

THE HIGH COURT - COURT 29
COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

MAXIMILLIAN SCHREMS

DEFENDANTS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON WEDNESDAY, 15th MARCH 2017 - DAY 21

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1 THE HEARING RESUMED AS FOLLOWS ON WEDNESDAY, 15TH MARCH
2 2017

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

5 **REGISTRAR:** Data Protection Commissioner -v- Facebook 11:05
6 Ireland Ltd. and another.

7 **MS. JUSTICE COSTELLO:** Yes, Mr. Murray.
8

9 **SUBMISSION BY MR. MURRAY:**

10 11:05
11 **MR. MURRAY:** Judge, I was just about to move on to
12 Article 4 when the court rose yesterday. But there is
13 just one point in relation to the national security
14 issue I want to observe before I leave that and it
15 relates to the case of the European Parliament -v- 11:05
16 Council. This was the case involving the passenger
17 registration details, you may recall it. I don't
18 propose to open the case but just perhaps to note this,
19 and in fact I think the ZZ case, which I had concluded
20 with yesterday, is a good way of making the point. 11:05

21
22 You will recall in ZZ the Charter, and in particular
23 Article 47 as it happens, is functioning in an area in
24 which the EU has competence, namely the provisions of
25 the Directive governing rights of entry and rights of 11:06
26 residence in Britain and therefore the Charter
27 operates. And the effect of the decision in that case
28 is that the introduction of national security as a
29 justification for the matters that gave rise to the

1 complaint, the manner in which the hearing was
2 conducted, the information that was disclosed in the
3 course of it, did not pull down the shutters, as it
4 were. The court was still entitled to and required to
5 interrogate the application of Article 47.

11:06

6
7 So the distinction, as it were, is between the
8 introduction into an area in which the EU *has*
9 competence of national security, which is something
10 that the court proceeds as in ZZ to interrogate, or the 11:07
11 question as to whether the EU has legislative
12 competence, which it doesn't, over the national
13 security of the Member States.

14
15 In the former situation the court looks at the national 11:07
16 security issues that are presented, in the latter it
17 does not. And the European Parliament case
18 demonstrates that distinction to be noted. It's a
19 pre-Charter case, but there the court held that there
20 was no competence to introduce a legislative measure 11:07
21 which had as its sole objective, as it was found, the
22 protection of public safety.

23
24 So, Judge, it, I think, underscores the point which
25 I made on Friday to you that the national security 11:08
26 issue is one which arises where one is concerned with
27 legislative competence, national security is not
28 something which is taken out of the court's enquiry
29 where a matter is actually within the Union's

1 competence. That is why the comments in the FRA Report
2 which I opened to you yesterday, that is why - sorry,
3 on Friday - that is why those observations were made in
4 the course of the FRA Report which I opened to you on
5 Friday. And the Charter, just to be clear, operates 11:08
6 whenever a matter falls within the scope of EU law and
7 that, as it were, is the test.

8
9 Here, and again I won't burden the court with opening
10 provisions which have been opened to you already, the 11:09
11 transfer of data outside the Union is clearly covered
12 by the provisions of the Directive. That is the
13 trigger, as it were, and it's not a trigger which is
14 pulled by issues of national security, it's a
15 commercial issue. 11:09

16
17 I think that distinction, Judge, emerges well from a
18 case that Mr. Gallagher referred to, and which I think
19 he accepted did, certainly arguably change the analysis
20 which he was urging in relation to the Parliament -v- 11:09
21 Council case and that's the case of Ireland -v-
22 Parliament and Council. This is in Tab 30, I just want
23 to draw your attention to this again.

24 **MS. JUSTICE COSTELLO:** 30 did you say?

25 **MR. MURRAY:** Yes, it's Tab 30. Judge, this case 11:10
26 concerned the Data Retention Directive which was
27 subsequently annulled in the Digital Rights case.
28 Ireland's objection to this Directive, or I think, more
29 particularly, the former Minister McDowell's objection

1 to the Directive, was that it was felt emphatically
2 that the EU had no competence in the area of criminal
3 law, that was the position adopted by Ireland, the EU
4 had no competence in the area of criminal law. The
5 objection was taken that the Data Retention Directive 11:10
6 was in truth a criminal law measure because of course
7 the reason that provisions were being introduced to
8 require commercial entities to retain information was
9 for the very purpose of allowing law enforcement
10 authorities obtain access to them in the event that 11:11
11 they became relevant to a criminal investigation and it
12 was held that was outside the competence of the Union.
13 That argument was rejected by the court and the
14 analysis I think reflects the position which we're
15 adopting in relation to national security. If you can 11:11
16 turn to Tab 30 and in particular to paragraph 76.

17
18 I should just, well sorry, paragraph 77:

19
20 *"It is the task of the Court to ensure that acts which, 11:11*
21 *according to one party, fall within the scope of Title*
22 *VI of the Treaty which, by their nature, are capable of*
23 *having legal effects, do not encroach upon the powers*
24 *conferred by the Treaty on the Community.*

25 11:12
26 *78. In so far as the amendment of Directive 2002*
27 *effected by Directive 2006/24 comes within the*
28 *scope of Community powers, Directive 2006/24 could not*
29 *be based on a provision of the EU Treaty*

1 *without infringing Article 47 thereof.*

2
3 79. *In order to determine whether the legislature has*
4 *chosen a suitable legal basis for the adoption of*
5 *Directive 2006/24, it is also appropriate, as follows*
6 *from paragraph 60 of this judgment, to examine*
7 *- and this is the key thing - the substantive*
8 *contention of its provisions.*

9
10 80. *In that connection - in paragraph 80 - the*
11 *provisions of the Directive are essentially limited to*
12 *the activities of the service providers and do not*
13 *govern access to data or the use thereof by the police*
14 *or judicial authorities of the Member States."*

11:12

15
16 Although clearly that was a key purpose. Although a
17 key purpose, the provisions were limited to the
18 activities of service providers:

11:12

19
20 "81. *More specifically, the provisions of the*
21 *Directive are designed to harmonise national laws on*
22 *the obligation to retain data", and that's explained by*
23 *reference to the Directive.*

11:12

24
25 "82. *By contrast, the measures introduced provided for*
26 *by Directive 2006 do not, in themselves, involve*
27 *intervention by the police or law enforcement*
28 *authorities in the Member States. Thus, as is clear in*
29 *particular from Article 3 of the directive, it is*

11:13

1 *provided that service providers will retain only data*
2 *that are generated or processed in the course of the*
3 *provision of the relevant communications services.*
4 *Those data are solely those which are closely linked to*
5 *the exercise of the commercial activity of the service* 11:13
6 *providers.*

7
8 83. *Directive 2006 thus regulates operations which are*
9 *independent of the implementation of any police and*
10 *judicial cooperation in criminal matters. It* 11:13
11 *harmonises neither the issue of access to data by the*
12 *competent national enforcement authorities nor that*
13 *relating to the use and exchange of those data between*
14 *those authorities."*

15 11:13
16 And then 84: *"It follows that the substantive content*
17 *of the Directive is directed essentially at the*
18 *activities of service providers in the relevant sector*
19 *of the market to the exclusion of state activities*
20 *coming under Title VI. "* 11:13

21
22 Therefore it relates primarily to the functioning of
23 the internal market. Then they record Ireland's
24 arguments over the following paragraphs and say at 89:

25 11:14
26 *"since the agreement which was the subject of Directive*
27 *2004 related in the same way as Decision 2004/535, to*
28 *data-processing which was excluded from the scope of*
29 *Directive 95/46, the Court held that that decision*

1 *could not have been validly adopted.*"

2
3 And that's its reference to and explanation of the
4 decision in Parliament -v- Council to which I have just
5 referred: 11:14

6
7 *"90. Such a line of argument cannot be transposed to*
8 *Directive 2006/24.*

9
10 *91. Unlike the Decision 2004/496 - that was the one in* 11:14
11 *the Parliament case - which concerned a transfer of*
12 *personal data within a framework instituted by public*
13 *authorities to ensure public security, Directive*
14 *2006/24 covers the activities of service providers in*
15 *the internal market and it does not contain any rules* 11:14
16 *governing the activities of public authorities for law*
17 *enforcement purposes."*

18
19 And therefore the jurisdictional argument, for the want
20 of a better term, based on the Parliament case was 11:14
21 rejected. And, similarly here, the Union has
22 competence in relation to data protection, as
23 I outlined yesterday, this Directive governs the
24 transfer of data to third party countries and national
25 security issues in another state, which may in 11:15
26 consequence arise, are properly cognisable along the
27 same theory.

28
29 But, as I said on Friday, I don't know that you even

1 have to get that far because, putting it at its very
2 highest, this is a referable issue having regard to the
3 approach adopted in and underpinning the Schrems case,
4 Judge. So that's what we want to say about national
5 security.

11:15

6
7 I want to move on to the Article 4 argument. This is,
8 and again I'm obviously going to deal with it, but it's
9 not an argument that Facebook presage in their
10 pleadings or submissions. It is an argument which
11 Mr. Schrems has been making, it wasn't an argument
12 observed in the opening. The first time we knew
13 Facebook were making this argument was in the course of
14 Mr. Gallagher's closing. I'm going to come back to
15 some of the changes in the Facebook case at a later
16 stage. Obviously the court is here to deal with the
17 issues.

11:15

11:16

18
19 The contention that Article 4 is some sort of a safety
20 valve that means that it can be never be invalid, and
21 that's effectively the end point of the argument that's
22 being advanced because really the Commissioner just has
23 to pull down the curtains and exercise the power to
24 prevent data flows to any jurisdiction which she
25 concludes does not provide adequate protection. It
26 seems to us there is four difficulties with that
27 proposition, Judge.

11:16

11:16

28
29 The first, albeit obvious, is of course that the

1 draftsman has presented Article 4 as a provision which
2 is permissive, not mandatory. It confers a power, not
3 an obligation. Now, I'm going to talk about Article 4
4 as it was in force at the time the decision was made,
5 it seems to be the appropriate analysis, but obviously 11:17
6 we have to come back to Article 28(3).

7 **MS. JUSTICE COSTELLO:** Yes, I was just going to say.
8 I mean as the matter comes before me do I not have to
9 consider, you might call it modern Article 4 rather
10 than old Article 4? 11:17

11 **MR. MURRAY:** Yes. well I have to say I think that's
12 right. I suppose it's more that we started off with
13 Article --

14 **MS. JUSTICE COSTELLO:** All your hard work may well be
15 up in smoke. 11:17

16 **MR. MURRAY:** I don't know that it makes any difference,
17 Judge, because the same principle applies. Article 4
18 is effectively now Article 28(3).

19 **MS. JUSTICE COSTELLO:** Hmm.

20 **MR. MURRAY:** In either event it is *permissive*. 11:17
21 I think, well I submit, Judge, and I think this is a
22 correct analysis, that if the argument advanced by
23 Mr. Schrems and now Facebook was well placed, it would
24 in fact be a mandatory provision. The effect of their
25 argument is that the Commissioner has to do this 11:18
26 because this is the way that the SCC is saved from
27 invalidity, therefore you have to do it. That of
28 course fits not at all with the permissive nature of
29 the power. That's not an accident of expression, the

1 fact that it's a power.

2
3 If you look, Judge, to recital 11 of the 2010 SCC,
4 which is in Tab 10.

5 **MS. JUSTICE COSTELLO:** Sorry, what am I looking at 11:19
6 again, recital 10?

7 **MR. MURRAY:** Recital 11, Tab 10.

8 **MS. JUSTICE COSTELLO:** 11, thank you. Yes?

9 **MR. MURRAY:** This power is described in terms that are
10 significant: "*Supervisory authorities of the Member 11:19*
11 *States play a key role in this contractual mechanism in*
12 *ensuring that personal data are adequately protected*
13 *after the transfer. In exceptional - and I would*
14 *underline that -- in exceptional cases where data*
15 *exporters refuse or are unable to instruct the data 11:19*
16 *importer properly, with an imminent risk of grave harm*
17 *to the data subjects, the standard contractual clauses*
18 *should allow the supervisory authorities to audit data*
19 *importers and sub-processors and, where appropriate,*
20 *take decisions which are binding on data importers and 11:20*
21 *sub-processors. The supervisory authorities should*
22 *have the power - and again just perhaps to emphasise*
23 *that - to prohibit or suspend a data transfer or a set*
24 *of transfers based on the standard contractual clauses*
25 *in those exceptional cases where it is established that 11:20*
26 *a transfer on contractual basis is likely to have a*
27 *substantial adverse effect on the warranties and*
28 *obligations providing adequate protection for the data*
29 *subject."*

1 So, Judge, that sentiment, as it were, in recital 11 is
2 then reflected in the provisions of Article 4, in the
3 decision itself, which in turn is now reflected in the
4 2016 amendment which you find at Tab 14 and which at
5 Article 2 simply relates the jurisdiction back to 11:21
6 Article 28(3).

