<u>THE HIGH COURT - COURT 29</u>

<u>COMMERCIAL</u>

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER   PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND   DEFENDANTS

MAXIMILLIAN SCHREMS

<u>HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO</u>
<u>ON FRIDAY, 10th MARCH 2017 - DAY 19</u>

19

Gwen Malone Stenography Services certify the following to be a verbatim transcript of their stenographic notes in the above-named action.

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THE HEARING RESUMED AS FOLLOWS ON FRIDAY, 10TH MARCH

2 **2017**

3

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

5 **REGISTRAR:** Data Protection Commissioner -v- Facebook   11:04

6 Ireland Ltd. and another.

7

8 **SUBMISSION BY MR. McCULLOUGH:**

9

10 **MR. McCULLOUGH:** May it please the court. Judge, there 11:04

11 are three broad areas with a number of subareas beneath

12 them that I want to cover today. First, I want to

13 complete the submissions that I was making yesterday in

14 relation to what I might call structure.

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

16 **MR. McCULLOUGH:** That's to say what is the proper

17 structure by which the court knows the questions to ask

18 itself in this case.

19

20 And then, secondly, I want to revert very briefly to   11:05

21 some questions the court raised yesterday, I think

22 they'll fit in naturally then; and then, thirdly,

23 I want to turn to the substance of EU law and US law

24 and point out to the court how they are incompatible

25 with each other, all by reference, Judge, to what is   11:05

26 set out in the speaking note that the court has seen.

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

28 **MR. McCULLOUGH:** I had dealt yesterday, Judge, with the

29 question of the State security exemption, if I may so

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

I want to deal, Judge, with the material then that's at
paragraph 24 onwards in this speaking note dealing with
Member States as a comparator. The court will recall   11:06
the submission made by Facebook which is to say that,
assuming for a moment that there is some principle of
equivalence, assuming that there is some necessity on
the part of the US in its laws to abide by EU standards
before data transfer is permitted, well then the proper   11:07
comparator, comparator is the Facebook phrase, is the
between EU laws on the one hand and US laws on the
other hand, rather it's between the laws of the Member
States on the one hand and US law on the other hand.
                                                           11:07
I say that's wrong, Judge, for the reasons that are
very briefly set out in paragraphs 24 and 25. It's as
simple as this, Judge: That EU citizens are entitled
to the rights for the Directive provides as a matter of

6

1 EU law and they are entitled to the rights for which

2 the Charter provides.

3 **MS. JUSTICE COSTELLO:** And Mr. Gallagher submitted that

4 both the Directive and the Charter make exceptions for

5 national security and that, therefore, if you like, 11:07

6 there isn't an equivalence at EU level in relation to

7 national security with which to compare US security, if

8 I have summarised the argument correctly.

9 **MR. McCULLOUGH:** That's what he makes, I suppose, as

10 his base case, Judge, but I think he accepts that, for 11:07

11 the purpose of the issue before this court, the Court

12 of Justice has made it clear that measures can be,

13 measures that infringe upon data privacy rights can be

14 justified only insofar as they are strictly necessary,

15 proportionate and strictly necessary, to the interests 11:08

16 of national security. So while he does maintain the

17 idea that he will be able to persuade I think the Court

18 of Justice, if the matter ever gets there, that the

19 entire area of national security is excluded from

20 consideration of this court or the Court of Justice, 11:08

21 I think for the moment, Judge, we can operate on the

22 assumption that what I say is correct.

23

24 Then, Judge, if there is a comparison to be made,

25 Judge, well then as a matter of EU law, and therefore 11:08

26 as a matter of Irish law, the EU citizens, citizens of

27 Ireland, citizens of every other Member State are

28 entitled to the rights for which the Directive and the

29 Charter provides. And it doesn't matter that their

7

1   individual national Member States in their legal
2   systems may fail in that regard, no doubt there are
3   deficiencies in the laws of the Member States in
4   various ways, but the fact that, for instance, the UK
5   or Denmark or Ireland may in its laws or their laws   11:09
6   fail to meet the standards provided by the Directive
7   and the Charter doesn't alter the nature of the rights
8   which EU citizens enjoy as a matter of EU law.
9
10   And it follows in my submission, Judge, that, when   11:09
11   there's a comparison to be made, it follows, therefore,
12   that the proper comparison is the comparison between EU
13   law on the one hand and US law on the other hand. It
14   is certainly the case, Judge, that's the comparison
15   made in Schrems.   11:09
16   **MS. JUSTICE COSTELLO:** Hmm.
17   **MR. McCULLOUGH:** And that's the case from which the
18   court can take its best guidance.
19
20   I want to address then briefly, Judge, and this is   11:09
21   under the heading (e), paragraphs 26 and 27.
22   **MS. JUSTICE COSTELLO:** Mm hmm.
23   **MR. McCULLOUGH:** The nature of the decision in Schrems,
24   and to make this submission, Judge: That the court can
25   see clearly from Schrems there's this comparative test,   11:10
26   this test of essential equivalence.
27   **MS. JUSTICE COSTELLO:** Hmm.
28   **MR. McCULLOUGH:** If the court looks at footnote 27 you
29   will see the reference to paragraph 73 of Schrems in

8

1   which the court says:

2

3   "*The word adequate in Article 25(6) of the Directive*

4   *admittedly signifies the third country cannot be*

5   *required to ensure a level of protection identical to*   11:10

6   *that guaranteed in the EU legal order, however, as the*

7   *Advocate General has observed in point 141 of his*

8   *Opinion, the term 'adequate level of protection' must*

9   *be understood as requiring the third country in fact to*

10   *ensure, by reason of its domestic law or its*   11:10

11   *international commitments, a level of protection of*

12   *fundamental rights and freedoms that is essentially*

13   *equivalent to that guaranteed within the European Union*

14   *by virtue of Directive 95/46 read in the light of the*

15   *Charter.*"   11:10

16

17   So that's, if you like, the test of essential

18   equivalence. I would just ask the court to note, of

19   course, that it's equivalent with the protection

20   guaranteed in the EU, Judge, and that means I think the   11:10

21   EU legal order.

22

23   So when you read though **Schrems**, Judge, it's evident

24   from subsequent parts of the judgment, particularly

25   paragraphs 92 to 94, that there is a broader test also   11:11

26   that's an absolute test; that there must be respect for

27   the Charter rights, in particular Articles 7, 8 and 47.

28

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

9

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

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

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

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

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

10

1	it's operative here, means that data transfers to the
2	US can't take place unless there is that essential
3	equivalence, that similar level of protection.
4	
5	But I suppose the point about the Charter is that that
6	requirement must stand as a principle of the EU legal
7	order apart from the Directive. Even if the Directive
8	was never there, it would still, in my respectful
9	submission, be a requirement of EU law at Charter level
10	that the data of EU citizens couldn't be transferred to
11	the US unless processing in the US was going to be
12	carried out in a manner compatible with the Charter.
13	So that's a broader but related principle, and I think
14	that follows from a proper reading of Schrems.
15	MS. JUSTICE COSTELLO: Am I right in thinking that in
16	Schrems the court's attention wasn't addressed to any
17	sort of arguments along the lines of the European Court
18	of Human Rights type jurisprudence in relation to
19	what's permissible in relation to national security?
20	You know, it would appear from the case law outlined by
21	Ms. Hyland that, let's say, the tolerance of
22	limitations on data privacy rights of EU citizens where
23	there is national security conducted by Member States
24	would appear to be greater than the tolerance indicated
25	in Schrems where there is surveillance of EU citizens'
26	Data by US government surveillance?
27	MR. McCULLOUGH: Well, I don't know if that's, it is
28	certainly true, Judge --
29	MS. JUSTICE COSTELLO: I mean I see what you are saying

11

1	there about the test of essential equivalence, strictly
2	necessary, but the Charter cases - sorry, the
3	Convention cases that Ms. Hyland was outlining, were
4	they applying that test as well?
5	MR. McCULLOUGH: Well they are, Judge, is the first
6	answer, yes. Under the -- well, three points, Judge.
7	First, it's true to say that the Convention cases
8	aren't referred to in any great detail in <u>Schrems</u>. But
9	it is nevertheless also correct to say, Judge, that the
10	same principles apply. I would just ask the court to
11	look at <u>Schrems</u>, paragraph 92, it's at the European
12	book of authorities, Book 3 Tab 36A.
13	MS. JUSTICE COSTELLO: Yes. Which paragraph again?
14	MR. McCULLOUGH: Paragraph 92, Judge: *"Furthermore and*
15	*above all, protection of the fundamental right to*
16	*respect."*
17	
18	I am sorry, Judge, paragraph 92. I will have to come
19	back to paragraph 92 in a different context in a
20	moment, but it provides as follows.
21	MS. JUSTICE COSTELLO: Yes, I have it, yes.
22	MR. McCULLOUGH: *"Furthermore and above all, protection*
23	*of the fundamental right to respect for private life at*
24	*EU level requires derogations and limitations in*
25	*relation to the protection of personal data to apply*
26	*only insofar as strictly necessary."*
27	
28	Now, there's no difference, Judge, in this regard
29	between the Charter and the Convention. The same

Timestamps in right margin: 11:14 (line 5), 11:14 (line 10), 11:15 (line 15), 11:15 (line 20), 11:15 (line 25)

12

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

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

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

MS. JUSTICE COSTELLO: Yes.

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

13

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 1        The court heard a lot of submissions, Judge, from
 2        Mr. Cush, Mr. Collins and Mr. Gallagher all reflecting
 3        on what they say is a distinction between the use in
 4        Article 25 of the phrase "adequate level of protection"
 5        and the phrase in Article 26 which refers to "standard      11:17
 6        contractual clauses providing adequate safeguards".
 7
 8        And the summary of their argument in that regard,
 9        Judge, I think is this:  Schrems read into Article 25 a
10        requirement of essential equivalence, but it did so on      11:18
11        the basis of the phrase "adequate level of protection"
12        in Article 25.  Article 26 uses a different phrase
13        "adequate safeguards" and the principle of essential
14        equivalence therefore can't be read into that because
15        they say it's a different thing.  Could I just ask the      11:18
16        court to look at the relevant part of the Directive,
17        it's at EU Book of Authorities 1 Tab 4.
18
19        So Article 25(1), Judge, relates to the adequate level
20        of protection.                                              11:19
21  MS. JUSTICE COSTELLO:  Mm hmm.
22  MR. McCULLOUGH:  The court can see it in the final
23        words of Article 25.  And Article 26 derogations
24        provides:
25                                                                    11:19
26        "By way of derogation from Article 25, and save where
27        otherwise provided by domestic law governing particular
28        cases, Member States shall provide that a transfer or a
29        set of transfers of personal data to a third country
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14

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

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

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

MR. McCULLOUGH: Yes.

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

MR. McCULLOUGH: Yes. Well, I think the reason that
they have different words, Judge, is because of the
slightly different functions that they are fulfilling.

15

1	Article 25 relates to an adequate level of protection,
2	Article 26, when it refers to safeguards, refers to
3	steps, measures, barriers that are put in place, but
4	the purpose for which they are put in place is to
5	achieve the same adequate level of protection for which 11:21
6	Article 25 provides.
7	
8	I think the most important reflection is this, Judge:
9	That all of this has to be read in the light of the
10	Charter. 11:21
11	**MS. JUSTICE COSTELLO:** Just so I am understanding, you
12	are saying that if we take away adjectives, that the
13	safeguards must provide essentially equivalent to what
14	the protections are in Article 25?
15	**MR. McCULLOUGH:** Yes, Judge, although there is a subtle 11:21
16	distinction in that regard between Article 26(1) and
17	Article 26(2) which I'll come to, Judge.
18	
19	Can I ask the court to turn back to **Schrems**, Judge,
20	which I think is helpful in explaining this. We say 11:22
21	the Directive has to be read in the light of the
22	Charter.
23	**MS. JUSTICE COSTELLO:** Which paragraph are we now?
24	**MR. McCULLOUGH:** 36A, it's paragraph 72, Judge.
25	**MS. JUSTICE COSTELLO:** 72, thank you. I have that. 11:22
26	**MR. McCULLOUGH:** So 72, Judge, refers to Article 25(6).
27	**MS. JUSTICE COSTELLO:** Mm hmm.
28	**MR. McCULLOUGH:** Then 73 continues, and I think this is
29	the important, Judge, in looking at the overall context

16

1   of the Directive: "*The word adequate in Article 25(6)*

2   *admittedly signifies a third country.*" Sorry, we

3   opened that before, Judge. Then it continues at the

4   foot of the page.

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

6   **MR. McCULLOUGH:** "*If there were no such requirement,*

7   *the objective referred to in the previous paragraph of*

8   *the present judgment would be disregarded.*

9   *Furthermore, the high level of protection guaranteed by*

10   *Directive 95/46 read in the light of the Charter needs*   11:22

11   *to be circumvented by transfers of personal data from*

12   *the Union to third countries for the purpose of being*

13   *processed in those countries.*"

14

15   The objective referred to in the previous paragraph,   11:23

16   Judge, is in paragraph 72: "*Article 25(6) implements*

17   *the express obligation laid down in Article 8(1) of the*

18   *Charter to protect personal data and, as the Advocate*

19   *General has observed in point 139 of his Opinion, is*

20   *intended to ensure that the high level of that*   11:23

21   *protection continues where personal data is transferred*

22   *to a third country.*"

23

24   Now everything has to be read in the light of the

25   Charter, Judge, and these comments are as true of   11:23

26   Article 26 as they are of Article 25. The proper

27   interpretation of the Directive must in *every*

28   circumstances be such as to ensure that the high level

29   of protection for which EU law provides is continued

17

1   where personal data is transferred to a third country.

2

3   And, seen in that light, Judge, it's hard to see how

4   one can interpret Article 26 in some way as permitting

5   that test to be failed when in fact it's the point of   11:24

6   the Directive and, if you like, the obligatory point of

7   the Directive under the Charter.

8

9   Just to refer the court to one more footnote, Judge,

10   from our paragraph 30, it's what the Advocate General   11:24

11   said in the **Schrems** case at footnote 30. It's just as

12   easy, I think, to look at it in the footnote, Judge,

13   where the Advocate General said:

14

15   *"The fact that the commission has adopted an adequacy*   11:24

16   *decision cannot have the effect of reducing the*

17   *protection of citizens of the Union with regard to the*

18   *processing of their data when that data is transferred*

19   *to a third country by comparison with the level of*

20   *protection which those persons would enjoy if their*

21   *data were processed within the European Union. The*

22   *national supervisory authorities must therefore be in a*

23   *position to intervene and to exercise their powers with*

24   *respect to transfers of data to third countries covered*

25   *by an adequacy decision. Were that not so, citizens of*

26   *the Union would be less well protected than they would*

27   *be if their data were processed within the European*

28   *Union."*

29

18

1	And he is talking about an Adequacy Decision, Judge,
2	but the point is the same; that the purpose of the
3	Directive, seen overall, is to ensure that the data of
4	EU citizens is as well protected when transferred to
5	the US as it is before its transfer. And, if that's
6	so, Judge, well then in my respectful submission it's
7	impossible to see how Article 26 can or should be
8	interpreted to provide for some lesser level of
9	protection.
10	
11	I did say, Judge, that there's a distinction, if you
12	like, in that regard between Article 26(1) and
13	Article 26(2) and I'll just turn to that, if I may,
14	Judge.
15	**MS. JUSTICE COSTELLO:** Mm hmm.
16	**MR. McCULLOUGH:** As I say the basic purpose of
17	Article 25, as the court can see, is to prohibit
18	transfers where there's no adequate level of
19	protection.
20	
21	If you look at Article 26(1), Judge, you can see why
22	those derogations permit transfer. The point is being
23	made to you that these derogations, for instance, a
24	derogation where a data transfer may take place "*on*
25	*condition that the data subject is given its consent*
26	*unambiguously to the proposed transfer*" is not one that
27	necessarily ensures that there is the adequate level of
28	protection for which Article 25 provides.
29	**MS. JUSTICE COSTELLO:** There is a waiver.

