

THE HIGH COURT - COURT 29

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON THURSDAY, 2nd MARCH 2017 - DAY 14

14

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APPEARANCES

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

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

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

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

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

Instructed by: AHERN RUDDEN QUIGLEY
5 CLARE STREET
DUBLIN 2

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

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

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

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

FOR DIGITAL EUROPE:

MR. MICHAEL CUSH SC
MS. NESSA CAHILL BL

Instructed by:

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

FOR ELECTRONIC PRIVACY
INFORMATION CENTER:

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

Instructed by:

FREE LEGAL ADVICE CENTRE
13 DORSET STREET LOWER
DUBLIN 1

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1 THE HEARING RESUMED AS FOLLOWS ON THURSDAY, 2ND MARCH
2 2017

3
4 **REGISTRAR:** Matter at hearing, Data Protection
5 Commissioner -v- Facebook Ireland Ltd. 11:19

6 **MR. GALLAGHER:** Judge, before Mr. Cush begins his
7 submissions, I do want to mention, you remember there
8 was an issue about Mr. Robertson's evidence. We have
9 identified the paragraphs, we haven't got formal
10 confirmation yet that there is no dispute with regard 11:20
11 to those paragraphs, but I just want to mention that
12 now. I'm sure it will be resolved before you, but
13 I want to mention it before Mr. Cush makes his
14 submissions.

15 **MR. MURRAY:** Yes. Certainly, Judge. We received them 11:20
16 on Monday night, we haven't had a chance to review them
17 yet, but I expect that we will do it today or tonight
18 and be able to advise Mr. Gallagher tomorrow.

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

20 11:20
21 **SUBMISSION BY MR. CUSH:**

22
23 **MR. CUSH:** May it please you, Judge.

24 **MS. JUSTICE COSTELLO:** Yes.

25 **MR. CUSH:** Judge, I am very grateful for this morning's 11:20
26 accommodation. Judge, I appear with Ms. Nessa Cahill
27 instructed by A&L Goodbody for Digital Europe.

28
29 As I think you know Digital Europe is the principal

1 representative body of members of the digital
2 technology industry in Europe, some 61 corporate
3 members including some of the world's largest IT
4 companies, telecoms and consumer electronic firms and,
5 in addition, 37 national trade associations across
6 Europe.

11:20

7
8 Digital Europe and its members are extremely concerned
9 about the uncertainty and the risks created by these
10 proceedings in relation to the efficacy of SCCs as a
11 means of effecting essential data transfers beyond the
12 borders of the EEA, including in particular, and I do
13 emphasise this, to countries *other* than the United
14 States.

11:21

15
16 The key legal issue from the perspective of Digital
17 Europe is the interaction between Articles 25 and 26 of
18 the Directive. The Commissioner's doubts regarding the
19 validity of the SCC decisions are predicated upon her
20 interpretation of the interaction of those two Articles
21 and we, with respect, suggest that she is in error.

11:21

22
23 Judge, I think the key or the core difference between
24 us is this, and I'm going to try and track this in a
25 little bit more detail in a moment but to try and
26 summarise the core difference, we think it is this:
27 The Commissioner's essential argument is that the
28 object of Article 26 is to achieve the same adequate
29 level of protection as is required by Article 25. That

11:21

1 reasoning led her to conclude, having first concluded
2 the United States didn't provide an adequate level of
3 protection because of the absence of effective remedy,
4 that the SCCs did not *address*, as she put it, that
5 inadequacy because they didn't bind the United States. 11:22
6 Now, I'll come back to that when we track that in the
7 dramatic decision in a little bit more detail in a
8 moment, but that's the reasoning that led her to that
9 conclusion.

10
11 Now Digital Europe, on the other hand, says the
12 Directive is not to be interpreted as requiring
13 Article 26, Article 26(2) in particular, to provide the
14 *same* adequate level of protection required by
15 Article 25. Article 26 as a whole envisages something 11:22
16 different, we say, and Article 26(2) in particular
17 envisages something different to compensate for the
18 absence of an adequate level of protection. And, as
19 you know, that absence of an adequate level of
20 protection is a given, it's a prerequisite to the 11:23
21 operation of Article 26.

22
23 So, Judge, I'm not proposing to open or refer to at all
24 the respective written submissions of the parties, save
25 to say this: You will find the Commissioner's 11:23
26 submissions on this topic, the interaction between
27 Articles 25 and 26, in paragraphs 37 to 67 of their
28 submissions and for us you'll find it in paragraphs 7
29 to 23.

1 So what I want to do, if you'll permit, Judge, is to
2 follow the argument as it is developed before the court
3 orally. I'm going to ask you, therefore, to look
4 firstly to the Directive and then to three transcripts,
5 1, 2 and 6, if you have those. And I'm just going to 11:24
6 identify what we say is clearly the Commissioner's
7 reasoning, identify where we, with respect, say it's in
8 error and identify how that reasoning, although it's
9 articulated after the Draft Decision obviously, but
10 that same reasoning led her to the error that we say is 11:24
11 inherent in the Draft Decision. So that's what I am
12 proposing to do for the submission, Judge.

13
14 So if I could ask you firstly to look to the Directive
15 which is in Tab 1, I'm sure you have looked at it so 11:24
16 many times, sorry Tab 4 of Book 1 and internal page 45,
17 Judge.

18 **MS. JUSTICE COSTELLO:** I have actually got it on the
19 tablet, I'll try it for once to see if this works.

20 **MR. CUSH:** Yes. We are regrettably going to start here 11:25
21 and move backwards and come back to them, Judge.

22 **MS. JUSTICE COSTELLO:** That's okay.

23 **MR. CUSH:** If you have Article 25.

24 **MS. JUSTICE COSTELLO:** Yes.

25 **MR. CUSH:** Just for the moment, 25(1): 11:25
26

27 *"The Member States shall provide the transfer to a*
28 *third country of personal data which are undergoing*
29 *processing or intended for processing after transfer*

1 *may take place only if, without prejudice to compliance*
2 *with the national provisions adopted pursuant to the*
3 *other provisions of this Directive, the third country*
4 *in question ensures an adequate level of protection."*

11:25

5
6 And there's that reference to the contract, so only if
7 that.

8
9 Then 26(1) says: "*By way of derogation from Article 25*
10 *and save where otherwise provided by domestic law*
11 *governing particular cases Member States shall provide*
12 *that a transfer or a set of transfers of personal data*
13 *to a third country which does not ensure an adequate*
14 *level of protection within the meaning of 25(2) may*
15 *take place on condition that". And there are six*
16 conditions, the first being consent, and again I'll
17 come back to that but just to identify it for the
18 moment.

11:25

11:25

19
20 In Article 26(2) is something different: "*without*
21 *prejudice to paragraph 1, a Member State may authorise*
22 *a transfer or set of transfers of personal data to a*
23 *third country which does not ensure an adequate level*
24 *of protection within the meaning of Article 25(2),*
25 *where the controller adduces adequate safeguards with*
26 *respect to the protection of the privacy and*
27 *fundamental rights and freedoms of individuals and as*
28 *regards the exercise of the corresponding rights; such*
29 *safeguards may in particular result from contractual*

11:26

11:26

1 *clauses."*

2
3 All that you have seen. I just want to go back now to
4 some of the recitals and to identify those which signal
5 these Articles, if I may. 11:26

6
7 If you turn backwards then to recital 56.

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

9 **MR. CUSH:** It's on page 36. It says: "*whereas*
10 *cross-border flows of personal data are necessary to* 11:26
11 *the expansion of international trade; whereas the*
12 *protection of individuals guaranteed in the Community*
13 *by this Directive does not stand in the way of*
14 *transfers of personal data to third countries which*
15 *ensure an adequate level of protection; whereas the*
16 *adequacy of the level of protection afforded by a third*
17 *country must be assessed in the light of all the*
18 *circumstances surrounding the transfer operation or set*
19 *of transfer operations."*

20 11:27
21 And then 57: "*whereas, on the other hand, the transfer*
22 *of personal data to a third country which does not*
23 *ensure an adequate level of protection must be*
24 *prohibited."*

25 11:27
26 Now those two recitals, 56 and 57, are clearly
27 signalling Article 25.

28
29 And then there's 58, Judge:

1 *"whereas provisions should be made for exemptions from*
2 *this prohibition in certain circumstances where the*
3 *data subject has given his consent"* and it goes on.

4 **MS. JUSTICE COSTELLO:** Hmm.

5 **MR. CUSH:** And what you find there is reference to what 11:27
6 are the other six conditions that we saw in 26(1). So
7 58 signals Article 26(1).

8
9 And then 59: *"whereas particular measures may be taken*
10 *to compensate for the lack of protection in a third* 11:28
11 *country in cases where the controller offers*
12 *appropriate safeguards; whereas, moreover, provision*
13 *must be made for procedures for negotiations between*
14 *the Community and such third countries."*

15
16 And that, Judge, is clearly referencing Article 26(2)
17 in particular, although, as you see also 26(4), that
18 reference to the Community. And it's that phraseology
19 of *"compensate for the lack of protection"* that I just
20 want to identify, Judge. 11:28

21
22 I want to suggest that there's nothing inherent in the
23 idea of compensation that the same thing is provided
24 for that which is being compensated for. And if
25 I could just try and identify that with a few examples, 11:29
26 if I may.

27
28 In the law of contract we often say that the purpose of
29 the damage is to put the person back in the position

1 they would have been but for the breach, and in many
2 examples that's exactly what happens. So the simple
3 example perhaps of a bank overcharging a customer
4 interest. That's a breach of contract, the customer is
5 at a loss of money and the court awards damages and 11:29
6 that's compensation which is providing the same thing
7 as the customer has lost.

8
9 But that actually, Judge, is rather unusual in
10 compensation generally. Much more likely is that the 11:29
11 compensation is the provision of something *different* to
12 that which has been lost, an injury, loss of a limb,
13 any form of injury, the compensation is *money*.
14 Something different is provided to compensate for what
15 has been lost. 11:29

16
17 In the parlance of the Commissioner, you may recall or
18 we'll certainly see, the Commissioner spoke of "*filling*
19 *the gap*". Well, the gap is the loss of a limb, the
20 filling it is the provision of money in the ordinary 11:30
21 scheme of compensation and it's the same for damage to
22 reputation, damage to property, all sorts of schemes of
23 compensation involve the provision of something
24 *different* to which has been lost or that which has been
25 compensated for. That's a concept that's familiar to 11:30
26 the national law of every Member State, there is
27 nothing unusual in that, that compensation is not
28 providing the same thing that's been lost, not
29 necessarily, Judge.

1 That's important in my respectful submission when one
2 looks at what Article 26(2) is actually about, and it's
3 part of the error of reasoning of the Commissioner in
4 our respectful submission and I'll just detail that a
5 little further, if I may. 11:30

6
7 So if I could ask you now, Judge, if you wouldn't mind,
8 to look to the transcript of Day 1 and pages 34 to 37.

9 **MS. JUSTICE COSTELLO:** Did you say 34?

10 **MR. CUSH:** Page 34, Judge, and just on line 13 the 11:31
11 Commissioner was taking up recital 56.

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

13 **MR. CUSH:** And it's there read and a number of
14 observations are made about it and, as you go down
15 through 35, there's further reference to the other part 11:31
16 of 56 and, at the very bottom of page 35, you'll see
17 then a reference to 57. And 57, as we read it again:
18 *"whereas, on the other hand, the transfer of personal*
19 *data to a third country which does not ensure an*
20 *adequate level of protection must be prohibited."* 11:31

21
22 And then the Commissioner said: *"And so if you come to*
23 *the view that, despite whatever arrangements are put in*
24 *place such as the standard contractual clauses or*
25 *whatever, that doesn't give an adequate level of* 11:31
26 *protection to your data once it gets to the third*
27 *country such as the US, well then you have to prohibit*
28 *that transfer of data."*
29

1 And that, with respect, and I'll just say this in
2 passing in a moment because it features again later,
3 that, with respect, is an error; 57 is only speaking of
4 the inadequacy in the third country.

11:32

5
6 But further down the page at line 19, the Commissioner
7 comes to recital 59 and it is quoted. Then at line 24
8 the following is said:

9
10 *"So I pause there. The controller is the person who is* 11:32
11 *in control of data, in this instance, for example,*
12 *Facebook who have the data of EU citizens. If that*
13 *controller can offer appropriate safeguards so he can*
14 *say I know 'well maybe the law in the foreign country*
15 *doesn't have the necessary adequate protection but I'm* 11:32
16 *going to put in place certain safeguards as the*
17 *controller of the data and you can rest assured that by*
18 *virtue of those safeguards you're going to get the same*
19 *equivalent level of protection you would get', well*
20 *this Directive is making allowance for that possibility* 11:32
21 *and lay down procedures for that to happen.*

22
23 *That compensates for the lack of protection in a third*
24 *country. So whatever these safeguards, as I say in*
25 *this case the standard contractual clauses, the SCCs,* 11:33
26 *they must be such as to compensate for the lack of*
27 *protection. They are supposed to make up for the lack of*
28 *protection and bring you to the position that they*
29 *would be if there was the same level of protection or*

1 *an equivalent level of protection, so it fills the gap,*
2 *if I can use a colloquial term."*

3
4 So there you see the beginning of this idea that what
5 Article 26(2) envisages is the provision of the *same*, 11:33
6 subsequently slightly translated to "*filling the gap*".
7

8 And then, Judge, if I could ask you to go to page 52 --
9 I am so sorry, Judge, page 47.

10 **MS. JUSTICE COSTELLO:** Thank you. 11:34

11 **MR. CUSH:** And at 47 then the Commissioner at the foot
12 of the page, line 20, comes then to address the
13 relevant Articles and begins, line 23, with referring
14 to Article 25. It is there quoted and over the
15 following pages, through to 52, Article 25 is opened to 11:34
16 you, Judge, and a number of observations are made in
17 relation to it. I have no particular issue with what
18 is said about Article 25.
19

20 But then, Judge, if you come to 52, line 10, "*so that's* 11:34
21 *Article 25*" the Commissioner says. Then Article 26 is
22 headed "*Derogations*" and "*this says*" and it is opened
23 there. Line 21:
24

25 "*Then there are six conditions set out, alternative* 11:35
26 *conditions.*"
27

28 And then this submission is made, Judge: "*Now before*
29 *I come to the conditions, Judge, the first thing to*

1 notice is Article 25 lays down the essential principle;
2 if it's not adequate protection in the third country,
3 you can't make the transfers. But you can make the
4 transfers if you enter into some agreement or the
5 domestic law of the third country is such that it does 11:35
6 afford the necessary level of protection."
7

8 So that's other aspects of Article 25, those sentences
9 are referring to, Judge. And then it is said:

10
11 "If that doesn't happen, here's an alternative way in 11:35
12 which you can make the transfers. And what it then
13 does is sets out these six conditions."
14

15 Now reference is being made to Article 26(1): "But the 11:35
16 wording just before it is important; if you are in a
17 situation where the third country does not ensure an
18 adequate level of protection within the meaning of
19 Article 25(2). So the object at all times in
20 Article 26." 11:35
21

22 And that's 26 as a whole it is being said.

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

24 **MR. CUSH:** "Just as much as in Article 25, is to get to
25 the level of adequate protection that is provided for 11:36
26 in Article 25. It's the Article 25 adequate level of
27 protection is the gold standard that you have to meet.
28 And you can meet it either by the sort of international
29 agreement or change in domestic law referred to in

1 Article 25 or you can meet it if you come within one of
2 these six conditions that are now referred to in
3 Article 26. But it must at all times get you to home
4 base in terms of get you to the level of protection,
5 the adequate level of protection that is provided for 11:36
6 within the meaning of Article 25(2)."
7

8 Now, with respect, Judge, that's entirely in error. If
9 one looks to the six conditions in Article 26(1), not a
10 single one of them has anything to do with providing an 11:36
11 adequate level of protection. If you would just look
12 to them again, Judge.

13 **MS. JUSTICE COSTELLO:** Oh I think we are chopping and
14 changing between the two I better get the hard copy
15 out. 11:37

16 **MR. CUSH:** I am so sorry.

17 **MS. JUSTICE COSTELLO:** No, no, not at all, between
18 transcripts. Which book is it again?

19 **MR. CUSH:** Book 1 Tab 4 (short pause) and internal page
20 46. 11:37

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

22 **MR. CUSH:** So the six conditions: "*The data subject*
23 *has given his consent unambiguously to the proposed*
24 *transfer.*"

25 11:38
26 Now consent does not provide an adequate level of
27 protection, it's just something entirely different;
28 (b): "*The transfer is necessary for the performance of*
29 *a contract between a data subject and the controller or*

1 *the implementation of pre-contractual measures taken in*
2 *response to data subject's request.*" Nothing to do
3 with providing adequate level of protection envisaged
4 by 25:

5
6 *"Transfer is necessary for the conclusion of*
7 *performance of a contract, including the interests of*
8 *the data subject between a controller and third party."*

11:38

9
10 And it is true, Judge, if each one of the six
11 conditions, they are truly *exceptions* or *exemptions*
12 from Article 25 and it is significantly in error,
13 I suggest, to advance the idea that they are there to
14 meet the same level of protection as Article 25. They
15 are just not.

11:38

16
17 And I think in fairness to the Commissioner the error
18 of that proposition was probably quickly realised. So
19 if you can come back to the transcript, Judge.

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

11:39

21 **MR. CUSH:** Line 22, you see that a number of conditions
22 are set out:

23
24 *"Consent; it's necessary for the performance of a*
25 *contract between the data subject and the controller;*
26 *or, in the next one, between a controller and the third*
27 *party; it's necessary and important on public interest*
28 *grounds; or it's necessary to protect the vital*
29 *interests of the data subject; or the transfer is made*

1 *from a register according to laws and regulations that*
2 *is intended to provide information to the public."*

3
4 And so on. And those are specific exceptions that are
5 set out there. But then the one, we're not concerned 11:39
6 with any of those, Judge, none of those apply to the
7 present case. But in paragraph 2 it says and then
8 that's quoted. And then at line 20:

9
10 *"So you have got in 26.1 perhaps a different type of 11:39*
11 *exception, the ones that are specifically there - for*
12 *example, somebody could give their consent to a*
13 *transfer even though the third country doesn't achieve*
14 *the adequate level of protection, but because he's*
15 *consented to it, it's permitted. So there's a number*
16 *of exceptions under 26(1). But 26(2) has a slightly*
17 *different criteria, it's not just a question of an*
18 *exception. 26(2) is the one that has to achieve what*
19 *I've referred to as the gold standard of the adequate*
20 *protection under Article 25(2). And so you mightn't*
21 *achieve that under Article 26(1), for example, by way*
22 *of some of the specific exceptions that are there."*

23
24 So fairly quickly the Commissioner moved from saying 26
25 in its entirety and meeting these conditions in 26(1) 11:40
26 is designed to achieve the adequate level of protection
27 envisaged by Article 25 to saying 'well that mightn't
28 be true of 26(1) but it's now true of Article 26(2)'.
29 But the error in my respectful submission, Judge, it's

1 quite an important one in the context of the idea that
2 somehow a harmonious interpretation of these Articles
3 leads you to the conclusion that 26 in its entirety is
4 designed to achieve what 25 sets out as the core
5 principle. Quite clearly Article 26(1) has nothing to 11:41
6 do with achieving the level of protection envisaged by
7 25.

8
9 Then, Judge, if I could just ask you to follow on. At
10 line 26 on page 54: "*But 26(2) has a slightly 11:41*
11 *different criteria, it's not just a question of an*
12 *exception.*"

13
14 Oh sorry, I have read that, I beg your pardon.

15 **MS. JUSTICE COSTELLO:** I think you had gone to page 55. 11:41

16 **MR. CUSH:** I had, and I am terribly sorry, Judge. At
17 line 5, at the end of that line: "*And that's an*
18 *apparent just from its construction and its own*
19 *wording*". In other words, Article 26(2) has to achieve
20 the level of protection envisaged by 25. "*That's 11:42*
21 *apparent from its construction and its wording*" and
22 then that's developed in the following passage.

23
24 "*If you look at it; first of all, by definition you're*
25 *talking about transfers to a third country which does 11:42*
26 *not ensure an adequate level of protection within the*
27 *meaning of Article 25(2). And then, when can you make*
28 *the transfer? Where the controller adduces adequate -*
29 *and that's emphasised -- safeguards.*" So there you

1 have that *word* again, the *adequate* safeguards, which
2 obviously means the same as *adequate* as used four or
3 five words earlier in the same sentence.

4
5 Judge, can I just ask you to look again at the 11:42
6 Directive and 26(2) and the emphasis that's here being
7 placed:

8
9 "*without prejudice to paragraph 1, a Member State may*
10 *authorize a transfer or a set of transfers of personal* 11:42
11 *data to a third country which does not ensure an*
12 *adequate level of protection within the meaning of*
13 *25(2)."*

14
15 Adequate level of protection is the phraseology of 25: 11:43
16 "*where the controller adduces adequate safeguards*" and
17 the submission being made to you, Judge, is that use of
18 the word *adequate* twice, one picking up what's said in
19 25 and then, secondly, here referring to the adequate
20 safeguards envisaged by Article 26(2), that that use of 11:43
21 the word is something to which you should attach
22 significance.

23
24 Looking at the transcript again, line 15: "*which*
25 *obviously means the same as "adequate" as used four or* 11:43
26 *five words earlier in the same sentence - adequate*
27 *level of protection within the meaning of Article*
28 *25(2). That's not there, but the controller adduces*
29 *adequate safeguards with respect to the protection of*

1 *the privacy and fundamental rights and freedoms of the*
2 *individuals and as regards the exercise of the*
3 *corresponding rights.*

4
5 *So it identifies the very specific rights that this*
6 *Directive is all about and it refers to the, in a*
7 *sense, the failure to -- "failure" is perhaps the wrong*
8 *word, but the difference in the level of protection*
9 *afforded in the third country, it's not adequate within*
10 *the meaning of Article 25(2), but the controller puts*
11 *in place some safeguards that are adequate for that*
12 *purpose. So you have to get back to the gold standard*
13 *of Article 25 adequacy of protection by means of these*
14 *mechanisms under Article 26(2)."*

15
11:44

16 And, Judge, could I just say to you that when you look
17 at the other language versions of the Directive, you'll
18 see in the French, German, Spanish, and indeed others,
19 but just those three, and I will have them for you at
20 the end, Judge, that that word --

11:44

21 **MS. JUSTICE COSTELLO:** I have no fluency in those at
22 that level, certainly not Spanish, whatever about
23 German and French.

24 **MR. CUSH:** Actually Spanish is perhaps one of the
25 easiest because you can just see it. The point being,
26 a very simple one: The same word is not used, so
27 what's being emphasised to you is *adequate* is used
28 twice. What is used in the other languages is *adequate*
29 when referring to the level of protection, which is the

11:44

1 25 concept, but, in terms of the protections or
2 guarantees that are spoken of, it's *sufficient*, and you
3 can see that. It's a different word used.