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

8 **MR. MURRAY:** But the first point is that this is
9 permissive. And I would, Judge, suggest that had it
10 been intended that the powers of the relevant 11:21
11 authority, the Data Protection Commissioner in this
12 jurisdiction, to stop data flows wherever there was an
13 inadequacy had been intended to be the safety valve,
14 which has been suggested in submissions by Mr. Schrems
15 and now by Facebook, then this would be a mandatory 11:21
16 obligation, but it isn't. And that leads to the second
17 point.

18
19 If this is a power, and it clearly is and is clearly
20 intended to be a power, then what are the factors which 11:21
21 have to be taken into account by the Commissioner in
22 exercising the discretion which she has been given?
23 And it hardly needs to be said, in the context of a
24 power vested in a national authority by an instrument
25 of European law, that in making her decision she has to 11:22
26 have regard to considerations such as those of
27 proportionality and non-discrimination and indeed has
28 to take account of the impact on the businesses and
29 commercial affairs of those who would be the subject of

1 such a decision if it was made.

2
3 Now here the fact is that the Commissioner considered
4 that the concerns she had raised in relation to US law
5 revealed a problem that was structural in nature and 11:23
6 her view was that any solution to those inadequacies
7 likewise had to be directed to the underlining
8 structural problem, the fact that a legal remedy
9 compatible with Article 47 was not available in the US
10 to EU citizens whose data was transferred. 11:23

11
12 If the Commissioner were to accept or to have accepted
13 or were it to be the case that she was required,
14 because Mr. Schrems had made a complaint against
15 Facebook to stop Facebook's data transfers, then that 11:23
16 would, to say the very least, present issues of
17 Facebook's data being, the transfer of it being stopped
18 but not that of other undertakings in Ireland and of
19 course would present the prospect of different
20 approaches being adopted in different jurisdictions to 11:24
21 the question.

22
23 In our respectful submission it would be most
24 surprising had the legislature intended that such a
25 significant step would be taken in a manner that is 11:24
26 essentially ad hoc in the sense that it's the product
27 of the complaint and the investigation. So --

28 **MS. JUSTICE COSTELLO:** Is that not built into the
29 Directive and the decisions where you have, for

1 instance, Member States are empowered to make adequacy
2 decisions in relation to other third countries.

3 **MR. MURRAY:** Absolutely.

4 **MS. JUSTICE COSTELLO:** So you might have, I don't know,
5 Uruguay was one state that has an adequacy decision, it 11:25
6 might be that Italy decided that Uruguay was adequate
7 and then the Czech Republic mightn't follow it, but
8 that happens to be a commission decision obviously.

9 **MR. MURRAY:** well, that's right. But I think there's a
10 difference between that and what is being urged here. 11:25
11 We are concerned --

12 **MS. JUSTICE COSTELLO:** No, I'm not saying they are the
13 same, but I am saying that there is this possibility of
14 actions by different --

15 **MR. MURRAY:** No, no, absolutely, yes. 11:25

16 **MS. JUSTICE COSTELLO:** -- Member States, be it through
17 the Member States or I presume their data protection
18 advices.

19 **MR. MURRAY:** That is not disputed. But the question
20 is, as you come to interpret Article 4, this power, is 11:25
21 it a legitimate construction of the provision of
22 Article 28(3) that in fact it was intended to be used
23 to resolve structural problems of that kind through the
24 conferral of a discretion which effectively would have
25 involved in this case, as contended for by Mr. Schrems, 11:25
26 the imposition of this constraint on Facebook, which
27 would have been imposed on nobody else. And whatever,
28 if that's right, if that is the construction, well so
29 be it. But the question you have to resolve by

1 reference to these considerations is, is that the
2 proper construction? Is that actually what was
3 intended by the introduction of this provision?
4

5 And in our respectful submission, when the court bears 11:26
6 consideration such that in mind, and those were the
7 factors, as I have said, that animated the
8 Commissioner's approach to the Article, then it is very
9 difficult to see that it was intended that this
10 discretionary stopgap to be used in exceptional 11:26
11 circumstances according to the recital was actually the
12 method by which a problem of the kind which has
13 presented itself here where it is drawn to the
14 attention of the data protection authority in a Member
15 State is how ultimately the SCC gets salvaged from any 11:27
16 validity which would otherwise have attended. It is,
17 in my respectful submission, to say the very least a
18 far-fetched interpretation of the - it's a far-fetched
19 interpretation of the provision.

20 11:27
21 Just to remind you, Judge, first of all, that
22 Article 16 of the Charter protects the freedom to carry
23 on business, one of the interests which is engaged by
24 the suggestion that this power would be used in the
25 manner suggested. But also that, under the domestic 11:27
26 legislation, under section 11 of the 1988 Act, you'll
27 find that at Tab 17, Judge.

28 **MS. JUSTICE COSTELLO:** Yes, section 11.

29 **MR. MURRAY:** And if you go to subsection 7.

1 MS. JUSTICE COSTELLO: Yes.

2 MR. MURRAY: Page 50, you see how the power is
3 conditioned here and the consideration which, under the
4 legislation, the Commissioner is required to take into
5 account. Certainly, as interpreted by the national 11:28
6 legislature, not powers or not considerations that are
7 immediately reconcilable with the type of provision
8 which, on Mr. Schrems' argument, Article 4 is intended
9 to be.

10
11 Subsection 7: *"The Commissioner may, subject to the*
12 *provisions of this section, prohibit the transfer of*
13 *personal data from the State to a place outside the*
14 *State unless such transfer is required or authorised by*
15 *or under any enactment or required by any convention or 11:29*
16 *other instrument imposing an international obligation*
17 *on the State.*

18
19 8. *In determining whether to prohibit a transfer of*
20 *personal data under the section, the Commissioner shall 11:29*
21 *also consider whether the transfer would be likely to*
22 *cause damage or distress to any person and have regard*
23 *to the desirability of facilitating international*
24 *transfers of data."*

25
26 And then, over the page, a prohibition under
27 subsection 7: *"Shall be effected by the service of a*
28 *notice (a prohibition notice) on the person proposing*
29 *to transfer the data concerned. The prohibition notice*

1 *then will prohibit the transferred concerned either*
2 *absolutely or until the person aforesaid has taken such*
3 *steps as are specified in the notice, specify the time*
4 *it is to take effect, specify the grounds of the*
5 *prohibition and it may make provision for the court,* 11:29
6 *for an appeal to the court."*

7
8 And then there's various provisions to deal with
9 circumstances of urgency and the like.

10
11 Thirdly, Judge, the manner in which recital 11 is
12 framed appears to us to suggest that the power
13 envisaged is, as it says, exceptional, one off,
14 directed in fact to specific parties, not to a
15 structural problem in a particular jurisdiction of the 11:30
16 kind suggested.

17
18 On Mr. Schrems' argument these orders or directions
19 should be issued in respect of all persons sending all
20 data to the United States. That again is the logical 11:30
21 conclusion of what he is saying. And, as I have said
22 already, that aside from the fact that the Article, and
23 indeed Article 28(3), which I'm going to ask you to
24 take a look at now, the Article is intended to have
25 that dramatic effect is in my respectful submission a 11:31
26 surprising one having regard to its terms.

27
28 The Directive as you --

29 **MS. JUSTICE COSTELLO:** I have it.

1 **MR. MURRAY:** And the relevant provision appears on
2 page 47: "*Each authority shall - it says - be endowed*
3 *with investigative powers, powers of access to data*
4 *forming the subject matter of processing operations and*
5 *powers to collect all the information necessary for the* 11:31
6 *performance of its supervisory duties; effective powers*
7 *of intervention, such as, for example, that of*
8 *delivering opinions before processing operations are*
9 *carried out, in accordance with Article 20, and*
10 *ensuring appropriate publication of such opinions, of* 11:31
11 *organised the blocking, erasure or destruction of data,*
12 *of imposing a temporary or definitive ban on*
13 *processing, of warning of admonishing the controller,*
14 *or that of referring the matter to national parliaments*
15 *or other political institutions; and the power."* 11:32

16
17 Just to note the last indent: "*The power to engage in*
18 *legal proceedings where the national provisions adopted*
19 *pursuant to the Directive have been violated or to*
20 *bring these violations to the attention of the judicial* 11:32
21 *authorities."*

22
23 And then there's provisions made for applications to
24 court.

25
26 Judge, that is now in the new Article 4, the power, and
27 that is the power which it is being contended, one of a
28 very large number of component powers rolled into
29 Article 28(3), that is the power buried in there which

1 it is being said national authorities are required to
2 use in any circumstance where, under the SCCs, where
3 the SCCs are operative, they reach a conclusion of
4 inadequacy. And in my respectful submission that is to
5 put a very, very significant weight indeed on a 11:33
6 provision which in no sense, as one reads it, could be
7 said to be intended to bear it.

8
9 One further, and it's the fourth point, Judge, problem
10 that the interpretation of Article 4 that's been urged 11:33
11 suggests is this: Actually Article 4 doesn't provide
12 any remedy of any kind. It doesn't provide any remedy
13 for unlawful or inappropriate processing that has
14 already been carried out. It simply draws a line in
15 the sand ensuring that no further data can be advanced. 11:33
16 It's not a remedy, it is simply an in futuro measure.

17 **MS. JUSTICE COSTELLO:** But it would not be equivalent
18 to an injunction?

19 **MR. MURRAY:** well, that is the effect, yes.

20 **MS. JUSTICE COSTELLO:** Often a very useful remedy. 11:34

21 **MR. MURRAY:** But again we are here, Judge, trying to
22 understand and the court is concerned to get a complete
23 picture of how, whether the SCCs in their entirety,
24 including Article 4, operate to provide a remedy which
25 is, we say, missing within the United States. And 11:34
26 I simply observe, that insofar as reference, and I can
27 understand that it's being invoked for a different
28 purpose, but I would just perhaps emphasise that aspect
29 of it.

1 It means that, perhaps to put it this way: It means
2 that Facebook's customers, users, their data no longer
3 gets transferred to the United States. Everybody
4 else's continues to be transferred to the United States
5 without there being any remedy generated in consequence 11:35
6 until such time as circumstances present themselves in
7 which an arresting order is made for other
8 undertakings.

9
10 Effectively, Judge, and maybe this is an 11:35
11 overgeneralised way of looking at it but perhaps you
12 will find it helpful: This argument effectively turns
13 the Commissioner into something in the nature of a law
14 maker. I mean it's not making individualised decisions
15 in particular circumstances on particular facts, it 11:35
16 actually has her issuing something, taken to its
17 logical conclusion, in the nature of a legal
18 injunction, as you have rightly described it,
19 applicable to all persons who are transferring data in
20 the United States. Maybe she should have that power, 11:35
21 maybe if she were to have that power that would be in
22 some sense an answer to the issue that's raised, but
23 the critical question with which you are concerned is
24 whether Article 4, Article 28(3) properly construed
25 confer that power. 11:36

26 **MS. JUSTICE COSTELLO:** This question may well be
27 revealing my very significant ignorance in relation to
28 things technological, but would it be possible to make
29 an order directing that Mr. Schrems' data not be

1 transferred?

2 **MR. MURRAY:** I don't see why not, Judge. I haven't
3 considered that question, but certainly as I - as you
4 look at the language of the relevant provisions I don't
5 see why not. But that... 11:36

6 **MS. JUSTICE COSTELLO:** No, it still begs the question.
7 She has raised the flag, I am worried about this whole
8 bigger picture.

9 **MR. MURRAY:** Yes. Well that's the exactly the point,
10 that's exactly the point. So the argument in my 11:36
11 respectful submission is misconceived. And I do just
12 remind you that it's an argument which Facebook have
13 never suggested before until after the evidence had
14 closed when it became one of a number of parts of their
15 case which they decided to ignite when the evidence had 11:37
16 closed.

17 **MS. JUSTICE COSTELLO:** Well, despite the temptation,
18 it's not really inter partes litigation in that sense.

19 **MR. MURRAY:** Ah, no, no.

20 **MS. JUSTICE COSTELLO:** And it was a point that was 11:37
21 always raised by Mr. Schrems.

22 **MR. MURRAY:** Judge, absolutely. And as I hope --

23 **MS. JUSTICE COSTELLO:** I know the default mechanism is
24 easy to slip into, Mr. Murray.

25 **MR. MURRAY:** Yes, it is, Judge, for a number of 11:37
26 reasons. I am addressing all of the arguments.