11:25
11:25
11:25
11:26
11:26

19

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 1      MR. McCULLOUGH:  But that's because they are all
 2      waivers, Judge.  And one can see why if a person
 3      doesn't want the adequate level of protection or is
 4      willing to waive it, well then that should be a
 5      legitimate derogation.  So one can see why fits in the        11:26
 6      structure.  Article 26(2), Judge, though, the purpose
 7      of that, I think it's clear, is to expand EU
 8      protections to a third country but in this case to do
 9      so by way of the standard contractual clauses.
10                                                                   11:27
11      And those clauses are clauses, Judge, between the data
12      exporter and the data importer.  They are quite
13      different from what's contemplated in 26(1).  And it
14      doesn't make sense, Judge, it's not in accordance with
15      what the Court of Justice said in Schrems and the            11:27
16      Advocate General said in Schrems to think that there
17      can be a lesser measure of protection provided for EU
18      citizens by virtue of a contract between two parties,
19      one of whom is not the data subject.  So why does an EU
20      citizen get less protection than that to which he is         11:27
21      entitled in the EU simply because two other parties,
22      who are party to a contract transferring data across
23      the Atlantic, agree for a different level of
24      protection?  And that, with respect, Judge, couldn't be
25      correct.  It's different from Article 26(1) and the          11:28
26      purpose of Article 26(2), when the court reads it, in
27      my respectful submission, can only be this:  To provide
28      that the standard contractual clauses provide the same
29      level of protection pursuant to contract that is
```

20

1   obtained for EU citizens pursuant to law.

2

3   It's, if you like, the analogue or the flip side of the

4   coin of Article 25. Article 25 is where the Commission

5   certifies that a particular country in its laws   11:28

6   provides an adequate level of protection, Article 26(2)

7   kicks in when a country doesn't provide that level of

8   protection by its laws but those can be overcome by a

9   contract.

10   MS. JUSTICE COSTELLO: So you accept that the SCCs can   11:29

11   operate to meet the required level of protection?

12   MR. McCULLOUGH: Yes, they can. And the final point

13   I want to make about the structure of all this, Judge,

14   is to reflect back to Article 4 of the SCC decisions

15   which supports the point I'm making.   11:29

16

17   You remember that the structure of Article 4, Judge, is

18   as follows: That where requirements are imposed which,

19   to summarise and to paraphrase, have the effect that

20   protections for which, protections to which EU data   11:29

21   subjects are entitled are not in fact capable of being

22   met.

23   MS. JUSTICE COSTELLO: Mm hmm.

24   MR. McCULLOUGH: Notwithstanding the contractual

25   clauses, well then the DPC or --   11:29

26   MS. JUSTICE COSTELLO: That's where the contract lets

27   you down, I'll put it very colloquially.

28   MR. McCULLOUGH: Exactly, Judge, exactly. It's the

29   text of Article 4 that supports this interpretation.

21

1　　　Because the text of Article 4, I think, makes it clear,

2　　　Judge, that the order forbidding the transfer of data

3　　　is to be made. It's the old Article 4, I should say of

4　　　course. The text of the old Article 4 makes it clear

5　　　that the circumstances in which that order is to be　　11:30

6　　　made is when there's a failure to meet the adequate

7　　　level of protection. And all of that feeds into the

8　　　idea, Judge, which must be correct in my respectful

9　　　submission, that the test of effective equivalence,

10　　　which is found in Article 25 by the Court of Justice,　　11:30

11　　　must in logic also apply to an SCC decision under

12　　　Article 26(2).

13　　　**MS. JUSTICE COSTELLO:** So to that extent do you

14　　　disagree with the Commissioner in her Draft Decision

15　　　where she sort of says 'the SCCs don't remedy the　　11:30

16　　　problems in the US and how could they', I have

17　　　forgotten what paragraph that is in the Draft Decision.

18　　　She deals with the SCCs in a less fulsome way than she

19　　　does US law.

20　　　**MR. McCULLOUGH:** Well, it's for that reason I say,　　11:31

21　　　Judge, that she should have exercised have Article 4.

22　　　**MS. JUSTICE COSTELLO:** And I appreciate that you are

23　　　saying if Article 4 weren't there you would have an

24　　　entirely different case to make, I get that.

25　　　**MR. McCULLOUGH:** Yes. Then, Judge, the final point　　11:31

26　　　I want to make about this is that it is our submission

27　　　that there shouldn't be a reference to the Court of

28　　　Justice, as the court the aware. But if there is a

29　　　reference to the Court of Justice, I'll come back at

1	the end to suggest that we should all have an
2	opportunity to agitate the nature of the questions to
3	be asked with the court but one of those, I think,
4	would have to be a question about Article 25 and 26
5	effective equivalence but also Article 4, but I'll come
6	back to that at the end, Judge.
7	
8	Moving on to paragraph 33, Judge, and the following
9	paragraphs briefly. This is just a brief consideration
10	of what processing means and I can summarise this very
11	quickly, Judge. The court has seen how processing is
12	defined in the Directive and there's a reference in
13	footnote 36 to Article 2(b) which sets out that
14	definition.
15	**MS. JUSTICE COSTELLO:** Mm hmm.
16	**MR. McCULLOUGH:** And the only point I want to make,
17	Judge, is that processing includes making data
18	available, and the court will recall that from
19	Mr. Collins' opening submission.
20	**MS. JUSTICE COSTELLO:** Mm hmm. I just wanted to
21	clarify, I had some notes myself here.
22	**MR. McCULLOUGH:** Yes, Judge.
23	**MS. JUSTICE COSTELLO:** Is your objection to the
24	processing in this that we'll say occurs as a result of
25	Mr. Schrems' Facebook data --
26	**MR. McCULLOUGH:** Yes.
27	**MS. JUSTICE COSTELLO:** -- that when it arrives in the
28	US, as I understood Ms. Barrington said that your
29	complaint really didn't relate to when it was in

23

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

MR. McCULLOUGH: It is.

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

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

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

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

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

24

1	is when does the processing to which I object kick in.
2	And that's a series of acts of processing here, Judge,
3	the transfer itself, the importation, the making
4	available. I suppose the basic rule of Article 25 and
5	the subsequent articles is there can't be a transfer in
6	the first place unless US law is going to provide
7	essential equivalence and respect for the Charter.
8	
9	So I don't think it's correct to say, Judge, that
10	I object only to the making available when it happens,
11	Judge. I say it is a more subtle question than that.
12	There can't be the first act of processing, that's to
13	transfer, unless there is a guarantee in US law that
14	the rights of EU citizens would be protected as if the
15	data had never left.
16	
17	Just looking, Judge, at what happens when it does reach
18	the US, and that's what we address at paragraph 36,
19	Judge. It's clear, Judge, just looking at Section 702,
20	Section 702 is the main authority. The language in
21	Section 702, Judge, and I'll just remind the court of
22	where that's to be found.
23	**MS. JUSTICE COSTELLO:** Well, if you want to put it on
24	receiving or broadcasting, I have it here.
25	**MR. McCULLOUGH:** I'll try and do that, Judge.
26	**MS. JUSTICE COSTELLO:** Thank you.
27	**MR. McCULLOUGH:** It's BO 3, Judge.
28	**MS. JUSTICE COSTELLO:** Yes.
29	**MR. McCULLOUGH:** I'll have to get my reference, just

25

1	give me one second, Judge. Section 1881.
2	**MS. JUSTICE COSTELLO:** That's what I am receiving,
3	somebody is broadcasting it to me anyway.
4	**MR. McCULLOUGH:** Sorry, Judge.
5	**MS. JUSTICE COSTELLO:** No, no.
6	**MR. McCULLOUGH:** It's probably best to turn that off
7	just for a moment, and I'll just have to find section
8	1881, Judge.
9	**MS. JUSTICE COSTELLO:** Well, it appears to be on page
10	50 of 66.
11	**MR. McCULLOUGH:** Yes, Judge.
12	**MS. JUSTICE COSTELLO:** I think.
13	**MR. McCULLOUGH:** Sorry, Judge, if you can look at
14	section 1881h (i) that's under the heading *"Directives*
15	*and Judicial Review of Directives"*.
16	**MS. JUSTICE COSTELLO:** I think I'm on receiving mode so
17	I'm just waiting for those who are more skilled at
18	doing it than I am. Sometimes I think the books are
19	better. I don't want to be accused of being a complete
20	Luddite, I will try.
21	**MR. McCULLOUGH:** Sorry, I have to be in something else,
22	Judge, I just realised.
23	**MR. MURRAY:** I don't know does that mean that
24	Mr. McCullough is leaving us, Judge.
25	**MS. JUSTICE COSTELLO:** No, it's called broadcasting
26	mode, I think.
27	**MR. McCULLOUGH:** It is at broadcasting now, thanks.
28	Yes, Judge, I'm on another tablet broadcasting now.
29	So, Judge, you should be on --

1	**MS. JUSTICE COSTELLO:** This is going to be a great
2	transcript!
3	**MR. MURRAY:** Well, I think, considering we're dealing
4	with the law of the United States, Judge, we are
5	entitled to say 'strike that from the record'.	11:37
6	**MR. McCULLOUGH:** You should be on page 52 of 66, Judge,
7	if everything is going to according to plan.
8	**MS. JUSTICE COSTELLO:** Thank you.
9	**MR. McCULLOUGH:** At the foot of the page there is
10	122(A)(h).	11:37
11	**MS. JUSTICE COSTELLO:** Yes, I have that, thank you.
12	**MR. McCULLOUGH:** Then: *"With respect to an acquisition*
13	*authorised under subsection (a), the Attorney General*
14	*and the Director of National Intelligence may direct,*
15	*in writing, an electronic communications service*	11:37
16	*provider to:*
17	*(A) immediately provide the government with all*
18	*information, facilities, or assistance necessary to*
19	*accomplish the acquisition in a manner that will*
20	*protect the secrecy of the acquisition."*	11:37
21	
22	So there's a requirement, Judge, to provide the
23	government with all information, facilities or
24	assistance. And making available, Judge, as a matter
25	of EU law is processing and in my respectful submission	11:38
26	it follows, Judge, that any programme under
27	Section 702, including the two of which we know, but
28	any programme under Section 702 will, therefore,
29	necessarily involve data processing as a matter of EU

1   law.

2

3   So that's all I wanted to say about the structure,

4   Judge. I suppose I just want to try and summarise it,

5   Judge, or summarise the important parts of it in this   11:38

6   way. I submitted to the court yesterday and this

7   morning that, as a matter of EU law, infringements by

8   Member States of data privacy rights can be justified

9   on grounds of national security only if and to the

10   extent that they are strictly necessary. So what's the   11:38

11   relevance of that to this case, Judge?

12

13   It follows, Judge, that in my submission, in looking at

14   the various steps that we have gone through, that a

15   transfer to the US is permissible only to the extent   11:39

16   that infringements in US law of the data rights of EU

17   citizens could be justified if they took place in the

18   EU and therefore it can be justified only on the basis

19   that they are strictly necessary in the interests of

20   national security.   11:39

21

22   So there's an essential equivalence, Judge, a necessity

23   to respect the Charter. If the rights of EU data

24   citizens could be infringed here on the grounds of

25   national security only on the basis of strict necessity   11:39

26   so the same will have to be said of the EU law.

27   **MS. JUSTICE COSTELLO:** And then how does that tie in

28   with the SCCs? If the two private companies comply

29   with the requirements of the SCCs, they are not going

28

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

11:40
11:40
11:40
11:40
11:41

29

1   what can it do about other companies, and I wanted to

2   just mention, Judge, section 10(1)(a) of the Data

3   Protection Act. I don't need to open it now, Judge,

4   just to mention that that provides that the DPC may, on

5   its own motion, investigate any matter. And so, Judge,   11:41

6   if the DPC saw some unfairness in the fact that it had

7   investigated Facebook but found circumstances that were

8   applicable to other companies, it wouldn't have to wait

9   for another complaint.

10   11:41

11   Secondly, Judge, we had a discussion yesterday of

12   national security, I just want to reflect briefly on

13   this. National security has been mentioned a lot in

14   this case and it has been said or at least inferred

15   that everything done pursuant to Section 702 and EO   11:42

16   12333 fits under the national security rubric or at

17   least under a rubric that is analogous to the national

18   security rubric in the Charter. Now I submit, Judge,

19   that that's not so. When you look at what the

20   justifications for actions under 702 in particular but   11:42

21   also 12333 are, Judge, they are much wider than that

22   and that follows from the definitions of foreign

23   intelligence, Judge.

24

25   The court will recall that under 702 the requirement as 11:42

26   far as obtaining access to the data of an EU citizen is

27   concerned, first he must be not US and, secondly, the

28   material must be obtained for the purpose of foreign

29   intelligence. And so what does foreign intelligence

30

1	mean then, Judge? Foreign intelligence is defined in
2	section 1801 of the FSA, I'll just find that for the
3	court.
4	
5	It should be on the court's, if this one is now
6	broadcasting, Judge, it should be on the court's book.
7	**MS. JUSTICE COSTELLO:** Yes, foreign intelligence
8	information.
9	**MR. McCULLOUGH:** Foreign intelligence, Judge, yes.
10	This is section 1801 of FISA.
11	**MS. JUSTICE COSTELLO:** Mm hmm.
12	**MR. McCULLOUGH:** And the court can see what *"foreign*
13	*intelligence information"* means. If I just skip to
14	two, Judge: *"Information with respect to a foreign*
15	*power or foreign territory that relates to, and if*
16	*concerning a US citizen is necessary to —*
17	*(A) the national defense or the security of the United*
18	*States; or*
19	*(B) the conduct of the foreign affairs of the US."*
20	
21	So, Judge, that's not the same as a national security
22	exemption. Just look at one part of it, Judge:
23	*"Information with respect to a foreign territory that*
24	*relates to the conduct of the foreign affairs of the*
25	*US."*
26	
27	Now, if material falls under that rubric and, if you
28	are a non-US person, FISA entitles the NSA to obtain
29	that data from Facebook. The 12333 exemption, Judge,

31

1   the 12333 definition of foreign intelligence is wider

2   again.

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

4   **MR. McCULLOUGH:** But in the interests of time, Judge,

5   perhaps I just won't refer to that at the moment, but   11:45

6   the court has it.

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

8   **MR. McCULLOUGH:** It is a wider again definition. And

9   I suppose that has two important consequences, Judge,

10   I just need to mention briefly. First, it reflects on   11:45

11   Facebook's basic argument about the national security

12   exemption. Because they say that everything done under

13   FISA can be justified on the grounds of national

14   security, it falls outside the Treaty, it would fall

15   outside the Treaty - sorry, it falls outside the Treaty 11:45

16   because the Treaty only applies to national security.

17

18   Sorry, it is undoubtedly the case that things are done

19   under FISA that *do* relate to the national security

20   exemption as set in the Treaty.   11:45

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

22   **MR. McCULLOUGH:** But a lot doesn't have to do so at

23   all. And that does also reflect, Judge, on the

24   strictly necessary analysis.

25   11:45

26   I mean to what extent, Judge, can FISA measures, when

27   carried out under US law, ever be justified as a matter

28   of *EU* law on this ground? I have suggested to the

29   court that they could be justified if they could be

32

1 said to be strictly necessary in the interests of
2 national security. But in fact FISA measures by
3 definition contain many actions, many individual
4 actions that aren't even attempted to be justified on
5 the grounds of national security.   11:46
6 MS. JUSTICE COSTELLO: And how does that play with the
7 acknowledgment of the CJEU, certainly in <u>Schrems</u> and
8 other cases from recollection, obviously the laws are
9 not going to be the same.
10 MR. McCULLOUGH: Yes.   11:46
11 MS. JUSTICE COSTELLO: Is there no margin for, if you
12 like, an absence of overlap or where they stray?
13 MR. McCULLOUGH: I have no doubt, Judge, that the Court
14 of Justice would say, the Court of Justice makes it
15 clear they don't have to be exactly the same, that's 11:46
16 what the principle of effective equivalence means, that
17 you are not looking for the same and you couldn't be
18 looking for the same word by word, the principle of
19 effective equivalence.
20   11:47

21 But this is a much wider problem than that, Judge, with
22 respect. If it be the case, and I respectfully submit
23 that it must be the case, that US laws can only be
24 justified on the grounds of national security if they
25 are effectively equivalent to the sort of laws that   11:47
26 would pass in the EU on the grounds of national
27 security.
28 MS. JUSTICE COSTELLO: Mm hmm.
29 MR. McCULLOUGH: Well then it's a vital consideration

1	to note that FISA does not in fact require a national
2	security justification at all.
3	**MR. GALLAGHER:** Judge, could I just intervene, I am
4	sorry. I am taken aback by this. The DPC's decision
5	is on the basis of national surveillance, that's what
6	we are addressing. This was never mentioned in the
7	opening statement and now, when I have completed my
8	submissions, this new point is being raised by
9	Mr. McCullough, and I do object to that.
10	**MR. McCULLOUGH:** With respect, Judge, I don't think
11	it's a new point, Judge. In fact it's a point really
12	that arises directly from what Mr. Gallagher says. The
13	court is left with the firm impression that national
14	security is the FISA justification. That's the basis
15	of what Mr. Gallagher said. I'm pointing out to the
16	court that's not so at all, Judge, that foreign
17	intelligence, which is the basis of the justification
18	for FISA measures, necessarily includes a wide number
19	of individual steps.
20	**MS. JUSTICE COSTELLO:** Well, I see what you are saying
21	in relation to the definitions.
22	**MR. McCULLOUGH:** Yes.
23	**MS. JUSTICE COSTELLO:** But I think Mr. Gallagher's
24	point was that wasn't taken up, I think, by the DPC
25	and, I think by implication, that you are not allowed
26	to take it up if she hasn't taken it up because it's
27	not in the case.
28	**MR. McCULLOUGH:** Well, I think it must be in the case,
29	Judge. I mean it is perhaps the case the DPC didn't

11:47
11:47
11:48
11:48
11:48

34

1	take it up, Mr. Murray can answer for the DPC on that,
2	Judge.
3	**MS. JUSTICE COSTELLO:** Hmm.
4	**MR. McCULLOUGH:** I suppose the point is this, Judge:
5	That this case as presented by Facebook in any event 11:48
6	doesn't depend upon the DPC's case. The court will
7	recall that one of the basic points made to you by
8	Facebook is that the DPC was wrong to concentrate only
9	on remedies and should have concentrated on the
10	substantive law of the US. Now, I'm taking up 11:49
11	Facebook's point on that and making arguments on
12	substantive law. So I don't think Facebook can be
13	heard validly to say, Judge, that we are here to
14	discuss only what is in the DPC decision. Facebook
15	itself expanded the case beyond that. 11:49
16	**MR. GALLAGHER:** Judge, there is a fundamental
17	unfairness about that.
18	**MS. JUSTICE COSTELLO:** Yes.
19	**MR. GALLAGHER:** It wasn't mentioned in the opening
20	statement. Mr. McCullough, who is in an antagonistic 11:49
21	position to my client, is coming after me. There was
22	no warning this was going to be raised. The exemption
23	in any event includes national security and other, as
24	you know it's broader than national security. And
25	I would -- 11:49
26	**MS. JUSTICE COSTELLO:** Which exemption now are we
27	talking about, in the Directive?
28	**MR. GALLAGHER:** In the Directive, exactly.
29	**MS. JUSTICE COSTELLO:** Yes.

1   MR. GALLAGHER: And the general principles or the

2   general objectives, legitimate objectives, that are

3   recognised in the cases does go beyond the narrow

4   bounds of national security. But it's not a matter

5   that I addressed because it wasn't raised. It is now   11:49

6   being raised when I finish my submissions. The

7   decisions itself refers to *"national security*

8   *purposes"*, that's the basis on which we were addressing

9   it. Mr. Collins made no suggestion in opening the case

10   that it should go beyond it or that the court should   11:50

11   look at it, and it wasn't, apart from anything else

12   then, an issue addressed with the witnesses either and

13   it is wholly unfair that it now be addressed after we

14   have finished our submissions.

15   11:50

16   But I don't accept for one moment that the legitimate

17   objective to which the strictly necessary applies is

18   confined to the narrow definition of national security.

19   The Directive is broader, and also, as you saw in the

20   context of the German case referred to or, sorry, the   11:50

21   German law referred to by Ms. Hyland yesterday, that

22   extended to foreign policy. That's a feature of all of

23   the cases, sorry of all of the laws, that they extend

24   to foreign policy, they are not national security in

25   the narrow sense.   11:51

26

27   But to raise it now and advance it as part of the case

28   is fundamentally unfair and I don't believe, on this

29   respect, the basis for the decision they can go outside

36

1	the DPC's decision.
2	**MS. JUSTICE COSTELLO:** Mr. McCullough, in relation to
3	this matter and you had the written, you had seen the
4	written submissions of Facebook and obviously of the
5	DPC before the case opened and you heard the opening of
6	Mr. Collins, I think if it had been the case that you
7	had wanted to advance this particular point in relation
8	to the definitions it should in fairness have been
9	made, flagged to them in advance.
10	**MR. McCULLOUGH:** I would agree, Judge, if it's a point
11	that hadn't been made before. But in fact
12	Mr. Gallagher is wrong, he just - if the court looks at
13	paragraph 148 of the DPC's submissions, Judge, the
14	point is made, it is squarely made.
15	**MS. JUSTICE COSTELLO:** DPC is Tab 3, isn't that it?
16	148?
17	**MR. McCULLOUGH:** Yes.
18	**MS. JUSTICE COSTELLO:** Extend beyond the national
19	security context, yes.
20	**MR. McCULLOUGH:** Exactly, Judge. So that point is
21	made, Judge. It may not have been a point that the
22	witnesses were asked to address, Judge, but it is
23	certainly a point that is addressed in their written
24	statements and it is certainly a point that's in the
25	case, Judge.
26	**MR. GALLAGHER:** Judge, sorry, that's reference to
27	*criminal* rules, and I did indicate to you the same
28	rules apply to law enforcement. This is a different
29	point, this is clearly a different point, and it wasn't

37

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

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

If I can move on from the point, Judge, if it's
agreeable to the court. I just want to deal briefly,
Judge, with a point that the court mentioned yesterday
about the European Court of Human Rights case law,
Judge.

MS. JUSTICE COSTELLO: Mm hmm.

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

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

38

1   there's an area in which there may not be an overlap as
2   well. So it provides, Judge, under this heading:
3
4   "*Insofar as the EU has not acceded to the Charter of*
5   *Fundamental Rights, the latter is not EU law.*"   11:54
6
7   The court is aware that Union itself hasn't acceded to
8   the Convention: "*Whilst it is true that Article 6(3)*
9   *TEU stresses that the ECHR may serve as a source of*
10   *inspiration for the discovery of general principles of*   11:54
11   *EU law, it does not follow from that Treaty provision*
12   *the Convention may prevail over conflicting national or*
13   *produce direct effect. This is a question for national*
14   *constitutions to address.*"
15   11:54
16   And then, top of the page:
17
18   "*In light of the Explanations relating to Article 52(3)*
19   *of the Charter, the latter is 'intended to ensure the*
20   *necessary consistency between the Charter and the*   11:54
21   *ECHR', 'without thereby adversely affecting the*
22   *autonomy of [EU] law and of that of the [CJEU]'.*
23   *However, the autonomy of EU law may only be granted in*
24   *the principle of 'of the more extensive protection', ie*
25   *the level of protection guaranteed under EU law may*   11:54
26   *never be lower than that guaranteed by the ECHR as*
27   *interpreted by the Court of Human Rights.*"
28
29   And if the court looks at paragraph, the footnote.

39

1   **MS. JUSTICE COSTELLO:** 52, yes. Sorry, which footnote

2   were you going to draw my attention to?

3   **MR. McCULLOUGH:** The footnote in this work, Judge,

4   footnote 143.

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

6   **MR. McCULLOUGH:** Judge, quotes from Article 52(3) of

7   the Charter to which specific reference is made to the

8   Convention.

9   **MS. JUSTICE COSTELLO:** I think Mr. Collins opened that

10   to me.   11:55

11   **MR. McCULLOUGH:** Very good, Judge. The work goes on,

12   Judge, to make the point that, if the Convention rights

13   fall below the level of rights for which the Charter

14   provides well then the Charter will provide higher

15   rights. That's what is said, I think in summary, in   11:55

16   the next paragraph.

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

18   **MR. McCULLOUGH:** And then in the final paragraph in the

19   page the point is made:

20   11:55

21   *"As to the rights recognised by the Charter which*

22   *correspond to rights guaranteed by the ECHR,*

23   *Article 52(3) of the Charter states that, without*

24   *prejudice to more extensive protection, 'the meaning*

25   *and scope of those rights shall be the same as those*   11:55

26   *laid down by the ECHR'."*

27

28   And if you look at footnote 147, Judge, you'll see that

29   there is an explanation, Judge, found in the Charter in