4
5 So this is an instrument of Community law, you just 11:45
6 can't attach significance to a one language similarity,
7 the use of an identical word in different lines when
8 that same identical word is not repeated in other
9 languages. You just can't do that as a matter of
10 interpretation and that is a misplaced emphasis on the 11:45
11 part of the Commissioner. So I'll just identify the
12 factual basis of that for you, Judge, at the end,
13 I have the book and you will actually be able to see it
14 quite clearly.

15
16 Then, Judge, if you just look to 56. 11:45

17 **MS. JUSTICE COSTELLO:** Page 56?

18 **MR. CUSH:** Page 56, I am sorry, Judge, and line 19.
19 Subparagraph 4 of 26 has been opened.

20 **MS. JUSTICE COSTELLO:** Hmm. 11:46

21 **MR. CUSH:** *"So the Commission can decide in particular*
22 *here are certain standard contractual clauses which*
23 *will form part of an agreement between the controller*
24 *who's transmitting the data from the EU - Facebook*
25 *Ireland in this case - to the person who is receiving*
26 *the data in the United States - Facebook Inc. in this*
27 *particular case - and if that relationship is regulated*
28 *by these particular set of contractual clauses, well,*
29 *then -- and the Commission then decides that that is*

1 *adequate safeguards within the meaning of adequacy of*
2 *protection under Article 25."*

3
4 And, Judge, that's not what 26(4) says, if you would
5 just look at it again. 11:46

6 **MS. JUSTICE COSTELLO:** Yes.

7 **MR. CUSH:** 26(4) is referencing the sufficient
8 safeguards as required by paragraph 2, that's 26(2).
9 It is *not* a reference back to adequate level of
10 protection in 25. 11:47

11
12 Judge, if you go to 58, line 13: "*So I respectfully*
13 *submit that on any ordinary construction, therefore, of*
14 *Article 26(2), what you have to look at is to see*
15 *whether or not these safeguards in the present case in*
16 *the form of the standard contractual clauses amount to*
17 *providing an adequate level of protection within the*
18 *meaning of Article 25(2). And as you'll see from the*
19 *case law, that concept of an adequate level of*
20 *protection has been interpreted to mean a very high* 11:47
21 *level of protection."*

22
23 So it's baldly asserted that any ordinary construction
24 of 26(2) points you back to 25(2), the *same* thing. And
25 in our respectful submission no ordinary principle of 11:48
26 construction does anything of the sort.

27
28 And 59, Judge, line 4: "*And we say no, the reference*
29 *to the controller adducing adequate safeguards in 26(2)*

1 *can only, on any ordinary principle of Community law*
2 *interpretation of the article, must mean the concept of*
3 *adequate level of protection within the meaning of*
4 *Article 25(2), and that it would be almost*
5 *inconceivable that, having expressly referred to an* 11:48
6 *adequate level of protection within the meaning of*
7 *Article 25(2), when the very next phrase refers to the*
8 *controller adducing adequate safeguards, that the*
9 *Commission was talking about something different and*
10 *some other concept of adequacy to the very concept of* 11:48
11 *adequacy that it's just identified, that within the*
12 *meaning of Article 25(2)."*

13
14 So this adequacy, the double use of the word *adequate*
15 in the English language version is core to the 11:49
16 Commissioner's suggestion of what are ordinary
17 principles of construction.

18
19 Then, Judge, if I could pass from that and just go to
20 Day 2, if you would permit me one extract. 11:49

21 **MS. JUSTICE COSTELLO:** what page?

22 **MR. CUSH:** Page 9, Judge.

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

24 **MR. CUSH:** At line 22:

25
26 *"You will recall the distinction I drew between 26(1)*
27 *and 26(2) yesterday. 26(1) contains certain exceptions*
28 *such as somebody consenting where you may not*
29 *necessarily meet the adequacy standard of Article 25,* 11:49

1 *but Article 26(2) does refer to the adequacy standards*
2 *of Article 25 and I say that therefore, whatever the*
3 *procedure allowed for under Article 26(2) such as the*
4 *SCCs, must in substance amount to the same adequacy*
5 *standard as Article 25."*

11:50

6
7 Now just two observations about that, Judge. A
8 distinction is being drawn between 26(1) and 26(2),
9 clearly.

10 **MS. JUSTICE COSTELLO:** Hmm.

11:50

11 **MR. CUSH:** Not originally but now acknowledged. And it
12 is said Article 26(2) *does* refer to the adequacy
13 standards of Article 25. But, Judge, Article 26(1)
14 makes exactly the same reference to the adequacy
15 standards of Article 25, if you wouldn't mind just
16 looking at it again.

11:50

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

18 **MR. CUSH:** Article 26(1) in the fourth line or third
19 line says:

20
21 *"Member States shall provide that a transfer or set of*
22 *transfers of personal data to a third country which*
23 *does not ensure an adequate level of protection."*

11:51

24
25 In other words, it's the same prerequisite to this
26 arising all, these exceptions. That's the reference,
27 *"it does not ensure an adequate level of protection".*

11:51

28
29 If you go to Article 26(2), third line: *"Data to a*

1 *third country which does not ensure an adequate level*
2 *of protection".* They make the identical reference to
3 25, and yet now it is being suggested in this passage
4 that because Article 26(2), as it is said on line 26,
5 *does refer to the adequacy stands of Article 25, well* 11:51
6 *it says but only to indicate that it's a prerequisite*
7 *to this arising at all and subject to Article 26(1),*
8 *but now it says that, therefore, it follows that it has*
9 *to be the same. The same. And again that reference to*
10 *the same.* 11:52

11 **MS. JUSTICE COSTELLO:** And is that the same, is he
12 referring there to the adequate safeguards, adequate as
13 opposed to adequate level of protection, referring back
14 to Article 25(2)?

15 **MR. CUSH:** If you look at the very last line: "*Must in* 11:52
16 *substance amount to the same adequacy standard as in*
17 *Article 25".* It's the same point again, Judge, forgive
18 me for saying "*same*", it's a repeat of the point that
19 it has to be the *same* as Article 25.

20
21 And then, Judge, lastly on the transcripts, if I could
22 ask you to go to Day 6. What the Commissioner is
23 actually doing here is bringing the court to its own
24 written submissions. I'm not going to go there, but
25 there are in the course of that some observations. So 11:52
26 page 78, Judge, I am so sorry.

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

28 **MR. CUSH:** Line 9, just to identify where it begins.

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

1 **MR. CUSH:** And we see there, the Commissioner is
2 turning to Article 25 and 26. And then, moving down to
3 79, you see that extracts from their own submissions
4 are being referred to. And then Article 26 is referred
5 to on page 80, the terms, Judge. 11:53

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

7 **MR. CUSH:** And on page 81, it is said, line 1:

8
9 *"Rather, where a data transfer is made pursuant to the*
10 *SCCs decisions, it's made on the premise that the SCCs* 11:53
11 *provide sufficient safeguards within the meaning of*
12 *26(4)."*

13
14 That's absolutely right, that's a reference to 26:

15 *"The safeguards provided by the SCCs must be, in turn,* 11:54
16 *be such as to enable the controller to adduce adequate*
17 *safeguards within the meaning the Article 26(1)."*

18
19 Now I think that just might be a slip because there's
20 no reference to adequate safeguards in 26(1), but 11:54
21 leaving that to one side. Then it continues:

22
23 *"So if adequate protection cannot be provided by the*
24 *third country, it will have to be supplied by the*
25 *controller, including by way of adherence to the SCCs.* 11:54
26 *The underlying premise is, therefore, unequivocal; if*
27 *the third country does not provide adequate protection,*
28 *the SCC has to match -- sorry, remedy the inadequacy."*
29

1 Slight change: *"Just to stop there. And that's why,*
2 *in the Commissioner's submission, you had to begin by*
3 *identifying what the inadequacy is, because it's only*
4 *when you have done that that you can proceed to*
5 *consider the extent to which it is addressed by the SCC* 11:54
6 *--"*

7
8 And you intervene, Judge, picking up language from some
9 days before, *"if there is a gap and it says 'plug the*
10 *gap'"* and they said: *"Exactly. Otherwise you're* 11:55
11 *looking at the SCC divorced from its actual purpose and*
12 *intention."*

13
14 And that phraseology in line 19 *"consider the extent to*
15 *which it is addressed by the SCC"* is in fact picking up 11:55
16 the language of the Draft Decision, and I'll come to
17 that in a moment.

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

19 **MR. CUSH:** And if you turn then, Judge, to page 86,
20 line 18: 11:55

21
22 *"Now just perhaps to stop there, Judge. I mean, there*
23 *will, of course, be inadequacies that are or that may*
24 *present themselves in third countries that can be*
25 *resolved by appropriate provision in an SCC - the*
26 *making available of claims and perhaps compensation is*
27 *one of them - which may not be available within the*
28 *State, or other deficiencies in entitlements to*
29 *notification or rectification. You can perhaps*

1 *envisage circumstances in which they would occur.*

2
3 *But here the problem which was identified by the*
4 *Commission - namely, the inadequacy defined by the US*
5 *law's failure to provide the essentials of a legal* 11:56
6 *remedy under Article 47 - is not something that could*
7 *be remedied by the SCC; it is a deficiency in the*
8 *remedial system in the United States itself."*

9
10 And there you have this analysis that says we have to 11:56
11 analyse in detail the law of the foreign state to see
12 does it provide an adequate level of protection, we
13 have to identify with precision the inadequacy and then
14 we look to the SCCs to see does it fill that inadequacy
15 so that you can get back to the *same*, as it was put. 11:56

16
17 That's the whole purpose of 26(2) according to the
18 Commission. And it's pursuit of the *same* that in our
19 respectful submission is so much in error and has led
20 to an analysis which is completely misplaced, this 11:57
21 incredibly detailed analysis of the foreign law,
22 firstly done by the Commissioner, now the court has
23 engaged in it. What's to happen when the next
24 complaint concern the transfer to India, China, Korea,
25 Russia. One of the disappointed amici applicants was 11:57
26 an Indian representative body, who came too late
27 perhaps, but expressing huge concern about the data
28 transfers to India and the importance of SCCs; is the
29 Commissioner on every occasion to endeavour to analyse

1 the intricacies of the foreign law in detail to
2 identify precisely the inadequacy and then look to the
3 SCCs and say 'do you fill *that* particular gap'. Now
4 that's unworkable, it's not what's envisaged.

11:58

5
6 And if I could just ask you at this point, Judge, to
7 look to the actual Draft Decision. You'll find it in
8 trial Book 1 at Tab 18.

9 **MS. JUSTICE COSTELLO:** Have we finished with the
10 transcripts?

11:58

11 **MR. CUSH:** Yes, Judge. Judge, if you have that, at
12 internal page 15, the Commission identified for herself
13 two questions:

14
15 *"whether by reference to the adequacy criteria*
16 *identified the Article 25(2) of the Directive, the US*
17 *ensures adequate protection for the data protection*
18 *rights of EU citizens; and (b) and if and to the extent*
19 *that the US does not ensure adequate protection,*
20 *whether it is open to FB-I to rely on one or more of*
21 *the derogations, provided for at Article 26 of the*
22 *Directive to legitimise the transfer of subscribers'*
23 *personal data to the US, if indeed, if indeed such*
24 *transfers continue to take place."*

11:59

11:59

25
26 And that's a perfectly appropriate set of questions, if
27 you like. Where we would part company, Judge, is of
28 course for 26(2) to arise at all it is a prerequisite
29 that there isn't an adequate level of protection, so

11:59

1 that has to be at least identified as a matter of fact.
2 where we part company is the extraordinary detailed
3 analysis engaged upon, we say that's wholly
4 unnecessary, to identify precisely these inadequacies.

5
6 Then, Judge, if you looked at page 17, two questions
7 again, middle of the page: "*Does the US ensure*
8 *adequate protection of the data protection rights of*
9 *the EU citizens; if not, do the SCC decision in fact*
10 *offer adequate safeguards with respect to the privacy*
11 *and fundamental rights and freedoms of individuals as*
12 *regards the exercise of their corresponding rights.*"

13
14 And those are two perfectly appropriate questions.

15
16 On page 18 then, Judge, at paragraph 39 the
17 Commissioner considers the first of the questions about
18 the US, and that analysis runs all the way to page 29.
19 And at paragraph 60 the Commissioner says:

20
21 "*For all the reasons outlined above, therefore, I have*
22 *formed the view, subject to considerations of*
23 *submissions that may be submitted in due course by the*
24 *complainant and Facebook Ireland, that, at least on the*
25 *question of redress, the objections raised by the CJEU*
26 *in its judgment in Schrems have not yet been answered.*"

27
28 so that's the analysis that leads to the conclusion
29 that those particular deficiencies still arise in US

1 law. And then in one paragraph the 26(2) analysis is
2 dealt with. And the Commissioner says:

3
4 *"It is also my view that the safeguards purportedly*
5 *constituted by the standard contract clauses set out in* 12:01
6 *the annexes to the SCCs decision do not address the*
7 *CJEU's objections concerning the absence of defective*
8 *remedy compatible with the requirement of Article 47 of*
9 *the chapter as outlined in Schrems, nor could they."*

10 12:02
11 And of course this is logically correct. But it's not
12 addressing the right question. It says: *"On their*
13 *terms the standard contract clause in question do no*
14 *more than establish a right in contract in favour of*
15 *data subjects to a remedy against either or both of the* 12:02
16 *data exporter and importer. Importantly for current*
17 *purposes there is no question but that the SCC*
18 *decisions are not binding on any US government agency*
19 *or other US public body, nor do they purport to be so*
20 *binding."* 12:02

21
22 well of course they are not. How could they possibly
23 be: *"It follows that they make no provision whatsoever*
24 *for a right in favour of a data subject to access to an*
25 *effective remedy in the event that their data is or may* 12:02
26 *be the subject of interference by a US public*
27 *authority."*

28
29 And that must be read as meaning as against the US.

1 Article 26(2) refers to adequate safeguards.

2 **MS. JUSTICE COSTELLO:** That's what I was just thinking
3 and you are using "*sufficient*" from the other
4 translations, is that it?

5 **MR. CUSH:** Yes. But actually 26(4) refers to, from 12:04
6 recollection, does refer to sufficiency.

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

8 **MR. CUSH:** Or sufficient protection, I can't remember.

9 **MS. JUSTICE COSTELLO:** It says: "*sufficient safeguards*
10 *as required by paragraph 2*". 12:04

11 **MR. CUSH:** Yes. So adequacy and sufficiency are there
12 equated and in the other translations it is
13 sufficiency. And in fact they speak of not protections
14 or safeguards but they sometimes speak of guarantees.
15 But the whole emphasis on adequacy and the idea of the 12:04
16 sameness, that's misplaced in our respectful
17 submission.

18

19 So if this were the only issue in the case, Judge, and
20 I can readily see that it is not, this analysis of the 12:04
21 Commissioner, this suggestion that there is doubts
22 sufficient for you to refer the issue, Judge, if that
23 were the only debate in the case, in our respectful
24 submission that would not warrant a reference, the
25 Commissioner is in error and clearly so. 12:05

26

27 But of course you have, and I'm not going to dwell on
28 this, but you have, somewhat strangely perhaps, the
29 main protagonists, Mr. Schrems and Facebook, being of

1 the same view, albeit for different reasons, that there
2 shouldn't be a reference. Mr. Schrems is saying that
3 in fact his complaint is really centred upon
4 non-compliance with the SCCs, and that's what he would
5 like to have resolved by the Commissioner and he says 12:05
6 there's no need for a reference to resolve that.

7 **MS. JUSTICE COSTELLO:** I think he actually says that
8 I should, that the Commissioner should be prohibiting
9 the data flows on the basis of the information she has
10 to date. 12:05

11 **MR. CUSH:** Exactly, yes. And then Facebook for a
12 variety of reasons, including perhaps I think support
13 for the one I have just advanced, I'm not sure that
14 that's so but I think it is so, but for other reasons
15 also the absence of any consideration of the Privacy 12:06
16 Shield, for example. But there are a whole series of
17 reasons being advanced to you why you shouldn't refer.
18 And we are confining ourselves to this one and saying
19 if this is the only thing in the case but it's not then
20 in our respectful submission the Commissioner is 12:06
21 clearly in error for the reasons outlined.

22 **MS. JUSTICE COSTELLO:** Thank you very much.

23 **MR. CUSH:** Thank you, Judge.

24 **MS. BARRINGTON:** I'm going to perhaps going to allow
25 Mr. Cush to get out, Judge. 12:06

26 **MS. JUSTICE COSTELLO:** Oh, is Mr. Maurice Collins
27 obviously?

28 **MS. BARRINGTON:** Oh we have switched order, I am
29 afraid, Judge. I am sorry, I should have told you

1 that.

2 **MS. JUSTICE COSTELLO:** Not at all. (Short pause)

3

4 **SUBMISSION BY MS. BARRINGTON:**

5

12:06

6 **MS. BARRINGTON:** Thank you, Judge. I think I indicated
7 to the court, I appear with Ms. Suzanne Kingston
8 instructed by McCann FitzGerald solicitors. Judge,
9 I propose at the outset making, if I may, some general
10 observations before outlining to the court the matters 12:07
11 that I don't propose addressing and then setting out
12 the structure of the matters that I do propose
13 addressing.

14

15 I want to make two sets of general observations, if 12:07
16 I may, Judge: First, to discuss the unusual nature of
17 these proceedings; and, second, to suggest to the court
18 that these proceedings have been entirely overtaken by
19 events by reason of the adoption of the Privacy Shield.
20 And ultimately I'll be saying to the court for a number 12:07
21 of reasons that this court should not refer any
22 question to the Court of Justice.

23

24 Judge, the court will know that a number of amici or
25 proposed amici applied to be joined to the proceedings. 12:07
26 I think the United States were the first out of the
27 traps and they outlined to the court that they were
28 looking to join the proceedings because it's in the
29 unusual position of being the sovereign state whose

1 laws are at the heart of this case and yet
2 paradoxically it's perhaps confined to, for procedural
3 reasons, a peripheral role as amicus and it's in an
4 unusual position.

5
6 I think it's also true to say that the United States
7 has rarely, if ever, applied to be joined as an amicus
8 in a foreign court. It has done that because it views
9 these proceedings views as being of critical
10 significance. They are unique and unprecedented, 12:08
11 I would suggest to the court, involving a court of a
12 Member State reviewing or being asked to review in this
13 level of detail the laws of a third country to assess
14 their adequacy, it is contended, from the perspective
15 of EU law. And of course the United States is not just 12:08
16 any third country, it's a third country that now
17 benefits from an Adequacy Decision decided upon after
18 two and a half years of negotiation with the European
19 Commission.

20
21 The court may know, I think it's mentioned in the
22 submissions, that there are a total of only eleven
23 adequacy decisions that the Commission has adopted.
24 And the court will see in due course that the Adequacy
25 Decision relating to America is significantly greater, 12:09
26 more complex and more detailed than any of the other
27 adequacy decisions.

28
29 The United States has achieved that Adequacy Decision

1 by extensive negotiations with the Commission, as
2 I have indicated some two and a half years, and in
3 those circumstances, because that Adequacy Decision was
4 in train, because of its critical interest in the
5 proceedings, and because of the potential ramifications 12:10
6 of what this court is being asked to do, both from a
7 legal and a commercial perspective, the United States
8 asked to be joined to these proceedings. And I think
9 the court knows from the interest of all the other
10 amici that the commercial implications of these 12:10
11 proceedings cannot be exaggerated.

12
13 The United States was also conscious of the fact that
14 in Schrems 1, both the High Court decision and indeed 12:10
15 the decision of the Court of Justice proceeded without
16 any comprehensive evidential basis with the result
17 that, by the time the Court of Justice came to decide
18 the matter, it had an incomplete, in our submission,
19 picture of the United States régime, and the United
20 States was extremely anxious to ensure that that did 12:11
21 not happen again. And that, in the event of a
22 reference, the full picture, the full panoply of
23 protections afforded by US law in this situation is
24 comprehensively outlined to the Court of Justice, if
25 there were to be a reference. 12:11
26

27 And I said not only any third country, Judge, because
28 of the Adequacy Decision, but also because of the
29 constitutional tradition of the United States. And,

1 Judge, I'm just going to allow the stenographer to
2 change.

3
4 The United States has, of course, the court will know,
5 its constitutional principles of the separation of 12:12
6 powers and, in this context, a sophisticated balance of
7 national security and privacy interests and a
8 sophisticated regime of checks and balances to ensure
9 that the correct equilibrium is achieved and maintained
10 between those perhaps divergent interests. 12:12

11
12 Its privacy protection principles in part predate the
13 EU data protection regime, which is perhaps one of the
14 problems, because one can see in the Adequacy Decisions
15 and in perhaps the criticisms of the Data Protection 12:12
16 Commissioner that if the United States had a regime
17 that perfectly mirrored the Data Protection Directive,
18 certain of the issues that have cropped up might *not* be
19 articulated. And notwithstanding the antiquity of
20 certain of the protections provided, of course 12:13
21 post-Snowden then there were a number of very
22 significant systemic and remedial reforms, which of
23 course weren't considered and, in fairness, not all of
24 which were in place at the time of the Schrems 1
25 decision. 12:13

26
27 All of which means that when *this* court is being asked
28 to consider the adequacy of US law, if it has to *get*
29 that far - and for various reasons, we'll say that it

1 doesn't - it *must* look in a holistic way at the
2 totality of the protections afforded by US law to
3 respond to privacy concerns.
4

5 The court will have noted in its very many readings of 12:14
6 ACLU -v- Clapper that the Second Circuit said in that
7 case that reconciling the clash between privacy and
8 security interests required productive contribution
9 from all three branches of government. And that is
10 fundamentally our position, Judge, and something which 12:14
11 we contend that the Data Protection Commissioner, in
12 error, has not had regard to, by looking exclusively
13 through a very narrow perspective of judicial remedies
14 only. And it's for that reason that the United States
15 considers that the draft decision is, unfortunately, 12:14
16 fatally flawed, because it fails to appreciate the
17 contribution from all of the three branches, which
18 contribution is all the more significant *because* we're
19 talking about national security. And the European
20 Court of Human Rights, the Commission, the Fundamental 12:15
21 Rights Agency all acknowledge that in that particular
22 area, judicial remedies must be considered in a
23 contextual manner. And accordingly, by failing to do
24 that, the Data Protection Commissioner has entirely
25 erred in her approach. 12:15
26

27 Judge, I think it's perhaps also perhaps unnecessary,
28 but useful to observe that it's inevitable that any
29 national legal system in this area will have its

1 critics. But these proceedings cannot be and *are* not
2 to be, according to Schrems, about whether the American
3 system could be improved or whether there should be
4 reforms. And certainly we've heard from some very
5 legitimate perspectives and strongly held views, and 12:16
6 the United States welcomes the fact that those views
7 have been aired, but they certainly don't, Judge, fall
8 into the court's consideration of the question of
9 adequacy. Because that is not what European law
10 suggests the test should be. 12:16

11
12 I think the court also, fundamentally, must not lose
13 sight of the fact that the *only* expert to opine *both* on
14 American *and* US law, Prof. Swire, has given
15 uncontroverted evidence that the overall 12:16
16 intelligence-related safeguards for personal data held
17 in the US are *greater* than the safeguards available in
18 the individual Member States. And he says that at
19 paragraph seven of his report. He hasn't been
20 challenged on that, Judge. That is simply a given. 12:17
21 And he cites Prof. Brown, in his 2015 Oxford study, who
22 says that the legal framework for foreign intelligence
23 collection in the US - as enhanced, admittedly, by
24 PPD-28 - contains much clearer rules on the
25 authorisation and limits on the collection, use, 12:17
26 sharing and oversight of data relating to foreign
27 nationals than the equivalent laws of almost all EU
28 Member States, such that the US now serves - and I
29 think we heard this line from Prof. Swire - as a

1 baseline for foreign intelligence standards. And again
2 there's no challenge, Judge, to that position. And it
3 is an extremely relevant factor when considering the
4 question of adequacy and when considering as part of
5 that question what is the appropriate comparator. Mr. 12:18
6 Gallagher, in making his opening observations, did
7 touch upon that question, Judge; by reference to what
8 is the system in the United States to be compared?