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

28 **MR. MURRAY:** I raised an issue at the start of the
29 case, I was slapped down in the first outburst of

1 Mr. Gallagher's fury that we saw in the course of the
2 case and it was said that this was all terribly
3 telling, that I was making this objection. The point
4 I was making of course was not that something wasn't
5 pleaded but that I didn't really see how we were 11:38
6 suppose to address in our opening matters that we
7 hadn't been put on notice were issues in the case.
8 That's going to become an issue I'll come back to when
9 I discuss Mr. Gallagher's interjection of yesterday.
10 But we're dealing with every argument and, you are 11:38
11 absolutely right, this is not a case that can be
12 confined by issues of pleading.

13
14 So I want to discuss Mr. Schrems' issues very briefly,
15 and I do think, Judge, we address them in our legal 11:38
16 submission. I don't know, in fairness, that
17 Mr. Schrems has, well he said one thing which perhaps
18 is of significance, but, no disrespect to
19 Mr. McCullough, insofar as this part of his case is
20 concerned he reflects what he said at the outset and we 11:38
21 have addressed it in our submissions.

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

23 **MR. MURRAY:** But just to say something about some of
24 the points he makes.

25 11:38
26 The claim that he wasn't challenging the SCCs, well
27 Mr. McCullough said on Thursday that if Mr. Schrems is
28 wrong about Article 4 he is challenging the SCCs,
29 though I think...

1 **MS. JUSTICE COSTELLO:** well I think his first point was
2 that we're on a moot because he says that Facebook
3 isn't actually complying with the SCCs, so that's a
4 factual matter, yes.

5 **MR. MURRAY:** well, I'm going to come back to that, I'm 11:39
6 going to come back to that issue, but just to deal with
7 the --

8 **MS. JUSTICE COSTELLO:** The reverse order?

9 **MR. MURRAY:** -- point that you're not within paragraph 11:39
10 65 of the judgment because I didn't make any objection.
11 well, it now seems to be the case from what
12 Mr. McCullough said that he *is* challenging the SCCs in
13 a contingent way, it's in fairness his fallback
14 position. His first position is that Article 4
15 resolves any difficulty with the SCCs, but, if he is 11:39
16 wrong on that, Mr. McCullough said, and I hope I'm not
17 misquoting him, if he is wrong on that, Mr. McCullough
18 said, he is challenging the SCCs.

19

20 So if he is right in that then one might think the 11:39
21 issue doesn't arise, but he is wrong in it for the
22 reasons that I have just outlined and he is challenging
23 the SCCs and therefore the court has jurisdiction under
24 the formulation of the Court of Justice, even in its
25 own terms. But, aside from that, and this comes back 11:40
26 to the first point I discussed with the court on Friday
27 afternoon, even if he isn't challenging the SCCs --
28 sorry, just to remind you, it's page 11 of his, Tab 17
29 page 11, I'm not going to open it, which is where the

1 quotation, it's been opened to you before from his
2 reformulated complaint, which is what had led us to
3 believe he was challenging the SCCs. The court will
4 read it itself, I don't think it was an unreasonable
5 construction for us to place on what he had said. 11:40

6 **MS. JUSTICE COSTELLO:** I am just wondering, in relation
7 to that, I know I am interrupting you, but I read the
8 whole of the reformulated complaint.

9 **MR. MURRAY:** Yes.

10 **MS. JUSTICE COSTELLO:** Obviously the whole of the 11:40
11 complaint has to be assessed --

12 **MR. MURRAY:** Absolutely.

13 **MS. JUSTICE COSTELLO:** -- and responded to. So I mean
14 is it a case of parsing it quite as narrowly as that?

15 **MR. MURRAY:** well, I hope it wasn't parsed too 11:41
16 narrowly. I think -- maybe just to take a look at
17 that, it's Tab 17 page 11 of Book 1.

18
19 And it is, I think, just above No. 2, "*exception to*
20 *decision 2010*". 11:41

21 **MS. JUSTICE COSTELLO:** Sorry, I should explain to you
22 but you are sort of trying to respond to a question in
23 the dark. When I was reading it, he was putting in his
24 complaints and then he was saying 'I don't really know
25 what Facebook's justification is going to be, 11:42
26 I anticipate what Facebook's justification is going to
27 be and this is what I say about it'.

28 **MR. MURRAY:** Exactly.

29 **MS. JUSTICE COSTELLO:** Is that fair, Mr. Doherty? [No

1 audible response].

2 **MR. MURRAY:** I think that is a fair summary, Judge.

3 **MS. JUSTICE COSTELLO:** Sorry, Mr. McCullough.

4 **MR. MURRAY:** But what he said in any event on page 11,
5 just above No. 2: "*Facebook has not proven, the* 11:42
6 *alternative agreement was authorised by DPC, such an*
7 *authorisation would be invalid and void in the light of*
8 *the judgments.*"

9
10 And then he says: "*Even if the current and all* 11:42
11 *previous arguments between Facebook and Facebook*
12 *Ireland and Facebook Inc. would not suffer from the*
13 *countless formal insufficiencies above and would be*
14 *binding for DPC - which it is not - Facebook Ireland*
15 *could still not rely on them in the given situation of* 11:42
16 *factual mass surveillance and applicable US laws that*
17 *violate Articles 7, 8 and 47 of the CFR, as the CJEU*
18 *has held and the Irish Constitution.*"

19
20 Now he then of course proceeds to make the observation 11:43
21 that he makes in relation to Article 4, but we do not
22 accept that construction of Article 4. And we're taken
23 the Commissioner I suppose in a curious sort of way is
24 taken to the position that Mr. McCullough was in last
25 Thursday when he said 'well if I am wrong about 11:43
26 Article 4, and we believe that Mr. Schrems is wrong
27 about Article 4, then there is a challenge'. So in
28 truth there is a challenge.
29

1 But I would also, Judge, just say this: Even if we're
2 wrong about that, what cannot be seriously contested is
3 that the complaint raised the issue of the compliance
4 of US law, with the provisions of the Charter to which
5 Mr. Schrems has just identified in that paragraph of 11:43
6 the reformulated complaint. And, for much the same
7 reason, Judge, as you in our submission are clearly and
8 indisputably entitled to refer issues of your own
9 motion, then it's very difficult to see how the
10 Commissioner herself is not entitled to bring to the 11:44
11 court a concern she has developed in the course of a
12 consideration of a complaint where she believes that
13 there are well-founded concerns herself as to the
14 validity of the SCCs. That must be the case, that must
15 fall within her power as a national authority. 11:44

16
17 So --

18 **MS. JUSTICE COSTELLO:** Is she in any way by analogy
19 obliged to if she can resolve matters on grounds or
20 narrow grounds. 11:44

21 **MR. MURRAY:** I am just about to come to that issue.

22 **MS. JUSTICE COSTELLO:** Very good.

23 **MR. MURRAY:** I mean I hope I'm not being unduly
24 dismissive when I say that that is really an argument
25 now about the ordering of how the Commissioner goes 11:44
26 about her job. She has the complaint before her, she
27 has a number of different grounds which are agitated,
28 she is obviously the statutory decision maker, she is
29 obviously the authority constituted under European law

1 to determine complaints of this kind. It is and it
2 must be the case that in relation to her, as with any
3 statutory decision maker, that once the complaint is
4 made it is a matter for her to determine the order in
5 which and manner in which she will proceed to decide 11:45
6 the issues which have been agitated before her. That's
7 an inherent part of the function of *any* decision-making
8 body from this court down.

9
10 And, as always, one can look at how decision makers 11:45
11 decide to order their decision making, the priority
12 they give to issues above others, the decision to have
13 a trial of a preliminary issue or a modular hearing or
14 to address one question before looking at the others,
15 but for the court to say, no, you don't have that 11:46
16 power, you have to do something rather like in
17 constitutional law in our system of reach the
18 constitutional issues last and only address the other
19 issues - sorry, and only address those if all of the
20 other issues are being resolved in a way that leaves 11:46
21 that issue intact, I think the proposition that that
22 rule is to be implied into the decision-making
23 processes of the Commissioner is a very ambitious one
24 and indeed, I would say with respect, fanciful.

25 11:46
26 The Commissioner, as you will have seen from the
27 various provisions that have been opened to you,
28 including, incidentally, the one I observed in the last
29 paragraph of Article 28(3) relating her function in

1 litigating and bringing matters to the attention of the
2 court. Now in fairness, just to emphasise, that was a
3 power directed to national legislation, but it reflects
4 a spirit of her function. And to say that, and this is
5 in fact the logical terminus of his argument as 11:47
6 advanced by Mr. McCullough, that actually there is to
7 be implied into the discharge of her functions an
8 obligation not, an obligation *not* to examine what is
9 perhaps *the* most fundamental issue raised in this
10 complaint and a consequent obligation and in fact 11:47
11 disability upon bringing the matter to court until
12 those issues have been addressed, would be a
13 significant impairment of the independence of her
14 functions, of her judgment and the exercise of her
15 discretion in or about the investigative process. And, 11:48
16 in my respectful submission, there is no warrant,
17 neither the Schrems judgment, any of the legislation,
18 domestic or European governing the Commissioner which
19 would justify the imposition of such a constraint, we
20 would say, and it is a fundamental issue. 11:48

21
22 Judge, I want to move on to address two questions that
23 were raised in the course of --

24 **MS. JUSTICE COSTELLO:** Sorry, have you addressed the
25 question of the moot tying in with necessity, have you 11:48
26 finished with that point?

27 **MR. MURRAY:** I think it's the same.

28 **MS. JUSTICE COSTELLO:** Because the Court of Justice
29 says obviously we won't deal with moots. In theory,

1 let's say the first point were resolved on the basis
2 that, whatever about the order in which she examines
3 things.

4 **MR. MURRAY:** Mm hmm.

5 **MS. JUSTICE COSTELLO:** Let's say that Facebook hasn't 11:48
6 in fact been transferring data pursuant to the SCCs,
7 now nobody can answer that question as things stand at
8 the moment.

9 **MR. MURRAY:** Oh, no, no, Judge, there's no dispute
10 about that issue, just to be absolutely clear. That is 11:49
11 absolutely accepted.

12 **MR. GALLAGHER:** That is so, Judge.

13 **MS. JUSTICE COSTELLO:** Right. Because I understood
14 that Mr. McCullough was saying that that hadn't been
15 enquired into, so it's not fully accepted. Am I wrong 11:49
16 with that.

17 **MR. MCCULLOUGH:** No, you are correct, Judge, it isn't.
18 That's Mr. Schrems' complaint.

19 **MS. JUSTICE COSTELLO:** So Facebook and the Data
20 Protection Commissioner say the data is transferred 11:49
21 pursuant to the SCCs, Mr. Schrems says it is not?

22 **MR. MCCULLOUGH:** I think it's just a difference of
23 terminology, Judge. Certainly it is accepted that the
24 transfer is pursuant to the SCCs, or at least
25 purportedly pursuant to the SCCs. We say that while 11:49
26 that is purportedly so, in fact the agreement doesn't
27 comply with the SCCs.

28 **MR. MURRAY:** Yes, I am sorry. No, no, we are all in
29 the same...

1 **MS. JUSTICE COSTELLO:** No, I was being incoherent.

2 **MR. MURRAY:** I mean there is no dispute that they are
3 transferred on foot of the SCCs. I mean, Judge, I am
4 sorry, perhaps I should have related what I was saying
5 to that very proposition. It is in my respectful 11:50
6 submission the same point as the one I have just been
7 addressing to the extent that to say well actually it's
8 not necessary for you, for the court to refer because
9 the Commissioner could go about this another way such
10 as would resolve the issue without the European or the 11:50
11 question of validity arising is actually to say in fact
12 you are under an obligation to order your investigation
13 so as to determine the other issues first, even though
14 in your view as the designated national authority, this
15 is an issue which requires to be determined. And that, 11:50
16 Judge, it is the same issue and please excuse me for
17 not perhaps making that as clear as I should.

18
19 I want to move on, Judge, to the two interjections that
20 were made by counsel for Facebook yesterday and the 11:50
21 first is Mr. Gallagher's. I'm going to hand up a copy
22 of the transcript of what he said yesterday because
23 I don't mean any disrespect to Mr. Gallagher when I say
24 that we were genuinely confused as to the proposition
25 that was being advanced and it's for that reason only 11:51
26 that I'm going to ask you to look to the transcript.

27
28 And I should say, and again this is not by way of
29 complaint as much as by way of explanation. Because of

1 the fact that Facebook has never made this argument in
2 its written submissions or its pleadings, there's no
3 document telling us what its case is insofar as the
4 operation of the Privacy Shield is concerned.