```
 1          Article 7 --
 2          MS. JUSTICE COSTELLO:  Corresponding to 8.
 3          MR. McCULLOUGH: -- which is the privacy right
 4          corresponds to Article 8 of the Charter.
 5          MS. JUSTICE COSTELLO:  Yes.                        11:56
 6          MR. McCULLOUGH:  But of course there is no equivalent
 7          to Article 8 of the Convention -- of the Charter
 8          I should say.
 9          MS. JUSTICE COSTELLO:  The Charter in the Convention.
10          MR. McCULLOUGH:  In the Convention, so I just want to   11:56
11          bring that material to the court's attention.  They are
12          clearly intended to be complementary documents, but
13          I think it's clear that, insofar as there is lesser
14          protection, well then the protections which the charter
15          provides will prevail.  And I would also agree, Judge,   11:56
16          that the Charter analysis of proportionality and
17          necessity is one that would certainly be of interest to
18          the Court of Justice when interpreting.
19          MS. JUSTICE COSTELLO:  When you say *Charter* there, did
20          you mean the Convention analysis?                  11:56
21          MR. McCULLOUGH:  I am so sorry, I did.  My apologies,
22          Judge, my apologies.  The ECHR analysis of
23          proportionality and necessity is going to be of
24          assistance to the Court of Justice when interpreting
25          Charter rights.                                    11:56
26
27          And then, Judge, the final point arising from yesterday
28          that I wanted to make was arising from a discussion
29          that we had about the old version of Article 4,
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41

Article 4(1)(a).

MS. JUSTICE COSTELLO: Mm hmm.

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

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

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

1	Can I return then, Judge, as briefly as I can, to the
2	parts of this speaking note that begin on page 13
3	onwards.
4	**MS. JUSTICE COSTELLO:** Yes.
5	**MR. McCULLOUGH:** Under the heading (h), and this is now 11:58
6	dealing with substantive US surveillance law. The
7	first point to make, Judge, is that, as I suggested in
8	opening our case, we agree entirely with the DPC about
9	the state of redress in US law. And we say, Judge,
10	that the analysis being carried out by the DPC of that 11:59
11	demonstrates that there is a lack of effective
12	equivalence between the state of EU law on the one hand
13	and US law on the other hand in that regard and,
14	equally and by extension, a lack of respect for
15	Article 47 Charter rights. That in itself would be 11:59
16	sufficient insofar as the issue arises. I say it
17	doesn't for the reasons I have discussed, but insofar
18	as the issues arises, Judge, that would be enough to
19	demonstrate the invalidity of the SCC decisions, as
20	I say insofar as that arises, Judge. 11:59
21	**MS. JUSTICE COSTELLO:** This is on the assumption that
22	she doesn't exercise the Article 4 powers?
23	**MR. McCULLOUGH:** It's on the assumption that a question
24	is necessary, Judge, it's on the assumption Article 4
25	isn't the appropriate path to take. 11:59
26	**MS. JUSTICE COSTELLO:** The answer.
27	**MR. McCULLOUGH:** It's on the assumption that for some
28	reason Article 4 is inoperative or can't be exercised,
29	it's on the assumption then that the SCC decisions

43

1   don't contain the escape valve, it's on the assumption
2   then that the court is considering that question
3   whether it has its own doubts and then referring the
4   question to the Court of Justice.
5   12:00

6   But I say, Judge, on all of those assumptions well then
7   there is a lack of effective equivalence in respect of
8   redress for all the reasons that the DPC have said and
9   I don't intend to spend a moment on that, Judge,
10   I won't add to that. The stenographers just want to   12:00
11   change, Judge.
12
13   Judge, to try and telescope this and make it shorter,
14   there's an element of repetition in some of these
15   paragraphs here, Judge, so I'm going to take paragraphs 12:00
16   37 to 41 -- to 42, excuse me, together with paragraphs
17   45 to 51, because they really cover the same material.
18   And everything that I say is within those paragraphs
19   Judge, but I'll just organise it slightly differently
20   to cover the same material in shorter time.   12:01
21
22   The first point, Judge, is that Section 702 the main
23   authority. The court is, I think, fully conscious of
24   that. And that's addressed in paragraphs 37 to 40,
25   Judge. Simply to make that point.   12:01
26
27   Paragraph 41 and 42, Judge, deal with the relevance of
28   EO12333. And EO12333 is also relevant, Judge, for the
29   reasons discussed. In particular it appears to govern

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1	or permit the transit authority. And on the evidence,
2	that permits the US security services to have access to
3	data that passes across the US. And --
4	**MS. JUSTICE COSTELLO:** Though as a matter of fact, does
5	that actually apply in your Facebook transfers?
6	**MR. MCCULLOUGH:** It may not apply a great deal to
7	Facebook, Judge. I think that was stated in the
8	evidence also. I think that's true.
9	**MS. JUSTICE COSTELLO:** So while it might be on your
10	overall sort of image of what happens in the US, is it,
11	does it arise on the facts of this case and this --
12	**MR. MCCULLOUGH:** I suspect it's not of great relevance
13	to Facebook, Judge.
14	**MR. GALLAGHER:** No, the evidence was it *didn't*. And
15	Ms. Gorski accepted that --
16	**MR. MCCULLOUGH:** I think that's correct, Judge.
17	**MR. GALLAGHER:** -- that it didn't apply to Facebook,
18	Judge.
19	**MR. MCCULLOUGH:** I'll have to find the particular piece
20	of evidence, I've a slightly different memory of it.
21	But I'll come back to it, Judge. Yes, I think I'm
22	correct in remembering, Judge, that 12333 also applies
23	in the transatlantic cables --
24	**MS. JUSTICE COSTELLO:** Yes, it did. And that's what I
25	was --
26	**MR. MCCULLOUGH:** -- before it arrives in the US, Judge.
27	**MS. JUSTICE COSTELLO:** -- incoherently asking you about
28	later.
29	**MR. MCCULLOUGH:** Yeah. And I'll just, I'll ask

12:02
12:02
12:02
12:02
12:03

45

1	somebody to find that --
2	**MR. GALLAGHER:** Sorry, Ms. Gorski dealt with Upstream.
3	Excuse me, I was incorrect in my intervention. She
4	dealt with Upstream, she didn't deal with that.
5	**MS. JUSTICE COSTELLO:** Well, what we can do is we can 12:03
6	park this and after lunch somebody can clarify that
7	point.
8	**MR. McCULLOUGH:** I'll just find precisely what was said
9	about that, Judge.
10	**MS. JUSTICE COSTELLO:** I know it's a small point, but I 12:03
11	recall Ms. Barrington saying that 12333 didn't arise
12	because the complaint related to sending the data to
13	Facebook and it was on the basis of once it arrived in
14	Facebook Inc., wherever that's situate.
15	**MR. McCULLOUGH:** She did, Judge. And for the reasons 12:03
16	that I explored a few minutes ago --
17	**MS. JUSTICE COSTELLO:** And I just wanted to hear
18	whether she was right or not.
19	**MR. McCULLOUGH:** Certainly, Judge, our complaint
20	relates to the processing that's involved in the 12:03
21	transfer and not just the transfer once it hits US
22	shores. So it may be that 12333 is relevant to that.
23	I'll just have to find that, Judge, in the transcript
24	and come back to you if I may. For the moment, Judge,
25	I think it suffices to say that it's certainly part of 12:04
26	the picture insofar as US law in general is concerned,
27	for the reasons that have been discussed.
28	
29	And I'll just mention at paragraph 42, Judge, the point

1	that is made there, about which I think there's no
2	doubt, that 12333 and PPD-28 are not justiciable.
3	Indeed, I think the court may not have been brought to
4	- it's hard to believe there's a document or part of a
5	document the court hasn't seen - but I think the court
6	may not have been shown section 6D of PPD-28.
7	**MS. JUSTICE COSTELLO:** Well, I'm not going to comment
8	from memory.
9	**MR. McCULLOUGH:** Well, it should come up on your tablet
10	now, Judge.
11	**MS. JUSTICE COSTELLO:** I'll go to the hard copy.
12	**MR. McCULLOUGH:** Very good, Judge.
13	**MS. JUSTICE COSTELLO:** I'm in a Directive.
14	**MR. McCULLOUGH:** PPD-28 is in book three of the US
15	authorities at B43.
16	**MS. JUSTICE COSTELLO:** Thank you. That's tab 43. What
17	section of this are you talking about?
18	**MR. McCULLOUGH:** It's Section 6(d), Judge.
19	**MS. JUSTICE COSTELLO:** Thank you. Well, its pristine,
20	so you must be right.
21	**MR. McCULLOUGH:** I see. It was stated in the evidence,
22	Judge, but in fact it's, if you like, even clearer, it
23	doesn't really need witnesses to confirm it. It said:
24	
25	*"This directive is not intended to, and does not,*
26	*create any right or benefit, substantive or procedural,*
27	*enforceable at law or in equity by any party against*
28	*the United States, its departments, agencies, or*
29	*entities, its officers, employees, or agents."*

12:04

12:04

12:05

12:05

47

Now, there *is* a similar reference in 12333, Judge.
I'll just ask somebody to find that and I'll come back
to you with that reference. But it's also expressly
stated in EO12333.   12:06

Can I move from that, Judge, to the material that's at
paragraph 45 and I'll come back to paragraph 44 I hope
in a more sensible order in due course? In paragraph 45
and 46, Judge, we make a point - we agree with the   12:06
DPC's submission on this - that the primary focus of
the court must be on the laws of the third country, not
with practice. And the material on which we base that,
Judge, is set out in footnote 55 of the speaking note.
And the court will see the reference to paragraph 50 of   12:06
__Schrems__, in which it's stated specifically it's the
legal order of the third country covered by the
Commission decision that must ensure an adequate level
of protection.
                                                            12:07
Mr. Gallagher mentioned the paragraph that is mentioned
in the footnote directly thereafter, paragraph 75. And
I say, Judge, properly read, that isn't in *fact* to a
similar effect. That provides the Commission is
obliged to assess the contents of the applicable rules   12:07
in that country - in this case the US - resulting from
its domestic law or international commitments and the
practice designed to ensure compliance with those
rules. And the focus in paragraph 75, Judge, is on the

48

1   rules that are in place to ensure -- sorry, the

2   practice that is in place to ensure compliance with the

3   legal rules. But the focus remains on the legal rules.