9
10 we'll also, Judge, at the end of my submissions, be 12:18
11 asking the court to consider what the from a report,
12 which Mr. Gallagher also alluded to, which is a report
13 conducted by the Fundamental Rights Agency, established
14 by a decision of EU law, has to say in its study of the
15 totality of the complex regimes provided for in the 12:18
16 individual Member States.

17
18 Judge, if I could move on then to saying why we believe
19 that these proceedings are entirely overtaken by
20 events. They're overtaken by events *because* of the 12:18
21 adoption of the Privacy Shield. I'm just going to
22 perhaps take the court through, if I may, the
23 chronology of events, much of which will already be
24 clear to the court, and I'll do so briefly.

25 12:19
26 Obviously Mr. Schrems, back in the summer of 2013,
27 brought his original complaint. That complaint has
28 been described by the Data Protection Commissioner in
29 her draft decision, I think it's at paragraph 19, as a

1 full frontal challenge to the Safe Harbour decision.
2 And the Court of Justice, in October 2015, of course,
3 invalidated the Safe Harbour decision on the basis, the
4 *procedural* basis that the Commission hadn't indicated
5 in the context of its decision whether it had 12:19
6 determined that the United States provided an adequate
7 level of protection.

8
9 The matter then was remitted by Hogan J. to the Data
10 Protection Commissioner for fresh consideration and 12:20
11 Mr. Schrems was afforded an opportunity to make what is
12 referred to as the reformulated complaint. And he
13 submitted his reformulated complaint in December 2015.
14 And in effect, his complaint is that once transfers are
15 effected to the United States, Facebook Inc. in the 12:20
16 United States may be obliged to make his data available
17 to the US Government. It is important, Judge, I think,
18 to recall the basis of the complaint, because certainly
19 we've heard a number of issues addressed by EPIC
20 yesterday, for example, which simply don't seem to fall 12:20
21 within the parameters of the complaint and of these
22 proceedings, Judge, as a result.

23
24 Mr. Schrems, in his letter, says a number of things
25 that we contend, Judge, are entirely *inaccurate* in 12:21
26 relation to the US, what is referred to as the SIGINT,
27 signals intelligence. What he says in relation to US
28 SIGINT is incorrect in a number of respects, Judge, but
29 I don't propose wearying the court with going through

1 that.

2
3 In February of 2016 the draft Privacy Shield decision
4 was published by the Commission. And in that month the
5 United States, *aware* of the fact that Hogan J. had 12:21
6 remitted the matter back to the Data Protection
7 Commissioner for fresh consideration, but unaware of
8 Mr. Schrems' precise complaint, which it didn't see
9 until it became involved in these proceedings, wrote to
10 the Data Protection Commissioner, indicating that it 12:21
11 *wished* to make a submission and indicating that it
12 *wished* to provide information in relation to the draft
13 Privacy Shield. And these facts are deposed to by
14 Ms. Chapin in the affidavit grounding the application
15 to join the proceedings. 12:22

16
17 We know then that in April of 2016 the Article 29
18 Working Party published its opinion on the Privacy
19 Shield and expressed certain concerns and asked for
20 certain clarifications. In the interim, of course, 12:22
21 there was significant interaction between not only the
22 United States and the Commission, but the United States
23 and the Article 29 Committee itself - the Commerce
24 Secretary met directly with the Chair of the Article 29
25 Committee in April. 12:22

26
27 In May, the European Parliament adopted a resolution on
28 transatlantic data flows. And on 16th May, the United
29 States submitted material relating to the Privacy

1 Shield framework to the Data Protection Commissioner
2 and outlining its desire to make submissions.

3
4 The Data Protection Commissioner, the court will have
5 seen, notes at paragraph 42 of her decision that she 12:23
6 received *unsolicited* submissions from the United
7 States. And it's apparent that while we received an
8 acknowledgment, this material in relation to the
9 Privacy Shield wasn't considered and the Data
10 Protection Commissioner proceeded to make her decision, 12:23
11 or her draft decision without ever seeking or being
12 provided with *any* submission by the United States in
13 relation to the consideration of *its* laws or the
14 question of the adequacy of its laws, or indeed even
15 the *approach* that might be taken to the question of 12:24
16 adequacy. And, Judge, it is, I think, surprising that
17 the Data Protection Commissioner, having regard to the
18 significance of the draft decision, proceeded as she
19 did, with the input, it would appear, exclusively from
20 Mr. Serwin without seeking to consult with or hear from 12:24
21 the United States.

22
23 In the meantime, the Privacy Shield negotiations were
24 proceeding, Judge. The court will see from the Bob
25 Litt letters that I'm going to ask the court to look at 12:24
26 that additional information was provided by the United
27 States by way of assurances and reassurance to the
28 European Commission. Mr. Litt, the court will have
29 seen, was the General Counsel to the Office of the

1 Director of National Intelligence.

2
3 On 1st July the Working Party issued the statement that
4 was handed in to the court by Mr. Collins welcoming the
5 improvements brought about in the Privacy Shield and 12:25
6 commending the Commission and the United States for
7 having taken the Working Party's prior concerns into
8 account and requests for clarifications. I think there
9 was one criticism that continued to be expressed in the
10 statement that was handed in, indicating that it 12:25
11 regretted the lack of concrete assurances that mass and
12 indiscriminate collection of personal data didn't take
13 place. In fact the court will see that that assurance
14 *is* provided in Mr. Litt's second letter.

15 12:25
16 Then on 8th July, Judge, the committee composed of
17 representatives of the Member States, the Article 31
18 Committee, adopted the Privacy Shield Decision. And
19 it's a matter of public record, I think, Judge, that
20 that decision was adopted on the basis of there having 12:26
21 been *no* votes against it. And in that regard, Judge, I
22 can hand in to the court a minute from the House of
23 Commons Select Committee. The Commission statement
24 that was handed in to the court indicated that the vast
25 majority, I think was the wording, of the Member States 12:26
26 voted in favour of it (Same Handed). The court will
27 see that the House of Commons Select Committee wrote to
28 the Minister to inquire specifically in relation to the
29 outcome of the vote and if the court looks at

1 two-thirds of the way down the page, the Minister's
2 letter of 26th October 2016 records:

3
4 *"The Minister responds to the questions we asked in our*
5 *report as follows. The text was adopted by the* 12:26
6 *Commission on 12th July. This followed approval by the*
7 *Article 31 Committee at its meeting on 8th July. A*
8 *formal vote was taken by Member States, through their*
9 *representatives, with 24 members in favour, including*
10 *the UK, none against and four abstentions."* 12:27

11
12 At that stage, Judge, the DPC, notwithstanding her
13 *involvement* in this process as a member of the Article
14 29 working Party and in clear *knowledge* of the
15 developments in relation to the Privacy Shield, had 12:27
16 proceeded to adopt the decision on 24th -- or her draft
17 decision - I'm sorry, I keep referring to it as a
18 decision. And no indication, Judge, is given in the
19 draft decision as to *why* she decided to push ahead with
20 her draft, which, of course, she describes as being 12:28
21 something that in respect of which further submissions
22 might be received and considered by her. And it is, in
23 our submission, unusual that she chose this
24 precipitated route, in circumstances where she knew the
25 significance of what was happening in the European 12:28
26 parallel process.

27
28 The draft decision is stated to be subject to further
29 submissions, but the court will know that these

1 proceedings issued within a week of the adoption of the
2 draft decision. And Mr. Collins, on day one, indicated
3 that the Commissioner's concern was simply to get it
4 right and suggested that these weren't usual
5 proceedings - and that's certainly true - and the 12:28
6 Commissioner wasn't advocating any particular result.
7 But I think the court will have noted that the
8 proceedings have certainly taken on all the hallmarks
9 of adversarial proceedings. And accordingly, there
10 hasn't *been* any consultation or further submission, as 12:29
11 was seemingly envisaged by the Data Protection
12 Commissioner, who got her proceedings out within a
13 week. And she got her proceedings out in circumstances
14 where, on the same day, she had got the revised
15 memorandum of Mr. Serwin, although he clarified in his 12:29
16 evidence that he had provided the same report, absent a
17 brief consideration of Spokeo, two weeks earlier.

18
19 Mr. Serwin, of course, doesn't practice in the area of
20 national surveillance, which he clarified during the 12:30
21 course of his evidence. And I don't propose going
22 through, Judge, what Mr. Serwin says in his report and
23 the court will have heard all of his evidence in
24 Ms. Hyland's cross-examination. But no indication is
25 given in the decision as to why it was exclusively 12:30
26 Mr. Serwin's report that provided the basis for her
27 draft decision, or perhaps more importantly, why was it
28 that Mr. Serwin was *only* asked about remedies? Because
29 that is the significant problem here, as I think I've

1 probably said already a number of times, Judge.

2
3 Mr. Serwin is asked for his view on remedies and the
4 DPC says because he has indicated that the remedies are
5 perhaps sectoral and that the remedies are attached by 12:31
6 a degree of unsurprising conditionality in respect of
7 some of them, that she didn't need to go any further,
8 because it was apparent that the remedies were
9 deficient. Well, one wonders how she knew that in
10 *advance* of receipt of Mr. Serwin's advice, because it's 12:31
11 not apparent that she asked for *any* additional input in
12 relation to the descriptions of the US regime that are
13 now before *this* court.

14
15 So, Judge, we immediately applied to be joined to these 12:31
16 proceedings and we indicated not only our concerns
17 about the proceedings and their ramifications, their
18 implications, but also advised the court of the
19 developments in relation to the Privacy Shield. And
20 the court will note that in the reply delivered by the 12:32
21 Data Protection Commissioner on 30th September - I'm
22 not asking the court to look at the pleadings now, but
23 simply to note that at paragraph 6.1 the Data
24 Protection Commissioner says the draft decision needs
25 to be read in the light of the Privacy Shield and that 12:32
26 the Commissioner will refer to the Privacy Shield
27 Decision at the hearing of the action for its true
28 meaning and effect. And the use of that standard
29 formula in *this* context doesn't avoid the prompting,

1 Judge, of the question: *what* true meaning and effect
2 will the Data Protection Commissioner say that the
3 *binding* EU measure has on these proceedings?
4

5 It's equally striking, Judge, that when one considers 12:33
6 the Data Protection Commissioner's submissions -
7 detailed submissions - they make, I think, a glancing
8 reference to the Privacy Shield at page 37, paragraph
9 110, where the issue as to whether the Ombudsperson is
10 a judicial officer is addressed. And when the 12:33
11 proceedings opened by Mr. Collins, it wasn't until day
12 three that any reference was made to the Privacy
13 Shield. And I'll come on, Judge, to a consideration of
14 what he *said* on day three in relation to the Privacy
15 Shield. 12:33

16
17 One can perhaps readily understand that the Data
18 Protection Commissioner is in an unusual position,
19 having issued her proceedings so quickly;
20 notwithstanding the European law developments, she now 12:33
21 has a binding measure of EU law to deal with and its
22 impact on the proceedings. But in our submission, the
23 issue simply hasn't been addressed in a satisfactory
24 way. And accordingly, Judge, we support the position
25 that *no* reference to the Court of Justice is required, 12:34
26 because the proceedings have been overtaken by events.
27

28 And even if they *weren't* overtaken by events, Judge,
29 fundamentally - and our written submissions focus on

1 the assumption that the court *is* to engage in the
2 question of adequacy; but if the court *does* engage in
3 the question of adequacy and does so properly, taking
4 account of a holistic assessment, the court can *only*
5 conclude that US law *is* adequate and shouldn't, 12:34
6 accordingly, make a reference. And for completeness, I
7 add --

8 **MS. JUSTICE COSTELLO:** when you say "adequate" in that
9 sense, are you using it in the sense of the decision
10 adopting Privacy Shield or the way it was being 12:35
11 explored by Mr. Cush earlier this morning?

12 **MS. BARRINGTON:** well, yes, I'm in fact using it in the
13 Privacy Shield way. Because I'm not going to address,
14 Judge, the question of Article 25/26 in any detail. So
15 I'm making a number of procedural assumptions before we 12:35
16 get to this submission, Judge. But it is a fundamental
17 one that, measured and assessed properly, as the
18 Commission has done, and taking the approach taken by
19 the Commission, the court can't but conclude that US
20 law provides adequate protection. 12:35

21
22 If the court were nonetheless minded ultimately to make
23 a reference - and this is a very caveated submission,
24 Judge - we do consider it absolutely vital that this
25 court should do the difficult task of providing the 12:36
26 Court of Justice with an extensive overview of American
27 law, and that it would be quite wrong to provide the
28 court with an analysis that dealt exclusively with the
29 question of remedies, because it would presuppose that

1 an examination of remedies only was the appropriate way
2 to proceed in respect of the question of adequacy. And
3 that, we will submit, is not the appropriate way to
4 proceed. And - fear of endless repetition - the United
5 States is *most* concerned that the Court of Justice 12:37
6 should have a complete picture, unlike the situation
7 that arose in Schrems 1.

8
9 Judge, if I could then outline what I'm *not* going to
10 address. I'm not going to address, Judge, the national 12:37
11 security exemption and leave that essentially to the
12 parties, although we support Facebook's position in
13 that regard. And similarly, the question of the
14 interpretation of Article 25 and 26 of the Directive;
15 we entirely support what Mr. Cush has said and I think 12:37
16 it's what Mr. Collins, for the BSA, will be saying
17 also. We believe, Judge, that there's a fundamental
18 error of interpretation insofar as the analysis of
19 Article 25 and 26 is concerned and that Facebook and
20 the amicus' interpretation of Article 26 is compelling 12:37
21 and consistent with both the teleological
22 interpretation which applies in the European law
23 context, with the literal interpretation *and* with a
24 consideration of the other linguistic versions of the
25 Directive, to which it's not apparent that in making 12:38
26 their submissions the Data Protection Commissioner had
27 any particular regard - no reference is made to
28 anything other English. And the court knows that all
29 of the languages have equally binding force.

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The issue then that I will then turn to, Judge, is the approach to adequacy. And I'm going to ask the court to look in the first instance at the Schrems test, I'm going to ask the court to look at the draft decision, the Privacy Shield and then to deal with adequacy in a little more detail. So if I could turn first to Schrems, because it, of course, provides the essential framework to any consideration of this -- to be carried out by this court. That's in the European books, Judge, the core books, tab three of five -- I'm sorry, book three of five, at tab 36. And I'll hope to through Schrems as quickly as I can, Judge, emphasising the aspects that we consider to be of significance insofar as the consideration of adequacy is concerned.

12:38
12:39
12:39

The judgment of the court is behind tab 36. And if I could ask the court, in the first instance, to turn to paragraph 31. And the court there makes reference to the High Court - if the court has that?

12:40

MS. JUSTICE COSTELLO: Yes.

MS. BARRINGTON: Makes reference to the High Court and, just in the last line, reference to indiscriminate surveillance and, at paragraph 33, reference to the mass and undifferentiated accessing of personal data

12:40

MS. JUSTICE COSTELLO: Just where is that again?

MS. BARRINGTON: That's just at the first line of paragraph 33, Judge. And the court will know by now that the US does not agree that that is the correct

1 characterisation of its signals intelligence
2 activities, which, for the reasons the court has
3 already heard, and I *am* going to ask the court to look
4 at the PCLOB report, is inaccurate, because what takes
5 place is, in our submission, and as I think the PCLOB 12:41
6 report shows, *targeted* surveillance. And yet this was
7 the factual predicate of the Schrems determination.

8
9 Paragraph 35, Judge. The Court of Justice notes that
10 the High Court had observed that in his action, 12:41
11 Mr. Schrems, in reality, raises the legality of the
12 Safe Harbour regime. And I think the court will recall
13 that Hogan J. had indicated that the issues that were
14 raised before him were *not* in fact full-on challenging
15 the legality of the Safe Harbour regime, but it was an 12:41
16 inevitable corollary of the consideration of whether
17 the European measure was fully binding or not. That's
18 how it's understood by the Court of Justice, that's how
19 it's understood by the Data Protection Commissioner - a
20 full frontal challenge to the Safe Harbour regime. 12:42

21
22 Judge, if the court then turns on to paragraph 52, just
23 the last three lines of the page there, Judge, the
24 court emphasises that which this court is well aware
25 of, that: 12:42

26
27 "*Measures of the EU institutions are in principle*
28 *presumed to be lawful and accordingly produce legal*
29 *effects until such time as they are withdrawn, annulled*

1 *in an action for annulment or declared invalid*
2 *following a reference for a preliminary ruling."*

3
4 So the Privacy Shield Decision is legally binding and
5 produces those effects, Judge, unless somebody is going 12:43
6 to be asked to declare it invalid and does so. And
7 it's in this regard, Judge, that the position taken by
8 the Data Protection Commissioner is somewhat puzzling.
9 And I'm going to ask the court to look at some of the
10 transcript references of what Mr. Collins said in 12:43
11 relation to the Privacy shield. I have a little book
12 of transcript references I've excerpted --

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

14 **MS. BARRINGTON:** -- it may be a bit quicker than using
15 the tablet (Same Handed). And if the court looks 12:43
16 behind tab one - this is day three, Mr. Collins'
17 opening - page 89. And at this stage he refers in the
18 second paragraph, he's turned on to the Privacy Shield
19 and he says:

20
21 *"So that's, of course, acknowledging the point decided*
22 *in Schrems - Commission decisions are binding."*

23
24 And over the page at page 90, he discusses that what
25 this court is being asked to do and he says from line 12:44
26 five:

27
28 *"... secondly, this is then a factor that one takes*
29 *into account and one says, you conceivably could say*

1 *'Actually, in light of all of this, I'm completely*
2 *satisfied that there's no doubt whatsoever that there's*
3 *adequate compliance and I'm not going to make a*
4 *reference to the European Court'. And you could do*
5 *that, that's the argument Mr. Gallagher will be urging* 12:16
6 *upon you, and some of the amici" - including, of*
7 *course, my client.*

8
9 *"But equally you have to look at it from the viewpoint*
10 *that even within the Privacy Shield decision itself,* 12:16
11 *the Commission has expressly adverted to the fact that*
12 *notwithstanding that Commission decisions are binding*
13 *in what they've said, there is still this obligation*
14 *to, if the complaint is made, to bring it before the*
15 *court and for the court to refer it to the European* 12:16
16 *Court of Justice if it still considers there are*
17 *concerns."*

18
19 And of course, that's the Schrems test, Judge. So
20 Mr. Collins is correctly articulating the Privacy 12:45
21 Shield Decision is binding, the Schrems test is still
22 there, *if* a complaint is made. But this complaint,
23 Judge, was made well ahead of the adoption of the
24 Privacy Shield agreement. And the court asked
25 Mr. Gallagher, when he made his statement, 'what's the 12:45
26 difference between Schrems 1 and now?' well, the
27 difference is in Schrems 1 Mr. Schrems is mounting what
28 the Data Protection Commissioner characterises as a
29 full frontal challenge. And that's *not* the case here,

1 Judge. And binding measures of EU law can't be
2 challenged or questioned as to their validity on the
3 basis of a side wind, and yet that's precisely what the
4 Data Protection Commissioner is asking this court to
5 do, Judge. 12:46

6 **MS. JUSTICE COSTELLO:** Can you just elaborate on that
7 point? Because you might be making an argument in
8 relation to some complaint, a complaint about X, but in
9 order to make a decision about X, it might necessarily
10 involve attacking an underlying or a justifying 12:46
11 provision Y. So in order to decide on the question X,
12 you necessarily have to decide on the question Y. In
13 other words, if Privacy Shield is binding on the court
14 and binding on the Commission and we can't look any
15 further in the context of Mr. Schrems' existing 12:46
16 complaint, that involves deciding his complaint *against*
17 him in that sense, doesn't it?

18 **MS. BARRINGTON:** well --

19 **MS. JUSTICE COSTELLO:** what I'm saying is do you not
20 *have* to look at it, or why are you saying you *can't* 12:47
21 look at it?

22 **MS. BARRINGTON:** well, you *can't* look at it unless
23 somebody is, in accordance with the Schrems logic,
24 raising concerns in relation to the validity of the
25 Privacy Shield, that the Data Protection Commissioner 12:47
26 believes those concerns to be well founded, brings
27 those concerns to this court and this court shares
28 those well founded concerns. The difficulty --

29 **MS. JUSTICE COSTELLO:** So then I've a second question

1 -- sorry, I understand what you're saying there. Let's
2 say we run with your pieces and argument that it's *not*
3 directly raised by Mr. Schrems in his complaint.

4 **MS. BARRINGTON:** Yes.

5 **MS. JUSTICE COSTELLO:** But in her examination of it, is 12:47
6 she not allowed to sort of say 'well, in my independent
7 assessment, I think this necessarily involves deciding
8 issue Y'?

9 **MS. BARRINGTON:** But she *hasn't* said that, Judge.
10 She's said in her decision that she's *not* examining the 12:47
11 Privacy shield.

12 **MS. JUSTICE COSTELLO:** Okay.

13 **MS. BARRINGTON:** And that's the difficulty; she hasn't
14 articulated in the decision that's brought before this
15 court as the transcript of the well founded concerns, 12:48
16 the Privacy shield isn't in there. And so what the
17 Data Protection Commissioner has to say to the court is
18 what they have said in day three of the opening of the
19 case is somehow such as transmogrify the Commissioner's
20 decision into an articulation of well founded concerns 12:48
21 in relation to the Privacy shield. And if the court
22 doesn't *share* the concerns, even assuming the court
23 could consider that a complaint that predated the
24 Privacy shield was somehow a complaint about it, if the
25 court doesn't share the concerns, it certainly 12:48
26 shouldn't be making a reference, Judge.