5
6 Just to perhaps recap on the scenario because it was
7 the point at which I objected when Mr. Gallagher was
8 opening the case when he said 'well there's an adequacy
9 decision there and that adequacy decision binds the
10 court and it binds the Commissioner and the adequacy 11:51
11 decision is in the form of the Privacy Shield'. That
12 was said for the first time in the opening. We adopted
13 the view, and I believe this is correct, that it's not
14 our function when we're opening the case to predict
15 arguments that might be made but haven't been made and 11:52
16 to negate them before they are made. So the Privacy
17 Shield was of course referred to by Mr. Collins in
18 opening but not by way of addressing its effect or
19 binding effect as an adequacy decision. But the case
20 is *now* made, and in fairness this case was made in 11:52
21 Mr. Gallagher's opening, that actually in some sense
22 the adequacy decision binds.

23
24 So that's the context in which I, not for the first
25 time yesterday, let me say, for the first time on 11:52
26 *Friday*, and before me Mr. McCullough made the same
27 point, explained, as is, in our submission, clearly the
28 case that the adequacy decision is an adequacy decision
29 of the Privacy Shield applicable only to data

1 transferred pursuant to the Privacy Shield. And then
2 Mr. Gallagher stands up yesterday and says the
3 following:

4
5 *"It does appear as if the DPC is raising a new issue* 11:53
6 *now that was never canvassed in opening."* Now just to
7 stop there. well, we didn't canvass it in the opening
8 because we did not know and had not been told that
9 Facebook were making a case that there was a binding
10 adequacy decision there and why would we in 11:53
11 circumstances where it was not evidently, as we read
12 it, an adequacy decision which bound anybody because it
13 was referable only to transfers under the Privacy
14 Shield.

15 11:53
16 *"Mr. Murray - Mr. Gallagher says - lays a lot of*
17 *emphasis on the fact that the Commission decision*
18 *refers to the Privacy Shield and adequacy in that*
19 *context, implying that the findings with regard to*
20 *national security law and the redress provisions,*
21 *including the Ombudsman person, are not findings as to*
22 *adequacy in relation to that sphere and that the*
23 *adequacy decision is solely conditioned on signing up*
24 *to the Privacy Shield. That was never made as part of*
25 *their case."* 11:54

26
27 well, I won't the repeat the comment I have just made:

28
29 *"If I have misunderstood the case he was now making*

1 *I will sit down, but that is of some importance, Judge,*
2 *because you will remember the Privacy shield documents*
3 *and assessments are divided into two. The first*
4 *relates to what I call the private sphere."*

11:54

5
6 Now in fairness Mr. Gallagher *did* draw this distinction
7 on Day 15 page 138, but not with a view to positing the
8 conclusion which he, as the party who is in pleading
9 the adequacy decision, is now alluding to here:

11:54

10
11 *"The first relates to what I call the private sphere*
12 *where you sign up to the principles and the second,*
13 *beginning on page 13, relates to the public sphere.*
14 *Both are assessed separately. No issue has ever been*
15 *made by the DPC about the adequacy of the SCCs clauses*
16 *in relation to the private sphere."*

11:54

17
18 I just want to stop there, Judge, because that
19 sentence, and I fully accept the infelicity of
20 unscripted oral submission, but I just don't understand
21 what the point being made there is: *"No issue has ever*
22 *been made by the DPC about the adequacy of the SCC*
23 *clauses in relation to the private sphere.*

11:55

24
25 *So the only part of the Privacy shield decision that's*
26 *relevant to the issue before you is that that relates*
27 *to the public sphere, the finding of strictly*
28 *necessary, and the finding of adequacy of remedies,*
29 *including the Ombudsperson. And if the DPC is now*

11:55

1 really, really wonders why, if that is the case that
2 was being made, it wasn't made before now and why my
3 Friends feel the need to relate back the interjection
4 and the attempt to now introduce this argument to our
5 failure to address something which they never raised. 11:57

6
7 But, as they say on the shopping channel, "*there's*
8 *more*". Because if you look, Judge, at the submissions
9 that have been delivered, that were delivered by
10 Facebook and see what it is we were told their case was 11:57
11 and what they said about the Privacy Shield.

12 **MS. JUSTICE COSTELLO:** Sorry, just a moment.

13 **MR. MURRAY:** It's Book 12, Judge.

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

15 **MR. MURRAY:** Paragraph 82 page 21. 11:57

16 **MS. JUSTICE COSTELLO:** Tab 3, is it? No?

17 **MR. MURRAY:** It is Tab 2, Judge.

18 **MS. JUSTICE COSTELLO:** Tab 2. Sorry, what paragraph
19 again?

20 **MR. MURRAY:** 82. 11:57

21 **MS. JUSTICE COSTELLO:** 82, thank you. "*Furthermore in*
22 *July 2016*".

23 **MR. MURRAY:** "*The Commission reviewed the remedies*
24 *available under US law and found that data transferred*
25 *to the US under the Privacy Shield régime*", now what is 11:58
26 it that is being said here in passing:

27
28 "*Data transferred to the US under the Privacy Shield*
29 *régime enjoyed an adequate level of protection for the*

1 *purposes of Article 25. The Commission recorded - in*
2 *the next paragraph - this finding in its Privacy Shield*
3 *decision which replaced the earlier Safe Harbour*
4 *Decision which had been invalidated in Schrems, the*
5 *Commission having carefully analysed US law and* 11:58
6 *practice and concluded that the US ensures an adequate*
7 *level of protection for public law transfers", for*
8 national security transfers, for some special necessity
9 test? No:

10
11 *"For personal data transferred under the EU-US Privacy*
12 *Shield to the US. The Commission specifically*
13 *considered whether sufficient remedies are provided*
14 *under US law and concluded: The US ensures effective*
15 *legal protection against interferences by its* 11:58
16 *intelligence authorities with the fundamental rights of*
17 *persons." Full stop? No: "whose data are transferred*
18 *from the Union to the United States under the EU-US*
19 *Privacy Shield."*

20
21 So it appears from the interjection yesterday that
22 Mr. Gallagher wants to reply to my submissions and
23 maybe those words *"wants to reply to my submissions"*
24 because I or Mr. Collins or both of us failed
25 egregiously by following the description of the 11:59
26 adequacy aspect of the Privacy Shield decision used by
27 Facebook in its own submissions and now he wants to
28 come back and make a new case which is that actually
29 this can all be separated out into parts and that you

1 are bound by the part 1 or Part 2 or part 3, I'm not
2 quite sure which.

3
4 Now it is an argument which evidently lacks any merit.
5 If you are bound by anything, it is by a decision and - 11:59
6 I see the stenographer is there.

7
8 So, Judge, if there is anything binding - and you have
9 not received *any* submissions from Facebook as to the
10 legal *theory* on which something is binding; reference 12:00
11 was made to, I think, perhaps section 11(1) in the
12 opening very briefly - but if anything is *binding*, it
13 is a decision. And the decision is clearly and plainly
14 about the Privacy Shield in its entirety. And *we* know
15 of no legal authority which justifies the creation of 12:01
16 what I suppose in domestic law would be something like
17 a *res judicata* from *part* of a decision, which is only
18 part and which is in fact one aspect of a composite
19 whole which is expressed clearly in the paragraphs
20 which I opened to you yesterday. 12:01

21
22 So, Judge, I have tried and I hope I have succeeded in
23 not saying anything that is not either in our
24 submissions or in Mr. Collins' opening or tendered to
25 the court by way of response to something one of my 12:01
26 colleagues has said in the course of the, I think I
27 said seven speeches that we heard in the course of the
28 last number of days. Mr. Gallagher is *determined* to
29 get a response of some kind. And whatever

1 justification he proffers for it, the one he suggested
2 yesterday, in my respectful submission, is not one on
3 the basis of which he should be permitted to re-open
4 his case.

5
6 If a new case is now to be made because Mr. Gallagher
7 and his colleagues thought of it over the weekend, well
8 - and they say that - the court will have to decide
9 whether it permits them so to do. That is going to
10 complicate the logistics of the case. I am certainly 12:02
11 not going to meet a new argument now, presented *after*
12 my reply, without taking appropriate instructions and
13 considering whatever is said. But certainly I've said
14 what I have to say about the Privacy Shield.

15
16 In relation to Ms. Hyland's interjection, I want to
17 address what she said. And in fairness, the point she
18 interjected at yesterday was one that *did* feature in
19 her oral submissions to you - and I didn't say that -
20 and which I did not address and I just want very 12:02
21 quickly to look at it and to record my understanding of
22 what's being said and what my response to it is. And
23 it relates to the SCC decision.

24
25 So Ms. Hyland's interjection yesterday was directed to 12:03
26 Clause 5. I had made the point to you, and I think it
27 was at this point that she intervened, I had made the
28 point to you that Clause 4(a) was not a provision which
29 was made justiciable at the suit of the data subject -

1 and that's obvious from the third party beneficiary
2 clause in Clause 3(1). But Ms. Hyland makes the point
3 in her interjection and, in fairness, in her
4 submissions that, well, you can't overlook clauses 5(a)
5 to (c). So if you --

12:04

6 **MS. JUSTICE COSTELLO:** Is it a (c) or an (e)? (c) is
7 it?

8 **MR. MURRAY:** No, I'm sorry, it is actually an (e),
9 excuse me. And I think that she was making the
10 following, or emphasising the following: Clause 5(a),
11 which *is* the subject of the third party beneficiary
12 clause, the data importer agrees and warrants to
13 process the personal data *only* on behalf of the
14 exporter and in compliance with its instructions, and
15 that includes the instruction to process in accordance
16 with the applicable data protection law. And if it
17 cannot provide such compliance for whatever reasons, it
18 agrees to inform promptly the data exporter of its
19 inability to comply - so this is an obligation, I
20 should've emphasised on the data importer - in which
21 case the data exporter is entitled to suspend the
22 transfer of data and/or terminate the contract.

12:04

12:04

12:05

23
24 Now, that does not seem to us to provide any remedy to
25 the data subject, because it does not impose any
26 obligation on the data exporter. The data exporter is
27 given the power, I suppose, to terminate, but does not
28 have to do so.

12:05

1 Then Clause 5(b); the importer agrees and warrants that
2 it has *no* reason to believe that the legislation
3 applicable to it prevents it from fulfilling the
4 instructions received from the data exporter and its
5 obligations under the contract and that in the event of 12:06
6 a change in this legislation which is likely to have a
7 substantial effect -- sorry, a substantial adverse
8 effect on the warranties and obligations provided for
9 by the clauses, it will promptly notify the change to
10 the data exporter as soon as it is aware, in which case 12:06
11 the data exporter *is entitled* to suspend transfer of
12 the data. And again it doesn't appear to us to result
13 in any right or remedy in favour of the data subject -
14 the data subject is not even *notified*. And we struggle
15 to see how that confers any remedy per se that would 12:06
16 address the issues to which I've referred. And indeed,
17 suspension is not a remedy, as I've said before, for
18 these or any purposes.

19
20 You'll also note that under Clause 5(d)(1) that there's 12:07
21 an obligation to notify the exporter about a legally
22 binding request for disclosure of the personal data by
23 a law enforcement authority unless otherwise
24 prohibited. And you've seen already and heard evidence
25 in relation to the gag orders and you'll recall that 12:07
26 from the Microsoft case.

27
28 Before I conclude, Judge, there was correspondence
29 exchanged between the parties in relation to the issue

1 of the United States Government providing comments in
2 relation to witnesses. I don't propose to say anything
3 further about that issue, Judge. I should've asked
4 Mr. Gallagher if he wanted the court to see all of the
5 correspondence or what his position is, but we're happy 12:07
6 to furnish that correspondence, it perhaps would be
7 useful. I mean, I'm not sure even if all of Mason
8 Hayes and Curran's correspondence has gone up to the
9 court yet. That correspondence is available to the
10 court, Judge, but I don't propose to say anything 12:07
11 further on the issue.

12 **MS. JUSTICE COSTELLO:** well, it could be put on the
13 tablet in due course if there's --

14 **MR. GALLAGHER:** Yes, Judge. You have the book, but
15 there are three additional letters. And I have no 12:08
16 objection, in fact I would like you to see them.

17 **MR. MURRAY:** well, I thought Mr. Gallagher would want
18 you to see them, which is why we --

19 **MS. BARRINGTON:** I think that includes, or may include
20 a letter from my solicitors also, Judge. 12:08
21

22 **MR. GALLAGHER:** It does, yeah.

23 **MR. MURRAY:** But I simply just want to close off the
24 record on that issue, as it were, and I thought
25 Mr. Gallagher would want to have that material, Judge
(Same Handed). 12:08
26

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

28 **MR. MURRAY:** So, subject to the court, Judge, those are
29 my submissions.