4

5   Then there's a reference to paragraph 94, which again   12:07

6   expressly refers to legislation. And then finally,

7   Judge, there's a reference to paragraph 117 of the

8   **Watson** decision. It contains a useful, it's a single

9   sentence, Judge, but I think useful, in paragraph 117.

10   It provides that data retention measures must lay down   12:08

11   clear rules indicating the circumstances under which

12   providers of electronic communication services must

13   grant the national authorities access to that data and

14   states expressly that a measure of that kind must be

15   legally binding under domestic law.   12:08

16

17   So I hope that usefully collects the material, Judge,

18   upon which *we* say in any event that the court's focus

19   must be on the laws and not practice.

20   **MS. JUSTICE COSTELLO:** And what do you say to that both 12:08

21   the European Court of Human Rights case law which was

22   looking at all the other parameters -- maybe you want

23   to deal with that in due course. They were looking at

24   things like equivalence to Ombudsmans, they were

25   looking at the culture, they were looking at all the   12:08

26   other - the holistic approach I think was what

27   Ms. Hyland described it as.

28   **MR. McCULLOUGH:** Sure. I don't say, Judge, that

29   they're irrelevant. But I say the court's primary

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1   focus has to be on the state of the law of a foreign

2   country. That's, I suppose, particularly so, Judge,

3   when so much of the emphasis in this case on the part

4   of Facebook and the US Government as to the protections

5   that are provided in US law, notwithstanding the text   12:09

6   of Section 702, was on PPD-28 and EO12333. And the

7   court will recall that they're not even statutory

8   administrative schemes, they're just interpretations

9   that are set up by a presidential order or directive.

10   MS. JUSTICE COSTELLO: I gather they're binding upon   12:09

11   the personnel.

12   MR. McCULLOUGH: Yes.

13   MS. JUSTICE COSTELLO: But they don't go further, as

14   far as I can gather.

15   MR. McCULLOUGH: They're binding on the personnel,   12:09

16   Judge. But they're capable of being altered tomorrow.

17   So they don't even -- and the same applies to --

18   MS. JUSTICE COSTELLO: Well, I mean, the EU may move

19   slowly, but it's capable of varying *its* laws too. I

20   mean, that's inherent in law.   12:09

21   MR. McCULLOUGH: It is, Judge. But a lot of the, I

22   suppose, systems that are going to be looked at in the

23   context of the Court of Human Rights, perhaps without

24   really making this distinction, but many of the systems

25   that are going to be looked at are systems that are set 12:10

26   up at least under statute, or at least under law. In

27   this case the major protections are said to be PPD-28,

28   which is reflected in part in EO12333 - that's a

29   Presidential Order, Presidential Directive - and then

50

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

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

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

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

51

MS. JUSTICE COSTELLO: Mm hmm.

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

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

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

52

1

2   *"Legislation is not limited to what is strictly*

3   *necessary where it authorises, on a generalised basis,*

4   *storage of all the personal data of all the persons*

5   *whose data has been transferred from the European Union*

6   *to the United States without any differentiation,*

7   *limitation or exception being made in the light of the*

8   *objective pursued and without an objective criterion*

9   *being laid down by which to determine the limits of the*

10   *access of the public authorities to the data, and of*

11   *its subsequent use, for purposes which are specific,*

12   *strictly restricted and capable of justifying the*

13   *interference which both access to that data and its use*

14   *entail."*

15

16   And just thinking about that for a moment, Judge, can

17   be it said that US law, as it's been explained to the

18   court, meets that requirement? And we say not, Judge.

19   We say that in fact there *is* access to all data. All

20   data is processed in the meaning of EU law. The fact 12:14

21   that some is extracted and kept doesn't alter that

22   fact. Is there an objective criterion laid down by

23   which to determine the limits of the access of the

24   public authorities to that data? Well, as far as non-EU

25   citizens -- sorry, non-US persons are concerned, the 12:14

26   only requirement is that it have the collection of

27   foreign intelligence as the purpose. And the court has

28   seen the width of the definition of foreign

29   intelligence. Sorry, a significant purpose of its

53

1	collection must be foreign intelligence.
2	
3	And that's the extent of the requirement of US law:
4	One, that you're non-US - you obviously are; and then
5	secondly, that a significant purpose must be the 12:15
6	collection of foreign intelligence. That's *actually*
7	the extent of the requirement under Section 702. And
8	in my respectful submission, Judge, that couldn't
9	conceivably be thought to meet the standards that it is
10	said a law would require to meet in paragraph 92 -- 93 12:15
11	of **Schrems**.
12	**MS. JUSTICE COSTELLO:** And you're saying because of
13	that scope, the fact that you have to have the tasking
14	of selectors and you have to have your directives and
15	your certificates, that doesn't arise? 12:15
16	**MR. McCULLOUGH:** But the court saw what the tasking
17	was. I'll come to this in a moment, Judge. We got
18	very interesting evidence, I think from Prof. Swire,
19	about this in which he showed us the document that the
20	person has to complete before a person, before a non-EU 12:15
21	citizens can be tasked. I'll bring the court to that
22	evidence in a moment. In fact it provides almost no
23	protection for non-US persons. It largely consists of
24	a requirement that you demonstrate the person is a
25	non-US person and you state that it's for the purpose, 12:16
26	significant purpose of collecting foreign intelligence.
27	But I'll bring the court to that evidence in just a
28	moment.
29	

54

```
 1      And the same applies to paragraph 94, Judge:

 2

 3      "*In particular, legislation permitting the public*

 4      *authorities to have access on a generalised basis to*

 5      *the content of electronic communications must be*

 6      *regarded as compromising the essence of the fundamental*

 7      *right to respect for private life, as guaranteed by*

 8      *Article 7 of the Charter.*"

 9

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

11      Section 702 permits Upstream to take place.  And if

12      that's so, well, then Section 702 permits a system to

13      be maintained in place in which the NSA have access to

14      every single piece of information that goes across the

15      internet.  Because that's what Upstream *is*.  It may     12:16

16      extract from it, having -- considers it all, admittedly

17      by a machine, but that makes no difference.  And it may

18      extract from it and keep only the bits that respond to

19      its particular level of interest.  But its starting

20      point is to look through the entire of the internet       12:17

21      traffic passing through a particular point.  And that,

22      in my respectful submission, falls foul of what the

23      Court of Justice says in paragraph 94, that is:

24      Legislation permitting the public authorities to have

25      access on a generalised basis to the content of          12:17

26      electronic communications.

27

28      Then paragraph 95 deals with remedies, Judge, and I

29      won't refer to that.  Then dealing with **Watson** in the
```

55

1 footnote at the foot of the page, Judge.

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

3 **MR. McCULLOUGH:** Now, <u>Watson</u> is a case that applies by

4 analogy, Judge, but nevertheless applies correctly by

5 analogy. It is a case dealing, of course, with EU 12:17

6 legislative measures and not with foreign measures.

7 And it is a case that was dealing not with national

8 security, but with crime. But the principles are the

9 same, Judge. And so useful principles can be

10 extracted, I say, from <u>Watson</u>, in particular at 12:18

11 paragraph 109 of <u>Watson</u>. 109, 110 and 111 again set

12 out general principles and not dissimilar to those in

13 <u>Schrems</u>. 109:

14

15 "... *national legislation must, first, lay down clear*

16 *and precise rules governing the scope and application*

17 *of such a data retention measure and imposing minimum*

18 *safeguards, so that the persons whose data has been*

19 *retained have sufficient guarantees of the effective*

20 *protection of their personal data against the risk of*

21 *misuse.*"

22

23 Then importantly:

24

25 "*That legislation must, in particular, indicate in what*

26 *circumstances and under which conditions a data*

27 *retention measure may, as a preventive measure, be*

28 *adopted, thereby ensuring that such a measure is*

29 *limited to what is strictly necessary.*"

56

So can it be said, Judge, that retention is strictly
necessary when its *only* requirement is that it have as
a significant purpose the collection of foreign
intelligence when that is widely defined in the way it   12:18
is? Could that be said to meet the requirements of
strict necessity? And I say clearly not, Judge.

Then paragraph 110 is to similar effect:

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

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

57

1   establish a connection between the data retained and

2   the objective pursued. And there must be an actual

3   circumscription of the extent of the measure and thus

4   the public affected. So it brings one back to the same

5   point, Judge; is the limitation that a significant   12:20

6   purpose must be the collection of material for the

7   purpose of foreign intelligence? Could that *conceivably*

8   meet the standard for which paragraph 110 provides?

9

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

11

12   "... *the national legislation must be based on*

13   *objective evidence which makes it possible to identify*

14   *a public whose data is likely to reveal a link, at*

15   *least an indirect one, with serious criminal offences,*

16   *and to contribute in one way or another to fighting*

17   *serious crime or to preventing a serious risk to public*

18   *security.*"

19

20   And again the same point applies, Judge; can it be said   12:20

21   that US law requires the existence of objective

22   evidence demonstrating a link even between national

23   security on the one hand and the material that's been

24   collected on the other hand when you look at the width

25   of the definition and you look at the ease with which   12:20

26   the material relating to non-US persons can be

27   collected?

28

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

58

1   out at paragraph 120, 121 and 123. 120 provides that

2   it's essential -- sorry:

3

4   "*In order to ensure, in practice, that those conditions*

5   *are fully respected, it is essential that access of the*

6   *competent national authorities to retained data should,*

7   *as a general rule, except in cases of validly*

8   *established urgency, be subject to a prior review*

9   *carried out either by a court or by an independent*

10   *administrative body, and that the decision of that*

11   *court or body should be made following a reasoned*

12   *request by those authorities submitted, inter alia,*

13   *within the framework of procedures for the prevention,*

14   *detection or prosecution of crime.*"

15

16   Now, it's said, Judge, correctly, that the FISC court

17   exists. And I *think* it was said by Mr. Gallagher that

18   that meets the standards of EU law that are set out in

19   paragraph 120. But in fact the court has heard - I

20   think the court knows - in evidence that as far as   12:21

21   non-US persons are concerned, there is one FISC

22   authorisation. It does *not* look at the individuals

23   whose data is being collected. And can that be said,

24   Judge, truly to meet the requirements for a prior

25   review?   12:22

26   **MS. JUSTICE COSTELLO:** When you say one authorisation,

27   is that the annual one?

28   **MR. McCULLOUGH:** Yes, Judge. Sorry, the annual

29   authorisation, the court is quite correct.

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 1      MS. JUSTICE COSTELLO:  Because there's also a

 2      three-monthly one I seem to recollect.

 3      MR. McCULLOUGH:  I think there's a three-monthly

 4      review, Judge, if I'm -- I'll come back to that

 5      evidence, Judge, in case I've misunderstood it.          12:22

 6      MR. GALLAGHER:  Yes, the authorisation is usually

 7      annually, Judge, you're correct.

 8      MR. McCULLOUGH:  It's annual, Judge, yes.  There is, I

 9      think, a three-monthly review --

10      MR. GALLAGHER:  It can't be more than annually, but     12:22

11      it's usually annually, Judge.

12      MS. JUSTICE COSTELLO:  Annually, yes.  But there was a

13      reference to something every three months, I've

14      forgotten --

15      MR. McCULLOUGH:  There is, Judge, but I think not by     12:22

16      the FISC court, I think it's by an administrative body.

17      I just can't quite recall the nature of that body.

18      MS. JUSTICE COSTELLO:  Anyway, its annually with the

19      FISC.

20      MR. McCULLOUGH:  I think it's annually by FISC, Judge,   12:22

21      yes.