27
28 So there are a number of significant difficulties
29 attaching to what the Data Protection Commissioner is

1 asking this court to do. And Mr. Collins, with all due
2 respect to him and to his agility, skirts around it,
3 Judge, and he says at page 90, just reading from the
4 bottom of the page:

5
6 *"So one way perhaps to look at it, Judge, is to*
7 *consider, leaving aside the point that I rely upon that*
8 *this postdates the Commissioner's decision and the*
9 *analysis in terms of the Standard Contractual Clauses,*
10 *one way to look at it is to say supposing you were* 12:49
11 *satisfied, absent the Privacy Shield, that there wasn't*
12 *in fact, or there's certainly a question that deserved*
13 *to be referred to the European Court about adequacy,*
14 *does this Ombudsperson mechanism remedy the concerns*
15 *and satisfy all those concerns or is there still a* 12:17
16 *concern that's worthy of reference?"*

17
18 And, Judge, that, we contend, is an erroneous
19 presentation of the matter, because it fails to take
20 account that this court is *bound* by the Privacy Shield 12:49
21 decision *unless* the Schrems test is met. And it hasn't
22 been, on the basis of what's occurred

23
24 Then he comes back to it at page 105, Judge. And at
25 this point he's outlined the Ombudsperson mechanism. 12:50
26 And he says in the middle of the page, if the court has
27 that, page 105:

28
29 *"The issue in present circumstances, Judge, is, when*

1 *one is looking at the question of adequacy and in terms*
2 *of analysing whether the legal rules that are referred*
3 *to and the mechanisms of compliance with those legal*
4 *rules as contemplated... whether this has any*
5 *significant impact on that analysis.*

12:34

6
7 *We respectfully say, Judge, that first of all, the*
8 *Privacy Shield mechanism is not a matter of law within*
9 *the United States."*

12:50

10
11 And that, with respect, is an odd observation. Because
12 the issue is: Is it a matter of binding law on *this*
13 court? which, of course, it is. And he says it's a
14 series of commitments. Well, they are solemn
15 commitments, Judge, from the United States that have
16 been given to the European Commission, which the
17 European Commission have said that they rely upon, but
18 reserve the right to repeal, which he seems to consider
19 is of some significance. And:

12:51

20
21 *"... if it looks as if those policies are not being*
22 *implemented... significant reliance is, of course,*
23 *placed on... PPD-28 and the way... the US Government is*
24 *going to approach it... and matters of that sort.*

12:51

25
26 *So I respectfully say that while undoubtedly it would*
27 *be wrong to proceed without knowledge of the Privacy*
28 *Shield mechanism that is there, the essential question*
29 *remains as I've outlined to you at the start of these*

12:35

1 *proceedings.*"

2
3 And the court only has to consider, well, what well
4 founded concerns in relation to the Privacy Shield did
5 the Data Protection Commissioner outline at the start 12:51
6 of the proceedings? And the answer is none.

7
8 So, Judge, just coming back to Schrems. The mechanism
9 for protection is outlined having regard to the
10 possibility of making a complaint. The test in that 12:52
11 regard is at paragraph 65. The issue is whether
12 Mr. Schrems has advanced objections that the Data
13 Protection Commissioner believes to be well founded and
14 then whether the court, if the Data Protection
15 Commissioner comes to court, if the court shares its 12:52
16 doubts.

17
18 Now, it's been suggested at some point that if the
19 court has *any* doubts, that that's sufficient, that
20 *deference* should be afforded to the Data Protection 12:52
21 Commissioner. And certainly there, I've no doubt, are
22 areas in which the Data Protection Commissioner is
23 entitled to deference, but not this, Judge, where the
24 Data Protection Commissioner has acted *exclusively*, it
25 seems, on *Mr. Serwin's* advice - because she, of course, 12:53
26 can't be expert in American law. So without wishing to
27 sound in any way pejorative, she's not entitled to
28 deference in respect of this decision. And it's not a
29 question of sharing *any* doubt, it's a question of this

1 court sharing the well founded doubts in relation to
2 the objections advanced by Mr. Schrems.

3
4 The court then considers, at paragraph 70, the matters
5 to which account has to be taken in Article 25(2). And 12:53
6 the court will recall perhaps just from Mr. Cush's
7 dealing with it that 25(2) states, addresses the
8 question of adequacy in the third party country, which
9 is to be assessed in the light of *all* of the
10 circumstances surrounding a data transfer operation and 12:54
11 lists, on a non-exhaustive basis, the circumstances to
12 which consideration must be given when carrying out
13 such an assessment. And the court will recall that the
14 non-exhaustive list includes the circumstances in the
15 Member State of origin and the circumstances in the 12:54
16 third party country.

17
18 So we say two things flow from this, Judge: First,
19 you're *certainly* entitled to take account of the Member
20 States of the European Union and their regimes; and 12:54
21 second, 25(2) requires an understanding of the totality
22 of the circumstances which, even insofar as the
23 Directive is concerned, Schrems has confirmed is
24 non-exhaustive, Judge.

25 12:55
26 At paragraph 73 the court puts in place the essential
27 equivalence test. And again, Judge, the wording of the
28 Court of Justice is significant in this regard.
29 Because perhaps an impression has crept in that what

1 Schrems requires is an *identical* regime between the EU
2 and the US, and of course, that's *not* what's envisaged.
3 At paragraph 73 the court says that - and I'm reading
4 from the first sentence, Judge:

5
6 "*The word 'adequate' in Article 25(6) of [the*
7 *Directive] admittedly signifies that a third country*
8 *cannot be required to ensure a level of protection*
9 *identical to that guaranteed in the EU legal order.*"

10
11 And at paragraph 74, Judge, reference is made - and I'm
12 just looking at the second sentence:

13
14 "*Even though the means... that third country has*
15 *recourse... for the purpose of ensuring such a level of*
16 *protection may differ from those employed within the*
17 *European Union.*"

18
19 But they are nonetheless, the court goes on to say, to
20 be sufficient to provide effective protection. But the 12:56
21 court, understandably, considers that to be considered
22 as essentially equivalent, that is *not* the same as
23 requiring absolutely identical protections to those
24 provided within the European Union or within the Member
25 States of the European Union. 12:56

26
27 Judge, at paragraph 75 then the court goes on to say:

28
29 "... *when examining the level of protection afforded by*

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

9
10 Yet again, Judge, an emphasis of the global nature of 12:57
11 the assessment to be conducted, which we contend *hasn't*
12 been conducted, Judge.

13
14 Then the court goes on to deal with the national 12:57
15 security exemption provided for at paragraph -- this is
16 at paragraph 86, that was put in place by the Safe
17 Harbour regime. And there there was just, I think it's
18 fair to say, a fairly bald derogation for national
19 security. And at paragraph 87 then is one of the
20 critical paragraphs in the judgment, because it's 12:57
21 seemingly one of the significant bases of the Data
22 Protection Commissioner's decision. And Mr. Collins
23 made repeated reference to paragraph 87. Judge, I see
24 the type, I wonder if perhaps it's...

25 **MS. JUSTICE COSTELLO:** well, I did indicate I would sit 12:58
26 a little longer.

27 **MS. BARRINGTON:** Oh, yes, I'm very happy, Judge, to do
28 that and then I might conclude Schrems. So at
29 paragraph 87, the court says that - and I'm reading

1 from four lines down:

2
3 *"To establish the existence of an interference with the*
4 *fundamental right to respect for private life, it does*
5 *not matter whether the information in question relating*
6 *to private life is sensitive or whether the persons*
7 *concerned have suffered any adverse consequences on*
8 *account of that interference."*

9
10 And reference is made to **Digital Rights Ireland**. 12:58

11 Mr. Collins *repeatedly* said that the standing rules in
12 the United States meant that paragraph 87 wasn't met.
13 And one could be forgiven for thinking that **Schrems** had
14 abolished domestic standing rules and that this
15 paragraph was designed somehow to deal with the 12:59
16 question of standing or procedural rules. In fact the
17 DPC's submissions, Judge, you'll recall, suggest at one
18 point that European law *has* established a standing test
19 and the standing test is whether you have a feeling
20 that you've been under surveillance. And as we'll see, 12:59
21 Judge, that's completely wrong. Paragraph 87 is
22 dealing with the question of the interference with the
23 right. It may then be a *justified* interference, having
24 regard to the proportionality analysis that's then
25 envisaged by the court to follow. 12:59

26
27 And the court then does precisely that; paragraph 88,
28 the first step of a proportionality analysis is set
29 out. So you may have an interference, but do you have

1 a justification for that? Is this a measure that
2 pursues a legitimate objective such as national
3 security? That's dealt with at 88, the first step.
4

5 The court goes on then to consider the question of 13:00
6 minimum safeguards at paragraph 91 and, at paragraphs
7 92 and 93, continues with the building blocks of a
8 proportionality analysis, Judge. And at paragraph 93
9 the court says legislation isn't limited to what is
10 strictly necessary - of course, that's an ingredient of 13:00
11 a proportionality analysis - where it authorises, on a
12 *generalised* basis, storage of all of the persons -- of
13 the data of the persons whose data has been transferred
14 from the EU.

15 13:01
16 That reference to "generalised basis" is something that
17 seems to subtend the court's analysis. And this court
18 will, of course, well know that this isn't a data
19 retention case in the way that Digital Rights is
20 dealing with, there isn't a generalised retention of 13:01
21 all data, although that may have been a misapprehension
22 that the court harboured.

23
24 At paragraph 94, Judge:

25
26 *"In particular, legislation permitting the public*
27 *authorities to have access on a generalised basis to*
28 *the content of electronic communications must be*
29 *regarded as compromising the essence of the fundamental*

1 *right to respect for private life."*

2
3 So insofar as reference is made at paragraph 93 and 94
4 to a generalised basis, we submit to the court, Judge,
5 that that's certainly not what's happening in this 13:02
6 case.

7 **MS. JUSTICE COSTELLO:** Can you just explain to me about
8 Upstream?

9 **MS. BARRINGTON:** Yes.

10 **MS. JUSTICE COSTELLO:** Because in order to effect -- 13:02
11 the first step in giving effect to your Upstream
12 searches - I'm not quite sure whether they're searches
13 or seizures, but we'll leave that particular nuance to
14 one side for a moment; as I understand, some of the
15 evidence is that you have to somehow assess - I'll use 13:02
16 a neutral sense - everything that goes through the
17 backbone for Upstream and then you apply your filters.

18 **MS. BARRINGTON:** Hmm.

19 **MS. JUSTICE COSTELLO:** And Upstream, as far as I can
20 recollect, is authorised by 702, so it's authorised by 13:02
21 --

22 **MS. BARRINGTON:** It's authorised by 702, Judge.

23 **MS. JUSTICE COSTELLO:** -- by legislation.

24 **MS. BARRINGTON:** Yes.

25 **MS. JUSTICE COSTELLO:** So how does that fit into what 13:02
26 you're submitting here in relation to, was it paragraph
27 94?

28 **MS. BARRINGTON:** Yes. Well, I'll come back to that,
29 Judge. I'll address that question now, but I will come

1 back to it also, because I'm going to ask the court to
2 look in due course at the PCLOB report --

3 **MS. JUSTICE COSTELLO:** well, if you want to deal with
4 it then, that's fine, just carry on with Schrems if you
5 wish. 13:03

6 **MS. BARRINGTON:** Yes. But I can say, I suppose, this
7 very briefly: First, the definitions of the FISA act
8 kick in prior to any surveillance under Upstream. So
9 you have the circumscription of is it foreign
10 intelligence, is it a foreign person, all of those 13:03
11 definitions that the court has gone through --

12 **MS. JUSTICE COSTELLO:** But necessarily, didn't they
13 have to sort of scan - well, you'll tell me when you
14 come to PCLOB - in order to ascertain whether or not
15 to, if you like - de-Americanisate it or whatever they 13:03
16 were doing when they were weeding out the US citizens?

17 **MS. BARRINGTON:** I don't like to use the word "scan",
18 Judge, because I think the evidence has established
19 that that isn't, or can't be said to be --

20 **MS. JUSTICE COSTELLO:** Oh, no, I accept that "scan" is 13:03
21 not the word we should use. But assess in some way.

22 **MS. BARRINGTON:** Yes. But perhaps one filters from a
23 mass. The mass is not retained, Judge. So there isn't
24 generalised retention. What is retained is the product
25 of the filtration process. And that's retained in, as 13:04
26 we'll see, a manner that's highly regulated. But
27 nothing is retained that doesn't -- isn't thrown up by
28 the filtering process.
29

1 So there can be no question that there's generalised
2 storage or generalised retention in the way that an
3 across-the-board data retention requirement, such as
4 exists in the Member States --

5 **MS. JUSTICE COSTELLO:** But is paragraph 94 concerned 13:04
6 with retention? It says: "*In particular, legislation*
7 *permitting the public authorities to have access*" --

8 **MS. BARRINGTON:** Yes.

9 **MS. JUSTICE COSTELLO:** -- "*on a generalised basis to*
10 *the content*". 13:04

11 **MS. BARRINGTON:** Yes. But there *is* no access on a
12 generalised basis to the content, Judge, having regard
13 to the fact that something must be done to extract the
14 filtered data.

15 **MS. JUSTICE COSTELLO:** I was thinking of the "about" 13:05
16 communications. It was submitted that you can't filter
17 your "about" communications unless you access the
18 content.

19 **MS. BARRINGTON:** well, in the filtration process you
20 can't filter out initial -- what's thrown up by the 13:05
21 process, Judge, includes "about" communications, if
22 you're talking about Upstream, which is less than 10%
23 of the method of collection. And undoubtedly, a
24 computer does the exercise of reviewing, however it
25 happens, the data to extract the "to", the "from" or 13:05
26 the information that might include "about". That's not
27 done by any analyst or any human. And the stream of
28 information - which somebody described it as the data
29 in the pipe - is not being retained or being accessed

1 for the purposes of *any* review by any government
2 authority.

3
4 so I think what the court is looking at in the first
5 instance is generalised accessing, generalised storage. 13:06
6 And that is not what's happening, Judge, in this
7 regime. Paragraph 93 is dealing with storage,
8 paragraph 94 is dealing with generalised access to the
9 content. And while I appreciate that the argument may
10 have been made that the retrieval process involves 13:06
11 reviewing a mass of data, that's something quite
12 different, in my submission, to what the court is
13 looking to address at paragraph 94.

14
15 Then critically, Judge, paragraph 95 is the paragraph 13:07
16 that addresses remedies and is the paragraph that
17 encompasses the EU law position on standing. So
18 paragraph 95 provides:

19
20 "*Likewise, legislation not providing for any*
21 *possibility for an individual to pursue legal remedies*
22 *in order to have access to personal data relating to*
23 *him, or to obtain the rectification or erasure of such*
24 *data, does not respect the essence of the fundamental*
25 *right to effective... protection, as enshrined in*
26 *Article 47 of the Charter.*"

27
28 And I'm skipping on to the next sentence:
29

1 *"The very existence of effective judicial review*
2 *designed to ensure compliance with provisions of EU law*
3 *is inherent in the existence of the rule of law."*

4
5 And various authorities are cited, Judge, that are well 13:08
6 established, including Johnston. Now, Judge, in our
7 submission, when it comes on to looking at the Data
8 Protection Commissioner's decision, she's misunderstood
9 the position on standing both as a matter of European
10 law and as a matter of American law. Because as a 13:08
11 matter of European law, the standing rules are
12 encompassed by the reference at paragraph 95 to Article
13 47 of the Charter. It's well established as a matter
14 of European law that standing rules are to be
15 determined by the Member States, or remedies to be 13:08
16 determined by the Member States, *subject* - subject, of
17 course - to what are generally referred to as the twin
18 principles of equivalence and effectiveness; you must
19 provide the same remedy for somebody seeking to invoke
20 an EU right as a domestic law right and your remedy 13:09
21 must be effective, in that there is -- you're not left
22 without *any* possibility to pursue a legal remedy.

23
24 And if one applies that test then to the Data
25 Protection Commissioner's decision, it's clear that she 13:09
26 has misunderstood that, Judge. And in that regard, I'm
27 going to ask the court at this stage to come on to the
28 data protection draft decision, and when I've done
29 that, I'll open briefly two authorities in relation to

1 standing, Digital Rights Ireland, which helpfully
2 summarises the law in relation to standing in
3 McKechnie J's judgment, including the paragraph on
4 Unibet, and a decision that isn't in the books that I'm
5 going to hand in to the court, which is a decision 13:10
6 called Inuit. And those two decisions make it quite
7 clear that you're not required to have a remedy for
8 every situation, which is what the Data Protection
9 Commissioner, in error, seems to believe.

10
11 Judge, if I could ask you now to turn to the draft
12 decision. It's in book one of the pleadings, tab 18.
13 And perhaps I could just outline, before plunging into
14 it, what we say at a very broad level is notable from
15 the decision. It's notable for what it *doesn't* refer 13:10
16 to. It *doesn't* refer to the systemic protections
17 provided by American law and focuses only on ex post
18 remedies.

19 **MS. JUSTICE COSTELLO:** By "systemic remedies"?

20 **MS. BARRINGTON:** So a panoply of them: Ex ante 13:11
21 protections such as those provided by the FISC court;
22 protections provided by the foreseeability and clarity
23 of its legislative regime and the procedures adopted
24 under the legislative regime; protections afforded by
25 the oversight mechanisms existing within American law, 13:11
26 including Congressional oversight, including oversight
27 from PCLOB, including institutional oversight within
28 the various bodies charged with carrying out
29 intelligence activities, including the Inspectors

1 General. I'm sure I'm missing quite a number of them,
2 Judge, but they're all set out in Mr. Litt's letters
3 and I'm going to ask the court to look at them.
4

5 Those are all factors that are absent from the Data 13:11
6 Protection Commissioner's decision and which we say
7 should've been taken into account. And no
8 consideration was given to the national security
9 context, no consideration was given to Article 47 case
10 law - on what basis exactly does the Data Protection 13:12
11 Commissioner think that Article 47 has been breached?
12 No consideration is given to a proportionality
13 analysis. And Mr. Murray said 'well, we don't need to
14 do a proportionality analysis, because we know already
15 from just looking at remedies, we know that the essence 13:12
16 of the right is impaired and, accordingly, we're not
17 required to do *any* balancing exercise'. And that,
18 Judge, is equally, we say, an error of reasoning, in
19 that the national security context was absolutely to be
20 taken into account and considered. If you consider the 13:12
21 structure of the Schrems analysis, is there an
22 interference? Is there a justification for the
23 interference? Does it pursue a legitimate end? Is it
24 necessary? Is it proportionate with, at the end result,
25 the protection of the core of a right? But you don't 13:13
26 *get* to a consideration of the core of the right until
27 you've carefully calibrated those various factors.
28

29 And Mr. Murray says 'No, no, no, we don't have to do

1 that exercise at all. We start at the end and we
2 conclude, looking only at remedies, that the core of
3 the right, the essence has been interfered with,
4 without ever putting into the equation or into the
5 balance the significant factors, contextual factors', 13:13
6 which in this case are, of course, national security.

7
8 Judge, she starts her analysis insofar as the relevant
9 issues are concerned at paragraph 43. She says at
10 paragraph 43 that her investigation's ongoing, but she 13:13
11 expresses her concern that even now - and I'm just
12 reading from the last lines -- I'm sorry, the court may
13 not have that yet.

14 **MS. JUSTICE COSTELLO:** I have it, yes.

15 **MS. BARRINGTON:** Oh, I beg your pardon. 13:14

16
17 *"It remains the case that, even now, a legal remedy*
18 *compatible with Article 47 of the Charter is not*
19 *available in the US to EU citizens whose data is*
20 *transferred... where it may be at risk of being*
21 *accessed and processed by US State agencies."*

22
23 So that's her analysis of the issue - accessing and
24 processing by US state agencies. And she says at
25 paragraph 44, critically: 13:14

26
27 *"It is important to note that EU citizens are not*
28 *completely without redress in the US... a number of*
29 *remedial mechanisms are available under US law."*

1
2 So that's the starting point, we have a number of
3 remedial mechanisms. But she says there's specific and
4 general deficiencies in those mechanisms. First, from
5 a specific perspective - it's not quite clear what that 13:15
6 means - from a specific perspective, the remedies are
7 fragmented and subject to limitations that impact on
8 their effectiveness to a material extent. Well, Judge,
9 insofar as fragmentation is concerned, certainly if one
10 had a data protection regime such as one has in *this* 13:15
11 jurisdiction, you'd have one statute that deals with
12 data protection. Of course, that statute would *exempt*
13 national security, as the Directive does.

14
15 So it's difficult to understand the criticism that the 13:15
16 protections are fragmented. What perspective *is* it
17 that the Data Protection Commissioner is looking
18 through? That that is a matter of concern. They *are*
19 fragmented; Prof. Vladeck said there's no one meta
20 remedy. And that's true. But there are a number of 13:16
21 remedies, as she has outlined. And --

22 **MS. JUSTICE COSTELLO:** We might take it up at two
23 o'clock.

24 **MS. BARRINGTON:** Yes. Thank you, Judge.

25 **MS. CAHILL:** Judge, I wonder before the court rises, 13:16
26 there was a small book of documents prepared containing
27 different language versions of --

28 **MS. JUSTICE COSTELLO:** Oh, yes, I was going to ask you
29 about my linguistic homework.

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MS. CAHILL: My solicitor is just handing that up.
(Same handed).

MS. JUSTICE COSTELLO: Thank you.

13:16

(LUNCHEON ADJOURNMENT)

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

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

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

7 **MS. BARRINGTON:** Thank you, Judge. Judge, if I may, if
8 the court forgives me momentarily, go backwards and
9 just say something that I perhaps should have said in
10 relation to Schrems, and the court needn't take it out 14:04
11 but paragraphs 93 and 94.

12
13 On looking at them again, Judge, I think it's clear
14 that paragraphs 93 and 94 are quoting from the Digital
15 Rights case and the Digital Rights case of course 14:04
16 related to a data *retention* régime, a régime whereby
17 the Directive imposed on companies a requirement to
18 retain data. So I think those paragraphs are clearly
19 addressing a scenario where there has been a retention
20 and then accessing a storage of retained data. 14:04

21
22 And I should perhaps also have said, Judge, there is no
23 such equivalent provision in American law, there isn't
24 a generalised data retention obligation imposed on
25 companies such as was to be found in the Data Retention 14:04
26 Directive.

27
28 Now, Judge, if I may take up where I was in the Draft
29 Decision, I think I was looking at paragraph 45 page 20

1 and the Data Protection Commissioner's concerns set out
2 there that the remedies were fragmented and didn't
3 apply in every situation. And I was emphasising in the
4 first instance, Judge, the fact that many of the
5 American remedies that we're concerned with predate the 14:05
6 European data protection régime. We know that we have
7 the FISA Act, it's 1978; the Privacy Act is '74; the
8 Wiretap Act is '68; and ECPA '86, I think
9 Prof. Richards described as a far-sighted measure then.