MS. JUSTICE COSTELLO: well --

1 **MR. GALLAGHER:** Judge, I do have one or two things,
2 despite being described as making an outburst, which I
3 reject that calmly. But --

4 **MR. MURRAY:** It was a reference to a plural, Judge, not
5 to a... 12:08

6
7 **SUBMISSION BY MR. GALLAGHER:**

8
9 **MR. GALLAGHER:** Judge, firstly there is the matter that
10 arose yesterday which Mr. Murray has now, I say, 12:08
11 misrepresented the position - not deliberately, of
12 course, but misstated it is a better word. And there
13 were one or two other issues that did arise for the
14 first time in his submissions, there were some cases
15 opened that hadn't previously been opened. And my 12:09
16 objection yesterday is not trying to ultimately shut
17 something out that you consider *relevant*, but to have
18 something said in a closing which I haven't had an
19 opportunity of addressing. And I would ask the court
20 for ten minutes to deal with those matters. 12:09

21 **MS. JUSTICE COSTELLO:** well, just before you go into
22 that, Mr. Gallagher, I did, as I promised, I re-read
23 Mr. Collins' opening in that regard and it seemed to be
24 largely opening the, large portions of the document.
25 And Mr. Murray has showed me your submissions. I must 12:09
26 admit I didn't check the pleadings, but I'm not going
27 to be bound by the pleadings.

28 **MR. GALLAGHER:** Yes.

29 **MS. JUSTICE COSTELLO:** But in your submissions, as he

1 opened them to me today, it would appear that there
2 wasn't this argument that there was a freestanding
3 adequacy decision. Now, I didn't re-read your opening
4 in response to Mr. Collins', so I haven't re-read *that*.

5 **MR. GALLAGHER:** Yeah.

12:10

6 **MS. JUSTICE COSTELLO:** But...

7 **MR. GALLAGHER:** well, could deal with that? Because
8 it's of some importance. And I did deal with it in the
9 opening response to Mr. Collins, which hasn't been
10 referred to.

12:10

11
12 Firstly, let me say I'm not criticising Mr. Collins; he
13 had a huge amount to open to the court, and there's no
14 difficulty in relation to that. But a distinction
15 being drawn in closing that hadn't previously been
16 drawn is something that I do object to. And, judge --

12:10

17 **MS. JUSTICE COSTELLO:** You see, that's the point. The
18 first thing is it's your point, not *theirs*. So I mean,
19 in the sense that Mr. Collins was opening, as I
20 understand it, based on what your submissions were,
21 your written submissions.

12:10

22 **MR. GALLAGHER:** well --

23 **MS. JUSTICE COSTELLO:** obviously you're entitled to
24 reply to him.

25 **MR. GALLAGHER:** Yes.

12:11

26 **MS. JUSTICE COSTELLO:** But it then became a matter for
27 reply for Mr. Murray. What I don't understand is how
28 there could be -- the Data Commissioner's legal team
29 were meant to deal with your point before it was

1 raised. And as I understand Mr. Murray's argument,
2 this particular point wasn't raised until you were
3 making your submissions.

4 **MR. GALLAGHER:** well, firstly, Judge, I don't agree
5 that that is the correct interpretation of the 12:11
6 submissions. Secondly, I did raise this point
7 explicitly in my opening submission.

8 **MS. JUSTICE COSTELLO:** But that's after the opening.

9 **MR. GALLAGHER:** Yes. But it's now suggested that we're
10 making a new case in respect of that. We're *not*. 12:11

11 **MS. JUSTICE COSTELLO:** No, no, but he has to reply, he
12 only gets to reply to it in reply once you've opened.

13 **MR. GALLAGHER:** Yes.

14 **MS. JUSTICE COSTELLO:** There wasn't a reply to your
15 opening. 12:11

16 **MR. GALLAGHER:** well, in effect it really is. I --

17 **MS. JUSTICE COSTELLO:** No, no, but what I mean is when
18 back in - what was it - the second week --

19 **MR. GALLAGHER:** Day seven.

20 **MS. JUSTICE COSTELLO:** -- the second week, Mr. Collins 12:11
21 or Mr. Murray didn't then stand up and reply to your
22 opening, we went into evidence.

23 **MR. GALLAGHER:** well, you see, the difficulty, Judge,
24 is Mr. Collins didn't deal with this issue. He did
25 refer to the Privacy Shield... 12:12

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

27 **MR. GALLAGHER:** ... in general terms and he referred to
28 the Ombudsperson. But he did not analyse the Privacy
29 Shield in *any* way, and no suggestion was made that

1 there was any *challenge* to the Privacy Shield. I then
2 dealt with the Privacy Shield in substance in day
3 seven. It's not something that the DPC could ignore -
4 this issue that I had to raise it or it's a matter of
5 defence - it's *there*. They *acknowledged* it in their 12:12
6 own pleadings that they would have regard to it for its
7 full force and effect. But they didn't actually deal
8 with the substance of the Privacy Shield in the
9 opening. I --

10 **MS. JUSTICE COSTELLO:** There were *days*, there was *pages* 12:12
11 read out. I've read the --

12 **MR. GALLAGHER:** No, but they didn't deal with this
13 point. They read it out, but they didn't *analyse* it.
14 And nobody *ever* suggested, Judge, that this was not an
15 adequacy finding in relation to US law in the national 12:12
16 security sphere. And *I* drew attention to the fact in
17 my opening that there were two aspects of the Privacy
18 Shield; there was the bit in relation to the principles
19 which I described in pages 50, 54 --

20 **MS. JUSTICE COSTELLO:** This is day seven, is it? 12:13

21 **MR. GALLAGHER:** Day seven. 50, 54, 56 and 60, as being
22 a determination as to adequacy in the private sphere.
23 And I went on to say there's then a determination as to
24 adequacy in the public sphere.

25
26 The idea, Judge, that Article 1(1) is now being
27 interpreted without regard to the recitals and the
28 *clear statement* by the Commission that in the sphere of
29 national security, US law, when you take account of the

1 Ombudsperson, is adequate, that is something that was
2 never raised -- sorry, just one second. That was never
3 raised, Judge, at all. The adequacy --
4 **MS. JUSTICE COSTELLO:** No, I'm not faulting them for --
5 I'm against you on that, Mr. Gallagher. I don't think 12:14
6 they were obliged to raise it. I think you were
7 entitled to raise it.
8 **MR. GALLAGHER:** Yes.
9 **MS. JUSTICE COSTELLO:** And I have no problem with that
10 so far. It may have been more advisable if things had 12:14
11 been dealt with in writing rather than, so that they
12 could've been dealt with in the opening, but I'm not
13 taking any issue with that. But Mr. Murray then has to
14 reply. When on earth were they meant to reply, other
15 than when he did so over the last three days? Because 12:14
16 we went into evidence --
17 **MR. GALLAGHER:** Yes.
18 **MS. JUSTICE COSTELLO:** -- and then it was all the other
19 witnesses and all the other counsel were --
20 **MR. GALLAGHER:** But, Judge, even taking that, he has 12:14
21 replied to it. I'm surely entitled to respond to what
22 he now says.
23 **MS. JUSTICE COSTELLO:** well, it's your case and he's
24 replied.
25 **MR. GALLAGHER:** Yes. 12:14
26 **MS. JUSTICE COSTELLO:** Isn't that the way defences
27 work?
28 **MR. GALLAGHER:** well, it is, Judge. But normally --
29 well, Judge, as you have identified, this case is not

1 the normal adversarial type. The case was opened
2 without any distinction being drawn of the type that
3 has now been drawn by the DPC. I dealt with --
4 **MS. JUSTICE COSTELLO:** No, no, no, it was *your* case,
5 *you* drew it. You told me you drew it on pages 50, 54 12:15
6 and 60 of day seven.
7 **MR. GALLAGHER:** Yes.
8 **MS. JUSTICE COSTELLO:** And then that was in your what I
9 called your opening. And then when you will have what
10 we would classically call your reply, it was over three 12:15
11 days between yourself and Ms. Hyland from
12 recollection --
13 **MR. GALLAGHER:** Yes.
14 **MS. JUSTICE COSTELLO:** -- we won't fall out on what
15 that may or may not may have been; you were free to 12:15
16 elaborate on that as much as you wished.
17 **MR. GALLAGHER:** Mm hmm.
18 **MS. JUSTICE COSTELLO:** Now, I don't know where that
19 distinction was made, but I'm truly open to correction
20 on that, because I do not remember all 20 days of 12:15
21 transcripts.
22 **MR. GALLAGHER:** No.
23 **MS. JUSTICE COSTELLO:** But by all means show where that
24 was, that distinction was raised in *your* submission.
25 **MR. GALLAGHER:** Yes, I'll do that. 12:15
26 **MS. JUSTICE COSTELLO:** Because you're saying that's
27 your case.
28 **MR. GALLAGHER:** But firstly, Judge, can I just go back
29 to the submissions? We said that data trans --

1 **MS. JUSTICE COSTELLO:** Sorry, whose submissions, so I
2 follow you?

3 **MR. GALLAGHER:** Sorry?

4 **MS. JUSTICE COSTELLO:** whose submissions, so I follow
5 you, yours or Mr. Murray's? 12:15

6 **MR. GALLAGHER:** Well, no, sorry, Judge, our written
7 submissions.

8 **MS. JUSTICE COSTELLO:** Your written submissions, yes.

9 **MR. GALLAGHER:** which were said *not* to make the point.
10 The written summations made a simple point that data 12:16
11 transferred under the Privacy Shield, there was a
12 finding of adequacy in respect of US law. That
13 obviously --

14 **MS. JUSTICE COSTELLO:** well, no, that's not what the
15 wording said. 12:16

16 **MR. GALLAGHER:** well, sorry, if you look at it, Judge,
17 it says - paragraph 83.

18 **MS. JUSTICE COSTELLO:** Just let me get it out.

19 **MR. GALLAGHER:** Page 22. Sorry, it's book 12, Judge,
20 divide two, paragraph 83 and page 22. 12:16

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

22 **MR. GALLAGHER:** It says the Commission recorded its
23 finding in its Privacy Shield Decision, which replaced
24 the earlier Safe Harbour decision which had been
25 invalidated in Schrems. That's, firstly, a finding of 12:16
26 adequacy. We made the point --

27 **MS. JUSTICE COSTELLO:** Sorry...

28 **MR. GALLAGHER:** The Safe Harbour decision dealt with
29 the adequacy under Article 25(2), which is what is the

1 basis of the DPC's decision here. And we go on to say
2 the Commission, having carefully analysed US law and
3 practice, concluded the US law ensures an adequate
4 level of protection for personal data transferred under
5 the EU and US Privacy Shield. 12:17

6 **MS. JUSTICE COSTELLO:** Mm hmm, yes, under the --

7 **MR. GALLAGHER:** There are two components, Judge, to the
8 Privacy Shield. All we were *ever* concerned with was
9 the national surveillance. There is a finding in the
10 recitals of the Commission decision that national 12:17
11 surveillance law is *adequate*. That is a finding within
12 the Privacy Shield. As I pointed out --

13 **MS. JUSTICE COSTELLO:** That may well be the case, but
14 where is that in this written submission? Because as I
15 read the written submission - now, I'm just saying as I 12:17
16 read it - I couldn't see that this was being taken as a
17 subset of data transferred from the Union to the United
18 States under the Privacy Shield decision.

19 **MR. GALLAGHER:** But, Judge, nobody has ever explained,
20 never explained, because there has been no issue, as I 12:17
21 said - and I made that clear yesterday and it's
22 something Mr. Murray said he didn't understand - there
23 has *never* been an issue with regard to the protection
24 given by the SCCs in the private sphere. The only
25 issue was it says it didn't cover the public sphere. 12:18
26 And in respect of the public sphere, we were told US
27 law is inadequate.

28
29 Now, that is in the teeth of what is found in the EU-US

1 Privacy Shield Decision, where there *is* an express
2 finding of the adequacy of US law in the public sphere.
3 It has *never* been suggested that that finding is of no
4 relevance to this case -- sorry, that that is not a
5 finding, I should say, of adequacy. It *couldn't* be 12:18
6 suggested. There is a *clear* finding that data
7 transferred --

8 **MS. JUSTICE COSTELLO:** Now, you're arguing the merits
9 here. I just want to get this right.

10 **MR. GALLAGHER:** Yes. 12:19

11 **MS. JUSTICE COSTELLO:** And I'm not trying to be
12 splitting hairs, but it seems to me that -- that's your
13 written submission. I've no criticism of the written
14 submissions, obviously that's not the function of this
15 at all. But it doesn't appear to me on that written 12:19
16 submission that there was an onus on the Data
17 Commissioner in opening to sort of say, argue the point
18 that Mr. Murray made on reply. So that's my first
19 position.