22      MS. JUSTICE COSTELLO:  Thank you.

23      MR. McCULLOUGH:  And does that meet the requirement,

24      Judge, for a reasoned request by the authority

25      submitted, as suggested in paragraph 120?               12:23

26

27      Paragraph 121, Judge, is a very difficult one for the

28      US Government and Facebook.  It provides for a

29      requirement of notification:
```

60

1

2   *"Likewise, the competent national authorities to whom*

3   *access to the retained data has been granted must*

4   *notify the persons affected, under the applicable*

5   *national procedures, as soon as that notification is no*

6   *longer liable to jeopardise the investigations being*

7   *undertaken by those authorities. That notification is,*

8   *in fact, necessary to enable the persons affected to*

9   *exercise, inter alia, their right to a legal remedy,*

10   *expressly provided for in Article 15(2) of Directive*

11   *2002/58, read together with Article 22 of Directive*

12   *95/46, where their rights have been infringed."*

13

14   **(SHORT PAUSE IN PROCEEDINGS)**

15

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

17   **MR. McCULLOUGH:** Judge, I was dealing with paragraph

18   121 of **Watson**, which is quoted in one of our footnotes.

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

20   **MR. McCULLOUGH:** And making the point, Judge, that   12:26

21   **Watson** sets out an absolute requirement of

22   notification. Now, I'll return briefly, Judge, to what

23   Ms. Hyland said in the context of ECHR cases. But we

24   can say this with absolute certainty, that 702 does

25   knotted provide for notification under *any*   12:26

26   circumstances, no matter what the level of risk or non

27   risk associated with notification. It just doesn't

28   happen.

29

1   Then -- and I'll be submitting to the court that's
2   clearly, *clearly* in breach of the provision, the
3   requirement of EU law set out by **Watson** in paragraph
4   121. It has the consequence, I say, *clearly* that US
5   law *cannot* be effectively equivalent to the rights   12:26
6   provided for -- sorry, cannot be effectively equivalent
7   to the rights that obtain in EU law for EU citizens in
8   respect of data privacy.
9
10   Then finally, at paragraph 123:   12:27
11
12   "*In any event, the Member States must ensure review, by*
13   *an independent authority, of compliance with the level*
14   *of protection guaranteed by EU law with respect to the*
15   *protection of individuals in relation to the processing*
16   *of personal data, that control being expressly required*
17   *by Article 8(3) of the Charter and constituting, in*
18   *accordance with the Court's settled case-law, an*
19   *essential element of respect for the protection of*
20   *individuals in relation to the processing of personal*
21   *data.*"
22
23   So there's a requirement for a review by an independent
24   authority of compliance with the level of protection
25   guaranteed by EU law. Now, there are measures to   12:27
26   review what has occurred, Judge, but can it be said
27   that the measures of which the court has heard
28   constitute review by an independent authority of
29   compliance with the level of protection guaranteed by

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

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

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

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

MS. JUSTICE COSTELLO: The court of Justice? In __Watson__?

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

MS. JUSTICE COSTELLO: Notwithstanding the fact that   12:30 __Watson__ is in the criminal area --

MR. McCULLOUGH: Yes.

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

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1   **MR. McCULLOUGH:** Yes, exactly, Judge. And I don't

2   think that makes any difference, Judge, to the analysis

3   that's conducted here, the requirement of strict

4   necessity. The requirement of strict necessity applies

5   anyway.   12:30

6

7   And of course, each case must be viewed in its

8   individual facts. I can easily envisage that there

9   would be would be nothing wrong with a system that

10   provided for a lesser or greater method of notification 12:30

11   or a system of notification that said in the case of

12   some people, because they pose *such* a risk to national

13   security, they won't be notified for 20 years. But

14   this is not what the US law provides for. The US law

15   provides for no notification ever for anybody. And one 12:31

16   just asks the question, Judge: Could that *ever* meet the

17   test for which **Watson**, the Court of Justice provided in

18   **Watson**, a national measure or French measure saying 'We

19   just won't notify you'?

20   12:31

21   So, Judge, those are the tests, Judge. And we set out,

22   Judge, in paragraph 48, Judge, a summary, I suppose, of

23   why we say that those tests are failed. I'll just

24   enumerate them if I may, Judge - they follow from what

25   I've said. I'll just refer the court to the relevant 12:31

26   footnotes where evidence in this regard can be found.

27

28   First, because US law permits indiscriminate

29   surveillance. And if the court looks at our footnotes

1   63 and 44, the court will see the evidence set out in
2   that regard. At footnote 63, Judge, of course, you'll
3   see there's extensive evidence set out from Ms. Gorski,
4   Prof. Swire, Prof. Vladeck, talking there about
5   Upstream and making the point that the nature of   12:32
6   Upstream is such that the entire of the data flowing
7   across a particular point in the internet is examined -
8   examined by a machine, Judge, but that makes no
9   difference. That's the nature of Upstream. And
10   there's similar material, Judge, at footnote 44, but I   12:32
11   think in footnote 44 relating to, yes, relating to
12   12333.
13
14   Then secondly, Judge, US laws permit direct access.
15   The material in that regard is set out at footnote 41,   12:33
16   where Prof. Swire says:
17
18   "*So in terms of direct, my own view would be direct*
19   *access to the internet backbone upon Upstream is a fair*
20   *reading.*"   12:33
21
22   That's what he says, Judge. He says there's direct
23   access on the part of the US Government, the NSA,
24   directly under Upstream.
25   12:33
26   Thirdly, Judge, US laws permit mass surveillance, as I
27   say, properly so understood, Judge. It certainly
28   permits the surveillance of the data of *very* large
29   numbers of people under both PRISM and Upstream. It's

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

MS. JUSTICE COSTELLO: And the MCTs.

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

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

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

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

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1

2   And the point, Judge, I suppose that I should have made

3   at the beginning about these programmes - all this

4   evidence is grounded in the programmes, related to the

5   programmes. But of course, the programmes are only   12:35

6   examples. The programmes are only what we know occurs

7   at the moment under Section 702. There may be other

8   programmes, although doubt was expressed as to whether

9   that's so, but there's evidence to and fro on that.

10   But it doesn't *matter* very much. *Because* they are   12:35

11   carried out under Section 702, they are examples only

12   of what can occur. So if you like, the most extreme

13   effects, the most extreme parts of every one of those

14   programmes are apparently legally permissible as a

15   matter of EU law -- my apologies, of US law. And it   12:36

16   follows, therefore, that as a matter of US law, the US

17   Government is capable of introducing *another* programme

18   the following day under Section 702 which has the same

19   characteristics.

20   12:36

21   So if, as I say, mass surveillance, or indiscriminate

22   surveillance perhaps more correctly, is permitted under

23   Upstream, well, then it's permitted under Section 702.

24   If direct access is permitted under Upstream then it's

25   permitted under Section 702.   12:36

26

27   Then fourthly, Judge, US laws permit targeting without

28   limitation of non-US persons. And the relevant

29   material in that regard, Judge, is to be found, I

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

Lines with timestamps: line 5 — 12:37; line 10 — 12:37; line 15 — 12:37; line 20 — 12:38; line 25 — 12:38.

1	a way of avoiding --
2	**MS. JUSTICE COSTELLO:** And you're saying it's not for
3	targeting the, if I put it, the likely suspects?
4	**MR. McCULLOUGH:** Well, no, there is an element of that
5	in it too, Judge. But the main purpose of targeting
6	minimisation is to ensure that you catch the
7	material -- that you *don't* get the material of US
8	citizens. So of course, if you do that, that's of no
9	protection to non-US persons.
10	
11	Now, targeting then and minimisation in the more
12	specific sense relating to US persons, I have to say
13	I'm at a loss logically to see how that is going to
14	lead to targeting and minimisation for non-US persons.
15	To take just an obvious example, Judge; if your job is
16	to ensure that you only collect relevant material
17	relating to Mr. Jones, a US person, you have no
18	obligation, no such obligation at all in relation to
19	Ms. Smith, an EU person. Those targeting and
20	minimisation requirements procedures just don't apply.
21	So I suppose I can see how you collect less incidental
22	information about Ms. Smith if you target Mr. Jones in
23	a more specific way, but in fact there's no limitation,
24	no targeting and minimisation limitation in respect of
25	the collection of data relating to the EU person. So
26	if there *is* a benefit, Judge, it's entirely tangential.
27	
28	Then fifthly, Judge, there's no adequate prior review.
29	And I've mentioned that, that arises under paragraph

12:38

12:39

12:39

12:39

12:39

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1	120 of **Watson**. I've mentioned, Judge, what, in my
2	respectful submission, is the inadequacy of the FISC
3	system in the context of paragraph 120.
4	
5	There is never any notification, Judge, we know that. 12:40
6	I'll just mention, if I may, Judge, what Ms. Hyland
7	said about the FRA report in that context. That's to
8	be found at book five, tab 61. And she referred to
9	material at page 61. And she read this material,
10	Judge, under paragraph 3.1, a precondition obligation 12:40
11	to inform and the right to access.
12	**MS. JUSTICE COSTELLO:** Mm hmm.
13	**MR. McCULLOUGH:** The starting point is, as the text
14	says:
15	
16	"*The obligation to inform and the right to access one's*
17	*own data can generally be perceived as strong*
18	*safeguards for ensuring the effectiveness of a remedial*
19	*action, and, ultimately, legal scrutiny by judicial or*
20	*non-judicial bodies. From the point of view of the*
21	*right to data protection, these safeguards also ensure*
22	*transparency of data processing and the exercise of*
23	*other rights of the individual.*"
24	
25	And so on. Then about six or seven lines down, Judge: 12:41
26	"*To safeguard national security*".
27	**MS. JUSTICE COSTELLO:** Yes.
28	**MR. McCULLOUGH:** The text continues:
29	

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

5

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

11   "*According to the CJEU, the judicial review guaranteed*
12   *by Article 47 of the Charter first requires full*
13   *knowledge by the individual, and subsequently by the*
14   *court, of the information on which the administration*
15   *based its decision. The adversarial procedure shall be*
16   *complied with*" --
17   **MS. JUSTICE COSTELLO:** I think that's "*principle*".
18   **MR. McCULLOUGH:** Sorry, "*The adversarial principle*
19   *shall be complied with, so that the individual can*
20   *decide whether there is an argument to make against the*
21   *national decision. From there the court may review the*
22   *national decision.*"

23

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

28

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

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

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

If you look at the cases, Judge, to which reference is
made in the box beside it, there's a reference to
<u>Klass</u>, of which the court heard, about which the court
heard from Ms. Hyland, making the point, Judge, in
essence, that there may be *some* cases in which it will
be legitimate not to inform a subject for *years* after
surveillance of the fact that he'd been surveilled.
And again, Judge, one can see that that might be a
system, if set up, that might satisfy the requirement
for notification. But that would be a system in which
a decision was made, an objective decision was made
that some people are classified one way, others are
classified another way, 'Those on whom we have
collected information, who actually pose no risk or
whose information we have collected who in fact turn

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

And the same applies in the cases over the page, Judge,
maybe just the second page, **Weber**:   12:44

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

But then:

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

That's the principle under the Convention, Judge. And
the same applies in the case below that, **The
Association For European Integration and Human Rights
and Ekim** against, I think, Bulgaria where the same   12:44
quote is in the final words:

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

<div style="text-align:center">74</div>

1 *termination, information should be provided to the*

2 *persons concerned.*"

3

4 So with respect, Judge, I don't think these parts of

5 the Convention really assist the court that Facebook is   12:44

6 making. They demonstrate, as is undoubtedly the case,

7 that it would be legitimate under the Directive and the

8 Charter to have a system whereby you didn't just pass

9 over the information immediately. But what they *don't*

10 demonstrate is the legitimacy of a system in which   12:45

11 there is no *question* of notification under any

12 circumstances. And in that regard, Judge, in my

13 respectful submission, there's a --

14 **MS. JUSTICE COSTELLO:** This might be a hypothetical

15 question, but in relation to Upstream, where you're   12:45

16 submitting that everything that passes over particular

17 points of the internet is surveilled because it is

18 subject to automatic searching in order to find out

19 whether tasked communications pass through those

20 points, would that require notification of all the   12:45

21 blanks, if I can put it that way? That sounds rather

22 horrendous.

23 **MR. McCULLOUGH:** Yes. I suppose, Judge, one might take

24 the view that if it ever came to a proper measuring

25 system to be justified under the Convention, or under   12:45

26 the Directive, the answer to that might be no. The

27 answer -- a country, say Ireland, might legitimately

28 say --

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

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

2 touched'.

3 **MR. McCULLOUGH:** No. I can see, Judge, that a Member

4 State might legitimately say 'The requirement of

5 notification *should* relate only to those whose data I   12:46

6 have *retained*, as opposed to those whose data I have

7 accessed'. The adequacy of that --

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

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

10 **MS. JUSTICE COSTELLO:** No, I mean, it's going to what I   12:46

11 was sort of groping around about; there's a qualitative

12 incremental invasion of privacy depending on the nature

13 of the process that's applied, processing applied.

14 **MR. McCULLOUGH:** Yes, there is, Judge. It's

15 *undoubtedly* the case, Judge, that retention poses a   12:46

16 greater threat to data privacy than merely surveilling.

17 That's obviously the case, Judge. And therefore, it

18 might be so that the notification requirement, just for

19 instance, might be more easily met in respect of those

20 whose data we've just surveilled but not retained. And   12:46

21 I suppose the same might apply to the various

22 requirements of EU law, that there might be a

23 distinction to be made between those people.

24

25 But just looking at the particular issue we're talking   12:47

26 about, notification, Judge, the point I'm making is

27 that for *any* of those groups, US law simply doesn't

28 provide for *any* form of notification.

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

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1   hypothetical.

2   **MR. McCULLOUGH:** Yes, Judge. Then finally, Judge, I

3   think separately in respect of what I say are breaches

4   of substantive law, there's no subsequent review on an

5   individual a basis of compliance with those standards. _{12:47}

6   And that follows from paragraph 123 of **Watson**.

7

8   So, Judge -- there may, of course, as the court knows,

9   be other programmes, there may well be certainly other

10   programmes in the future. And so, Judge, for the   _{12:48}

11   reasons that I've described, Judge, in our respectful

12   submission, as is suggested at paragraph 51 of these

13   speaking notes, the state of US law is not compatible

14   with the Charter. That is demonstrated by the evidence

15   in respect of the programmes of which we *know*. But it _{12:48}

16   is all the *more* clear, I think, Judge, in relation to

17   the law itself, Section 702 in particular.

18

19   And for the reasons discussed, Judge, if that is so,

20   well then a system in the EU, in an EU member country   _{12:48}

21   that had the characteristics which the US legal system

22   have would not pass muster. And if *that* is so, well

23   then data can't be transferred to the US, because to do

24   so is in breach of the principles of effective

25   equivalence and respect for Charter rights. And that's _{12:49}

26   how I say that feeds into the structure, Judge.

27

28   I just wanted to return then, Judge, to the earlier

29   parts of this speaking note, just to deal with the

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1	material, Judge, at page 15; that's the changes in US
2	law since **Schrems**.
3	**MS. JUSTICE COSTELLO:** Yes.
4	**MR. McCULLOUGH:** I just want to deal with this and one
5	other issue then, Judge, and then I'll be able to 12:49
6	conclude. And much of this material here, Judge, I
7	suppose is obvious. We say, Judge, that although
8	there's a great deal of emphasis on it, there are in
9	fact limited changes in **Schrems** in the state of US law.
10	There are in fact no *substantive legal* changes properly 12:49
11	so-called. Section 702, and 12333 insofar as it's
12	relevant -- and I'll come back to that,
13	Mr. O'Sullivan's been able to collect the material on
14	that, in just a moment. But there's no changes to the
15	legal structure, Judge. 12:50
16	
17	An emphasis was laid on the following matters about
18	which we make some brief comments in paragraph 44.
19	First, on the Privacy Shield Ombudsperson. And the
20	court has heard this material, so I'll simply point 12:50
21	out, Judge, that it's not a tribunal, it's an executive
22	officer of the US department, therefore can't provide
23	redress within the meaning of Article 47.
24	
25	Second, the point is made that the options available to 12:50
26	the Ombudsperson are very limited. The court will see
27	that at footnote 47. The court's aware what the
28	response *is*; the response from the Ombudsman is either
29	a statement that the requirements have been complied

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1	with, or in the event of noncompliance, that the
2	noncompliance is being remedied. So a person whose
3	rights have been breached and a person whose rights
4	have been found by the Ombudsperson to be breached but
5	not remedied actually will just never hear again from
6	the Ombudsperson, that's just the end of it as far as
7	that person is concerned.
8	
9	Then there's reference to the standing type obstacle of
10	which the court has heard at the third indent, Judge,
11	which is set out there and I won't spend time on that.
12	
13	Then, Judge, in relation to PPD-28, the court will
14	recall some discussion about the tasking and the
15	minimisation procedures -- the targeting, I should say,
16	sorry, and minimisation procedures provided for by
17	PPD-28. And the court will recall that there's no such
18	protection in Section 702 itself for EU citizens, but
19	it's said that there's some protection --
20	**MS. JUSTICE COSTELLO:** In your note there you have
21	"*tasking* and minimisation". Are we talking about
22	tasking or targeting?
23	**MR. McCULLOUGH:** It should actually be "targeting",
24	Judge, that's a misprint. And therefore, it's only by
25	reference to PPD-28 that any such protection is to be
26	found. And the evidence, Judge, that establishes that
27	to be so is mentioned at footnote 50.
28	
29	Then over the page, Judge, the reasons why that's not

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1	adequate are set out: First, that PPD-28 isn't a law;
2	secondly, Article 1 of PPD-28, which *does* refer or does
3	relate to Section 702 programmes is cast in *extremely*
4	wide terms. And I'd ask the court to look at that in
5	due course. But the terms, Judge, are aspirational,	12:52
6	wide, indefinite and, in my respectful submission, they
7	provide no effective protection, particularly under
8	circumstances where, as has been demonstrated to the
9	court, they are in fact nonjusticiable.