10
11 So it can come as no surprise that the sectoral
12 protections afforded by American law don't perfectly
13 mirror the postdated European data protection régime.

14
15 Judge, she then goes on to address what she describes 14:06
16 as the limitations of the remedies she acknowledges do
17 exist and they are set out, Judge, at paragraph 47.

18
19 I don't propose going through them at any great, in any
20 great detail. The court will have seen from 14:06
21 Mr. Serwin's evidence the issues that arise here, but
22 to say perhaps briefly this: 47(1) deals with 18 USC
23 2712. The limitation identified there by the Data
24 Protection Commissioner was the wilfulness requirement.
25 The court will recall that Prof. Richards acknowledged 14:06
26 that this is a common thread throughout civil remedies
27 envisaged where action is being taken against a
28 government. And of course, if you think back to this
29 jurisdiction, it doesn't come as any huge surprise

1 either, the threshold seems to be lower than the
2 **Glencar** threshold that would apply here for breach of
3 statutory duty, it's not a mala fides requirement.
4 **MS. JUSTICE COSTELLO:** And what's the EU threshold?
5 **MS. BARRINGTON:** well, there isn't an EU threshold. 14:07
6 **MS. JUSTICE COSTELLO:** Oh because you are saying
7 standing is determined by the national states?
8 **MS. BARRINGTON:** well, I am saying standing is
9 determined by the national states subject to
10 effectiveness. 14:07
11 **MS. JUSTICE COSTELLO:** Mm hmm.
12 **MS. BARRINGTON:** But these are particular Member State
13 remedies.
14 **MS. JUSTICE COSTELLO:** Mm hmm.
15 **MS. BARRINGTON:** so there isn't a counter part -- 14:07
16 **MS. JUSTICE COSTELLO:** Mm hmm.
17 **MS. BARRINGTON:** -- in the national security context in
18 European law. Because of course the Directive, as we
19 know, excludes national security and doesn't provide
20 for a code of remedies. 14:07
21
22 So wilfulness is the problem she identifies there,
23 again seemingly coming at it from the perspective that
24 there must be an access to the court without these kind
25 of remedial requirements which would apply in this 14:08
26 jurisdiction.
27
28 At 47(2) she addresses USC 2712. At 47(3) she comes
29 back to or rather she addresses 50 USC 1810, that's the

1 protection provided in the FISA Act, and there she
2 makes this statement that "*the utility of pursuing*
3 *individual officers might be questionable*", something
4 which, as Ms. Hyland explored with Mr. Serwin, wasn't
5 in his report and something which Prof. Vladeck dealt 14:09
6 with in his evidence and in his report where he
7 indicated that the US government would almost certainly
8 offer an indemnity to an officer defendant. But
9 recoverability isn't necessarily the issue, that's a
10 question of is your defendant a mark, and she seems to 14:09
11 have strayed in that territory, that you must have a
12 damages action and you must have a damages action where
13 your defendant is a mark.

14
15 At 47(4) she addresses the notice requirement and the 14:09
16 facility to bring a motion to suppress on foot of a
17 notice in criminal proceedings provided for in the FISA
18 Act, 50 USC 1806, and she says of that well that's just
19 a defensive protection for the individual in
20 administrative and judicial proceedings. But, as we 14:10
21 have seen, Judge, from the extensive array of case law
22 opened to the court, such motions have given rise to
23 consideration of constitutional issues. Prof. Vladeck
24 says so in his report at paragraph 86 and he cites a
25 number of examples, the case of United States -v- 14:10
26 Mohamud that was opened to the court but also
27 Hasbajrami and Muhtorov, cases where motions to
28 suppress were brought and where the underlying
29 constitutionality of 702 was considered which allowed

1 Prof. Vladeck to say that these motions permitted
2 access to a merits or substantive review.

3
4 But equally, Judge, in our submission we make the point
5 that they equally provide an important deterrent 14:11
6 effect, as do the criminal sanctions put in place, and
7 they are part of, if they are to be considered by the
8 Data Protection Commissioner, one wonders why she cuts
9 off at that point in the consideration of perhaps
10 slightly more peripheral issues. There are others 14:11
11 equally that she should have had regard to.

12
13 At paragraph 51, Judge, she makes a reference to, and
14 that's over the page, page 23, she makes a reference to
15 Executive Order 12333. She says that the available 14:11
16 remedies don't deal with certain legal bases such as
17 Executive Order 12333. Now again, Judge, that's
18 something of a puzzle. Because the court will recall
19 that on Day 2 Mr. Collins said, and if you look at my
20 book of excerpts from the transcripts, I think it's at 14:12
21 Tab 2, if the court has that, Tab 2 line 19. He is
22 dealing with Section 702 and he says, it goes on then
23 to say:

24
25 *"I think as a broad principle one can say that actual 14:12
26 intelligence activities that take place outside the
27 United States I think are conducted pursuant to
28 Executive Order 12333, with which we're not really
29 concerned, because we're only concerned with what*

1 *happens to data when it goes to the US and how is it*
2 *processed or accessed within the US. So we're not*
3 *actually concerned that much with Executive Order*
4 *12333."*

14:13

5
6 And I agree entirely with Mr. Collins, save to say the
7 DPC is not concerned at all with Executive Order 12333.

8 **MS. JUSTICE COSTELLO:** Does that cover the transit
9 data?

10 **MS. BARRINGTON:** well, then the experts obviously
11 addressed and Prof. Swire addressed this question of
12 the Transit Authority and I think it is important to
13 consider what was said about that. It's in the joint
14 expert report at page 12, point 12. And this, I think,
15 was a point that was raised by Ms. Gorski taking issue
16 with Prof. Swire's statement that 12333 didn't apply to
17 collection within the US. *"And the experts then*
18 *agreed"*, if the court has that.

14:13

14:13

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

20 **MS. BARRINGTON:** Looking at the ultimate right-hand
21 column:

14:14

22
23 *"The experts agree the Transit Authority under*
24 *Executive Order 12333 is an exception to the general*
25 *rule that 12333 applies to collection only outside the*
26 *US. The expert's understanding is that Transit*
27 *Authority would apply, for instance, to an e-mail that*
28 *went from a foreign origin across the*
29 *telecommunications network within the US without having*

14:14

1 a US destination and then went to a foreign
2 destination. Transit Authority would likely not apply
3 to the e-mail if its destination was a corporate server
4 within the US that forwarded the e-mail to a
5 destination outside the US." 14:14

6
7 And then it goes on to deal with radio, and I think we
8 all know at least we're not dealing with radio
9 communications. But neither, Judge, are we dealing
10 with Transit Authority because this is a case where, 14:15
11 the court will recall Mr. Schrems is complaining about
12 the transfer of his information to Facebook Inc. and to
13 servers in the United States. The experts are agreed
14 that Transit Authority is foreign-to-foreign transit
15 and not stopping in the United States as Mr. Schrems' 14:15
16 data is.

17 **MS. JUSTICE COSTELLO:** Just to make sure I have got
18 this straight.

19 **MS. BARRINGTON:** Yes.

20 **MS. JUSTICE COSTELLO:** So if he is using his Facebook 14:15
21 account, which is through Facebook Ireland, to, let's
22 say, communicate with a friend in Germany; it may be
23 that it's transferred by Facebook Ireland to Facebook
24 Inc. and because it's arriving in Facebook Inc. in the
25 United States you are saying it's therefore outside the 14:15
26 remit of 12333?

27 **MS. BARRINGTON:** Yes.

28 **MS. JUSTICE COSTELLO:** Okay. I just want to make sure
29 I got your argument straight.

1 **MS. BARRINGTON:** I am saying when it's in the United
2 States it's governed exclusively by 702, and Transit
3 Authority has crept in to this case as a refinement by
4 Ms. Gorski of the statement that: "*For collection in*
5 *the US any other authority such as Executive Order*
6 *12333 does not apply*".

14:16

7
8 And it's a refinement Prof. Swire agreed to of that
9 statement but it doesn't in fact deal with the
10 situation that *this* court is concerned with which is
11 Mr. Schrems' data lands in Facebook Inc. and what does
12 the US government do with it then is his concern. And,
13 accordingly, 12333 in our respectful submission, and
14 the Data Protection Commissioner and Mr. Collins seems
15 to agree, is simply irrelevant. If that's so, one
16 wonders why it's in the Data Protection Commissioner's
17 decision because she certainly doesn't deal with
18 Transit Authority and doesn't suggest any basis upon
19 which it might be contended that this executive order
20 is of relevance, not a matter that Mr. Serwin I think
21 dealt with in his report.

14:16

14:16

14:17

22
23 So, Judge, the overarching issue she then goes on to
24 address at paragraphs 52 and 53 is one of standing.
25 And at paragraph 54, having set out the American
26 standing rules, and I don't think anybody has any
27 particular disagreement with the articulation, so far,
28 of her understanding of the three prongs of the
29 standing rules. And then she says at paragraph 54:

14:17

1 *"On their terms, I consider that these requirements*
2 *appear to be incompatible with EU law in circumstances,*
3 *where as a matter of EU law, it is not necessary to*
4 *demonstrate an adverse consequence as a result of an*
5 *interference with Article 7 and 8 of the Charter."* 14:18

6
7 And she brings that back to paragraph 87 of the
8 judgment in Schrems.

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

10 **MS. BARRINGTON:** So that's her first major conclusion 14:18
11 and, as we have seen, Judge, here, in our submission,
12 she is comparing oranges and apples because she is
13 comparing the American standing rules with the Court of
14 Justice's articulation of the first step in identifying
15 a breach which is an interference, without necessity to 14:18
16 show an adverse consequence, but standing is not being
17 defined by paragraph 87.

18
19 And then she goes on, Judge, at paragraph 55 to deal
20 with her understanding of the standing requirements 14:19
21 applicable under US law and she says they would operate
22 to: *"Limit an individual's capacity to access a*
23 *remedy."*

24
25 And she gives us an example, Clapper -v- Amnesty, the 14:19
26 Supreme Court Clapper, and at the end of the paragraph
27 she says:

28
29 *"I consider is that such an approach is not*

1 *reconcilable with that outlined in Schrems where the*
2 *court of Justice made it clear that a claimant cannot*
3 *be required to demonstrate that harm has in fact been*
4 *suffered as a result of the interference alleged."*

14:19

5
6 So again a suggestion that she understands that
7 standing rules, domestic standing rules, if that's her
8 understanding, well either, that European law has fixed
9 standing rules or that domestic standing rules have
10 been altered by Schrems in a manner such as to mandate
11 the bringing, the permissibility of claims such as
12 Clapper -v- Amnesty. So does that mean, because we
13 know that the Supreme Court in Clapper -v- Amnesty
14 identified five degrees of speculation, is it being
15 said by the Data Protection Commissioner that European
16 law requires that the Member States permit of
17 speculative claims, because that surely can't be what
18 she is saying. And yet, when one studies that
19 paragraph, it's the Clapper -v- Amnesty Supreme Court
20 speculative claim, the second prong of the
21 injury-in-fact and not the first prong, that seems to
22 be of concern to the Data Protection Commissioner.

14:19

14:20

14:20

23
24 And she concludes on this issue at paragraph 56.

25 **MS. JUSTICE COSTELLO:** By the second prong you mean
26 actual or imminent?

14:20

27 **MS. BARRINGTON:** Yes. Sorry, I should have said the
28 second part of the first prong. At paragraph 56 she
29 concludes on this point, saying the Federal Rules of

1 Procedure Rule 11 also pose the requirements that they
2 pose and she says:

3
4 *"Taken with the analysis by the court in Clapper in*
5 *connection with the making of 'speculative' claims* 14:21
6 *regarding alleged violations of privacy rights, the*
7 *Federal Rules of Procedure would appear to preclude the*
8 *bringing of precisely the kind of complaint now before*
9 *me."*

10
11 So it certainly suggests that she believes that
12 European law requires a complaint such as Mr. Schrems'
13 complaint to be considered to be one that must be
14 heard, irrespective of a degree of speculation.

15
16 Rule 11, Judge --

17 **MS. JUSTICE COSTELLO:** Just to get, I want to make sure
18 I'm not getting confused here, so my apologies if I'm
19 slowing you down.

20 **MS. BARRINGTON:** No, please. 14:22

21 **MS. JUSTICE COSTELLO:** She is dealing with a complaint
22 made by a data subject in the EU.

23 **MS. BARRINGTON:** Yes.

24 **MS. JUSTICE COSTELLO:** Now there's no question of
25 standing in relation to a complaint to her, is there? 14:22

26 **MS. BARRINGTON:** No.

27 **MS. JUSTICE COSTELLO:** So were you saying that,
28 I thought you were saying there was something about a
29 complaint made to her had a standing point vis-à-vis

1 the standing in the United States?
2 **MS. BARRINGTON:** No.
3 **MS. JUSTICE COSTELLO:** I think I misunderstood you
4 there.
5 **MS. BARRINGTON:** I beg your pardon, Judge. What she 14:22
6 says at the end of paragraph 56 is that American rules
7 would appear to preclude the bringing of the kind of
8 complaint before her. So...
9 **MS. JUSTICE COSTELLO:** But American rules that she's
10 been discussing there are standing for going to court; 14:22
11 isn't that right?
12 **MS. BARRINGTON:** Yes.
13 **MS. JUSTICE COSTELLO:** And you say she is saying there
14 that, she is comparing American standing rules for
15 access to court with bringing an application before 14:23
16 her --
17 **MS. BARRINGTON:** No.
18 **MS. JUSTICE COSTELLO:** -- as a data commissioner?
19 **MS. BARRINGTON:** I think what she is saying is a
20 complaint such as Mr. Schrems' mightn't be permitted to 14:23
21 getting into court in the United States.
22 **MS. JUSTICE COSTELLO:** Yes.
23 **MS. BARRINGTON:** If that's so, that's a breach of
24 European law, presumably because European law mandates,
25 makes mandatory the requirement that claims such as 14:23
26 this should be able to get into court.
27 **MS. JUSTICE COSTELLO:** Get into court, not just get to
28 her?
29 **MS. BARRINGTON:** No, no, get to court. And what does

1 that mean? Does that mean European law in her view
2 sets the parameters of standing rules, because it
3 doesn't, or that European law has adjusted domestic
4 standing rules such that they must allow of claims that
5 are speculative in nature. But none of that is spelled 14:24
6 out, Judge, in her decision but that seems to flow from
7 her emphasis on Amnesty -v- Clapper, second part of
8 first limb of the standing test. And she marries that
9 with Rule 11 and says 'well this keeps you out of
10 court'. And again, like the reference to 12333, one 14:24
11 can only wonder, especially having regard to the
12 evidence that the court has heard, where the concern in
13 relation to Rule 11 in practice arises from because we
14 know Mr. Serwin doesn't practice in the area and those
15 who do practice in the area have said, including 14:24
16 Prof. Vladeck, that it's never, he has never known of
17 the filing of a Rule 11 application for sanctions in a
18 surveillance action. That's consistent with my
19 instructions, that the government hasn't ever filed for
20 such sanctions. And certainly, insofar as the chilling 14:25
21 effect is concerned, Mr. Serwin with all due respect to
22 him can't be chilled, because he doesn't do it anyway,
23 but he did acknowledge that this was, I think in
24 response to Ms. Hyland, a vibrant and active space
25 having regard to the litigation in the area in the last 14:25
26 five years. Equally Ms. Gorski wasn't chilled by Rule
27 11.

28
29 So it does appear to be a completely academic and

1 concern unrelated to practice in this area at all and
2 yet that is cited with Supreme Court Clapper as being
3 one of the reasons to consider that the remedial
4 landscape in the United States doesn't comply with the
5 Charter.

14:26

6
7 And, Judge, if I could just, having done that, what is
8 admittedly, I think, a whistle-stop tour of the
9 decision, turn to the question of standing and I'm
10 going to ask the court to look briefly at Digital
11 Rights Ireland - sorry, I mean by that the Irish
12 decision - and it's in Book 2 of the core books at
13 Tab 19, Judge.

14:26

14 **MS. JUSTICE COSTELLO:** I'm taking it that that's Book 2
15 of the EU authorities?

14:26

16 **MS. BARRINGTON:** Book 2 of the EU authorities, thank
17 you, Judge.

18 **MS. JUSTICE COSTELLO:** And the tab again, sorry?

19 **MS. BARRINGTON:** And it's Tab 19, Judge.

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

14:27

21 **MS. BARRINGTON:** Judge, I'm not going to take the court
22 through the whole background to the case, but it was
23 the genesis of the challenge to the Data Retention
24 Directive brought by Digital Rights Ireland and one of
25 the main features of the judgment of McKechnie J was
26 the consideration of the issue of whether Digital
27 Rights Ireland had standing.

14:27

28
29 It should of course be noted in this regard that in

1 Schrems 1 the Data Protection Commissioner also took a
2 standing point against Mr. Schrems which was determined
3 by Hogan J.

4 **MS. JUSTICE COSTELLO:** In his favour, presumably?

5 **MS. BARRINGTON:** In his favour. 14:27

6 **MS. JUSTICE COSTELLO:** Or we wouldn't have gone
7 anywhere.

8 **MS. BARRINGTON:** In his favour, but it wasn't suggested
9 by the Data Protection Commissioner that there was any
10 breach of the Charter on his part at the time. 14:27

11 **MS. JUSTICE COSTELLO:** I know it's a corporation but
12 I also understand it's a different person involved.

13 **MS. BARRINGTON:** Yes. The standing issue, Judge, is
14 addressed at paragraph 30 page 266. Of course the
15 starting point was a consideration of Cahill -v- Sutton 14:28
16 and it is perhaps useful to take a step back and to
17 consider the standing rules in this jurisdiction in
18 Cahill -v- Sutton where a person is required to show
19 that his interests have been: "*Adversely affected or*
20 *stand in real or imminent danger of being adversely* 14:28
21 *affected by the operation of a statute.*"

22
23 Language which is certainly not a million miles from
24 the second part of the first limb of the American
25 standing rules. 14:29

26
27 Then, Judge, the court goes on to consider at
28 paragraph 44 onwards the question of whether European
29 law affects the standing rules. And at page 275,

1 paragraph 44 of the judgment of McKechnie J, he refers
2 to the decision in Johnston, which the court will
3 remember is referred to at paragraph 95 of Schrems, and
4 is one of the key European standing basic principle
5 cases. McKechnie J quotes from that, and I'm reading 14:29
6 from the quotation in paragraph 44 --

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

8 **MS. BARRINGTON:** -- in the Court of Justice: "*while it*
9 *is, in principle, for national law to determine an*
10 *individual's standing and legal interest in bringing* 14:29
11 *proceedings, Community law nevertheless requires that*
12 *national legislation does not undermine the right to*
13 *effective judicial protection and the application of*
14 *national legislation cannot render virtually impossible*
15 *the exercise of the rights conferred by Community law.*" 14:30

16
17 So that's a matter for domestic law subject to the
18 oversight of the principle of effectiveness.

19
20 And more recently the significant decision in Unibet is 14:30
21 then referred to. And I look down at paragraph 38,
22 Judge:

23
24 "*Under the principle of cooperation laid down in*
25 *Article 10 - that's of the Treaty - it is for the* 14:30
26 *Member States to ensure judicial protection of an*
27 *individual's right under Community law.*"

28
29 And at paragraph 41: "*It would be otherwise only if it*

1 *were apparent from the overall scheme of the national*
2 *legal system in question that no to legal remedy*
3 *existed which made it possible to ensure, even*
4 *indirectly, respect for an individual's rights under*
5 *Community law.*

14:31

6
7 42. *Thus, while it is, in principle, for national law*
8 *to determine an individual's standing and legal*
9 *interest in bringing proceedings, Community law*
10 *nevertheless requires that the national legislation*
11 *does not undermine the right to effective legal*
12 *protection."*

14:31

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

14 **MS. BARRINGTON:** *I beg your pardon, "effective judicial*
15 *protection". Then at paragraph 45 McKechnie J says:*

14:31

16
17 *"In summary, the court held that the principle of*
18 *effective judicial protection is a general principle of*
19 *community law, which flowed from the common traditions*
20 *of the member states, and the member states must ensure*
21 *judicial protection of an individual's rights under*
22 *community law. National procedural rules must*
23 *therefore not undermine this right to effective*
24 *judicial protection."*

14:31

25
26 So a number of things are very clear, Judge, from
27 **Unibet**. It's a question of whether there is *no* legal
28 remedy existing which makes it possible to ensure, even
29 indirectly, a respect for an individual's rights and

14:31

1 that's then subject to the overarching supervision of
2 the principle of effectiveness.

3
4 Judge, the Inuit decision I'm going to hand into the
5 court (SAME HANDED TO THE COURT). That's a Grand 14:32
6 Chamber decision. That, Judge, was an appeal to the
7 Court of Justice from the General Court. What had
8 happened was that an application had been brought by a
9 number of applicants, a number of them, all involved in
10 the trade in seal products. They were looking, Judge, 14:33
11 to challenge the validity of an EU legislative measure
12 before the General Court and the question was whether
13 they met the EU standing rules as provided for in
14 Article 263 of the Treaty of European Union which
15 required that they satisfy the requirement of direct 14:34
16 and individual concern. And the General Court had held
17 that, notwithstanding the fact that they were involved
18 in trade in seal products, they didn't have the
19 standing to challenge the European measure which
20 prohibited sale in seal products, broadly, save in 14:34
21 certain limited circumstances.

22
23 And they brought an appeal against that decision and
24 the court will see at paragraph 23 what they said was
25 that, or rather what the General Court had said at 14:34
26 paragraph 23 that:

27
28 *"while the four appellants involved are active in*
29 *placing on the market seal products supplied by the*

1 *Inuit and non-Inuit hunters and trappers. They are in*
2 *that capacity concerned by the contested regulation in*
3 *the same way as any other trader who places seal*
4 *products on the market. Even if those appellants are*
5 *covered not only by the general prohibition but also by* 14:35
6 *the exception in relation to the products of Inuit*
7 *origin that's not sufficient to distinguish them*
8 *individually in the same way as the addressee of a*
9 *decision and accordingly the action was inadmissible."*

10
11 So even though they had an interest, they were active
12 in the area or covered by the EU measure, the question
13 was were they sufficiently directly affected and the
14 General Court said no. The grounds of appeal are set
15 out at paragraph 30 at the top of the next page,
16 including the third ground referred to there that the
17 General Court had disregarded Article 47 of the Charter
18 and the provisions of the Convention which guarantee an
19 effective remedy. I am just reading, Judge... 14:35

20 **MS. JUSTICE COSTELLO:** Sorry, which page was that? 14:35

21 **MS. BARRINGTON:** I beg your pardon, from the top of
22 page 9 of 22.