20 12:19
21 So then in relation to, you had your opening and you
22 made the distinction and then you had your three and a
23 bit days, whatever it was, to make your argument. Now,
24 I've no problem with making the argument and we have
25 allowed elaboration and this is a case where there has 12:19
26 to be elaboration. What I'm dealing with now is
27 whether or not you're entitled to reply, having had the
28 opportunity to expand on the argument you wished to
29 make during the three days.

1 **MR. GALLAGHER:** Yes.

2 **MS. JUSTICE COSTELLO:** Now, as I understand it, you're
3 saying you're taken by surprise by the stance
4 Mr. Murray is making in his reply to your case.

5 **MR. GALLAGHER:** Yes. 12:20

6 **MS. JUSTICE COSTELLO:** Is that a fair summary of where
7 we are?

8 **MR. GALLAGHER:** That is a fair summary, Judge, yeah.

9 **MS. JUSTICE COSTELLO:** But his was a reply.

10 **MR. GALLAGHER:** It was, Judge. But the criticism -- 12:20

11 **MS. JUSTICE COSTELLO:** To your argument.

12 **MR. GALLAGHER:** Sorry, I was interrupting you.

13 **MS. JUSTICE COSTELLO:** No, no. His is a reply to your
14 argument. So it's really a question as to whether or
15 not it is fair to allow you to reply to *his* reply. 12:20

16 Because I don't think that it could be criticised --
17 I'm taking the view, whether I'm right or wrong, that I
18 don't think he can be criticised for how he approached
19 responding to your case. I will use it in that sense
20 rather than the technical sense. 12:20

21 **MR. GALLAGHER:** Can I move away from the question of
22 criticism? I think it's important that an issue which I
23 think is of some importance is adequately ventilated.
24 We *were* told that this was not an adversarial case.

25 **MS. JUSTICE COSTELLO:** Mm hmm. 12:20

26 **MR. GALLAGHER:** The DPC is *bound* by Commission
27 decisions. The Commission decision was *there*. It was
28 never suggested that it didn't contain an adequacy
29 finding with regard to the public law. It does clearly

1 on its face, it contains such a finding. If the DPC
2 was saying -- and it's not a matter of defence, Judge;
3 this is something that's binding, it had to be put
4 before the court. And if the issue that is *now* being
5 made, that somehow you're to parse and analyse the 12:21
6 decision, you're to ignore that the decision does make
7 an adequacy finding and you're to do that by reference
8 to Article 1(1), that was *never* made, Mr. Murray has
9 elaborated on that now for the first time and I do
10 believe it is something that I should have an 12:21
11 opportunity to respond to, because it is obviously of
12 some considerable significance.

13 **MS. JUSTICE COSTELLO:** I just want to hear what
14 Mr. Murray has to say. Mr. Murray, it may be of
15 assistance to me in how I construe the matters if I 12:21
16 hear a response from Mr. Gallagher in relation to that
17 matter.

18
19 **SUBMISSION BY MR. MURRAY:**
20 12:21

21 **MR. MURRAY:** Certainly, Judge.
22 **MS. JUSTICE COSTELLO:** Particularly given the fact that
23 I think the first thing Mr. Collins said, it's probably
24 on page two of the transcript, was that the Data
25 Commissioner wanted to get it right. 12:22

26 **MR. MURRAY:** Yes, and we all do. It's just
27 unfortunate, Judge, that Mr. Gallagher, in a manner
28 which was clearly misconceived, started off trying to
29 justify his asserted right --

1 **MS. JUSTICE COSTELLO:** well, I think we'll try to park
2 the animosities.

3 **MR. MURRAY:** well, absolutely. well, no, but I just do
4 want to make this observation, Judge --

5 **MS. JUSTICE COSTELLO:** No, I understand the point you 12:22
6 are making that --

7 **MR. MURRAY:** -- and I will finish with this.
8 Mr. Gallagher assumed from the get-go when I started my
9 reply that he would have the right to get up and say
10 whatever he wanted to say. That was his assumption. 12:22
11 And that is reflected, if I can respectfully say so, in
12 what he has just said. Because he is staggered that
13 anybody is even *questioning* his entitlement to respond.

14 **MR. GALLAGHER:** well --

15 **MR. MURRAY:** That is absolutely the case, Judge. Now, 12:22
16 Judge, I'm in the court's hands --

17 **MS. JUSTICE COSTELLO:** Do I have any say in the matter?

18 **MR. MURRAY:** well, Judge, you have the only say in the
19 matter that matters. If the court feels it's
20 appropriate to hear Mr. Gallagher, I would ask the 12:22
21 court to request him to be short, because he's already
22 made this point, according to himself, and I will reply
23 in a manner which I hope will be equally brief. I'm
24 assuming that this is the only issue on which the court
25 is going to be addressed. 12:23
26

27 **SUBMISSION BY MR. GALLAGHER:**

28

29 **MR. GALLAGHER:** Judge, firstly - I don't want to extend

1 an unnecessary argument - I want to assure the court
2 that there is *no* basis for the suggestion that I
3 assumed I was going to make a reply. This is an issue,
4 as I say, that has arisen, leaving aside the rights and
5 wrongs of it, it is an issue that has arisen and needs 12:23
6 to be addressed. I didn't draw your attention, and I
7 should have, to paragraph 107 of our submissions,
8 paragraph 27, where we say in the last sentence --
9 **MS. JUSTICE COSTELLO:** Paragraph 27 of your
10 submissions? 12:23
11 **MR. GALLAGHER:** No, 107, page 27.
12 **MS. JUSTICE COSTELLO:** I beg your pardon.
13 **MR. GALLAGHER:** Where we say in the last sentence:
14
15 "*The Commission has now clearly stated that since 12:23*
16 Schrems, US law does ensure an adequate level of
17 protection."
18
19 Now, that is unambiguous, Judge. And if I can draw
20 your brief attention, and thank you for the -- 12:24
21 **MS. JUSTICE COSTELLO:** So, certainly, if you address
22 the issue as to where you say Privacy Shield is an
23 adequacy -- is a decision by the Commissioner on the
24 adequacy of US law --
25 **MR. GALLAGHER:** Exactly. 12:24
26 **MS. JUSTICE COSTELLO:** -- as opposed to, as Mr. Murray
27 was arguing in reply, an adequacy decision in the
28 confines --
29 **MR. GALLAGHER:** Exactly.

1 **MS. JUSTICE COSTELLO:** -- of transfers of data under
2 the Privacy Shield mechanism itself.

3 **MR. GALLAGHER:** Okay. Can I do it as I believe I did
4 it on day seven - and I'll just get the transcript
5 reference in a moment? I went through the two parts, 12:24
6 Judge, of the Privacy Shield and what I have
7 colloquially called the private sphere and signing up
8 to the principles. And on page 50 of that transcript I
9 said that's the equivalent of the SCCs, that deals with
10 the privacy sphere. 12:24

11
12 I then said, if you go on you will see that the
13 Commission then deals with the public sphere. And it
14 does it from page 13 onwards. It analyses all the
15 issues that you've been asked to analyse on US law - 12:25
16 the substantive, the practice, taking into account the
17 commitments, because that's relevant under Article
18 25(2), commitments are part of what you look at in
19 terms of adequacy - and it concludes at paragraph 140
20 of the decision that in the public sphere, US law is 12:25
21 adequate on what I said was the strictly necessary
22 test, I use that as a shorthand.

23
24 It then goes on in Article 1(1) of the decision to say
25 that data transferred under the Privacy Shield is -- 12:25
26 there is adequate protection. That statement in 1(1)
27 obviously relates back to the recitals - it's well
28 established that you must interpret a European document
29 by reference to the recitals. The recitals contain two

1 parts. We're not interested in the private sphere,
2 because there was no suggestion, as I said yesterday,
3 that there was any inadequacy of the SCCs in the
4 private sphere. So the adequacy conclusion in Article
5 1(1) has two limbs; adequate in the private sphere, 12:26
6 adequate in the public sphere. In circumstances where
7 there's no issue about adequacy in the private sphere,
8 the conclusion of adequacy in the public sphere still
9 applies.

10 **MS. JUSTICE COSTELLO:** Can I just, I would like to get 12:26
11 straight in my head, obviously we have all these
12 recitals and they're not in there just for the sake of
13 filling paper.

14 **MR. GALLAGHER:** Yes.

15 **MS. JUSTICE COSTELLO:** But on the other hand, the 12:26
16 recitals themselves are given effect to by the
17 decision, is that correct?

18 **MR. GALLAGHER:** That's correct, Judge -- well, it's a
19 bit more; it's not so much the recitals are given
20 effect to by a decision -- 12:26

21 **MS. JUSTICE COSTELLO:** well, they're the reasoning for
22 the decision.

23 **MR. GALLAGHER:** They're the reasoning for the --
24 exactly. They're the reasoning that underpins and they
25 become something that is relevant to the interpretation 12:26
26 --

27 **MS. JUSTICE COSTELLO:** Interpretation of the decision.

28 **MR. GALLAGHER:** Exactly, Judge.

29 **MS. JUSTICE COSTELLO:** But it's the decision as

1 enshrined in the articles which is, if you like, the
2 law.

3 **MR. GALLAGHER:** Yes, Judge.

4 **MS. JUSTICE COSTELLO:** Is that right?

5 **MR. GALLAGHER:** Yes. 12:27

6 **MS. JUSTICE COSTELLO:** So then take me to the decision
7 and --

8 **MR. GALLAGHER:** Yeah. And Article 1(1), as I said,
9 that for the purposes of Article 25(2), the United
10 States ensures an adequate level of protection for 12:27
11 personal data transferred from the Union to
12 organisations under the Privacy Shield.

13
14 For the private sphere, you don't need to use the
15 Privacy shield if you're entitled to rely on the SCCs. 12:27
16 The public sphere is separate - it's separate from the
17 principles in the Privacy Shield, it's a separate part
18 of it, it's dealing with the public sphere. So it's
19 saying 'Your protection is adequate on two accounts:
20 You get protection in the private sphere by signing up 12:27
21 to the principles; you have adequate protection in the
22 public sphere, because we have *examined* US law and
23 *concluded* it gives adequate protection'.

24
25 Now, Judge, remember, all of the DPC's test is a test 12:27
26 of adequacy that derives from Article 25. This is an
27 examination of Article 25 adequacy - that's what it
28 clearly is - in the Privacy Shield Decision. It is --

29 **MS. JUSTICE COSTELLO:** But it's not a simpliciter

1 decision, sure it isn't? It doesn't just say 'This is a
2 decision that the US law is adequate'. As with safe
3 Harbour, it's in a particular context.

4 MR. GALLAGHER: But, Judge, what is the dif --

5 MS. JUSTICE COSTELLO: Like, looking at the Israeli 12:28
6 decision I was handed up by, oh, I can't recall who.

7 MR. GALLAGHER: Yeah, but, Judge, what is the
8 difference in the context? The public sphere cannot
9 provide adequate protection in the context of the
10 Privacy Shield and not provide adequate protection in 12:28
11 any other context.

12 MS. JUSTICE COSTELLO: Okay, so you're...

13 MR. GALLAGHER: So Article 1(1) *has* to be read in terms
14 of the recitals. There are two limbs that they keep
15 separate. They are saying the public sphere provides 12:28
16 adequate protection. What you're concerned about is
17 the public sphere. And the contention that you can
18 ignore that finding that the public sphere is adequate
19 which underpins Article 1(1), it says it's adequate -
20 there are two limbs - and that you can ignore it for 12:29
21 the purposes of *precisely* the same test which the DPC
22 has now invoked. The DPC says the law is *not* adequate.
23 And that is just *inconsistent* with this decision,
24 Judge.

25
26 It's not a literal interpretation. Could it *possibly*
27 be said that the public security law is adequate when
28 data is transferred under the Privacy Shield but is
29 *inadequate* generally if it's transferred under SCCs?

1 Because the adequacy decision was based on precisely
2 the issues that are before this court in terms of the
3 substantive law, the practice, the remedies, the
4 Ombudsperson, which I agree is an integral part of it.
5 And of course, it does take account of commitments. 12:30
6 But any assessment of adequacy under Article 25(2) *must*
7 take account of commitments.

8
9 So if somebody is saying that it can be adequate for
10 one purpose but not for another, that is certainly, I 12:30
11 say, a novel proposition. But apart from its novelty,
12 it is an *incorrect* proposition. It could *not* be so.
13 And it would be asking this court to ignore the
14 Commission decision, something which it's not entitled
15 to do, in circumstances where Mr. Murray - and 12:30
16 Mr. Collins - on a number of occasions yesterday,
17 Mr. Murray repeated they do not challenge the privacy
18 decision.

