] - 51:14, 171:9
tends [3] - 98:15, 103:21, 103:24
tension [1] - 90:2
tent [2] - 172:25
term [2] - 17:24, 112:18
terminated [1] - 109:7
termination [1] - 113:4
terminology [1] - 143:19
terms [20] - 10:18, 22:13, 30:1, 31:28, 42:25, 54:15, 55:17, 55:26, 57:4, 60:24, 62:1, 68:7, 77:29, 88:10, 89:17, 105:10, 142:14, 169:28, 177:8, 177:15
TERRACE [1] - 2:8
terribly [1] - 164:21
Terrorism [1] - 175:5
terrorism [4] - 106:16, 106:18, 107:17, 173:14
terrorist [1] - 22:13
test [20] - 34:16, 34:18, 34:19, 34:20, 37:12, 60:20, 73:3, 74:3, 85:27, 100:8, 102:25, 102:26, 103:3, 119:27, 138:9, 139:21, 139:23, 140:29
TEU [2] - 16:6, 172:3
text [1] - 176:15
TFEU [2] - 57:9, 173:25
that.. [1] - 131:4
THE [8] - 1:2, 1:7, 2:16, 5:1, 6:24, 83:1, 179:19
the.. [3] - 53:21, 66:29, 150:16
thematic [1] - 169:4
themes [3] - 97:8, 97:10, 130:6
themselves [3] - 100:4, 106:17, 109:15
THEN [1] - 179:19
theoretical [1] - 25:4
theoretical].. [1] - 158:3
theory [1] - 72:9
thereby [1] - 112:5
therefore [27] - 6:4, 7:1, 11:20, 11:25, 17:19, 36:20, 40:26, 45:19, 47:28, 65:21, 68:19, 102:10, 106:22, 110:16, 111:18, 115:21, 116:9, 125:19, 126:3, 133:20, 134:18, 144:24, 147:4, 152:11, 153:17, 154:10, 174:21
therein [2] - 83:20, 86:28
thereto [1] - 35:29
they've [1] - 134:7
thinking [2] - 93:19, 156:17
thinks [2] - 142:14, 145:6
third [19] - 30:10, 30:13, 30:26, 31:5, 31:10, 31:29, 33:20, 35:28, 37:16, 37:18, 41:24, 41:27, 66:22, 75:22, 76:16, 76:18, 129:13, 169:23, 174:14
thirds [3] - 104:13, 114:18, 157:20
thoroughly [1] - 169:26
thread [1] - 85:24
threads [1] - 6:22
threatened [1] - 106:17
threats [1] - 106:20
three [12] - 5:13, 41:12, 41:27, 50:27, 51:3, 51:23, 51:29, 52:2, 109:5, 136:24, 136:26, 150:11
Three [1] - 178:18
throughout [3] - 102:26, 105:3, 106:29
THURSDAY [1] - 179:19
thwarted [1] - 112:6
tick [2] - 153:18, 153:24
tick-box [1] - 153:24
til [1] - 92:17
times.. [1] - 151:7
timing [1] - 54:26
title [1] - 48:13
Title [1] - 16:6
TO [1] - 6:24
today [2] - 18:8, 100:27
together [4] - 6:22, 100:23, 122:2, 147:11
tolerance [1] - 105:14
tomorrow [2] - 175:7, 179:16
took [3] - 93:20, 128:16, 137:20
top [9] - 24:15, 50:23, 51:18, 51:20, 101:22, 102:28, 120:2, 133:15
topics [1] - 169:12
total [3] - 150:28, 167:5, 176:14
Total [1] - 151:1
totality [2] - 126:13, 157:17
towards [1] - 133:16
traceable [1] - 41:22
track [1] - 54:20
trade [8] - 10:24, 11:3, 17:3, 34:4, 37:6, 38:18, 39:8, 39:9
trading [2] - 38:10, 39:5
tradition [1] - 10:15
traditional [1] - 93:28
traffic [2] - 11:15, 12:4
trafficking [1] - 128:9
train [1] - 146:12
trained [1] - 132:17
transatlantic [1] - 38:16
transcript [3] - 1:24, 6:1, 61:20
Transcripts [1] - 3:23
transfer [11] - 15:9, 15:11, 16:17, 17:10, 32:6, 38:19, 39:11, 74:18, 132:11, 174:13, 174:19
transferred [3] - 17:3, 73:12, 79:5
transferring [1] - 39:6
transfers [3] - 31:10, 31:29, 38:5
transmission [3] - 132:2, 132:18, 132:22
transmit [1] - 132:14
transmits [1] - 70:5
transmitted [1] - 128:19
transparency [2] - 21:19, 165:14
transparent [1] - 13:19
travels [1] - 128:10
treat [1] - 98:15
treated [3] - 41:1, 93:16, 103:15
treaties [1] - 163:20
Treaties [1] - 16:10
treatment [2] - 117:28, 134:4
treats [1] - 99:17
Treaty [5] - 7:1, 7:6, 17:14, 17:17, 57:11
trial [4] - 148:2, 154:5, 154:10, 163:21
trial.. [1] - 154:7
Tribunal [5] - 26:1, 76:9, 135:17, 137:13, 158:12
tribunal [2] - 119:22, 144:29
tried [2] - 63:1, 75:15
trigger [1] - 89:13
trillion [1] - 176:15
true [5] - 59:3, 71:11, 71:13, 87:7, 173:13
truth [2] - 30:14, 61:2
try [2] - 5:11, 78:13
trying [5] - 40:2, 69:26, 96:17, 97:3, 130:4
turn [12] - 101:17, 102:24, 119:6, 119:26, 127:13, 132:26, 134:3, 137:14, 138:1, 149:29, 171:2, 175:26
Turning [1] - 158:19
turning [17] - 108:18, 113:8, 114:17, 118:1, 119:14, 126:15, 126:17, 127:28, 128:1, 131:20, 147:26, 153:7, 166:7, 168:17, 170:24, 171:9, 178:4
turns [2] - 94:21, 132:9
tweets.. [1] - 176:16
twelve [1] - 121:29
twice [1] - 75:15
two [41] - 5:13, 14:1, 14:21, 15:11, 16:14, 28:6, 28:19, 49:22, 56:20, 60:5, 64:28, 75:3, 75:13, 78:16, 78:18, 78:22, 80:10, 80:13, 80:22, 91:12, 95:28, 99:11, 99:19, 104:13, 106:13, 108:23, 109:7, 110:18, 114:18, 124:6, 126:18, 134:23, 135:4, 135:28, 137:12, 149:21, 149:29, 150:27, 156:21, 157:20, 160:28
two-thirds [1] - 157:20
type [16] - 9:20, 11:7, 12:23, 13:22, 44:1, 44:17, 53:5, 91:26, 93:20, 93:21, 146:1, 150:27, 163:8, 165:7, 165:15, 178:15
types [3] - 16:14, 26:4, 150:27
Typically [1] - 165:15