23 **MS. JUSTICE COSTELLO:** First part of the first ground
24 of appeal.

25 **MS. BARRINGTON:** First paragraph. It's paragraph 30,
26 Judge. 14:36

27 **MS. JUSTICE COSTELLO:** 30, thank you.

28 **MS. BARRINGTON:** Two lines down "*the third ground of*
29 *appeal*" and that's the only ground of appeal, Judge,

1 that I think this court needs to consider, and the
2 judgment of the court then dealing with this issue
3 starts at page 19 paragraph 97. And there the court
4 addresses the impact --

5 **MS. JUSTICE COSTELLO:** Sorry, my pages are different to 14:36
6 yours.

7 **MS. BARRINGTON:** I beg your pardon, Judge.

8 **MS. JUSTICE COSTELLO:** Paragraph 97?

9 **MS. BARRINGTON:** Paragraph 97. I think I'm the only
10 one working from a different version. 14:36

11
12 At paragraph 97 the court says: *"Having regard to the*
13 *protection conferred by Article 47 of the Charter, it*
14 *must be observed that that article is not intended to*
15 *change the system of judicial review laid down by the* 14:36
16 *Treaties, and particularly the rules relating to the*
17 *admissibility of direct actions brought before the*
18 *Courts of the European Union, as is apparent from the*
19 *Explanation to Article 47 of the Charter."*

20 14:37
21 The court then goes on to express the standard
22 principle that, at paragraph 100, it's a matter for the
23 Member States: *"To establish a system of legal*
24 *remedies and procedures which ensure respect for the*
25 *fundamental right to effective judicial protection."* 14:37

26
27 Paragraph 102: *"In the absence of European rules*
28 *governing the matter, it is for the domestic legal*
29 *system of each Member State to designate, with due*

1 *observance to the requirements of the principles of*
2 *effectiveness and equivalence, the courts and tribunals*
3 *with jurisdiction and to lay down the detailed*
4 *procedural rules governing actions brought to safeguard*
5 *rights which individuals derive from European law."* 14:37

6
7 Then at paragraph 103 the court says that "*the Treaty*
8 *is not*", and I'm just looking at line 3, Judge:

9 "*Intended to create new remedies before the national*
10 *courts to ensure the observance of European Union law* 14:38
11 *other than those already laid down by national law."*

12
13 Citing Unibet: "*104. The position would be otherwise*
14 *only if the structure of the domestic legal system*
15 *concerned were such that there was no remedy making it* 14:38
16 *possible, even indirectly, to ensure respect for the*
17 *rights which individuals derive from European Union*
18 *law, or again if the sole means of access to the court*
19 *was available to parties who were compelled to act*
20 *unlawfully."* 14:38

21
22 And, accordingly, insofar as it was contended that
23 there was a remedial gap which had to be filled in by
24 Article 47 of the Charter, the Court of Justice said
25 no, upheld the General Court and declared the 14:39
26 applicants' case to be inadmissible.

27
28 And, Judge, those are fundamental principles of
29 European law. How they interact with the Data

1 Protection Commissioner's decision is a matter that is
2 simply not apparent from her decision. Because, as
3 Mr. Collins put it on a number of occasions, it was
4 certainly suggested that the American standing rules
5 didn't comply with Article 87. And yet we know that as 14:39
6 a matter of European law standing rules are a question
7 for domestic law, subject only to the effectiveness.
8 And effectiveness is something that kicks in only when
9 there's no remedy, not even an indirect remedy, that's
10 available, and the Charter isn't designed to fill gaps 14:39
11 in the remedial landscape.

12
13 But we also know from the Data Protection
14 Commissioner's own decision, if nothing else, that the
15 American remedial landscape is not one that provides 14:40
16 for no remedies. On the contrary, she says herself
17 there are remedies but she views them as problematic
18 because there are limitations. And that, Judge,
19 simply, on the basis of the case law, doesn't meet the
20 threshold for getting the oversight of the principle of 14:40
21 effectiveness. We assume, Judge, that that was her
22 view, that somehow the remedial landscape was such that
23 Article 47 was engaged and breached because the
24 principle of effective judicial protection was called
25 into play because there was no remedy. That can be the 14:40
26 only valid European law logic, but that's not what she
27 says. She says there isn't a remedy in every case.
28 And if you match Unibet and Inuit to her statement that
29 there must be a remedy in every case, the two don't

1 fit. So from a European law perspective, Judge, we
2 submit there's a problem in her analysis.

3
4 And then of course, Judge, you have to consider well is
5 she right insofar as what she is saying that American 14:41
6 law imposes requirements that mandate a demonstration
7 of an adverse consequence. It's not a standing issue,
8 it's an interference with the right issue. If she is
9 saying well the two are interlinked, American law
10 requires you to show something that European law says 14:42
11 you don't have to show, and therefore you are
12 unlawfully precluded, if that's the logic, equally
13 there, Judge, we say she is mistaken in her
14 understanding. And one can only try to work out what
15 her reasoning is because it is certainly not spelled 14:42
16 out in these terms. But, if that's the complaint, the
17 evidence falls far short in our submission of
18 establishing that the US standing rules are deficient
19 in the manner contended for.

20 14:42
21 And I will say something very briefly about the
22 standing rules, and I don't propose going into the
23 detail, Judge, of the evidence or the case law because
24 so much has been said already. I think, Judge, it can
25 be fairly be said first that it is accepted by the 14:42
26 experts that the standing rules stem from Article III
27 of the Constitution. The application of the
28 injury-in-fact leg of the standing requirement may be
29 fact dependent, the outcome may be difficult to

1 predict, but the DPC's own experts - I suppose this is
2 the second point - acknowledge that legal challenges to
3 surveillance over the past five years have been a
4 vibrant active space. That's what Mr. Serwin says at
5 Day 9 question 303, it's in our book of extracts, but 14:43
6 I don't propose asking the court to open it.

7
8 Third, in order to satisfy the injury-in-fact
9 requirement it's not inevitably necessary to
10 demonstrate an additional harm or adverse consequence 14:43
11 beyond the interference itself. And that's readily
12 apparent, Judge, from the decision in ACLU -v- Clapper,
13 Second Circuit Clapper. There we know that the Court
14 of Appeals had no difficulty in acknowledging the
15 plaintiffs' standing where the US government had 14:44
16 purported to rely on FISA to collect data and the court
17 held that the injury flowed from the very collection of
18 their data.

19
20 Now Mr. Murray said 'oh but they were making a 14:44
21 constitutional claim in that case', but the court has
22 heard Prof. Vladeck's response to that, that one must
23 view this issue from the prism of standing and not from
24 ultimately the merits point and the court considered as
25 a matter of standing that the injury-in-fact 14:44
26 requirement was met by the collection of the data. The
27 fact that the European plaintiffs in similar situations
28 might not be in a position to *invoke* the Fourth
29 Amendment doesn't impact on the standing analysis.

1 **MS. JUSTICE COSTELLO:** would that not come to another
2 parts of the standing analysis, and I fully confess
3 I may have got this wrong so definitely correct me,
4 where you have to have a redressable injury and if you
5 are suing for a constitutional right that you don't 14:45
6 have is it redressable?
7 **MS. BARRINGTON:** well, that's a second...
8 **MS. JUSTICE COSTELLO:** I know we have move on from the
9 four bits of injury.
10 **MS. BARRINGTON:** Yes. I think the Data Protection 14:45
11 Commissioner's issue, if this is a correct analysis, is
12 that paragraph 87 of Schrems says you don't have to
13 show an adverse consequence. The Data Protection
14 Commissioner appears to be contending that as a matter
15 of US law, to satisfy the injury-in-fact limb 1 part 1, 14:45
16 you do have to show an adverse consequence and
17 accordingly there's a mismatch between the two and
18 therefore a breach of the Charter.
19 **MS. JUSTICE COSTELLO:** And are you saying I have to
20 confine myself to the issues she arises in her Draft 14:46
21 Decision or can I look at the issues that have been
22 canvassed throughout the hearing?
23 **MS. BARRINGTON:** well, the court, and I think
24 Mr. Murray touched upon this, that the court does look
25 at the decision because that's where you find the well 14:46
26 founded concerns.
27 **MS. JUSTICE COSTELLO:** what I am saying is, if there
28 are other well founded concerns in my opinion that have
29 been raised during the course of this hearing but which

1 are not spelled out in the Draft Decision, where does
2 that leave me?

3 **MS. BARRINGTON:** well, I think the Data Protection
4 Commissioner under the Schrems test is the person who
5 has the obligation to bring the well founded concerns
6 to the court and the court must consider those
7 concerns.

14:46

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

9 **MS. BARRINGTON:** And is circumscribed, Judge, by those
10 concerns. Those are...

14:47

11 **MS. JUSTICE COSTELLO:** So you are saying, if there are
12 concerns, hypothetical, if there are concerns that have
13 been thrown up in the light of the exchanges that have
14 been taken place during the course of this hearing
15 which are not actually identified in her Draft
16 Decision, I can't use those concerns as a valid grounds
17 for considering whether or not to make a reference?

14:47

18 **MS. BARRINGTON:** well, if you look back at paragraph,
19 and I'm not asking the court to open it up, Judge.

20 **MS. JUSTICE COSTELLO:** Hmm.

14:47

21 **MS. BARRINGTON:** If you look back at paragraph 67 of
22 Schrems - 65 of Schrems.

23 **MS. JUSTICE COSTELLO:** No, I understand that Schrems
24 says that, the national authority first raises the
25 concerns and brings them to the court.

14:47

26 **MS. BARRINGTON:** Yes.

27 **MS. JUSTICE COSTELLO:** It's a different point which
28 they haven't expressly addressed.

29 **MS. BARRINGTON:** Yes. I think that's probably correct.

1 what Schrems envisages is that the court *share* the
2 doubts --

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

4 **MS. BARRINGTON:** -- as to the validity of the decision.
5 So I think... 14:48

6 **MS. JUSTICE COSTELLO:** So is the obligation of the
7 court to confine its question of doubts to what's put
8 before it by the national authority or if the court of
9 its own motion has doubts from the hearing.

10 **MS. BARRINGTON:** Yes. 14:48

11 **MS. JUSTICE COSTELLO:** Because obviously in references
12 to the Court of Justice, the court can do them of its
13 own motion as well as on application of the parties.

14 **MS. BARRINGTON:** The court can do it of its own motion,
15 refer of its own motion, undoubtedly, Judge. The court 14:48
16 must share doubts as to the validity of the decision.

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

18 **MS. BARRINGTON:** So the court must have doubts, but the
19 sharing of the doubts, Judge, would suggest that the
20 court must consider the doubts that have been brought 14:48
21 to it --

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

23 **MS. BARRINGTON:** -- and decide whether it shares those
24 particular doubts, that's what the wording of paragraph
25 65 certainly suggests; although of course the court in 14:48
26 general in reference scenarios could decide whether it
27 wished to refer because a reference is necessary for
28 its decision, which is a different test. So the court
29 may consider in the normal course that it wishes to

1 refer, notwithstanding the fact that the parties
2 haven't asked it because it decides it has an issue of
3 concern.

4
5 Here I suppose the unusual, it's an unusual 14:49
6 jurisdiction that's defined by Schrems and defined, it
7 would seem, in a way that requires the court to
8 consider the concerns that have been brought to it and
9 to consider whether it shares those concerns.

10 **MS. JUSTICE COSTELLO:** Mm hmm. 14:49

11 **MS. BARRINGTON:** But, coming back to standing, Judge,
12 if I may.

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

14 **MS. BARRINGTON:** Insofar as the concern on her part
15 was, first, the requirement to demonstrate something 14:49
16 over and above the interference, the court will of
17 course carefully consider all of the evidence that has
18 been heard, but will recall that the Plaintiffs had
19 standing in ACLU -v- Clapper, will recall that

20 Prof. Richards in his own evidence indicated that, in 14:50
21 the statutory context, he accepted that proof of an
22 interference in and of itself was sufficient to meet
23 the injury-in-fact leg without any requirement to
24 demonstrate additional harm. We've put the extracts
25 from his evidence on Day 8, Judge, into the - I think 14:50
26 it's Tab 5 of the book. I'm not going to go through it
27 now, Judge, but the court will note in particular what
28 he says at page 125 and in particular at page 132,
29 question 408, in relation to 1810 where he acknowledged

1 that a standing issue didn't arise in relation to the
2 statutory context that this court is principally
3 concerned with because the wrongful use of the data met
4 the injury-in-fact requirement.

14:51

5
6 And Prof. Vladeck, Judge, didn't demur from his view,
7 which is to be found at paragraph 95 of his report,
8 that where EU citizens can marshal plausible grounds to
9 say that the US government has collected, will collect
10 or is maintaining records relating to them in a
11 government database they will likely have standing to
12 sue. And he said, and people have articulated this in
13 different ways and it is, I think, difficult, but he
14 also said at Day 12 page 54 that acquisition and
15 dissemination by government was a harm.

14:51

14:52

16
17 So if the concern is you have to show an adverse,
18 something beyond the interference itself, and that
19 that's not compatible with European law, the evidence
20 doesn't seem to support that proposition in the context
21 that this court has to deal with.

14:52

22
23 Now, Spokeo, Judge. I must say my clients were
24 surprised at the significance that Spokeo took on in
25 this court, and it's not referred to in the Data
26 Protection Commissioner's decision. I think it must be
27 assumed, on the basis of the fact that Mr. Serwin had
28 already provided his memo two weeks earlier, that the
29 Data Protection Commissioner, who issued her decision

14:52

1 the day of the second memorandum, proposed to issue it
2 in any event.

3
4 Spokeo has nothing to do with surveillance. It's not
5 an action brought against the government, Prof. Vladeck 14:53
6 said that was a significant matter. Prof. Vladeck said
7 at Day 12 page 48 it's a very "narrow" decision,
8 doesn't change the standing test. We know from Lujan
9 what the standing test was. In any event Spokeo held
10 that a bare violation of a procedural right granted by 14:53
11 statute *can* be sufficient to constitute injury-in-fact
12 once it's concrete and particularised. And of course
13 the ultimate outcome of Spokeo was that the matter was
14 remitted for further consideration as to whether or not
15 what had occurred *did* meet the concrete and 14:54
16 particularised test.

17
18 The decision restates in our submission the
19 pre-existing requirements that the injury be concrete
20 and particularised. And one can only echo the views 14:54
21 that the court cannot but have noted of Judge Donato in
22 the Gillen -v- Facebook case that Mr. Murray introduced
23 where she, I think she, said Spokeo impressed her for
24 its utter lack of novelty. And, Judge, while there may
25 be an argument that in other contexts Spokeo has caused 14:54
26 some recalibration where there is a statutory cause of
27 action and you might assume, based on the statutory
28 provision, that you meet the standing requirements,
29 that doesn't, on the evidence, seem to be a factor in

1 this context: The height seem to be Prof. Swire saying
2 that there was a *colourable* argument, that in privacy
3 cases you had to show more than the statutorily, if
4 that's a word, prohibited act. But that was an
5 argument he didn't agree with himself and he said that 14:55
6 at Day 11 page 125.

7
8 So it can't be said, Judge, in our submission that the
9 evidence has demonstrated that the American rules in
10 standing impair the essence of a Charter right. 14:55
11 Because they don't in fact, in this context, seem to go
12 beyond paragraph 87 of Schrems, even assuming that
13 that's the appropriate comparator and it only can be
14 once you get through the paragraph 95 standing issue in
15 the first place. 14:55

16
17 Insofar as Amnesty -v- Clapper is concerned, and Rule
18 11, Judge, I'm not going to detain the court further on
19 that, simply to say that Rule 11 simply doesn't arise
20 as an issue on the evidence; and Amnesty -v- Clapper is 14:56
21 dealing with the other leg, the second part of the
22 first limb of the standing test and it surely can't be
23 being suggested that EU law requires claims that
24 involve five degrees of speculation to be mandatory in
25 the Member States. 14:56

26
27 So --

28 **MS. JUSTICE COSTELLO:** well just to tease that one out.
29 I mean the Court of Justice didn't seem to have any

1 difficulty with Mr. Schrems, I'm just imagining
2 Mr. Schrems was the plaintiff in what we have been
3 calling Supreme Court Clapper.

4 **MS. BARRINGTON:** Yes.

5 **MS. JUSTICE COSTELLO:** Now he clearly didn't have any 14:56
6 problem with standing in the Court of Justice and
7 I know it was a reference.

8 **MS. BARRINGTON:** He doesn't have an issue, yes.

9 **MS. JUSTICE COSTELLO:** No, he does have standing. He
10 was accepted here in Ireland. 14:57

11 **MS. BARRINGTON:** Yes.

12 **MS. JUSTICE COSTELLO:** The issue of [inaudible] was
13 accepted and the Court of Justice didn't raise any
14 point that this was speculative or shouldn't be
15 considered. 14:57

16 **MS. BARRINGTON:** But that's not a matter --

17 **MS. JUSTICE COSTELLO:** They weren't considering it.
18 But if he was trying to make the sort of complaint that
19 was agitated in this court in America would he lack
20 standing? 14:57

21 **MS. BARRINGTON:** well, if he was -- there are many,
22 many hoops one would have to go through in answering
23 that question, Judge. Because one would have to --

24 **MS. JUSTICE COSTELLO:** 'My data may be subject to
25 surveillance in the US', as I understand the basic 14:57
26 premise of his complaint and he doesn't want it to be
27 subject, because he doesn't have remedies.

28 **MS. BARRINGTON:** Yes. well, with all due respect to
29 Mr. Schrems, that is an assertion that certainly

1 involves degrees of speculation, and one can start
2 listing them out, Judge. We know that in 2015 there
3 are 95,000 targets.

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

5 **MS. BARRINGTON:** We know that he has to meet the 14:58
6 definition of foreign intelligence, we know that he has
7 to come within the definition of foreign power, we know
8 that the exercise of SIGINT activities can't be used,
9 perhaps we don't know this yet, but I'll come to it, to
10 burden criticism or dissent. It's not at all apparent 14:58
11 how Mr. Schrems could claim to come within any of the
12 definitions, within all of the definitions such as to
13 mount a case meeting the second part of the
14 injury-in-fact. It's difficult to see how he could
15 meet the requirement of showing the, if it's formulated 14:58
16 as Mr. Murray likes, certainly impending harm.

17
18 But those are all issues for the Irish courts. Also,
19 if Mr. Schrems were to bring a case here, having regard
20 to the evidence that we now know, and not what was 14:59
21 known at the time when the matter was before Hogan J
22 without really any evidence, how would he fare on a
23 standing analysis? Because it certainly cannot be
24 assumed, Judge, that from an *Irish* perspective equally
25 that he would be entitled to bring a claim. 14:59
26

27 So he may very well not meet the US standing
28 requirements, but that's not a breach of the Charter.

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

1 **MS. BARRINGTON:** The difficulty is to understand why
2 the Data Protection Commissioner believes that a claim
3 such as his must be permitted to be brought because, in
4 conjunction with Rule 11, there is a breach of the
5 Charter.

14:59

6
7 So, Judge, that's what we have to say about those
8 standing issues.

9 **MS. JUSTICE COSTELLO:** Hmm.

10 **MS. BARRINGTON:** Yesterday there was perhaps an
11 additional gloss put on matters, well perhaps a *gloss*
12 is the wrong word. Mr. O'Dwyer sought to advance a
13 completely different case which was to the effect that,
14 in considering the question of remedies, consideration
15 should be given to the possibility of attacking in the
16 United States *lawful* action.

15:00

15:00

17
18 Now that's something, Judge, that doesn't feature in
19 the Data Protection Commissioner's decision. So again
20 we say, Judge, that is not what this case is about,
21 but, equally, it can't be what an adequacy analysis
22 conducted in this court is about. This court can't be
23 asked to consider whether the US Constitution should be
24 opened up to non-US citizens. One only has to reflect
25 for a moment on the constitutions of the Member States,
26 indeed our own fundamental rights provisions
27 articulated in terms of protections to citizens and
28 which our Supreme Court has said in the *Illegal*
29 *Immigrants (Trafficking) Act* are not co-extensive for

15:00

15:01

1 aliens with the rights of citizens; is it seriously to
2 be suggested that the Constitution of the US is to be
3 amended in some way? And in fact the Data Protection
4 Commissioner, when the point was made by the United
5 States in their submissions that the standing 15:01
6 requirements flowed from Article III of the US
7 Constitution, the Data Protection Commissioner's
8 response was that was a presumptuous assertion on the
9 part of the United States and that if the standing
10 rules flowing from its Constitution didn't meet what 15:02
11 the Data Protection Commissioner contends to be the
12 Charter obligations, then implicitly the constitution
13 should be amended.

14 **MS. JUSTICE COSTELLO:** Obviously, it's no function of
15 any national court of a Member State to comment on the 15:02
16 laws of a third party country's laws, obviously, but
17 what the court is concerned with is transfers of data
18 from the EU where the data subjects have the benefit of
19 certain legal régimes for good or ill. Imagine, for
20 example, that this was being transferred to, let's say, 15:02
21 Nazi Germany or Soviet union, somewhere where we would
22 have a high degree of speculation that there would have
23 been all sorts of interference with privacy going on.
24 So I'm deliberately taking it outside any particular
25 current existing third country; would it not, 15:03
26 therefore, then be relevant to consider what might well
27 be lawful in those countries? For instance, it might
28 been, in Nazi Germany we might have been tracking them
29 to see whether there were Jews involved for example, or

1 whatever it might be in the Soviet union, you know what
2 I am saying?

3 **MS. BARRINGTON:** Yes. And the way that is done, Judge,
4 is by the mechanisms provided for by Union law back at
5 base camp. So you have the protection afforded by your 15:03
6 Adequacy Decision or your protection afforded by your
7 SCCs because those are the protections that have regard
8 to assess the totality of the legal régime. And there
9 the mechanism, assuming that one is correctly in the
10 sphere of national security at all -- 15:03

11 **MS. JUSTICE COSTELLO:** Hmm.

12 **MS. BARRINGTON:** -- as a Treaty function, and that's a
13 major question, but the manner in which the contours of
14 *lawful* action are addressed is through the protection
15 afforded by the Directive. But it can't be contended 15:04
16 that, in circumstances where that protection has been
17 exercised in this case through the Adequacy Decision,
18 for example, that litigants are nonetheless entitled to
19 come in to an Irish court complaining that an American
20 court might not afford them the benefit of its 15:04
21 Constitution and that that is a remedial disappointment
22 that places a question mark over the adequacy of
23 American law.

24
25 That exercise is conducted in viewing the acceptability 15:04
26 of the broad range of the legislative and judicial
27 landscape in the area through the adequacy régime, and
28 that's the only way it could operate, Judge. So
29 Mr. O'Dwyer's point, with respect to him, is not an

1 issue in this case and cannot be an issue in this case.
2 Judge.