19
20 But you can't just say 'well, I'm going to look at 12:30
21 Article 1(1) and it applies to data transferred'. It
22 does, but there were two dangers in respect of data
23 transferred: There was the dangers in the private
24 sphere where it was perceived you didn't have remedies,
25 which are dealt with, the principles and all of that; 12:31
26 and there was the danger in the public sphere. But you
27 can't then ignore a clear and unambiguous finding with
28 regard to the public sphere and say 'That's grand in
29 the context of the Privacy Shield but it is irrelevant

1 in the context of the SCCs where they provide the
2 necessary protection'.
3

4 Judge, this is a formal process under Article 28 and
5 it's done on that basis and -- sorry, Judge, I said 28, 12:31
6 it's 25(6); the only basis on which you make a finding
7 of adequacy is through 25(6). But that does
8 incorporate article --

9 **MS. JUSTICE COSTELLO:** 31, is it?

10 **MR. GALLAGHER:** 31, you're absolutely correct, not 28. 12:32
11 And, Judge, yesterday there was an announcement from
12 the working Party, of which the DPC is a member --

13 **MR. MURRAY:** Ah, now, I mean *really*.

14 **MR. GALLAGHER:** Sorry, excuse me --

15 **MS. JUSTICE COSTELLO:** Okay, well, we'll hear it. Good 12:32
16 Lord --

17 **MR. GALLAGHER:** Sorry, excuse me --

18 **MS. JUSTICE COSTELLO:** -- it's a fast moving court this
19 courtroom. I should've made sure this case finished
20 earlier. 12:32

21 **MR. MURRAY:** I mean, this is *extraordinary*, Judge.

22 **MR. GALLAGHER:** Sorry, Judge, it's -- I'm not
23 criticising him for not bringing it to your attention,
24 he may not have known about it. But it is
25 extraordinary, Judge, that the DPC, who is a member of 12:32
26 the working Party, the working Party have issued a
27 document that you shouldn't be aware of, that's all I
28 say.

29 **MR. MURRAY:** No.

1 **MR. GALLAGHER:** Sorry, excuse me. That is something
2 that you clearly *should* be aware of and I would assume
3 that all parties knowing of it would put it before you.
4 I'm going to hand it in in a moment.

12:32

5
6 So, Judge, that is the point. And it is a point that
7 was made on day seven by me, firstly in article -- or
8 in paragraph 50 of the transcript. I wonder if we
9 could get out the transcript, Judge?

10 **MS. JUSTICE COSTELLO:** Have you worked how to do
11 receiving or broadcasting, or am I asking too much?

12:33

12 **MR. GALLAGHER:** Yes, Judge. Well, if you hit -- sorry,
13 I'm on "viewing" at the moment because I was going to
14 move it. If you put it receiving first, hit the
15 "Receiving", as you know, and it just takes a moment
16 for it to come up, because I've just announced it. But
17 it's day seven and it's page 50, Judge.

12:33

18 **MS. JUSTICE COSTELLO:** Just a moment, it's...

19 **MR. GALLAGHER:** And I've lost it now, having -- I'll go
20 back to "Receiving". It's page 50.

12:33

21 **MS. JUSTICE COSTELLO:** For some reason, mine will only
22 do "View" or "Log Out". For the last five weeks I've
23 been able to do broadcasting and now it says "view" or
24 "Log Out", so I think --

25 **MR. GALLAGHER:** Oh, yes, I had that. I think they're
26 handing you up -- that just happens at some stage,
27 Judge.

12:33

28 **MS. JUSTICE COSTELLO:** I think I've magnets in my
29 fingers. Thank you, I've been handed one that is

1 receiving. Yes, thank you. Page 50?

2 **MR. GALLAGHER:** Page 50, Judge. So we say:

3
4 *"That's dealing with the private authorities", you see*
5 *on line nine, "it's dealing with the companies that was* 12:34
6 *companies that have subscribed to the Privacy Shield.*
7 *And what I will say now - I won't have time to*
8 *elaborate - the sort of protections and procedures and*
9 *commitments are the equivalent of those in the SCC*
10 *decisions; the arbitration process, the system of* 12:25
11 *redress, the commitment to doing it in accordance with*
12 *the applicable Member State law. And you don't have to*
13 *satisfy yourself of that, but you will be satisfied.*
14 *But what's significant is it's not even examined by the*
15 *DPC when assessing the SCC decisions."* 12:26

16

17

18 Then I go on:

19

20 *"They deal separately with the public authorities. And* 12:34
21 *this is important, because -- 64" - that's recital 64 -*
22 *"on page 13", sets that out.*

23

24 And I'm just skipping over, Judge, but if you go to 54
25 - I can't move it myself - I think 54 is the next one. 12:34

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

27 **MR. GALLAGHER:** Having gone through it, Judge, I say at
28 the bottom of page 22:

29

1 *"Now, if you just stop there, Judge, for a moment and*
2 *compare that with what the DPC did. Firstly" --*

3
4 Sorry, can I take the earlier, Judge?

5 **MS. JUSTICE COSTELLO:** Yes. 12:35

6 **MR. GALLAGHER:** At 122 in divide seven. It says:

7
8 *"'Overall, this mechanism' - it has gone through and*
9 *examined it - 'ensures that individual complaints will*
10 *be thoroughly investigated'."*

11
12 That's the Ombudsperson. And at 123:

13
14 *"On the basis of all of the above, the Commission*
15 *concludes the United States ensures effective legal*
16 *protection."* 12:35

17
18 Now, that's a conclusion of the Commission in the
19 public sphere. And I know of *no* principle of EU law
20 that would allow you interpret Article 1(1), ignore a 12:35
21 finding of adequacy made under 25(6), where the
22 Commission can determine whether there is adequate
23 protection.

24
25 And I go on at line 22: 12:35

26
27 *"Now, if you just stop there, Judge, for a moment and*
28 *compare that with what the DPC did. Firstly, it*
29 *divided the protections in the private sphere, then it*

1 *looked in the public sphere. In the public sphere it*
2 *didn't go straight to remedies and say 'Oh, there are*
3 *standing problems' and '... only provide redress in*
4 *certain circumstances'... '... the oversight bodies*
5 *aren't relevant'; they look at those."*

12:32

6
7 Go to just 55:

8
9 *"But they look at [them]. Because in its assessment of*
10 *the public sphere, the national security sphere, a*
11 *different standard applied."*

12:32

12
13 So I can then go to 56, I think, Judge. And, Judge, so
14 you will see at 1 at the top:

15
16 *"So national security does have that exclusionary*
17 *element, but it also imposes a different basis of*
18 *assessment", I say.*

12:36

19
20 Then at line nine:

12:36

21
22 *"The adequate protection then, the final recitals are*
23 *at 136 to 140 on page 12. The periodic review is*
24 *identified in 145. And then the formal decision for*
25 *the purposes of Article 25(2) - this is on page 35 -*
26 *Article 1(1): '... the United States ensures an*
27 *adequate level of protection.'*

12:34

28
29 So that's a formal decision. And the significance of

1 *that formal decision can be appreciated if you'd be*
2 *kind enough to get out [the books of materials]."*

3
4 And I refer you to Article 31. And I think 59 and 60
5 then I think I want to refer to, Judge, if my 12:37
6 references I've noted are correct. 59 first obviously.
7 Thanks. And, Judge, at 18:

8
9 *"The Adequacy Decision, which takes account of the*
10 *Privacy Shield. And the sort of protections that apply* 12:39
11 *there in respect of the private actors are mirrored in*
12 *the SCCs. So you have, if the test is adequacy of*
13 *protection - which we say it's not - that is met by the*
14 *protections provided for under the contract, the SCCs*
15 *and provided in the context of US law.* 12:39

16
17 And even in respect of the US law, you can see that in
18 terms of the analysis, Judge, leaving aside the
19 principles that apply in the Privacy Shield and all
20 that, in terms of the public" - that should be -- well, 12:39
21 "actor" I think I may have said - "and the law that
22 governs the public actor, the Adequacy Decision says
23 that that law complies with what it's required to
24 comply with, namely that these are provisions that
25 allow national security to process data, that they meet 12:40
26 the requirement of being strictly necessary for the
27 particular objective. The fact that you don't have
28 notification, the fact that you don't have access
29 doesn't undermine their adequacy.

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So when you're looking at [this]... I'll call it the public law [sector]... the Adequacy Decision in and of itself finds that that meets the requirements."

12:40

So the point is made very clearly there with regard to that. It's not something new that's been introduced, it's very, very clear. And it cannot but be anything else, Judge, in the light of the principles which you must apply. But what took me aback is an implication yesterday that seemed to be said - Mr. Murray said he said it on Friday, I'm not going to enter into that dispute - but that you would somehow proceed on the basis that where there is *no* issue with regard to the protections in the private sphere, where the Commission looks separately at the public sphere, found it to be adequate, that you can *ignore* the binding nature that have decision because Article 1(1) talks about transfer of data under the Privacy Shield, that, I say you can't do.

12:38

12:39

12:39

we did make that clear in our submissions on day seven, I think it *is* clear and that passage that I drew your attention to on paragraph 107 in the submissions, and one has to accept that perhaps everything wasn't as clear as it ought to be as the case developed.

12:39

So the concern was that that was being made in those circumstances. Maybe I *shouldn't* have raised it in

1 that way because of what you have --

2 **MS. JUSTICE COSTELLO:** I'm not concerned with a
3 criticism in relation to how --

4 **MR. GALLAGHER:** Yeah, of what you put to me.

5 **MS. JUSTICE COSTELLO:** It's the merit of the argument. 12:39

6 **MR. GALLAGHER:** Yes, it's the merits of the argument.
7 This is something that *cannot* be ignored and has to be
8 dealt with. I'm either right or wrong. It's there in
9 the decision. And it's not a change of case. And in
10 any event, even if it was raised for the first or 12:40
11 second time, if there was some clarification, I think
12 it's important that I provide the clarification. But
13 that is the response and that is what I *believe* I said
14 yesterday, but obviously I didn't have an opportunity
15 of elaborating because there was an objection and 12:40
16 Mr. Murray said 'He can deal with that at the end, but
17 he cannot interrupt my submission'.
18

19 So that is very important. There were one or two other
20 matters, as I say -- oh, can I hand up the Working 12:40
21 Party document, Judge, the 29 (Same Handed).
22 **MS. JUSTICE COSTELLO:** Thank you.

23 **MR. GALLAGHER:** These are the working Party under
24 Article 29, of which the DPC is a member, setting out
25 the procedures for the Ombudsman and referring to that 12:40
26 procedure in the second paragraph. And there just *is*
27 no basis, Judge, for making any criticism of the
28 Privacy Shield. As I said, they are not calling it
29 into question, they can't segregate out a part of it

1 and seek to question it and certainly in the working
2 Party they don't raise any issue in relation to it,
3 they set out the procedures for availing of it.
4

5 Judge, there *are* one or two other matters, but maybe 12:41
6 it's better if I give Mr. Murray an opportunity of
7 responding to that in the first instance before then
8 just briefly identifying --

9 **MR. MURRAY:** well, sorry --

10 **MS. JUSTICE COSTELLO:** what other matters are we 12:41
11 talking about? I thought we were just dealing with this
12 matter.

13 **MR. GALLAGHER:** well, I did say there were one -- he
14 opened the Denuit case yesterday, which had never
15 previously been opened. 12:41

16 **MS. JUSTICE COSTELLO:** Oh, the new cases that hadn't
17 been opened?

18 **MR. GALLAGHER:** Yeah.

19 **MR. MURRAY:** It's in our written submissions, Judge.

20 **MS. JUSTICE COSTELLO:** It's because I am not treating 12:41
21 this as inter partes litigation that I will allow it,
22 in the sense that we classically deal with it, because
23 it's meant to help me and that's the basis. So if you
24 do deal with it and then Mr. Murray can respond in one
25 go. If we have ping pong, I'll get dizzy. 12:42

26 **MR. GALLAGHER:** May it please you, Judge. It's just
27 the Denuit case was opened, Judge, and it was suggested
28 that it was relevant to the Article 47, the Article 47
29 protection in respect of what was an independent

1 tribunal. That had never been opened. It is a case
2 that deals with the entitlement to make a reference
3 under what was then, I think, 234, I think is now 267,
4 as to whether it was a tribunal for the purpose of
5 making a reference. It doesn't *deal* with Article 47. 12:42

6
7 And you *have* to take account in looking at the redress
8 mechanism of the Ombudsperson - it doesn't address that
9 issue at all - the independence recited in the
10 provisions of the Privacy Shield relating to the 12:43
11 Ombudsperson, that it's independent of the Intelligence
12 Community. It *is* set up by law, because these
13 commitments obviously have a legally binding nature at
14 an international level. And finally, Judge, it is
15 subject to review not only by the Commission, but by 12:43
16 the interaction of the DPCs, who are able to interact
17 with it and assess how it operates.