10		12:53
11	Article 2, Judge, sets up some limitations, but they
12	relate only to bulk surveillance. That's expressly
13	stated in Article 2. And those in fact, as far as the
14	US Government is concerned, appear to be 12333
15	measures, as opposed to Section 702 measures. And	12:53
16	again, Judge, the court has had the opportunity of
17	looking at them, but in my respectful submission, they
18	are so vague as to provide no effective protection.
19	
20	Article 4, Judge, is said to provide limits on	12:53
21	retention and dissemination. They're not the same
22	limits on retention and dissemination as are found in
23	Section 702, the text makes it clear they're the limits
24	that are to be found in 12333. And there's no
25	limitation in it on the collection of data. And this	12:54
26	requires the court to follow this labyrinth down a bit
27	I'm afraid, but when the court then turns to 12333 in
28	order to see the targeting minimisation protections
29	that are introduced via it to PPD-28 and thereby to

80

Section 702 programmes, the court will see just how wide they are. Because those targeting and minimisation procedures are based upon the foreign intelligence definition in 12333, which is wider again than the foreign intelligence definition in Section 702.

And in my respectful submission, Judge, when you look carefully at that, PPD-28 and EO12333, to which it refers for *this* purpose and which is, therefore, certainly relevant for this purpose anyway, contains targeting and minimisation procedures that are not in fact of assistance in cutting down on an objective basis the range of those to whom they apply.

Now, all of that, Judge, of course, in the context of both PPD-28 and EO12333 being expressly nonjusticiable. So even if they're breached, Judge, well then what of it in a legal sense? They just don't provide for a remedy. And that's the point made, Judge, at the last indent.

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

1   NSA. The Judicial Redress Act equally, therefore,

2   doesn't apply to the NSA. And indeed the NSA is not a

3   designated agency under the Judicial Redress Act.

4

5   So for the reasons that are set out, Judge, in the   12:56

6   material mentioned at paragraph, at footnote 54, when

7   Prof. Vladeck was talking, I think the court can safely

8   conclude that that is not part of the picture to which

9   it needs to pay any attention.

10   12:56

11   Very briefly, Judge, if I can ask the court to turn

12   forward to, finally, the material at paragraph 53.

13   There is one matter that I have to return to after

14   this, but paragraph 53, Judge, deals with an issue upon

15   which a great deal of emphasis was laid by Facebook,   12:56

16   this is the Privacy Shield Decision. And I say, Judge,

17   that's not germane to the court's consideration of

18   these matters, for six reasons that are set out.

19   They're not numbered one to six, Judge, but they do

20   follow one to six in what is said here.   12:56

21

22   The first, Judge, is this, that the adequacy decision,

23   or *no* adequacy decision is effectively binding. And we

24   know that, Judge, because that's what the Court of

25   Justice found in **Schrems**. In **Schrems** it was contended   12:57

26   that you can do, the court could do -- that the DPC

27   could do nothing about this, the court could do nothing

28   about this, it just had to abide by the decision of the

29   Commission. And that turned out to be not correct. It

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1	*was* correct that the court couldn't strike it down and
2	the DPC had to observe it until it was struck down.
3	But it doesn't have some magical status. It is clearly
4	something that is open to attack and the mere fact that
5	an adequacy decision has been reached does not mean
6	that it's immune from challenge.
7	
8	Then secondly, Judge, and I suppose most importantly
9	for present purposes, the court has to look at what the
10	Privacy Shield Decision actually is. It's not a
11	finding of general adequacy, it's only a finding that
12	there's adequate protection for transfers to the US by
13	those who sign up to the Privacy Shield principles.
14	And the material in that regard is set out at footnote
15	69, Judge; people must, users of it must self-certify.
16	So just look, Judge, over the footnote at recital 16,
17	or recital 16 on that footnote
18	**MS. JUSTICE COSTELLO:** Yes.
19	**MR. McCULLOUGH:** "*The protection afforded to personal*
20	*data by the Privacy Shield applies to any EU data*
21	*subject whose personal data has been transferred from*
22	*the Union to organisations in the US that have*
23	*self-certified their adherence to the principles with*
24	*the US Department of Commerce.*"
25	
26	And recital 136 -- sorry, 139, 19:
27	
28	"*As part of their self-certification, organisations*
29	*have to commit to complying with the principles.*"

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1
2   And then 136:
3
4   "*In the light of these findings, the commission*
5   *considers that the US ensures an adequate level of*   12:58
6   *protection for personal data transferred from the Union*
7   *to self-certified organisations in the US under Privacy*
8   *Shield.*"
9
10   So it's not a general measure, Judge, it's a measure   12:58
11   that applies only under those specific circumstances.
12
13   The third point, Judge, just at the top of that page,
14   page 24 -- and of course, I should say, Judge, we don't
15   know whether Facebook has signed up to those   12:59
16   principles, we don't know whether it *is* transferring
17   data pursuant to those principles. The third point is
18   the point made at the top of page 24; it *certainly*
19   isn't relying on them for *these* transfers. *These*
20   transfers are transfers that, according to the   12:59
21   information it gave to the DPC, it relies on the SCC
22   decision to transfer.
23   **MS. JUSTICE COSTELLO:** So you say that, contrary to
24   Mr. Gallagher's submission, this isn't a collateral
25   attack on the Privacy Shield?   12:59
26   **MR. McCULLOUGH:** No.
27   **MS. JUSTICE COSTELLO:** Because it doesn't apply because
28   we haven't any evidence that they have self-certified?
29   **MR. McCULLOUGH:** Well, it's not *just* that, Judge.

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1	That's certainly true. But it's not a general adequacy
2	decision *anyway*. And it's been presented to you as if
3	it was some sort of validation of US law under all
4	circumstances for everybody. It's not. It says that
5	if you certify that you adhere by certain principles,
6	if you self-certify, *then* you can transfer pursuant to
7	Privacy Shield.
8	MS. JUSTICE COSTELLO: Is it adopted under, what was
9	it, 25(6)?
10	MR. McCULLOUGH: I think it --
11	MR. GALLAGHER: Yes.
12	MR. McCULLOUGH: I think it has been, Judge, yes. I
13	think it has been, yeah. Then, Judge, the fourth
14	point, over the page at (d) is that in any event, while
15	the Privacy Shield may be a strong indication of the
16	Commission's view, the Commission has been wrong in
17	these matters and indeed -- like, I suppose that's the
18	origin of the first **Schrems** case, Judge.
19	MS. JUSTICE COSTELLO: Mm hmm.
20	MR. McCULLOUGH: That the Commission was wrong in that
21	regard.
22	MS. JUSTICE COSTELLO: I just want to understand your
23	argument here. Are you saying that the Privacy Shield
24	isn't a binding measure on the DPC?
25	MR. McCULLOUGH: No, it *is* a binding measure on the
26	DPC, Judge.
27	MS. JUSTICE COSTELLO: Yes.
28	MR. McCULLOUGH: Yeah, it is. But --
29	MS. JUSTICE COSTELLO: And, therefore, on the court?

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1   **MR. McCULLOUGH:** Sorry, but it's been presented to the
 2   court as if it were an adequacy finding that is
 3   relevant that, if you like, prevents the court
 4   embarking upon and reaching a decision on the questions
 5   of effective equivalence. And in my respectful   13:01
 6   submission, it doesn't do that at all. All it does is
 7   it says that there are adequate safeguards under
 8   Article 25 for those who sign up to observe certain
 9   principles. But that's not a set of principles that
10   anybody has signed up to in *this* case. It just doesn't 13:01
11   *arise* in the context of this case, Judge, in my
12   respectful submission.
13
14   The fifth point, Judge, is this, that when you look at
15   the Privacy Shield Decision, Judge, it also contains a   13:01
16   provision akin to the Article 4 provision - it's at
17   Article 3 of the Privacy Shield Decision. It also has
18   a safety valve in it, in the same way as the <u>Safe</u>
19   <u>Harbour</u> decision had a safety valve in it which was
20   struck down. Now the Privacy Shield Decision has a   13:01
21   safety valve in it, its Article 3, which is phrased in
22   wide terms. And so again the Privacy Shield Decision
23   is subject to precisely the same logic as the <u>Safe</u>
24   <u>Harbour</u> decision was in <u>Schrems</u>. You *can't* rely on it
25   if the net effect of your reliance on it is to deprive   13:02
26   EU citizens of the rights to which they're entitled
27   under the Directive and the Charter.
28
29   So it's circular, Judge, to say that it's an adequacy

1	decision. It's an adequacy decision that contains
2	within it a provision whereby the DPC can *override* it.
3	MR. GALLAGHER: Sorry, it's not the DPC, it's the
4	Commission.
5	MS. JUSTICE COSTELLO: Well, I think what you mean is 13:02
6	that in the sense that the DPC can bring proceedings to
7	challenge it in the way that Mr. Schrems brought
8	proceedings by way of judicial review which ultimately
9	challenged **Safe Harbour**, is that what you meant?
10	MR. McCULLOUGH: Sorry, Judge, just give me one second, 13:02
11	because I've to find it.
12	MS. JUSTICE COSTELLO: Well, perhaps we might take it
13	up at two.
14	MR. McCULLOUGH: Very good, judge.
15	MS. JUSTICE COSTELLO: That'll give you a longer time 13:02
16	to find it.
17	
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19	(LUNCHEON ADJOURNMENT)
20	13:03
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1	**THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS**
2	**FOLLOWS**
3	
4	**MS. JUSTICE COSTELLO:** Good afternoon.
5	**REGISTRAR:** In the matter of Data Protection
6	Commissioner -v- Facebook Ireland Ltd. and another.
7	**MS. JUSTICE COSTELLO:** I just wanted to confirm that
8	I will be in a position to resume this on Tuesday.
9	**MR. GALLAGHER:** Thank you.
10	**MR. McCULLOUGH:** Thank you, Judge.
11	**MS. JUSTICE COSTELLO:** I hope it doesn't interfere with
12	previous arrangements.
13	**MR. McCULLOUGH:** Judge, before lunch I was making a
14	point about the fact that the Privacy Shield decision
15	contains what I described as a safety valve, similar to
16	the safety valve contained in Article 4 of the SCC
17	decisions. And I was making the point that that
18	demonstrates that an Adequacy Decision in itself leaves
19	open the possibility that if, contrary to the finding
20	by the Commission, it turns out that the protections
21	provided by the foreign law are not adequate.
22	**MS. JUSTICE COSTELLO:** And who operates the safety
23	valve, yes.
24	**MR. McCULLOUGH:** Well, that's the point. And I had
25	suggested it was the Commissioner, Judge, and I think
26	Mr. Gallagher had intervened, so I just wanted to
27	return, and said it was the Commission. I just wanted
28	to give the court the text of the article to which
29	I was referring in any event, and in fact you will find

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

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

3   **MR. McCULLOUGH:** And it's Article 3 of the Privacy

4   Shield decision itself. The Privacy Shield decision,

5   Judge, just to point you to the place where you'll find   14:07

6   it, is at Book 1 of the EU authorities, Tab 13.

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

8   **MR. McCULLOUGH:** The decision itself is a short item,

9   as the court is aware, at the end of a very long series

10   of recitals. One paragraph of it is Article 3 which   14:08

11   provides as follows:

12

13   *"Whether the competent authority of the Member States*

14   *exercises their authority pursuant to Article 28(3) of*

15   *Directive 95/46/EC leading to the suspension or*   14:08

16   *definitive ban of data flows to an organisation in the*

17   *US that is included in the Privacy Shield List in*

18   *accordance with Sections I and III of the Principles*

19   *set out in Annex II in order to protect individuals*

20   *with regard to the processing of their personal data,*   14:08

21   *the Member State concerned shall inform the Commission*

22   *without delay."*

23

24   So, in the case of Ireland, Judge, it's the DPC who

25   makes an order.   14:08

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

27   **MR. McCULLOUGH:** She exercises her powers pursuant to

28   Article 28(3) which, in the case of our Ireland, are

29   her powers under section 11 of the Data Protection Act.

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1	when does she do that? She does it when she needs to
2	do so in order to protect individuals with regard to
3	the processing of their personal data. And so it's an
4	important aspect, Judge, of the Privacy Shield decision
5	that it contains within it the recognition that it may	14:09
6	not be a decision that actually does provide adequate
7	protection for individuals with regard to the
8	processing of their personal data.
9	MS. JUSTICE COSTELLO: Is that required because in
10	Schrems 1 the CJEU says that you can't preclude a	14:09
11	national authority from enquiring?
12	MR. McCULLOUGH: Well, the Safe Harbour Decision,
13	Judge, contained an article - was it Article 3 or 4 -
14	Article 3, Judge, which was prescriptive and it set out
15	limited circumstances in which the DPC could make an	14:10
16	order under Article 28(3) or section 11. And one of
17	the findings in Schrems at the end of the judgment was
18	to the effect that that too was a breach of...
19	MS. JUSTICE COSTELLO: Was it Article 28?
20	MR. McCULLOUGH: It was a breach of, I think,	14:10
21	Article 28, Judge, and perhaps the Charter rights, but
22	it was also struck down. The Article 3 aspect of the
23	Safe Harbour Decision was struck down, but that was
24	precisely because it was too prescriptive as to the
25	conditions that it laid down in order to justify the	14:10
26	intervention of the DPC.
27	MS. JUSTICE COSTELLO: Hmm.
28	MR. McCULLOUGH: So the original version of Article 4
29	in the SCC decisions contained a set of circumstances

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1   under which the DPC could intervene. They are less

2   prescriptive than those in the Safe Harbour Decision,

3   I won't bring the court to it, but if the court looks

4   at it you will see the criticism made in **Schrems**, at

5   the very end of the judgment, of the quite prescriptive 14:11

6   nature of the circumstances under which the DPC could

7   act.

8

9   The Article 4 conditions in the Safe Harbour Decision

10   was always less prescriptive, but the 2016 amendment of 14:11

11   the SCC decisions was premised on a conclusion that,

12   because of what the Court of Justice had said in

13   **Schrems** in relation to Article 3 of Safe Harbour, it

14   was now better to open up Article 4 so as to remove any

15   prescription as to the circumstances in which the DPC   14:11

16   could act, and that's the order of events.

17   **MS. JUSTICE COSTELLO:** And this Article 3 and Privacy

18   Shield is in comparable terms to the new Article 4?

19   **MR. McCULLOUGH:** Exactly, Judge, it's in comparable

20   terms with what I might call the new model article.   14:11

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

22   **MR. McCULLOUGH:** It's the same for practical purposes

23   as Article 4 of the SCC decisions in its new version.

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

25   **MR. McCULLOUGH:** Judge, I want to go back to one thing 14:11

26   I said about the Privacy Shield decisions before lunch.

27   I said that we don't know if Facebook have signed up.

28   I think in fact we have heard in the course of the

29   evidence that they *have* signed up. In that context

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1   there is one document missing from those before the

2   court. In our footnote 6, Judge, we refer to a letter,

3   correspondence passing between us and the solicitors

4   for the DPC, I should give you that, Judge.

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

6   COURT)

7   **MR. McCULLOUGH:** Because you don't have it as yet.

8   Hopefully you will be able to add it, Judge, to the

9   folders that you have.

10   14:12

11   And you see, Judge, in the recent past we asked them

12   again what are the basis upon which, the legal basis

13   upon which your client relies to transfer and they said

14   that they weren't answering that in circumstances

15   where: *"Your request doesn't relate to an issue in the*   14:12

16   *above proceedings."* And then they made a comment in

17   respect of costs, Judge. The comment in respect of

18   costs doesn't matter for present purposes.

19

20   But the point is this, Judge: That we don't know the   14:13

21   basis upon which Facebook transfers all data to the

22   States. The court will recall that's an express issue

23   that we raised in the complaint. It's clear that there

24   are other bases but the DPC was asked to investigate

25   them, Judge, and didn't do so. That's one of the   14:13

26   criticisms we make about the necessity of a reference.

27

28   What we can certainly say, Judge, about the Privacy

29   Shield decisions is that they are not relied on in this

case.

MS. JUSTICE COSTELLO: Mm hmm.

MR. McCULLOUGH: For the purpose of *these* transfers

4 and, therefore, Judge, in my respectful submission,

5 they don't affect the court's decision in *this* case.   14:13

6

7 And then the final point I want to make about Privacy

8 Shield, Judge, is what's expressed at paragraph 55 of

9 the speaking note. For the reasons, Judge, that we

10 have gone through, the Privacy Shield, the adequacy,   14:14

11 the validity, I should say, of the Privacy Shield

12 decision doesn't arise in this case. But we do also

13 express the view, Judge, that it is in fact invalid

14 under Article 25 of the Directive and the Charter. We

15 say it's not being invoked and considerations such as   14:14

16 that don't arise.

17

18 But I suppose it is important just to say this, Judge:

19 If I am wrong about all of that and if the court thinks

20 that it plays an important part in its considerations   14:14

21 well then the court will have to reflect back to the

22 way in which the first **Schrems** case developed. In that

23 case, Judge, ultimately the issue that came before

24 Hogan J wasn't one in which the parties

25 straightforwardly raised the validity of the Safe   14:14

26 Harbour Decision but he said well I need to have a

27 decision on that in order to enable a - sorry,

28 ultimately the Court of Justice embarked upon that and

29 said now we need to have a decision as to the validity

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1   of the Safe Harbour Decision.

2

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

18

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

27

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

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

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

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

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

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

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

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

MS. JUSTICE COSTELLO: Mm hmm.

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

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

A. Certainly stopping terrorism and protecting national security are objectives that the government pursues through its foreign intelligence surveillance, but the foreign intelligence surveillance is much broader given the definition of foreign intelligence in FISA and also given the even broader definition of foreign intelligence in Executive Order 12333. Under the executive order, foreign intelligence is defined in

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

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

MS. JUSTICE COSTELLO: Mm hmm.   14:19

MR. McCULLOUGH: That the material that falls under the
foreign intelligence rubric in 12333, but in particular
in 702, is clearly broader than the national security
rubric.

                                                14:19

Then the final point, Judge, to which I said I would
return is 12333. And I said, Judge, I just asked
somebody to have a look at the evidence so as to
reflect on what parts of 12333 are relevant, Judge.
And it applies, Judge, and is relevant to all   14:20
collection outside the US, so that's collection that
occurs on the transatlantic cable before data, if you
like, hits the US border, if that's an accurate
analogue for what data actually does.

                                                14:20

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

The Transit Authority, Judge, and the radio   14:21
communications authorities also fall within 12333, but
I accept that they are not relevant to Facebook, Judge.
Because, insofar as Facebook specifically is concerned,
Judge, our complaint is data, if you like, that goes to

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1	and then stops in the US and then is subject in the US
2	to surveillance by national security.
3	
4	Then finally, Judge, I just wanted to return to a point
5	that I made earlier which is addressed at paragraphs 56