3
4 That brings me on, Judge, to the Privacy Shield itself.
5 The Privacy Shield is at Book 1 of 5 Tab 13. I think 15:05
6 it is useful, Judge, when considering the Privacy
7 Shield to know of the format of other adequacy
8 decisions. The court will note that the Adequacy
9 Decision in this case runs to in excess of 100 pages.
10 I'm going to hand into the court the Israeli Adequacy 15:05
11 Decision, that's I think the second last of the
12 adequacy decisions in time, I think New Zealand might
13 be since then.

14
15 (SAME HANDED TO THE COURT) The court will see, I think 15:06
16 it's three pages long, and paragraph 6 the Commission's
17 statement in relation to --

18 **MS. JUSTICE COSTELLO:** which one are we on now?

19 **MS. BARRINGTON:** I beg your pardon, Judge. This is the
20 -- 15:06

21 **MS. JUSTICE COSTELLO:** -- Israeli one.

22 **MS. BARRINGTON:** The Israeli one, recital 6.

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

24 **MS. BARRINGTON:** *"The legal standards for the*
25 *protection of personal data in the state of Israel are* 15:06
26 *largely based on the standards set out in the Directive*
27 *and are laid down in the Privacy Protection Act*
28 *5741-1981, lastly amended in 2007, in order to*
29 *establish new processing requirements for personal data*

1 *and the detailed organisation of the supervisory*
2 *authority."*

3
4 And at recital 8: "*Data protection provisions are also*
5 *contained in a number of legal instruments regulating* 15:07
6 *different sectors."*

7
8 If one looks at the underlying Israeli law that's
9 referred to, and I'll hand in a copy of that also,
10 I think the court may have that already. The court 15:07
11 will see straight away that there's an exception at
12 section 19 for actions taken by security authorities,
13 including the Israeli police, the intelligence branch
14 of the general staff of the Israeli defence forces etc.

15 15:07
16 So it does indeed follow the model of the Directive,
17 the Israeli legislation, and it follows it to the point
18 that, as Irish legislation does, it carves out an
19 exception for national security.

20 15:08
21 By contrast, Judge, the American Privacy Shield
22 decision provides significant detail in relation to its
23 landscape generally in the national security area.
24 It's the result of two and a half years of work and,
25 insofar as national security is concerned, the letters 15:08
26 from Bob Litt are of some significance, and I'm going
27 to ask the court to look at them. But before I do,
28 Judge, I would just ask the court in the first
29 instance, if it has the Privacy Shield decision.

1 MS. JUSTICE COSTELLO: Mm hmm.

2 MS. BARRINGTON: Tab 13, to look at recital 13.

3 MS. JUSTICE COSTELLO: Yes.

4 MS. BARRINGTON: *"The Commission has carefully analysed*
5 *US law and practice, including these official* 15:09
6 *representations and commitments. Based on the findings*
7 *in the recitals, the Commission concludes that US law*
8 *provides an adequate level of protection."*

9

10 And what the decision then does, Judge, is to set out 15:09
11 at Part 3.1 and that's at page 13 onwards, Judge, the
12 limitations in relation to national security.

13

14 And the court has seen a number, I think perhaps both
15 Mr. McCullough and Mr. Gallagher have taken the court 15:09
16 through those limitations. They include reference to
17 PPD-28 and provide some detail of the manner in which
18 SIGINT is conducted, all of which I think, Judge, is in
19 fact --

20 MS. JUSTICE COSTELLO: SIGINT is what? 15:10

21 MS. BARRINGTON: I beg your pardon, signals
22 intelligence, which is how it's referred to in the from
23 a report and what we're dealing with.

24

25 So the approach taken in that part of the decision, 15:10
26 Judge, reflects the assurances given by Mr. Litt. And
27 at page 20 onwards the court deals with effective legal
28 or, I beg your pardon, the Commission deals with
29 effective legal protection and deals in the first

1 instance with, if the court has that paragraph.

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

3 **MS. BARRINGTON:** Paragraph 92 onwards, "*Oversight*",
4 just going through the headings, Judge, because I know
5 the court has been through it already. And then at 15:11
6 paragraph or at page 26 paragraph 111 starts to deal
7 with individual redress.

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

9 **MS. BARRINGTON:** What is significant, Judge, in all of
10 that is that the Commission is taking an approach to 15:11
11 adequacy that's entirely at odds with the approach
12 taken by the Data Protection Commissioner. Because
13 what the Commission does do is assess oversight
14 generally, including the various matters that I alluded
15 to earlier on when the court asked what did I mean by 15:11
16 oversight; the legislative framework, the
17 foreseeability of the laws, the procedures put in place
18 to give effect to the laws, the role of the FISA court
19 and the other oversight bodies, all of which the Data
20 Protection Commissioner believes to be irrelevant. 15:12
21 They were all taken into account in conducting the
22 exercise that the Commission conducted.

23
24 Then individual redress is dealt with, Judge, from
25 paragraph 111 onwards and in particular, page 29, 15:12
26 paragraph 125, "*Access and use by US public authorities*
27 *for law enforcement and public interest purposes*".
28 And again the court will see that this part of the
29 Privacy shield is based in large part on the assurances

1 given by Mr. Litt.

2
3 I'm going to ask the court to turn to the letters that
4 he sent that are annex 6 to the decision, they are at
5 page 91, and I don't think anybody has opened these 15:13
6 letters to the court yet.

7 **MS. JUSTICE COSTELLO:** They have been a bit because
8 I've got quite a lot of highlighting on them.

9 **MS. BARRINGTON:** Oh, have you. Well then I don't need
10 to take the court through them in any detail save to 15:13
11 note that the first, Judge, is February 22, 2016. He
12 sets out that there have been two and a half years of
13 negotiations already and the purpose of his letter, and
14 I'm just reading from the first paragraph, Judge.

15 **MS. JUSTICE COSTELLO:** Sorry just a moment, 15:13
16 Ms. Barrington, I think the stenographers need to
17 change.

18 **MS. BARRINGTON:** Oh, I beg your pardon. Mr. Litt says
19 that the document summarises the information that has
20 been provided. Mr. Litt, we know, is the General 15:14
21 Counsel of the Office of the Director of National
22 Intelligence. The court queried the role of the
23 Director of National Intelligence. It's one of the
24 matters that is now addressed in the amended version of
25 Executive Order 12333 that was handed in to the court. 15:14
26 The court will see the definition of the Office of the
27 Director of National Intelligence, an office created
28 after 9/11 to provide general oversight in relation to
29 intelligence matters and a co-ordination role between

1 the various, I think they're referred to as elements of
2 the Intelligence Community, reporting directly to the
3 President and to the National Security Council.
4

5 So Mr. Litt is in a very authoritative position to set 15:15
6 out what he does address in his letters. And, Judge,
7 again I'll just ask the court to note the approach that
8 he takes in the letters by looking at the headings if
9 the -- this has been opened already. He addresses
10 PPD-28 and the conduct of US signals intelligence 15:15
11 activity, provides an overview of PPD-28. He sets out,
12 over the page, the collection limitations and in
13 particular the requirement that signals intelligence
14 activity be as tailored as feasible. He deals at page
15 95 with retention and dissemination limitations, and 15:16
16 we'll see that specific procedures have been adopted to
17 address concerns in relation to EU citizens. And at
18 (d) he deals with compliance and oversight.
19

20 And I think, Judge, in response to your question, 15:16
21 'what's the oversight?', this is a very comprehensive
22 list of the oversight mechanisms that we believe should
23 be taken into account: In the first instance, the
24 hundreds of oversight personnel, 300 employed within
25 the NSA to address compliance; second, each element of 15:16
26 the Intelligence Community has its own Office of the
27 Inspector General - and the court has heard about the
28 role of Inspectors General; third, the Civil Liberties
29 and Privacy Office within the Director of National

1 Intelligence Unit; then reference is made to PCLOB and
2 the FISC court and Congress. And in addition, he sets
3 out that apart from these formal oversight mechanisms,
4 the Intelligence Community has in place numerous
5 mechanisms to ensure that the Intelligence Community is 15:17
6 complying with the limitations on collection described
7 above.

8
9 And in summary, at the end of the letter, Judge, he
10 says this: "*The United States process for collecting*" 15:17
11 --

12 **MS. JUSTICE COSTELLO:** what page are you on now?

13 **MS. BARRINGTON:** I'm sorry, Judge, page 97.

14 **MS. JUSTICE COSTELLO:** Oh, it's just over the page.
15 Thank you. 15:17

16 **MS. BARRINGTON:** Yes, under the heading "Summary":

17
18 "*The United States process for collecting, retaining*
19 *and disseminating foreign intelligence provide*
20 *important privacy protections for the personal* 15:17
21 *information of all persons, regardless of nationality.*
22 *In particular, these processes ensure that our*
23 *Intelligence Community focuses on its national security*
24 *mission as authorised by applicable laws, Executive*
25 *Orders and Presidential Directives, safeguards* 15:18
26 *information from unauthorised access, use and*
27 *disclosure and conducts its activities under multiple*
28 *layers of review and oversight, including Congressional*
29 *Oversight Committees. PPD-28 and the procedures*

1 *implementing it represent our efforts to extend certain*
2 *minimisation and other substantial data protection*
3 *principles to the personal information of all persons,*
4 *regardless of nationality. Personal information*
5 *obtained through US signals intelligence is subject to* 15:18
6 *the principles and requirements of US law and*
7 *presidential direction, including the protections in*
8 *PPD-28. These principles and requirements ensure that*
9 *all persons are treated with dignity and respect,*
10 *regardless of their nationality or wherever they might* 15:18
11 *reside and recognise that all persons have legitimate*
12 *privacy interests in the handling of their personal*
13 *information."*

14
15 And then he sets out in some detail, Judge, the 15:19
16 operation of Section 702. That's at page 98. He
17 details at page 110 -- I beg your pardon, 100, Judge,
18 the reforms introduced by the Freedom Act. He, at page
19 101, deals with transparency and the various mechanisms
20 to ensure transparency, including the reference to the 15:19
21 website IC On The Record, which is Intelligence
22 Community On the Record, which sets out a number of
23 procedures applicable to the various agencies and
24 declassified information, Judge. And at page 102 he
25 sets out the extensive transparency that exists about 15:19
26 US intelligence activities, and I don't think any issue
27 could be taken but that since the reforms introduced,
28 there has been extensive transparency provided for.
29 And they are listed there, Judge, I don't propose

1 taking the court through them.

2
3 Finally, he deals with redress and in his conclusion,
4 Judge, at page 103, he says - and I'm reading from the
5 second sentence, Judge: 15:20

6
7 *"The United States only uses signals intelligence to*
8 *advance its national security and foreign policy*
9 *interests and to protect its citizens and the citizens*
10 *of its allies and partners from harm. In short, the* 15:20
11 *Intelligence Community does not engage in*
12 *indiscriminate surveillance of anyone, including*
13 *ordinary European citizens."*

14
15 That's, Judge, when I was referring to the Article 29 15:21
16 Committee seeking --

17 **MS. JUSTICE COSTELLO:** Sorry, I think I missed where
18 you were getting that quote from, I'm sorry,
19 Ms. Barrington.

20 **MS. BARRINGTON:** I'm sorry, Judge. Page 103 -- 15:21

21 **MS. JUSTICE COSTELLO:** Yes. And I couldn't find the
22 sentence.

23 **MS. BARRINGTON:** -- the very bottom of the page under
24 the heading "Conclusions".

25 **MS. JUSTICE COSTELLO:** Oh, sorry, I was looking up at 15:21
26 the top.

27 **MS. BARRINGTON:** I'm sorry, Judge.

28 **MS. JUSTICE COSTELLO:** And you said the second sentence
29 under "Conclusions"?

1 **MS. BARRINGTON:** Yes.

2 **MS. JUSTICE COSTELLO:** I'm with you now.

3 **MS. BARRINGTON:** And he recites why the US uses signals
4 intelligence and says: "*In short, the Intelligence*
5 *Community*" - or IC - "*does not engage in indiscriminate* 15:21
6 *surveillance of anyone, including ordinary citizens.*"
7

8 And he goes on over the page to talk about section 702
9 and the Freedom Act innovations and the improvements in
10 transparency with a view to enhancing the privacy and 15:21
11 civil liberties of all individuals, regardless of their
12 nationality.
13

14 Judge, we know from the chronology then that the
15 Article 29 Committee came back with further queries and 15:22
16 sought further clarifications and Mr. Litt wrote
17 another letter, which is also annexed to the decision,
18 and that's eight June 21st letter. And in that letter,
19 Judge, he addresses broadly the role of PCLOB and
20 Inspectors General, and I don't propose taking the 15:22
21 court through that.

22 **MS. JUSTICE COSTELLO:** What, if any, regard am I to
23 have to the fact that the PCLOB now is inquorate?

24 **MS. BARRINGTON:** Yes, well --

25 **MS. JUSTICE COSTELLO:** And has been for some time, as I 15:22
26 understand it.

27 **MS. BARRINGTON:** -- the last PCLOB report issued in
28 August 2016, Judge. My instructions are that there is
29 no reason to believe that new members *won't* be

1 appointed in the normal way, although that may take
2 some time. Obviously the role of PCLOB, which is set
3 out in that, in particular in the second letter, but
4 also referred to in the first letter, is significant
5 from the Commission's perspective. So one can 15:23
6 certainly envisage that when the review takes place in
7 this summer, the annual review, that in the event that
8 PCLOB were not to be fully functioning, the Commission
9 might raise that as an issue of concern.

10
11 Equally, Judge, Section 702, as the court has heard,
12 has what's referred to as a sunset clause in it, with
13 the result - this has previously happened insofar as
14 Section 702 is concerned - it lapses and an Act of
15 Congress will be required if 702 is to be extended. 15:23
16 And that will happen by the end of the year, Judge.
17 But it did previously happen in 2012 and the Act was
18 extended.

19
20 So as I think that certain of the witnesses indicated, 15:23
21 it is inevitable that there will be a significant
22 debate when it comes to considering whether Section 702
23 is to be extended by a further Act of Congress that
24 appropriate checks and balances be put in place. So
25 there are two significant opportunities in the 15:24
26 foreseeable future for ensuring that PCLOB, if not act
27 -- will be active, or if not, there will be, I think,
28 some concerns raised in a number of quarters.

29 **MS. JUSTICE COSTELLO:** I'm assuming PCLOB would have a

1 role in relation to the sunset clause and the 702
2 replacement?

3 **MS. BARRINGTON:** I don't believe that that is formally
4 true, Judge.

5 **MS. JUSTICE COSTELLO:** Is that not inherent in what you 15:24
6 were submitting there, no?

7 **MS. BARRINGTON:** No. The legislation will lapse --

8 **MS. JUSTICE COSTELLO:** Yes, I understand it'll lapse
9 and then Congress will obviously have to consider it.
10 But will it do so without the benefit of PCLOB or are 15:25
11 you saying that PCLOB will be in place to assist
12 Congress?

13 **MS. BARRINGTON:** No, I think formally the two processes
14 are divorced from each other, Judge.

15 **MS. JUSTICE COSTELLO:** Totally separate. Okay. 15:25

16 **MS. BARRINGTON:** But I think the evidence was - and we
17 agree with this - that if 702 is to be continued,
18 there'll be some quid pro quo required, which will
19 include a debate in relation to ensuring that adequate
20 oversight and protection is also in place. That was 15:25
21 the evidence that was given and my instructions are
22 that that would certainly be a factor in any debate
23 and, equally, a factor as a matter of consideration for
24 the Commission.

25 15:25

26 So I don't think this court can be asked to speculate
27 into the future, as it has been, that the court should
28 consider that PCLOB will *not* be able to exercise its
29 function. It *has* been exercising its functions. It

1 has been a very important form of oversight. The court
2 will know that in addition to the 702 report there was
3 a 215 report in relation to the meta-data programme
4 that was very critical of the meta-data programme. And
5 its criticisms in relation to, as we'll see, the 702 15:26
6 report, have been taken on board. So it *is* important,
7 but we certainly take issue with the suggestion as a
8 matter of speculation that the court should consider
9 that in the future, PCLOB might *not* provide the
10 oversight that it has been providing to date. The 15:26
11 Commission -- the Privacy Shield Decision says that it
12 has regard to the assurances provided by the United
13 States and in particular the assurances provided by
14 Mr. Litt, which in turn refer to PCLOB.

15 15:27
16 Judge, just one or two matters, if I may, in relation
17 to the Ombudsperson mechanism itself. The court has
18 seen that the mechanism, which starts at page 72,
19 applies equally to the SCCs, and that's evident from
20 paragraph four of annex A. And the way it works is 15:27
21 that the request is submitted by the -- at the national
22 handling body, it then goes up to a coordinating
23 European organisation and it'll be transferred from
24 that organisation to the US Ombudsperson.

25 15:28
26 And there was some debate, Judge, in relation to the
27 manner in which the US Ombudsperson considered a
28 complaint, and I'll ask the court to look in that
29 regard at page 74, subparagraph (e).

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

2 **MS. BARRINGTON:** And that provides, Judge, that once a
3 request has been completed, the Privacy Shield
4 Ombudsperson will provide, in a timely manner, an
5 appropriate response to the submitting EU individual 15:28
6 complaint handling body. I should just clarify, Judge,
7 one and perhaps minor matter that crept into the
8 evidence; the response goes back from the United States
9 Ombudsperson to the member -- to the coordinating,
10 European coordinating body - it would probably be the 15:29
11 Article 29 Working Committee - and then back to the
12 Member State.

13 **MS. JUSTICE COSTELLO:** Two stages?

14 **MS. BARRINGTON:** Two stages. The Privacy Shield, in
15 general, provides for its publication in the Federal 15:29
16 Register, but there isn't any express provision, Judge,
17 for the publication of the individual decisions of the
18 Ombudsperson. I think that may have been said at some
19 point during the course of the evidence.

20 15:29

21 So, Judge, the Privacy Shield Ombudsperson is to
22 provide a response to the submitting EU individual
23 complaint handling body confirming that a complaint has
24 been properly investigated and, two, that the US laws,
25 statutes etc. providing the limitations and safeguards 15:29
26 have been complied with, or in the event of
27 noncompliance, such noncompliance has been remedied.
28 Now, Judge, the suggestion was made, I think, by
29 Ms. Gorski during the course of her evidence that this

1 permitted of the possibility of an identification of
2 noncompliance which *wasn't* remedied. And, Judge, I
3 don't believe that that follows from the wording, but
4 my instructions are to reject that proposition in the
5 most categorical terms, that there's any possibility 15:30
6 that a compliance issue would be identified and left
7 *unaddressed*, as seemed to be suggested.

8
9 And one only has to consider the vast array of
10 compliance mechanisms outlined by Mr. Litt in his 15:30
11 letter to understand that the agencies involved are
12 under an independent obligation to report incidents of
13 noncompliance. And all compliance incidents are to be
14 reported to the FISC, to appropriate oversight bodies
15 in the executive branch and Congress, with a view to 15:31
16 appropriate remedies being applied. So there's simply,
17 in our submission, Judge, no basis for the speculation,
18 either from the wording or as a matter of procedures,
19 that a situation of noncompliance would be left without
20 being remedied. 15:31

21
22 The answer that *is* to be given, Judge, is one that, as
23 Prof. Swire indicated, takes account of the hostile
24 actor scenario, which is a significant feature. And
25 the Ombudsman mechanism is one that, for this reason, 15:31
26 is envisaged in a number of Member States as an
27 appropriate mechanism to deal with -- to get around
28 standing issues and to deal with complaints and to
29 provide reassurance without there necessarily being

1 judicial ex post interrogation of or consideration of
2 complaints, for that very hostile actor scenario. And
3 the court will see from the from a report that similar
4 complaints handling or Ombudsperson mechanisms which
5 are non-judicial in nature are to be found in a number 15:32
6 of the Member States.

7
8 And insofar as it is now suggested by the DPC in their
9 submissions since the case started that this
10 Ombudsperson mechanism doesn't address any pre-existing 15:32
11 concerns in relation to remedies because it is
12 non-judicial in nature, the court will note what the
13 Commission says about the utility of the Ombudsperson
14 mechanism that's addressed at recitals 116 onwards -
15 I'm afraid I'm asking the court to go backwards. 15:33
16 That's at page 27, Judge, where the Commission sets out
17 - if the court has that, page 27?

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

19 **MS. BARRINGTON:** Recital 116, the bottom of the page,
20 the US's proposal to create the Ombudsperson mechanism 15:33
21 and sets out how it would operate its schema within the
22 administration; at paragraph 120, the US Government
23 commitment to ensure that, in carrying out its
24 functions, the Privacy Shield Ombudsperson would be
25 able to rely on the co-operation from other oversight 15:34
26 and compliance review mechanisms existing in US law;
27 paragraph 121, the fact that the Privacy Shield
28 Ombudsperson - or, sorry, I should've said recital -
29 will be independent from and thus free from

1 instructions by the US Intelligence Community and that
2 this was a matter of significant importance to the
3 Commission; overall, at recital 122, the mechanism
4 ensures that individual complaints will be thoroughly
5 investigated and resolved and that at least in the 15:34
6 field of surveillance, this will involve independent
7 oversight bodies with the necessary expertise and
8 investigatory powers and an Ombudsperson that will be
9 able to carry out its functions free from improper and,
10 in particular, political influence. 15:34

11
12 *"Moreover, individuals will be able to bring complaints*
13 *without having to demonstrate or to provide indications*
14 *that they have been the object of surveillance. In the*
15 *light of these features, the Commission is satisfied 15:35*
16 *that there are adequate and effective guarantees*
17 *against abuse."*

18
19 And the Commission concludes at paragraph 124 that this
20 is, in addition to the remedies existing, concludes - 15:35
21 I'm just looking at the last sentence, Judge - the
22 Ombudsperson mechanism provides for an independent
23 oversight with investigatory powers and the
24 effectiveness of the mechanism is to be reassessed in
25 any review. 15:35

26
27 So the Commission, Judge, has considered - and I've
28 gone through those recitals quickly, Judge -
29 comprehensively considered the structure of the

1 Ombudsperson, how it works and its role within the
2 national security context and has considered that this
3 type of mechanism *does* provide for the requisite degree
4 of independence to provide, in a national security
5 context, additional reassurance. 15:36

6
7 The Data Protection Commissioner says only - only -
8 'well, it's not judicial in nature'. And it's not
9 clear where the requirement that, in the national
10 security context, a judicial ex post intervention is 15:36
11 mandatory, where that contention comes from, Judge. It
12 certainly *isn't* consistent with the case law of the
13 European Convention, which of course *does* have
14 jurisdiction to deal with national security issues;
15 there's no carve-out from the Convention as there is 15:36
16 with the Treaty. So the European Convention case law
17 is something to which regard can and should be had in
18 this context. And the court will see when it considers
19 in detail the various recitals to the Ombudsperson
20 decision that the Commission *has* had regard to the 15:37
21 Convention case law in the area.