U

UK [6] - 25:28, 135:12, 142:12, 175:5, 175:9, 176:20
ultimate [1] - 162:8
ultimately [10] - 10:20, 21:12, 40:22, 43:12, 64:6, 96:12, 136:18, 153:8, 159:20, 167:13
unable [3] - 29:23, 43:23, 44:18
unambiguously [2] - 13:20, 64:27

unassailable [1] - 83:11
unavoidable [2] - 113:13, 123:10
unchallengeable [2] - 139:11, 152:4
unclear [1] - 174:4
uncommon [1] - 57:14
uncontested [2] - 41:10, 60:17
uncontradicted [1] - 15:25
under [70] - 5:19, 15:26, 19:12, 22:29, 23:1, 30:5, 31:3, 35:22, 42:16, 47:4, 47:12, 48:18, 48:19, 50:4, 50:18, 50:27, 53:20, 54:9, 59:13, 68:22, 71:21, 73:2, 73:3, 73:13, 74:19, 74:21, 74:22, 77:23, 88:2, 89:14, 89:27, 94:3, 95:6, 102:11, 103:27, 105:8, 105:14, 106:7, 106:25, 107:1, 108:10, 108:20, 110:24, 112:26, 116:6, 116:10, 116:27, 118:23, 119:2, 121:24, 122:21, 130:22, 133:1, 134:15, 137:3, 137:10, 137:26, 141:15, 142:9, 142:10, 142:22, 147:24, 149:7, 158:22, 159:13, 163:10, 174:15, 179:6
Under [2] - 137:25, 145:21
underlay [1] - 13:18
undermining [3] - 22:5, 107:14, 121:16
understandable [2] - 57:17, 67:4
understood [2] - 23:14, 55:27
undertake [1] - 106:20
undertaken [1] - 143:24
undertaking [2] - 143:8, 145:2
undisputed [2] - 42:20, 55:21
undoubtedly [4] - 37:28, 56:23, 81:23,