6	and 57 of the speaking note, it is simply to do with
7	the questions. In summary, Judge, as the court is
8	aware, our submission is that there oughtn't to be a
9	reference for all of the reasons that I have embarked
10	upon, but if I'm wrong about that, Judge, and there is
11	to be a reference, as the DPC suggests, well then, in
12	our respectful submission, Judge, it's not simply a
13	matter of asking the single question that the DPC has
14	raised, there would almost certainly be other questions
15	to be asked.
16	
17	The precise nature of those questions I think would
18	necessarily depend upon the court's findings, what the
19	court had found by way of factual background. So
20	I won't address that now with the court, it would be a
21	waste of time to do so, but I just say, I think in
22	common with Ms. Hyland, Judge, is if the court,
23	contrary to our submission, reached the conclusion that
24	it is appropriate to refer a question well then we
25	would welcome the opportunity to address the court
26	again as to the appropriate questions to be referred.
27	May it please the court.
28	
29	

Timestamps in right margin: 14:21 (line 5), 14:21 (line 10), 14:22 (line 15), 14:22 (line 20), 14:22 (line 25)

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 1        SUBMISSION BY MR. GALLAGHER:

 2

 3        MR. GALLAGHER:  Judge, before Mr. Murray starts

 4        I wonder might I be permitted to correct two matters

 5        that, it will just take me a moment, that              14:22

 6        Mr. McCullough touched on and then refer to the

 7        significance of that Gorski answer that he has just

 8        mentioned, if that's permissible.

 9        MS. JUSTICE COSTELLO:  Well I think it is probably

10        preferable, yes, that everything is dealt with fairly  14:22

11        in this matter.  Yes, thank you.

12        MR. GALLAGHER:  Yes.  Thank you, Judge.  The point in

13        relation to the DPC's powers under the Adequacy

14        Decision.

15        MS. JUSTICE COSTELLO:  Yes.                            14:23

16        MR. GALLAGHER:  I don't think that's been accurately

17        set out by Mr. McCullough, with the greatest of

18        respect.  If you look at Article 3, Judge.

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

20        MR. GALLAGHER:  Yes.                                   14:23

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

22        it?

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

24        MS. JUSTICE COSTELLO:  13, is it?

25        MR. GALLAGHER:  -- 13, exactly, Judge.  What's referred 14:23

26        to, and it's on page 35, Judge, that you were referred

27        to, Article 3 of the decision.

28        MS. JUSTICE COSTELLO:  Yes.

29        MR. GALLAGHER:  What is referred to in Article 3 of the
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decision is not a power of the DPC, of any Member State

to suspend in any way the Privacy Shield, all that the

DPC can do is to suspend a data flow to an organisation

in the US included in the Privacy Shield where the

principles are not adhered to. And you will remember   14:24

that the principles dealt with what I called the

private sector, the private activities and the public

security was dealt with separately.

So if somebody doesn't comply with the principles, you   14:24

can stop in respect of an organisation. But it's

Article 4 that deals with a revision of the Privacy

Shield and it's only the Commission that is given a

role in respect of that. (Short pause)

14:24

Sorry, Judge. The second point was just, he made a

reference, and I think slightly critical of Ms. Hyland,

to page 61 of the FRA Report and footnote 438 and the

passage which quoted notification and he referred to

the case of ZZ at the footnote.   14:25

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

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

MS. JUSTICE COSTELLO: Yes.

MR. GALLAGHER: And said it or implied, I'm not making

any criticism of Mr. McCullough on a personal basis,   14:25

but just he implied it was a case of notification and

national security - or, in the case of national

surveillance, it was an entirely different case. It

was a case about the reasons given for a decision to

1	refuse entry to the UK on the grounds of national
2	security which is a different matter.
3	
4	And, finally, on the reference to Gorski, the answer of
5	a witness in a case doesn't make the matter an issue. 14:25
6	It has never been an issue, national surveillance is
7	the basis of the decision and, while we've gone outside
8	the reasoning of the decision, we've never gone outside
9	the issue which was national surveillance. Judge, in
10	any event Article 4(2) of TEU provides, outside the 14:26
11	scope is essential State functions. And also you find
12	in Article 3(2), which is the Directive itself, refers
13	to national security including the economic well-being
14	of the State. So it's not an issue, if it were an
15	issue I would say that was a legitimate objective, but 14:26
16	it's not been made an issue in the case by this answer
17	by Ms. Gorski.
18	**MS. JUSTICE COSTELLO:** Thank you.
19	
20	**SUBMISSION BY MR. MURRAY:** 14:27
21	
22	**MR. MURRAY:** May it please you, Judge. We've an awful
23	lot to respond to, Judge, in the sense that I think
24	there have been altogether seven speeches made.
25	**MS. JUSTICE COSTELLO:** Oh, I know and you are not being 14:27
26	confined, I have cleared my diary for next week.
27	**MR. MURRAY:** Well I am alarmed to [inaudible] say til
28	next week.
29	**MS. JUSTICE COSTELLO:** I am looking at what happened.

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1	we have already had a 33% increase.
2	**MR. MURRAY:** Yes. Well, Judge, I make those comments,
3	not by way of laying foundation for certainly next
4	week, but really just explaining that...
5	**MS. JUSTICE COSTELLO:** It's a short week.
6	**MR. MURRAY:** Well I hope so, Judge. Just logistically
7	managing, I suppose, the responses to all of the
8	various points which have been brought from different
9	perspectives, some in conflict with each other, some
10	new, some old, some variance, some familiar themes,
11	that what I'm proposing to do in the course of the
12	reply, and it will either be myself or myself and
13	laterally Mr. Collins, is to try to gather together by
14	reference to a number of themes the contentions you
15	have heard.
16	
17	What I have done, Judge, and I'll just hand a copy up
18	to you and one to my Friends is to try to (SAME HANDED
19	TO THE COURT) produce some sort of a road map. I don't
20	present it, Judge, as being completely comprehensive of
21	the issues in the case, although it is, as I now see,
22	headed *"issues"*, but it is the road map of the
23	questions which seem to me to have emerged from the
24	various submissions you have heard, and what I've laid
25	out here defines more or less the sequence in which I'm
26	going to deal with them.
27	
28	First of all, the issue identified as to whether the
29	court is entitled to look at matters that are (a) not

Timestamps in right margin: 14:27 (line 5), 14:27 (line 10), 14:28 (line 15), 14:28 (line 20), 14:28 (line 25)

1   addressed in the Draft Decision or (b) have arisen in

2   the course of the hearing in considering whether to

3   make a reference, and this is the issue as to whether

4   it has been, I think perhaps inaccurately, referred to

5   as to whether the court of its own motion can refer,   14:29

6   although that is it in part. It is also the extent to

7   which the Commissioner, when she comes to invoke the

8   jurisdiction under paragraph 66 of __Schrems__, is confined

9   to the Draft Decision so described, that's the first

10 issue. That's a new issue. I suppose by definition   14:29

11 it's a new issue in the sense that it's directed to

12 what has transpired in the course of the hearing.

13

14 The second issue, whether the reference is a moot.

15 This was, I think, Mr. Gallagher's first point. Again   14:29

16 I think it's a new issue, but an issue we can deal

17 with, I think, very briefly.

18

19 And then, thirdly, whether the court is precluded from

20 referring by reason of the Privacy Shield decision.   14:29

21 Now I think it's fair to say that those three issues

22 travel together to some extent because most, if not

23 all, of the discussion around the introduction of new

24 issues beyond the decision or the court's own motion

25 are related to the Ombudsman process in the Privacy   14:30

26 Shield. The Privacy Shield decision is also to some

27 extent a new issue and, certainly in the manner in

28 which it has been presented, is a fresh question.

29

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1	So we'll deal with those and I don't think they will
2	take terribly long.
3	**MS. JUSTICE COSTELLO:** Hmm.
4	**MR. MURRAY:** Fourthly then, Judge, I'm going to suggest
5	the court should move to the issue of the findings the 14:30
6	court should make in relation to US law. And
7	curiously, although this was the only issue on which
8	there was cross-examination, it's probably one of the
9	less contentious questions and, to the extent that, in
10	my submission, when the court comes to look at the 14:30
11	expert evidence it has heard, there isn't a huge
12	difference between the parties as to the contents of US
13	law.
14	
15	Then, fifthly, Judge, we move from there to consider 14:30
16	how those issues should be applied to the adequacy
17	analysis; in other words, that raises a series of
18	questions, which I think fit together, is the
19	proportionality analysis always necessary or is it
20	sufficient to look and see is the essence of the right 14:31
21	protected in the third country; if it is sufficient to
22	look at the essence of the right, is the essence of
23	Article 47 right impaired by US law? If the concern is
24	with the absence of a remedy for the purpose of
25	Article 47, is the focus properly solely on judicial 14:31
26	remedies or should the court also look at non-judicial
27	remedies.
28	
29	Then next, Judge, if the court finds that there is an

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inadequacy, and of course one of the features of the
SCCs, easily forgotten perhaps, is that by definition
there's an inadequacy because if there weren't an
inadequacy there wouldn't be a need for the SCCs in the
first place. But obviously --   14:31

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

MR. MURRAY: That's correct. But certainly, in our
respectful submission, I'll come back to this later,
that's a starting point. But nonetheless obviously the   14:32
court needs to identify what that is and to proceed
then to see is that inadequacy, and I have used, well,
neutral language for the moment, sufficiently addressed
by the SCCs and then that raises a series of
sub-questions: What's the appropriate test, do the   14:32
SCCs in force at the time of the Draft Decision meet
that test in the light of the findings of US law, and
in particular were the SCCs capable of meeting the
inadequacy identified by the Commissioner, is the
Ombudsman mechanism part of the SCCs.   14:32

Just to stop there. I phrase it as a question,
although I don't know that it's a matter in factum in
dispute between the parties to the extent that my
instructions are and my client takes the view that the   14:32
Ombudsman mechanism is part of the SCCs, but it is an
outcome achieved in a somewhat opaque way, and I'll
explain why I say that in due course, but it's part of
the sequence of logic, as it were.

1   And then, finally, if it is part of the SCCs, does it
2   change the answer to (b); in other words, the answer in
3   relation to adequacy.
4
5   Is the proper comparator the law of the EU or that of   14:33
6   the individual Member States? The relevance of the
7   ECHR jurisprudence, the relevance of the fact that some
8   of the processing undertaken in the US for the purposes
9   of national security, Article 4, and then, finally,
10   I have gathered together some of the objections   14:33
11   Mr. Schrems directs at me; does he challenge the
12   validity of the SCCs, if not is the Commissioner
13   nonetheless entitled to seek a reference and was the
14   Commissioner required to resolve all other aspects of
15   his complaint before proceeding to seek the reference.   14:33
16   I'm sure I have missed something, as I said, but that
17   presents the issues and the themes with which I will be
18   addressing.
19
20   Some of them I can deal with very quickly because we   14:34
21   have dealt with them before, as I said others, insofar
22   as they develop the case from the written submissions,
23   I'll need to spend a little more time on.
24
25   Judge, before I do that and before I begin with the   14:34
26   first of those, I'm going to ask the court to perhaps
27   just take ten or 15 minutes to step back from the
28   minutiae of all of this. I'm not going to suggest that
29   this is a simple case, but I am going to suggest,

1   Judge, that it is not necessarily as complex as might

2   appear from the blizzard of arguments and contentions

3   that you have heard from the defendants and from the

4   amici.

5   14:34

6   In particular, Judge, I'm going to suggest that there

7   are three issues, which are on this list and which

8   I will deal with in detail when we come to them, but

9   three issues which in truth can be resolved with

10   comparative ease, resolved insofar as the issue before 14:35

11   the court is whether there should be a reference rather

12   than whether particular questions of EU law should be

13   definitively determined by the court.

14

15   The first of those is the argument advanced by   14:35

16   Facebook, which I don't think it's unfair to say has

17   been central to their case and is certainly central to

18   their evidence in that it occupied a very significant

19   proportion of it, which is whether you assess, whether

20   the Commissioner assesses the adequacy of third country 14:35

21   laws by reference to what I am going to call an *EU* law

22   standard or whether that is an exercise which ought to

23   be undertaken by reference to a standard of the laws

24   applicable in the individual Member States.

25   14:36

26   Do we, when you look at the contents of US law in

27   relation, in the context of national security -- I'm

28   going to inevitably lapse into Mr. Gallagher's habit of

29   saying national *surveillance* which is a new phrase, but

1	national security; do you look at the EU standard
2	derived from the court's interpretation of Article 47
3	or do you look at the law in Germany or Holland or
4	Britain or amalgamate them or try to identify the
5	lowest common factor or denominator amongst them. 14:36
6	
7	In my respectful submission that is an issue that can
8	be resolved by this court relatively easily. Nobody,
9	insofar as we can ascertain, who has ever approached
10	this issue has addressed it in the manner which is 14:36
11	being suggested by Facebook. The court in **Schrems**, the
12	Commission in the Privacy Shield do not look to
13	identify the elements of the laws of the individual
14	Member States and from there make a determination as to
15	adequacy, they operate on the basis of the principles 14:37
16	of EU law.
17	
18	And for this court to adopt the analysis which has been
19	suggested by Facebook in relation to *this* question
20	would unavoidably involve you in adopting an approach 14:37
21	and an analysis which is at loggerheads with the
22	approach and analysis adopted by the Court of Justice
23	and indeed, insofar as it is significant, the
24	Commission. And, Judge, I would venture to suggest
25	that that method of analysis as suggested by my Friends 14:38
26	is one which, when one looks at how this area of
27	European law has developed, it's a method of analysis
28	which, with respect, makes little sense for this
29	reason: When the court looks at the three principal

1   decisions in this area, **Digital Rights**, **Schrems** and now
2   **Watson**, they are all, but in particular **Digital Rights**
3   and **Watson**, examples of the Court of Justice deciding
4   that the laws of the individual Member States and, not
5   just one or two Member States, the laws of the vast   14:38
6   majority or, in the case of **Digital Rights**, all of the
7   Member States, actually or arguably, and I'll come back
8   to that later, fell short of the standard in the
9   Charter.
10   14:39
11   I mean **Watson** is a particularly, well **Digital Rights** is
12   a good example because there the court struck down a
13   Directive which had been implemented in all Member
14   States and yet the constituents of that Directive were
15   held by the court to be contrary to the Charter; and in   14:39
16   **Watson** the court determined that, if I can use the
17   phrase, automatic retention, mandatory automatic
18   retention without differentiation between those who may
19   be involved in criminal activity or may not or may not
20   be in areas affected by criminal activity or not was   14:39
21   contrary to the Charter, although in fact nobody, none
22   of the plaintiffs argued for such an outcome in **Watson**
23   and many of the Member States had laws precisely to
24   that effect.
25   14:40
26   So the fact of the matter is that the standard which
27   has been set by the European Court of Justice is one
28   which has arisen from what the court ultimately
29   identified as deficiencies in the laws of the

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

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

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

1   where that issue would have to be resolved. It is one
2   of a number of features of the Facebook case which
3   incline towards rather than against a reference.
4
5   The second issue, Judge, relates to the question of   14:41
6   national security, and exactly the same point applies
7   in this connection. As we understand the Facebook
8   case, the national security argument has perhaps three
9   different versions. The first is the version whereby,
10   because the court, because my client originally was   14:42
11   concerned with matters affecting the national security
12   of the United States, that for that reason alone
13   competence was ousted and the review which was
14   undertaken was precluded. That's the version, I should
15   observe, which is recorded in the written submissions.   14:42
16
17   The second version is in fact conceptually quite
18   distinct from that. It is that national security is
19   off limits to the Charter and, therefore, if a case
20   were to arise as to the national security surveillance   14:43
21   practices of the German authorities, the court would
22   have to say it's off limits and therefore the
23   comparator with the United States is effectively,
24   certainly taken to its logical conclusion, one where
25   there is no comparator at all. That's the second   14:43
26   version.
27
28   And the third version, with which I'm not concerned at
29   the moment and I'm going to come back to in the course

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1   of the substantive submissions is well, and it really

2   fits in more the European Court of Human Rights level,

3   national security is a very important objective, it has

4   particular features and aspects to it. They condition

5   the proportionality test properly applied to data   14:44

6   protection, insofar as it arises.

7

8   But to take the first two of those, Judge: For either

9   of those to be correct then Hogan J, when he referred

10   **Schrems** to the Court of Justice, overlooked a   14:44

11   fundamental jurisdictional aspect of the dispute which

12   was before him. Not only did Hogan J overlook that -

13   because remember, Judge, the entire first **Schrems** case

14   was about and, as far as I can ascertain, only about

15   national security surveillance in the United States.   14:44

16   You will recall the references by Hogan J and indeed

17   the Court of Justice to the Snowden disclosures and the

18   practices of the NSA, it was all about national

19   security, but Hogan J apparently did not realise that

20   actually he was referring something which was entirely   14:45

21   outside the competence of European law. When it got to

22   Europe, the Advocate General, whose ruling or opinion

23   you will see is replete with references to national

24   security and the national security practices in the

25   United States, the Advocate General overlooked it and,   14:45

26   the Advocate General having overlooked it, the Court of

27   Justice overlooked it as well.

28

29   Because actually their ought to have been one of two

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

14:46

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

14:46

So that again in my respectful submission takes this
court to a very short point of conclusion on the
national security issue, the first two aspects of it,
the third is different and I'll deal with it
differently.   14:47
MS. JUSTICE COSTELLO: Yes.
MR. MURRAY: And the point of conclusion is that for
you to conclude that the national security bar pulls
down the curtains on this entirely would put the court

1	in clear conflict with the decision in **Schrems**. And
2	I don't believe that that can be addressed by saying
3	'well nobody argued it before them'.
4	**MS. JUSTICE COSTELLO:** It's a matter of jurisdiction.
5	**MR. MURRAY:** It is absolutely fundamental. Once again
6	maybe Mr. Gallagher is right, I'm going to explain very
7	shortly in a moment why he isn't but maybe he is right,
8	but, if he is, the only place that question can be
9	determined is by the Court of Justice. And it is, and
10	I do no disrespect to the sophistication and novelty of