18
19 And the relevant passage that was quoted in Denuit
20 related solely and exclusively to whether something was 12:43
21 a tribunal for the purposes of a reference and
22 identified factors that were relevant without saying
23 that any of them were exhaustive or exclusive. So
24 insofar as that was relied upon - and it *was* relied
25 upon - for suggesting that the Ombudsperson was not an 12:43
26 independent tribunal for the purposes of Article 47, I
27 say that's incorrect and that is my response to it.

28
29 Thank you, Judge.

1 **MS. JUSTICE COSTELLO:** Was there another matter? You
2 said "a number". We might as well get them all over
3 with.

4 **MR. GALLAGHER:** There was the -- I didn't want to prey
5 on your patience, Judge, when you'd allowed me, but -- 12:44

6 **MS. JUSTICE COSTELLO:** It's really not a question of
7 patience, it's a question of help.

8 **MR. GALLAGHER:** Well, then, Judge, the issue that was
9 raised in relation to Article 4 of the SCCs today --
10 sorry, I shouldn't have added "today" in a sense that 12:44
11 sounded as if I was making a criticism; but the issue
12 that was raised, I want to respond briefly to that if I
13 may?

14 **MS. JUSTICE COSTELLO:** Well, yes, okay. I'm so far
15 over the line at this stage, we'll carry on. 12:44

16 **MR. GALLAGHER:** Yeah. It was suggested, Judge, that
17 Article 4 was not a solution to the case and four
18 points were made.

19

20 First, it was said that it gives a power, not an 12:44
21 obligation. And that's true. Because of course, in
22 deciding whether or not to exercise the Article 4
23 power, you need to make the assessment required by
24 subarticle 1 and you need to take into account, as
25 Section 11 of the Act shows, the potential effect. So 12:45
26 it's not mandatory, but it's there. And remember,
27 Article 4 was raised to support the argument that the
28 test in respect of the SCCs was not the adequacy of the
29 law, but that to achieve an outcome, you had a

1 protection provided by Article 4. And in that sense
2 it's irrelevant whether it's mandatory or
3 discretionary.

4
5 But in any event, even if it's discretionary, if the 12:45
6 conditions are met - and they were never examined -
7 then it would be incumbent in an appropriate case on
8 the DPC to exercise the power. And that doesn't matter
9 whether you look at Article 4 of the 2010 or the latest
10 version, it all goes back to Article 28, which gives 12:46
11 that -- which provides that protection which is said to
12 be regarded as being very important.

13
14 It is said that it's not there to deal with structural
15 problems - there is no indication in *any* way of that - 12:46
16 and it was suggested that this would be the DPC, on her
17 own, making a judgment in respect of a structural
18 matter. Well, of course, the whole procedure provided
19 for in Article 28 involving the DPCs allows for
20 consultation *with* other DPCs. And in any event, 12:46
21 there's nothing to suggest that it cannot be used in an
22 appropriate case, there's no differentiation between
23 structural or other reasons. In fact, it inevitably
24 deals with structural matters, because it says you must
25 look at whether the protection meets the strictly 12:46
26 necessary requirement. That's what it says. So it
27 does involve --

28 **MS. JUSTICE COSTELLO:** Is that Article 4(1)?

29 **MR. GALLAGHER:** Article 4...

1 **MS. JUSTICE COSTELLO:** You see, don't forget Article
2 4(1) has been replaced by a new Article 4 which just
3 says 'Go back to 28(3)'. And I don't know that 28(3)
4 refers to those matters. But I can be very wrong at
5 this stage. 12:47

6 **MR. GALLAGHER:** No, no. And can I just take you --

7 **MS. JUSTICE COSTELLO:** Unless I have the documents in
8 front of me.

9 **MR. GALLAGHER:** Can I just take you to 10 first? I
10 mean, we're looking at it -- initially I agree that you 12:47
11 must look at it *now*. But a proposition was put forward
12 that it couldn't relate to a structural matter. And at
13 the time, the criticism is this wasn't considered at
14 the time she made the decision. And I say at the time
15 she made the decision, it did -- 12:47

16 **MS. JUSTICE COSTELLO:** Yes, but just as I have allowed
17 you to respond on the basis that I'm not regarding this
18 as an inter partes *true*, I'm not regarding this also as
19 a judicial review; we're not reassessing her procedures
20 and going to quash a decision because she hasn't 12:47
21 followed the correct procedures. I'm looking at the
22 issues that are before me.

23 **MR. GALLAGHER:** No, I do appreciate that. But I'm
24 merely saying it is said that it could never have
25 related to structural issues. And if you just look at 12:48
26 it, Judge.

27 **MS. JUSTICE COSTELLO:** I don't think he said "could
28 never", I think he said it wouldn't be appropriate.

29 **MR. GALLAGHER:** Well, he says it doesn't extend to

1 structural issues. But it deals precisely with that.
2 It says:

3
4 *"May exercise their existing powers" - those are the*
5 *Article 28 - "to prohibit... to a third country in* 12:48
6 *order to protect individuals with regard to the*
7 *processing where it is established that the law which*
8 *the data importer is subject to imposes requirements*
9 *which derogate."*

10
11 So it goes to the structure, it goes to the law and
12 there's nothing in the new version of it which alters
13 that, merely the new version is intended to extend the
14 powers.

15
16 It's said that the recital appears to suggest, recital
17 11 appears to suggest the power is exceptional. Well,
18 it is, it's to deal with that situation. I don't see
19 anything in particular in relation to that.

20
21 And it was said that it doesn't provide a remedy.
22 Well, it does - it stops the data being transferred.
23 And of course, Judge, you'll remember that Clause 5 of
24 the SCC terms *requires* an importer to inform the
25 exporter if they are required to comply with something 12:49
26 which goes beyond the mandatory -- or a mandatory law
27 which goes beyond the requirements. So if the --
28 **MS. JUSTICE COSTELLO:** Except if they're subject to a
29 gagging order.

1 *interchangeably*. One was "bound by" and the other was
2 "ignore", "have regard to", "take account of",
3 depending on what -- and I'm sure the transcript is
4 going to prove he didn't use one of those. But
5 generally he drew a distinction between that by which 12:51
6 you were bound and that to which you should have
7 regard.

8
9 Now, the critical question is what are you *bound* by?
10 And what you are *bound* by is the decision - what 12:51
11 Mr. Gallagher, in the transcript that he read out to
12 you of his own comments at the opening, described as
13 the formal decision. That was *his* language. And he's
14 *right*. And the formal decision in the Privacy Shield
15 is Article 1(1). And that is what you are *bound* by. 12:51
16 And the formal decision is that there's an adequate
17 level of protection for personal data transferred from
18 the Union to organisations in the United States under
19 the Privacy Shield.

20 12:52
21 The *recitals* - and that is what they are - are not
22 generally, in Community instruments, binding, and more
23 particularly, cannot be relied upon as a ground for
24 derogating from the actual provisions of the Act. And
25 that's European law, it's established in the **Nielsen** 12:52
26 case.

27
28 So what it is that Mr. Gallagher seeks to extract from
29 the recitals is properly no more than something which

1 is not disputed, which is that this is a conclusion
2 that the Commission reached, as it was entitled to do.
3 No one, I don't believe, Judge, ever suggested at any
4 stage that you should not have regard to it. That's
5 why Mr. Collins *opened* it, even though we're not 12:52
6 challenging it. But the point is that we say the
7 Commission was wrong. And that is not something that
8 hasn't occurred before in this context. And the
9 appropriate vehicle for the ascertainment of whether it
10 was right or whether it was wrong is the court. 12:53

11
12 Judge, I do think it's important just very quickly to
13 look at the structure of the Privacy Shield Decision.
14 You have an introduction which runs over 13 recitals.
15 That is then followed by "EU-US Privacy Shield" so 12:53
16 described. The distinction public/private may be a
17 helpful shorthand for Mr. Gallagher's purposes for
18 describing what it is dealing with - that is *his* term,
19 not the Commission's. It then proceeds from the
20 Privacy Shield to a heading of "Access and Use of 12:53
21 Personal Data Transferred Under" - *under* - "The EU-US
22 Privacy Shield", and moves from that heading onward,
23 Judge, to deal with what *it* clearly regards as a
24 separate matter under heading number four, which starts
25 at page 32, "Adequate Level of Protection Under the EU 12:54
26 Privacy Shield".

27
28 So it moves from its introduction to its Privacy shield
29 to its consideration of the specific question of what

1 Mr. Gallagher describes as the public aspect, but then
2 proceeds to join them together in the final recitals
3 that ultimately to what Mr. Gallagher correctly
4 describes as the formal and what I describe as the
5 binding decision.

12:54

6
7 So I opened these paragraphs to you yesterday, I won't
8 open them to you again, paragraphs 136 and following,
9 all of which are directed and *only* directed to the
10 transfer of data under the Privacy Shield. It proceeds
11 then, "Action of Data Protection Authorities", number
12 five; "Periodic Review", number six; "Suspension",
13 number seven; and then the final decision.

12:55

14
15 So in my respectful submission, it appears that we are
16 *in fact* in agreement that what is, if you wish to use
17 the term "binding" is the decision. The decision is
18 about the transfer of data under the shield. Findings
19 or determinations made by the Commission in its
20 recitals are *not* grounds for derogating from the
21 finding, no one has *ever* said the court can't have
22 regard to them, it's just that we say that they are
23 wrong.

12:55

12:55

24
25 But it actually goes a little bit further insofar as
26 you're concerned, Judge. Because this very debate is
27 to actually obscure the issue with which you're
28 concerned, which is that we are only looking at
29 transfers under the SCCs, and this only intrudes into

12:55

1 that insofar as the Ombudsman is there. And
2 Mr. Gallagher is absolutely right and I don't believe
3 and I hope we didn't seek to suggest that the
4 Commission had done anything other than determine that
5 in its view the Ombudsman effectively compensated for 12:56
6 the remedial difficulties in US law - in fact that is
7 the very point that I made to you yesterday. But it's
8 just that we say it doesn't do to so in a manner that's
9 Article 47 compliant. And if we're right on that then
10 it doesn't resolve the difficulties with the SCCs, and 12:56
11 that's the only question you're concerned with.

12
13 If that has an effect by way of side wind, was, I
14 think, the phrase used by Mr. Gallagher in the course
15 of his submissions, on the Privacy Shield Decision, 12:56
16 well, that's for somebody else to determine. But that
17 only arises if the Court of Justice agrees with us.

18
19 very briefly, insofar as reference has been made to the
20 Denuit case, that is, absolutely, not an Article 47 12:57
21 case. I don't think it requires authority to say that
22 the courts, in determining Article 47, are of course
23 going to have regard to the constituents of a tribunal
24 as defined in Article 234 cases. But more
25 fundamentally, you don't have to go anywhere beyond the 12:57
26 language of Article 47 itself: "Independent". And
27 Mr. Gallagher uses the phrase, as in fairness the
28 Commission does, of "independent of the intelligence
29 authorities or intelligence"...

1 **MR. GALLAGHER:** Community.

2 **MR. MURRAY:** Community. But that is not independent.
3 A body which is part of the executive is, on *no* version
4 of the law under Article 47 or any other instrument
5 which directs itself to an independent tribunal for an 12:58
6 adjudicative purpose, with *no* power of judicial review,
7 it simply, in our respectful submission does not pass
8 that test. But whether it does or whether it doesn't,
9 it cannot be seriously said that there is an issue
10 around that. And bear in mind, Judge, by way of 12:58
11 conclusion, again one doesn't have to go beyond the
12 text of Article 47 to see that it has to be established
13 by law.

14

15 Judge, that is my response to Mr. Gallagher's 12:58
16 submissions. Unless the court has any questions, I'd
17 just like to thank you, Judge, for your time - we've
18 gone significantly over the budgeted allocation.

19 **MS. JUSTICE COSTELLO:** Ms. Barrington has heard how
20 I've learned that lesson. 12:58

21 **MR. GALLAGHER:** Yes, thank you, Judge.

22 **MS. JUSTICE COSTELLO:** well, no, thank you all. And
23 please thank your colleagues who are not here. This
24 case would be immensely much more difficult but for the
25 help that you've all given me in this matter, possibly 12:59
26 to the chagrin of some of you present. But I am
27 reserving my decision.

28 **MR. GALLAGHER:** Thank you.

29 **MR. MURRAY:** May it please the court.

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THE HEARING WAS THEN ADJOURNED PENDING JUDGMENT

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