156:28
unduly [1] - 150:19
unfortunate [1] - 62:13
unfortunately [1] - 170:27
unfounded [3] - 65:21, 66:11, 67:5
unhindered [1] - 140:3
Unibet [2] - 85:28
unified [1] - 119:3
uniform [1] - 173:2
Union [10] - 10:23, 15:4, 15:9, 15:26, 15:27, 57:7, 168:14, 171:10, 171:20
unique [3] - 13:14, 41:6, 81:5
United [10] - 17:13, 38:14, 95:24, 138:7, 138:11, 141:18, 145:15, 158:9, 176:14, 178:9
UNITED [1] - 2:21
unjustified [5] - 85:10, 87:26, 92:11, 92:26, 140:21
Unjustified [1] - 87:25
unknown [1] - 174:10
unlawful [10] - 48:15, 48:27, 49:25, 50:12, 50:18, 51:21, 89:8, 142:26, 144:19, 158:1
unlawfully [3] - 48:20, 49:11, 147:2
unless [6] - 44:6, 78:13, 96:14, 111:11, 158:23, 158:25
Unlike [1] - 144:20
unlike [1] - 6:2
unlikely [3] - 50:29, 61:11, 158:26
unlimited [2] - 107:11, 154:5
unquestionably [1] - 89:12
unrestricted [1] - 115:5
unspoken [1] - 41:4
untargeted [1] - 26:12
UNTIL [1] - 179:19
unusual [3] - 45:17, 57:3, 69:11
up [20] - 31:25, 34:27, 35:9, 95:5, 98:8, 101:2, 102:5,

119:1, 120:2, 137:5, 138:3, 148:10, 160:18, 160:19, 163:7, 168:9, 168:11, 168:17, 179:13, 179:16
upheld [2] - 131:26, 165:17
Upstream [2] - 6:3, 6:14
urge [1] - 91:13
urged [2] - 8:5, 37:5
Uruguay [1] - 127:26
Uruguayan [1] - 127:25
US [63] - 7:4, 7:25, 15:8, 15:24, 17:10, 26:25, 31:13, 31:18, 31:19, 31:27, 32:2, 32:27, 38:9, 38:12, 39:3, 39:21, 46:1, 46:9, 50:18, 53:6, 57:24, 60:13, 60:25, 61:12, 62:1, 64:16, 78:25, 78:29, 79:5, 79:6, 79:11, 83:14, 83:16, 83:19, 89:2, 90:20, 90:22, 90:23, 91:13, 93:11, 93:20, 94:2, 96:21, 97:4, 97:11, 128:25, 129:8, 129:20, 130:9, 132:2, 135:23, 144:8, 144:11, 146:25, 149:12, 151:14, 161:3, 176:27
US' [1] - 31:25
US.. [1] - 73:17
USC [4] - 56:29, 57:21, 57:26
useful [3] - 77:8, 93:14, 176:2
users [2] - 11:25, 104:29
uses [1] - 70:25
utter [1] - 74:10

V

valid [1] - 68:14
validity [4] - 12:21, 59:24, 66:5, 67:1
value [2] - 22:5, 143:29
values [2] - 109:17, 161:28
variation [1] - 165:21
varied [1] - 173:11
variety [2] - 152:13,