22
23 So it's a structure that is found in the Member States,
24 is considered by the Commission to be significant and
25 is, in our submission, compatible with the Convention 15:37
26 jurisprudence. Judge --

27 **MS. JUSTICE COSTELLO:** And do you say the Convention
28 jurisprudence governed Charter -- Article 47?

29 **MS. BARRINGTON:** well, the Convention jurisprudence is

1 certainly a significant source of, a significant
2 consideration in Charter jurisprudence. In considering
3 proportionality also, Judge, under Article 52 - I was
4 struggling to remember the article - the Convention
5 jurisprudence is equally, in our submission, of 15:38
6 significance, as it reviews Member State action,
7 applying the Convention's margin of appreciation. But
8 what is perhaps most significant in respect of the
9 Convention jurisprudence is that the Court of Human
10 Rights has a long history of dealing with national 15:38
11 security issues, unlike the Court of Justice, for
12 obvious reasons.

13
14 So yes, the Convention jurisprudence is an important
15 source for Charter case law, although I think the Court 15:38
16 of Justice does indicate that it's entitled to go
17 further than the Convention in certain respects. And
18 that's undoubtedly a statement that is to be found.

19 **MS. JUSTICE COSTELLO:** Like, there's no equivalent to
20 Article 8, as far as I -- from recollection, in the 15:39
21 Convention.

22 **MS. BARRINGTON:** There is no precise equivalent of
23 Article 8, that's true. The Convention jurisprudence
24 addresses issues of data privacy in the context of
25 Article 8 of the Convention, which confers the right to 15:39
26 privacy.

27 **MS. JUSTICE COSTELLO:** which is more -- yes.

28 **MS. BARRINGTON:** Judge, when the Privacy Shield was
29 being discussed, the suggestion was also made and it

1 was a suggestion -- sorry, I should be more accurate;
2 the suggestion was made by Ms. Gorski and, I think, by
3 counsel for EPIC that the Privacy Shield laid
4 considerable emphasis on PPD-28 and PPD-28 was not a
5 legislative measure and that it could perhaps be 15:40
6 secretly revoked and nobody in the US administration
7 might tell the European Commission. And there was a
8 possible concern in that regard.

9
10 Insofar as this suggestion has been made that the US 15:40
11 would somehow pull the wool over the eyes of the EU and
12 surreptitiously replace PPD-28, I'm asked to say,
13 Judge, that that is simply inconceivable for a number
14 of reasons. First, the principles of international
15 comity and respect with which the US engages with its 15:40
16 partners in the EU absolutely preclude such a
17 suggestion. And second, it's inconceivable, Judge,
18 that a fundamental document, which, the evidence was,
19 codifies existing practice, which *has* been made
20 publicly available - it's not published as a 15:41
21 legislative measure, but it's publicly available, it's
22 available on various websites - it governs the
23 activities of *numerous* operators within the
24 Intelligence Community and the idea that it would
25 simply disappear or be surreptitiously revoked and that 15:41
26 no one would let on is one that is inconceivable,
27 Judge.

28
29 PPD-28 has permeated the Intelligence Community,

1 because it is reflected in procedures adopted within
2 the various Intelligence Community elements to ensure
3 that it is given effect to. And that includes, Judge,
4 specialised procedures to apply PPD-28 to non-US
5 citizens. And I don't think the court has seen those 15:42
6 procedures and I want to draw them to the court's
7 attention. They're in the US books of materials, they
8 are in book three, Judge, of the US materials at tab
9 43. I'm sorry, 43 is PPD-28 itself. 44 is PPD-28
10 Section 4 Procedures. The court will see if it does 15:43
11 look, in the first instance, at PPD-28, section 4 - if
12 the court has that?

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

14 **MS. BARRINGTON:** It's page six of 13.

15 **MS. JUSTICE COSTELLO:** Mm hmm. 15:43

16 **MS. BARRINGTON:** Provides for policies and procedures:
17

18 *"The Director of National Intelligence, in consultation*
19 *with the Attorney General, shall ensure that all*
20 *elements of the Intelligence Community establish 15:43*
21 *policies and procedures that apply the following*
22 *principles for the safeguarding of personal information*
23 *collected from signals intelligence activities."*

24
25 And those procedures then - there are, I understand, 15:43
26 various sets of procedures, but behind tab 44, the
27 court has the NSA procedures of January 2015. And
28 these are procedures, if the court looks at page, it's
29 three pages in, where you have the signature from the

1 Signals Intelligence Director

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

3 **MS. BARRINGTON:** These are procedures that relate to
4 the personal information of non-US persons. And
5 they're stated in the first paragraph, Judge, to be 15:44
6 procedures to implement PPD-28. And if the court turns
7 on to page three, under "Purpose", paragraph 1.1, the
8 procedures prescribe policies and procedures and - I'm
9 not going to read out that number - assigns:

10 15:44
11 *"Responsibilities to ensure that the missions and*
12 *functions of the US SIGINT system are conducted in a*
13 *manner that safeguards the constitutional rights of US*
14 *persons. These supplemental procedures implement the*
15 *privacy and civil liberties protections afforded to 15:45*
16 *non-US persons by PPD-28."*

17
18 And they deal, Judge, at page five with policy
19 generally and provide at 3.2 that:

20 15:45
21 *"Privacy and civil liberties shall be integral*
22 *considerations in the planning of US SIGINT activities.*
23 *The US shall not collect SIGINT for the purpose of*
24 *suppressing or burdening criticism or dissent or*
25 *disadvantaging persons based on their ethnicity, race, 15:45*
26 *colour, gender, sexual orientation or religion."*

27
28 And the policy of the United States is stated at 3.3,
29 which is to target or collect *only* foreign

1 communications for foreign intelligence purposes to
2 support national and departmental missions and so on
3 and so forth. And at paragraph 3.5 the same provision
4 as is to be found in PPD is set out; SIGINT activities
5 shall be as tailored as feasible. And, Judge, at page 15:46
6 eight the court has provisions in relation to the
7 retention of communications. And, in effect, the
8 timeframe set out at 6.1 mirrors the timeframes
9 referred to in 12333.

10
11 I think the point was made by Mr. Schrems' counsel
12 yesterday that 12333 only referred back to protections
13 afforded to US citizens --

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

15 **MS. BARRINGTON:** -- but he didn't address these 15:46
16 procedures, which extend the same protections to non-US
17 citizens.

18
19 And finally, Judge, paragraph 7.3:

20
21 *"If personal information of a non-US person is 15:46*
22 *improperly disseminated, the incident must be reported*
23 *to the SIGINT directorate's information sharing*
24 *services group and oversight and compliance*
25 *organisation within 24 hours upon recognition of the 15:47*
26 *error for remediation and follow-up reporting to the*
27 *DNI in accordance with the provisions of PPD-28."*

28
29 So those, Judge, are significant procedures put in

1 place and illustrate the permeation of PPD-28
2 throughout the elements of the Intelligence Community.

3
4 Judge, in considering the question then of adequacy -
5 and I'll go through this quickly, because I think I've 15:47
6 probably said some of this already - the DPC, in our
7 submission, has strikingly failed to consider a number
8 of very pertinent factors. And it's perhaps helpful to
9 list out what the DPC considers in its decision or in
10 its submissions to be irrelevant. 15:48

11
12 First, it's acknowledged that EU citizens are not
13 completely without remedies in the US - that's at
14 paragraph 44 of the decision; that a number of remedial
15 mechanisms are available, but it's contended, 15:48
16 seemingly, that these remedial mechanisms are to be
17 disregarded - they include, of course, the principal
18 civil remedies in the national security area.

19
20 Equally, remedies *not* identified in the DPC decision 15:48
21 are contended to be, seemingly, irrelevant; the
22 Administrative Procedure Act, which provided the basis
23 for the relief in ACLU -v- Clapper is seemingly
24 *irrelevant*. Further deterrent protections, such as
25 criminal sanctions, provided for in Section 1809, or 15:49
26 the exclusionary rules provided for in 1806, they are,
27 it would seem, factors that are not material in the
28 consideration of adequacy. The possibility of actions
29 by or against those to whom the FISA directives are

1 addressed, the companies - and they have also been,
2 we've seen, active in this area - that possibility, an
3 indirect one, but we know from Unibet and Inuit that
4 indirect remedies are of significance, that's to be
5 disregarded. The institutional checks provided for by 15:50
6 the executive, Congressional oversight to ensure that
7 breaches *don't* occur, those are to be disregarded. The
8 role of the FISA court in approving certification,
9 that's insignificant it seems. The fact that the
10 standing rules stem from Article III of the 15:50
11 Constitution is equally an irrelevant factor and it was
12 a presumptuous assertion on the part of the US
13 Government to point out the constitutional underlay of
14 the standing rules. The national security context is
15 irrelevant, it doesn't fall to be -- wasn't considered 15:50
16 by the DPC, doesn't fall to be considered as part of
17 any proportionality analysis. The practice in Member
18 States is irrelevant, even in the standing domain it
19 would seem, and notwithstanding the fact that it's
20 acknowledged that in this area US law is equal to or 15:51
21 better than the Member State law insofar as protections
22 are afforded. The fact that EU citizens are materially
23 in an analogous position to US citizens since the
24 reforms introduced in 2014 - that was Mr. Serwin's view
25 in his memorandum - that's irrelevant. The positive 15:51
26 aspects of the US litigation system when compared to
27 common law systems, which are, of course, *vital* to
28 questions of access to the court, such as the costs
29 rule - costs *don't* follow the event in the United

1 States; very important in terms of bringing on
2 proceedings or chilling effects, the availability of
3 class actions facilitating access to justice, those are
4 not matters seemingly to be taken into account. The
5 totality of the circumstances envisaged at Article 15:52
6 25(2) of the Directive, including law in practice,
7 those *aren't* taken into account. The calibrated
8 approach taken by the Court of Human Rights to cases
9 involving data in the national security context, that's
10 stated *not* to be the determining consideration. 15:52

11
12 And what's left, Judge, after that, when you've
13 excluded all of those matters, you have a core of
14 supposed relevance, which we contend is divorced from
15 the reality and practice of the law within the United 15:52
16 States and focusing only on a subset of legal remedies
17 has resulted in a skewed analysis.

18
19 So the court has to consider at this stage what *is* the
20 valid comparator? And for the reasons we've already 15:53
21 given, Judge, we say that the practice in the Member
22 States *must* be taken into account, because that's
23 provided for in Article 25(2) of the Directive.

24 Second, the practice in the Member States feeds into
25 any proportionality analysis, which we say *should* be 15:53
26 conducted, because Article 52(4) lists the
27 constitutional traditions of the Member States as a
28 relevant factor. Thirdly - and this is a point we
29 make, Judge, at paragraph 74 of our submissions - where

1 American law provides the same or greater privacy
2 protections, if the SCCs were to be invalidated, this
3 would place the EU and EU Member States at risk of
4 breaching the WTO nondiscrimination and most favoured
5 nation principles. And that is a significant factor, 15:54
6 Judge, because as a matter of EU law, EU provisions
7 must be interpreted insofar as possible with
8 international agreements.

9 **MS. JUSTICE COSTELLO:** That's, as far as I know, a
10 totally new point. And so you might need to elaborate 15:54
11 on that if I'm going to understand it.

12 **MS. BARRINGTON:** well, Judge, perhaps the easiest thing
13 to do is when I'm going through the submissions very
14 briefly, I'll point that out. It's something that we
15 say in our submissions, because it is a factor we 15:54
16 believe that should be taken into account. But I'll
17 come back to it, Judge, it might be speedier if I do it
18 that way.

19 **MS. JUSTICE COSTELLO:** Yes, I should apologise, I
20 thought Mr. Maurice Collins was going to be going 15:55
21 before you. I read his in anticipation of this morning
22 rather than yours.

23 **MS. BARRINGTON:** Oh, I mean sorry, Judge, I should've
24 told the court that we had swapped.

25 **MS. JUSTICE COSTELLO:** No, it doesn't matter. I'm just 15:55
26 saying...

27 **MR. MAURICE COLLINS:** It was a more exciting read
28 anyway, Judge.

29 **MR. GALLAGHER:** We won't ask you how illuminating they

1 were.

2 **MR. MURRAY:** well, hopefully you won't have to hear
3 from him so, Judge.

4 **MR. MAURICE COLLINS:** Ha ha ha.

5 **MS. JUSTICE COSTELLO:** I hope the stenographer managed 15:55
6 to get that.

7 **MS. BARRINGTON:** Judge, I'm not going to go through the
8 Convention jurisprudence, because I know that Facebook
9 will, but I'd simply draw the court's attention to the
10 fact that we do refer to a number of the Convention 15:55
11 cases in the area in our submissions, in particular the
12 decision in Kennedy, in Zabo and in Zakharov. And what
13 those cases show is that in the national security
14 context you have to look at the totality of the regime,
15 you have to look at standing as against the totality of 15:55
16 the regime and you have to look at the question of
17 breaches and justification of breaches as against the
18 totality of the regime.

19

20 *None* of the Convention cases confine themselves to an 15:56
21 analysis such as that conducted by the DPC of remedies
22 only. And the cases *do* support the proposition that
23 while judicial oversight is certainly the *preferred*
24 course, it isn't *mandatory*. Because of course, the
25 Convention jurisprudence affords a margin of 15:56
26 appreciation to the Member States. The United States,
27 of course, *does* have judicial oversight, but oversight
28 in the form provided for by section 702, oversight of
29 section 702 certification and oversight in that it

1 deals with challenges brought by the persons to whom
2 the directives are addressed and oversight in that it
3 allows for the amici to come in and to argue
4 significant points.

5 **MS. JUSTICE COSTELLO:** So that's ante? 15:57

6 **MS. BARRINGTON:** That's ante. That's ante. But the
7 Convention jurisprudence accepts that there may be a
8 number of ways in which the oversight can legitimately
9 be provided. And that case law, Judge, is case law
10 that is of importance and we say is case law that 15:57
11 provides an appropriate comparator in the manner in
12 which it approaches review of the action within Member
13 States. And it's on the basis of that Convention
14 jurisprudence that we have structured our submissions,
15 addressing, in the first instance, requirements such as 15:57
16 the foreseeability of mechanisms providing for
17 formalised published legal mechanisms and other forms
18 of procedures and oversight. So that jurisprudence is
19 an important source of precedent in a way as to the
20 correct approach to take in considering national 15:58
21 security contexts.

22
23 Judge, I haven't quite finished. I'm afraid I did
24 wish -- I *am* behind schedule, I know. I think I would
25 be perhaps another 15 or 20 minutes. I'm sorry for 15:58
26 having taken longer than I said.

27 **MS. JUSTICE COSTELLO:** I would normally stay, but I
28 have a meeting at quarter past four. So if we go for
29 another ten minutes and see where we go. But I --

1 **MS. BARRINGTON:** Yes, Judge. Judge, one document to
2 which reference has been extensively made but which the
3 court hasn't seen, I think, yet is the PCLOB report.
4 And I was going to ask the court to quickly look at
5 that report so that it can see what's in it. And it is 15:59
6 of use, Judge, in providing again an important insight
7 into the manner in which FISA and Section 702 in
8 particular operate.

9 **MS. JUSTICE COSTELLO:** Do you know which book it's in?
10 **MS. BARRINGTON:** Yes, it's in book five, tab 56. 15:59

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

12 **MS. BARRINGTON:** I think, Judge, there was unanimity
13 amongst the witnesses that PCLOB was an important
14 source because PCLOB had access to classified
15 information and because it is an independent body that 16:00
16 has produced, as I think I've indicated, a number of
17 reports. There's, equally, a report on the Section 215
18 meta-data programme, but this is the report on Section
19 702.

20 16:00

21 Judge, just before I go into it, there was, equally, a
22 suggestion during the course of the proceedings that
23 programmes within the United States - and when I say
24 "programmes", I'm told that that word is inaccurate,
25 but it's a word that everybody, I think, has been using 16:01
26 - that programmes within the United States for data
27 collection might be out there and we wouldn't know
28 about it. And, Judge, first, the position is that
29 Section 702 provides the basis for signals intelligence

1 within the United States and both the Privacy Shield
2 *and* PCLOB show that collection under 702 is carried out
3 either through PRISM collection or Upstream collection.
4 And that is, Judge, a complete and accurate
5 description. It would be incorrect to suggest that 16:02
6 there's any other means of acquisition under Section
7 702. And in the event that there *were* to be a new form
8 of collection - and that's what they are, PRISM and
9 Upstream, forms of collection - they would all fall
10 within the parameters of the strictures provided for by 16:02
11 Section 702.

12
13 So my instructions are that there's no basis for
14 contending that there are forms of collection of data
15 within the United States *outside* section 702 and that 16:02
16 the PCLOB report, in describing PRISM and Upstream, is
17 an entirely accurate description. Judge --

18 **MR. MURRAY:** Ms. Barrington *is* now starting to give
19 evidence, Judge, as will be quite obvious to everyone.

20 **MS. BARRINGTON:** The PCLOB report, Judge, states at 16:03
21 page two that Section 702 - I see PCLOB refer to it as
22 a programme as well - the Section 702 programme - I'm
23 looking at the middle of the page, Judge - is extremely
24 complex. And if the court has that?

25 **MS. JUSTICE COSTELLO:** I do. 16:03

26 **MS. BARRINGTON:** Involving multiple agencies collecting
27 multiple types of information for multiple purposes.
28 And PCLOB state at the end of that paragraph that
29 operation of the Section 702 programme *has* been subject

1 to judicial oversight and *extensive internal*
2 supervision and the board has found *no* evidence of
3 intentional abuse.

4
5 And in the following paragraph the board offers a 16:03
6 series of policy recommendations to strengthen privacy
7 safeguards and to address these concerns, which I think
8 the evidence was that those recommendations had all
9 been accepted and I think Prof. Swire said they were
10 being implemented or were in the course of being 16:04
11 implemented.

12
13 Judge, page 20 provides for, I think, a very succinct
14 description of Section 702. And the court already
15 knows all of these phases. The statutory scope of 16:04
16 Section 702 is defined as permitting the Attorney
17 General and the Director of National Intelligence to
18 authorise:

19
20 "*(1) targeting of persons who are not United States*
21 *persons, (2) who are reasonably believed to be located*
22 *outside the United States, (3) with the compelled*
23 *assistance of an electronic communication service*
24 *provider, (4) in order to acquire foreign intelligence*
25 *information. Each of these terms is, to various*
26 *degrees, further defined and limited by other aspects*
27 *of FISA. Congress also imposed a series of limitations*
28 *on any surveillance conducted under Section 702. The*
29 *statute further specifies how the Attorney General and*

1 *Director of National Intelligence may authorise such*
2 *surveillance, as well as the role of the FISC in*
3 *reviewing these authorisations."*
4

5 And, Judge, the report goes on at page 24 to deal with 16:05
6 certifications, how you apply to the FISC for a
7 certificate. I'm not going to open these, Judge, but
8 simply so the court knows where a very fulsome
9 description of the regime that everybody agrees is a
10 good and valuable description is to be found. Page 26 16:05
11 deals with the FISC review. Page 29 sets out at the
12 bottom of the page - and I'm just looking at the last
13 sentence - the requirement that the FISC be informed of
14 incidents of noncompliance. Page 32 deals with, at D,
15 directives and the possibility that directives be 16:06
16 challenged by the entities to which they are addressed.
17 And then it goes on to deal with targeting of persons
18 by tasking selectors.

19
20 And the court will note that the report records that: 16:06
21

22 *"Section 702 certifications permit non-US persons to be*
23 *targeted only through the 'tasking' of what are called*
24 *'selectors'. A selector must be a specific*
25 *communications facility that is assessed to be used by*
26 *the target, such as the target's e-mail address or*
27 *telephone number. Thus, in the terminology of Section*
28 *702, people... are targeted; selectors... are tasked."*
29

1 Then over the page, PCLOB confirm that it's *not*
2 permissible to use key words such as "bomb" or "attack"
3 or the names of targeted individuals. And --

4 **MS. JUSTICE COSTELLO:** Though obviously, as Mr. O'Dwyer
5 pointed out, *frequently* - it may be coincidentally so - 16:07
6 but frequently the e-mail addresses will contain the
7 names. And so that --

8 **MS. BARRINGTON:** Yes. And I think, Judge, that's a
9 fair observation. The report addresses, gives examples
10 of how precisely, at the top of page 34, that it's done 16:08
11 and under PRISM. So the target, the example given
12 there, is John Target and the e-mail address may very
13 well be johntarget@usa-ISP.com and it may incorporate
14 the name, but the targeting by a person's name or by a
15 key word is insufficient, it's the communication 16:08
16 identifier, whether it's the telephone number or the
17 e-mail address, that's the relevant issue.

18
19 How the tasking is done is set out at page 34 in, I
20 think, a useful example, Judge. And then at page 35 16:08
21 the report deals with the Upstream collection. And at
22 the top of page 36, Judge, the court will see the
23 various steps carried out in relation to Upstream
24 collection, which begins with the NSA's tasking of a
25 selector. And at the end of the paragraph there, 16:09
26 Judge, the court will see:

27
28 "*Upstream telephony collection therefore does not*
29 *acquire communications that are merely 'about' the*

1 *tasked telephone number.*"

2
3 And the manner of collection of internet transactions
4 is addressed, Judge, and perhaps just looking at the
5 bottom of page 37 -- or 36, Judge, one paragraph may be 16:09
6 of interest in view of the questions the court was
7 asking earlier:

8
9 *"Once tasked, selectors used for the acquisition of*
10 *upstream Internet transactions are sent to a United*
11 *States electronic communication service provider to*
12 *acquire communications that are transiting through*
13 *circuits that are used to facilitate Internet*
14 *Communications, what is referred to as the 'Internet*
15 *backbone'. The provider is compelled to assist the*
16 *government in acquiring communications across these*
17 *circuits. To identify and acquire Internet*
18 *transactions associated with the section 702 tasked*
19 *selectors on the Internet backbone, Internet*
20 *transactions are first filtered to eliminate potential*
21 *domestic transactions, and then are screened to capture*
22 *only transactions containing a tasked selector. Unless*
23 *transactions pass both these screens, they are not*
24 *ingested into government databases."*

25
26 So they don't get retained, Judge, at all in the
27 Digital Rights way. And the various forms of --
28 **MS. JUSTICE COSTELLO:** The word used in Schrems was
29 "access".

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non-US persons tomorrow. Thank you, Judge.
MR. GALLAGHER: Thank you, Judge.
MS. JUSTICE COSTELLO: Thank you very much.
MR. MURRAY: Thank you, Judge.

16:13

**THE HEARING WAS THEN ADJOURNED UNTIL FRIDAY, 3RD MARCH
AT 11:00**

'68 [1] - 79:8
'74 [1] - 79:7
'86 [1] - 79:8
'about' [1] - 147:29
'Actually' [1] - 57:1
'adequate' [1] - 64:6
'do' [1] - 31:3
'Internet' [1] - 148:14
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