164:15
various [17] - 5:11, 40:3, 75:7, 94:15, 95:14, 97:5, 103:27, 113:12, 116:10, 125:1, 128:4, 132:3, 147:16, 157:19, 160:3, 170:16, 174:8
variously [1] - 170:25
vary [1] - 26:5
Venice [8] - 25:16, 160:13, 160:15, 160:16, 161:9, 161:13, 161:21, 163:6
ver [1] - 62:7
ver-something [1] - 62:7
verbatim [1] - 1:24
verify [2] - 111:21, 132:17
verifying [1] - 132:21
Verizon.. [1] - 53:1
versa [1] - 39:5
version [2] - 26:16, 56:2
vested [1] - 110:11
vetting [1] - 119:20
vice [1] - 39:5
victim [3] - 53:18, 102:11, 118:9
victims [2] - 136:6, 136:15
video [1] - 163:1
view [20] - 19:17, 22:23, 27:14, 28:18, 55:25, 67:10, 83:19, 88:29, 101:28, 102:4, 105:26, 111:23, 111:28, 112:24, 121:14, 125:23, 135:25, 146:15, 152:1, 156:28
viewed [1] - 148:27
vii [1] - 122:23
viii [1] - 122:26
violated [2] - 54:5, 114:4
violation [11] - 48:26, 57:2, 57:22, 62:18, 102:12, 114:6, 117:26, 118:9, 147:26, 160:5, 160:7
virtue [1] - 44:13
vis-à-vis [1] - 73:17
vital [4] - 12:13, 12:22, 27:6, 27:22
Vladeck [1] - 44:9, 44:15, 45:25, 47:2, 55:24, 58:24, 60:23,

62:1, 62:12, 62:27, 63:22
voiced [1] - 160:29
volumes [2] - 35:1, 35:4

W

wait [2] - 74:6, 82:15
waiver [1] - 57:18
WALL [2] - 3:4, 3:4
walls [1] - 172:19
wants [1] - 128:12
war [1] - 128:8
warrant [3] - 27:13, 124:23, 145:8
warrants [3] - 142:19, 142:24, 153:12
WAS [1] - 179:19
was.. [1] - 142:3
Watson [6] - 11:12, 11:29, 12:26, 13:23, 86:16, 91:8
waves [1] - 57:19
ways [5] - 44:11, 87:27, 97:29, 135:17, 146:17
weaken [1] - 36:14
weakened [1] - 102:3
Weber [3] - 127:14, 127:24, 166:13
WEDNESDAY [2] - 1:18, 5:1
weeks [1] - 97:4
weighed [1] - 148:19
weighs [1] - 163:7
weight [1] - 98:7
well-being [1] - 103:9
well-founded [1] - 32:17
whatsoever [1] - 85:8
Whereas [1] - 130:23
whereby [4] - 103:3, 156:19, 168:10, 172:24
which.. [1] - 169:26
whistleblower [1] - 25:22
whole [10] - 17:1, 21:16, 26:23, 99:4, 99:8, 101:7, 112:2, 115:21, 126:24, 156:29
whole.. [1] - 162:13
wholesale [1] - 24:6

wholly [5] - 10:3,
14:27, 27:12, 92:11,
92:26
wide [4] - 121:12,
125:13, 133:27, 155:5
widespread [2] -
11:22, 140:19
wild [1] - 63:20
wilful [1] - 57:21
wilfulness [1] - 88:7
willful [2] - 57:1,
57:12
WILLIAM [1] - 2:28
willingness [1] -
62:28
WILTON [1] - 2:8
wind [1] - 78:2
wire [1] - 57:26
Wire [1] - 57:28
wiretap [1] - 90:21
wish [1] - 129:20
wishes [1] - 25:7
WITNESS [1] - 4:2
witness [1] - 92:23
witnesses [4] -
20:24, 40:19, 60:15,
148:26
wonder [3] - 100:16,
150:22, 167:16
wondering [1] -
73:22
word [1] - 29:1
wording [2] - 17:17,
31:3
words [8] - 70:25,
75:28, 96:5, 99:4,
104:14, 139:22,
170:5, 179:7
workings [1] - 146:9
works [1] - 128:4
worldwide [1] -
176:12
worth [1] - 45:21
WOULFE [1] - 2:12
written [1] - 3:25
wrongdoing [1] -
164:9
wrongful [1] - 164:13
wrongly [1] - 45:29

Y

year [3] - 14:6,
130:1, 169:2
years [6] - 106:16,
112:15, 135:21,
136:5, 146:3, 157:10
yes.. [1] - 49:1
yesterday [9] - 5:13,

9:7, 11:11, 12:15,
18:5, 20:17, 21:1,
86:19, 172:23
yesterday's [1] - 6:1
yield [1] - 59:8
YOUNG [1] - 2:7

Z

Zabo [7] - 140:28,
149:22, 160:11,
160:12, 160:24,
160:27, 166:7
Zakharov [3] -
140:28, 149:21,
166:13