11	the argument, but it is striking that he has been
12	unable to produce before the court, not only any
13	authority in the form of judicial decision, but any
14	informed commentary which even suggests that the
15	analysis which has been so vigorously urged upon you is
16	the correct one, and this is again a central pillar of
17	the case advanced by Facebook.
18	
19	Judge, in fact the arguments, and again I will develop
20	this in more detail when I look at this, undoubtedly it
21	will be Tuesday in the context of the issue sheet,
22	no. 9, but it is actually in my respectful submission
23	very simple. First of all, national security, where
24	it's referred to in TEU or in the Directive, is the
25	national security of Member States. It is not the
26	national security of a third party state. And, insofar
27	as it is suggested that, once you enter the zone of
28	national security, Member States are entitled to pull
29	down the shutters on their data privacy laws and say

14:47

14:47

14:48

14:48

14:48

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 1      'sorry the Charter doesn't apply, we can do what we
 2      like', that is fundamentally misconceived and can
 3      I just direct you to two statements in the FRA Report
 4      which address this very issue.
 5                                                              14:49
 6      I don't remember the book it is in, Judge.
 7      MS. JUSTICE COSTELLO:  I have it, it is Tab 61.
 8      MR. MURRAY:  And it's...but if you look --
 9      MS. JUSTICE COSTELLO:  Just as a matter of curiosity,
10      what's the status of this FRA Report?  I mean it is     14:49
11      evidence because Mr. Geoffrey Robertson exhibited it,
12      am I right?
13      MR. MURRAY:  It was exhibited to Mr. Robertson's
14      affidavit.  It is also obviously a document of some
15      official status and I think with the relevant          14:49
16      provisions of the...
17      MS. JUSTICE COSTELLO:  Yes.  You know the way,
18      obviously when you have decisions of the European
19      Council, they speak for themselves.
20      MR. GALLAGHER:  Yes.                                    14:49
21      MS. JUSTICE COSTELLO:  I am just wondering does that
22      speak for itself?
23      MR. GALLAGHER:  It does, for the reasons identified by
24      Ms. Hyland, it's a particular role provided for.
25      MS. JUSTICE COSTELLO:  Based on its role, thank you.    14:50
26      MR. GALLAGHER:  It is, yes, and Mr. Robertson explains
27      that also in his second affidavit.
28      MR. MURRAY:  Yes.  Mr. Robertson's affidavit, evidence
29      as it is now formulated, seems to be largely...
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1   **MS. JUSTICE COSTELLO:** Based on this.

2   **MR. MURRAY:** Well - based on this, yes. If you turn,

3   Judge, to page 10 and if you look, Judge, on the

4   right-hand column.

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

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

7

8   *"The limits of the national security exemption are*

9   *subject to debate, including in relation to the*

10   *activities of intelligence services. Although*   14:50

11   *international guidelines exist, there is no uniform*

12   *understanding of 'national security' across the EU.*

13   *The concept is not further defined in EU legislation or*

14   *in CJEU case law, although the CJEU has stated that*

15   *exceptions to fundamental rights must be interpreted*   14:51

16   *narrowly and justified."*

17

18   But this is the important statement, Judge: *"The CJEU*

19   *has also stated that the mere fact that a decision*

20   *concerns state security does not render EU law*   14:51

21   *inapplicable."*

22

23   Now that is, as Mr. Gallagher correctly observed by

24   reference to the footnote derived from a case **ZZ**, which

25   was a case about entry into a Member State. But, if   14:51

26   you turn over the next page, this is elaborated upon,

27   again on the left-hand side. You'll see there's a

28   quotation there, Judge, and if I can just open the two

29   sentences before that quotation:

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

7

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

14

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

26

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

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1	I'm going to regret because, necessarily these examples
2	don't cross over, tax is outside the competence of the
3	EU, but that does not mean that tax laws don't, cannot
4	come under scrutiny if they interfere with the freedom
5	of movement or freedom of establishment or if they 14:53
6	don't constitute a State aid, for example.
7	
8	So, Judge, the contention that once you are within the
9	zone of national security, which of course, the FRA
10	refers to the uncertainty even around the definition of 14:54
11	that, what exactly is it, is all terrorism national
12	security or only terrorism from outside forces? And
13	what's the difference between outside terrorism and
14	domestic terrorism and the difference between
15	terrorism, the difference between terrorism and 14:54
16	widespread organised crime, is widespread organised
17	crime outside national security and domestic terrorism,
18	what are the lines, they are very difficult lines to
19	draw.
20	14:54
21	But in our respectful submission, and again I will
22	elaborate upon this, but for the purpose of this
23	introduction the underlying point that I am anxious to
24	emphasise is that one can see why the Court of Justice
25	assumed that national security was not or the fact it 14:55
26	was dealing with US national security was not relevant
27	to its evaluation of **Schrems**. And, therefore, again
28	maybe there's an issue to be referred here, but not an
29	issue which can preclude the court from making a

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1   reference without going directly counter to what the

2   court has done, the Court of Justice has done.

3

4   I think the approach taken by the Commission as well to

5   the Privacy Shield decision speaks volumes about the   14:55

6   general understanding of the limits of national

7   security as a defence to data protection claims.

8   That's the second issue that I'm just anxious to

9   emphasise.

10   14:55

11   And the third is Privacy Shield. This again has

12   acquired, I suppose, a life in the course of the

13   hearing that it did not have in submissions. I don't

14   make any point about that, we are here to address

15   everything. But I think, Judge, there have been some,   14:56

16   well some confusion has been generated around this and

17   it's important to separate out what we're about, what

18   Privacy Shield is about and how the two relate to each

19   other, if they do at all.

20   14:56

21   I am not challenging Privacy Shield. I think one of

22   the interesting aspects, albeit a very superficial

23   observation, but one of the interests aspects of the

24   Privacy Shield decision is that it's not a decision on

25   the adequacy of United States law, it's a decision on   14:56

26   the adequacy of the protection provided by the Privacy

27   Shield, that's how it is titled. And of course the

28   reason for that is this: Privacy Shield is United

29   States law plus the principles provided for in the

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Privacy Shield, the various undertakings given by the

United States government as referred to in the

appendices to the shield, plus the Ombudsperson. And

what the European Commission decided was the sum of

those parts were adequate and transfers may be made   14:57

under the Privacy Shield by those companies who are

prepared and/or in a position to subscribe to its

principles. But the fact that it is there does not

mean that US law has been found to be adequate and in

particular it does not amount to a finding that the   14:57

SCCs are adequate.

Now, Judge, there's a number of threads of the case

which cross over at this point.

MS. JUSTICE COSTELLO: It feels like looking at a   14:58

carpet page in the Book of Kells, I have to say.

MR. MURRAY: Yes, and hopefully, with the aid of the

road map I have given you, we can try to kind of

separate some of these. This case is about the SCCs

and, at the time the decision of the Commissioner was   14:58

issued in its draft or preliminary form, the SCC

decisions stood on their own. Thereafter Privacy

Shield was introduced or the decision was finalised.

Now, just to say this, and there's no evidence to this

effect, let me just say that before I make this   14:58

observation.

But the reason there's no evidence to this effect is

that this was never an issue in the affidavits. In

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1 fact at the time the decision was issued by the
2 Commissioner it was not clear that Privacy Shield was
3 going to be finalised within two months. This process
4 has been going on for two years, and it was not evident
5 when it was going to be finalised and the Commissioner   14:59
6 was under direction from this court to proceed with
7 Mr. Schrems' investigation. I'll come back to that,
8 but, I think somewhat unfairly, this impression has
9 been given that the Commissioner knew that this was
10 about to come out and for some reason, which I haven't   14:59
11 been able to discern what it is implied the reason is,
12 she rushed this decision out and got her proceedings
13 out in the knowledge that Privacy Shield was about to
14 land. That is emphatically not the case.
15   14:59

16 Anyway, to go back, Judge, to the issue. The case is
17 about the SCCs because at the time of the decision and
18 now Facebook transfers information under the SCCs and
19 the question is whether they operate validly having
20 regard to Article 25 and Article 26, save for one   15:00
21 matter, the Privacy Shield stands quite independently
22 of that.
23
24 Now, Facebook -- I'll just let the stenographer change,
25 Judge.   15:00
26
27 Now, Judge, since Privacy Shield came into effect, it's
28 our understanding - and again there isn't evidence
29 before the court, but it's a matter that's objectively

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1   ascertainable and I'm sure this won't be disputed by my

2   Friends - Facebook transfers two categories of data

3   under Privacy Shield, but the rest of its data is

4   transferred under SCCs. And I get that from Facebook's

5   own website, where they publicise their involvement in   15:01

6   Privacy Shield. Everything else is transferred under

7   SCCs. And --

8   **MS. JUSTICE COSTELLO:** Does that mean that they've

9   signed up to the principles?

10   **MR. MURRAY:** They've signed up. But it does *not* mean   15:01

11   that it is convenient or appropriate for *them* to

12   transfer all of their data under Privacy Shield.

13   Because of course, Privacy Shield involves undertakings

14   at the importer level as well and certain constraints

15   and restrictions which one can see a data exporter   15:01

16   might not wish to, or might not be *able* to apply to all

17   of its data. So I don't know *why* they don't use it for

18   all of their data, but it is certainly the case that

19   they do not.

20   15:02

21   And in fact you raised a question with Mr. Gallagher -

22   and in fairness to Mr. Gallagher, one never disagrees

23   with the judge's point - but you said 'Well, are you

24   saying it's moot because if I strike down the SCCs then

25   you can just go and transfer all of your information   15:02

26   under Privacy Shield?' And Mr. Gallagher, again I say

27   it, for the reason I don't criticise him for -- said

28   'Yes, that's exactly what I'm saying'. But in truth,

29   that is *never* what they have said. And there is no

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1   evidence before the court that they would want to or

2   even *could* do that.

3

4   So that is why the adequacy finding as to Privacy

5   Shield does not mean that there is adequacy which binds   15:02

6   the court, or an adequacy finding which binds the court

7   or my client, leaving aside the point made by

8   Mr. McCullough as to the impact of the <u>**Safe Harbour**</u>

9   decision. But there is one point at which Privacy

10   Shield *undoubtedly* intrudes, and it's this: That   15:03

11   certainly on one reading of the Privacy Shield material

12   - and as I've already said to you, it's my client's

13   reading - the Ombudsman is now a remedy available for

14   those whose data is transferred under the SCCs. So if

15   that is so, one of the issues that arises is whether   15:03

16   the existence of the Ombudsman under Privacy Shield as

17   transferred over to SCCs remedies the inadequacies

18   which were identified by the Commissioner in her draft

19   decision.

20   15:04

21   Now, we say they don't, because it's not an independent

22   judicial remedy. And we've seen that -- we did not say

23   that in our decision, absolutely, but we did make this

24   point very clearly in our written submissions and

25   indeed in our evidence - Mr. Richards addressed it.   15:04

26   That brings in my entitlement to go outside the

27   decision, which is obviously the first point,

28   substantive point I'm going to come to shortly, but

29   just in terms of this sketch, as it were.

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If we are -- if the Court of Justice agrees that
Ombudsman is not a remedy, that resolves the
difficulties that we identified, then that undoubtedly
could have implications for Privacy Shield. It does
not *necessarily* invalidate Privacy Shield, but
absolutely it *could* have implications. But it is an
entirely separate matter, insofar as it can be separate
given that the Ombudsman derives from the Privacy
Shield's decision, but it is not a challenge to the
Privacy Shield itself, because that is not a matter
which we have brought before the court.

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

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

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

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1   is part of the SCCs, if that's the case then a

2   challenge to the SCCs is a challenge to the Ombudsman,

3   because it's part of the SCCs. If that has a

4   *consequence* for Privacy Shield, that's a separate

5   matter. That's not a challenge to Privacy Shield. It   15:06

6   may be a consequence --

7   **MS. JUSTICE COSTELLO:** He was making it in a broader

8   sense. He was saying, as I understand it, that Privacy

9   Shield was an adequacy decision in relation to US law.

10   Now, you said you disagree for the reasons you've just   15:06

11   outlined. But he says that that is a binding adequacy

12   decision on, binding both on your client and on this

13   court and that you can't have a collateral attack on an

14   adequacy decision, if you're challenging the SCCs you

15   can't incidentally ignore an adequacy decision in the   15:06

16   Privacy Shield

17   **MR. MURRAY:** But the adequacy decision is an adequacy

18   decision, as I said, as the title to the decision

19   itself announces, not on US law, but on the Privacy

20   Shield, applicable to those transferring their   15:07

21   information *under* the Privacy Shield, *not* applicable to

22   regimes which do not have all of the features of the

23   Privacy Shield. That *must* be the case, it's a matter

24   of simple logic.

25   15:07

26   Now, Judge, if I just stop there. Again and by way of

27   introduction, as it were, to the issues, if one just

28   stops there and says if I am *right* about what I've just

29   said about those three points - and in my respectful

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

16   And if I'm right on those three issues, which don't
17   require, in my respectful submission, a great deal of
18   detailed analysis, then what is *left* in the case? And
19   there are, not to diminish them, but what I'm going to
20   describe as satellite issues, such as: Is it moot? Is   15:08
21   it Article 4 a complete barrier to my claim? As
22   Mr. Schrems has always said and as Mr. Gallagher has
23   now said, in direct contradiction to the position
24   adopted in his written submissions, there's the issue
25   of is it moot?   15:09
26
27   But aside from those satellite issues and Mr. Schrems'
28   issues, what's left? And in truth, what is left is
29   really what was there when we started: (1) what are the

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

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

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

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

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

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

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

And in fact, as it happens, this, as you may recall is
precisely what Hogan J. said in __Schrems__ when he decided

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

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

1   fact accepted. But the consequence of that, which *may*
 2   not be accepted but which I say is irrefutable, is that
 3   most people will never be able to sue, they will have
 4   no possibility, because they will never know and
 5   because the rules of standing are such as to preclude   15:17
 6   them from suing unless they meet the now *overly* well
 7   rehearsed formula in **Clapper**.
 8
 9   So match those against each other, the EU law
10   principles which you've just put to one side and the US   15:17
11   principles which we've identified and about which there
12   are disputes around the margins and in relation to
13   which there are other deficiencies as well, but just
14   those two, because they're the most fundamental.
15   What's the outcome? The outcome is that the US law does   15:17
16   not match the standard.
17
18   And it doesn't matter whether you use the word, in our
19   submission, "adequacy" or "sufficient" or "compensate"
20   or whatever other descriptions were applied in the   15:17
21   course of some of the word games that were played in
22   submissions, it doesn't matter, it's absolutely clear
23   that they do not match the standard of the essence of
24   the right.
25   15:18
26   So then the next question is: Well, do the SCCs resolve
27   that? And that question answers itself. Because it
28   doesn't matter if you can sue the importer or the
29   exporter or get damages for breach of contract against

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1	them, it is absolutely irrelevant and of no avail
2	whatsoever, because you *don't know* and because the
3	standing rules prevent you from *ever* obtaining a
4	remedy.
5	**MS. JUSTICE COSTELLO:** Does that argument apply to *most* 15:18
6	third countries across the world?
7	**MR. MURRAY:** Well, it's certainly an argument -- I
8	mean, that depends obviously on the content of the
9	local laws.
10	**MS. JUSTICE COSTELLO:** I mean, it's predicated on every 15:18
11	third country having some class of notice requirement,
12	be it limited in whatever way it might or might not be
13	limited. The implication seems to me, if that's
14	correct, that unless there is some sort of notification
15	in a third country, the SCCs can never operate to 15:19
16	remedy.
17	**MR. MURRAY:** Well, not necessarily.
18	**MS. JUSTICE COSTELLO:** Okay.
19	**MR. MURRAY:** And I fully understand the court's, you
20	know, curiosity about how this is going to play outside 15:19
21	the US. But not necessarily. I mean, for example, in
22	Ireland if the standing rule that were to be applied is
23	that identified by McKechnie J. in **Digital Rights**, by
24	Hogan J. in **Schrems** then you have a remedy.
25	15:20
26	And it does bring in another issue which Mr. Gallagher
27	reacted with some irritation when it was raised by
28	Mr. O'Dwyer for EPIC, it does bring into focus this
29	issue, because the remedy responds to different types

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1   of issue - remedy for rectification of incorrect
2   information, remedy for damages for past wrongful
3   disclosure, there's a basket of issues that can arise
4   and the remedy has different implications for each of
5   them, remedy for *future* surveillance; but there's also   15:20
6   a *very* fundamental remedy which EU citizens are
7   *completely* cut out of in the United States, and its a
8   this: It is the remedy of being able to go to a court
9   and say 'It is against your basic law to access my
10   private data without prior independent authorisation',   15:21
11   which, as Mr. McCullough has shown you earlier this
12   afternoon, is a *core* entitlement. But you -- I mean,
13   we cannot, none of us whose information is liable to be
14   accessed on foot of Section 702 procedures or schemes,
15   we have *no* way of going to the United States and saying   15:21
16   'I want a remedy of stopping this for this very
17   reason'.
18
19   And just to say by the by, because it was said to you
20   with *absolute* assurance by Ms. Barrington and with *some*   15:21
21   but not quite absolute assurance by Mr. Gallagher 'Sure
22   that's the same as here, non-citizens don't have
23   rights', that is *not* the case. That's simply *not* the
24   case. And there's a section in Kelly on the
25   Constitution as to the not inextensive case law which   15:22
26   has suggested otherwise.
27
28   So, Judge, that analysis, when you've taken out
29   national security and law of Member States and Privacy

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1	Shield, that's where the case comes back to. And in my
2	respectful submission, although I'm loath to say it's
3	simple, there is certainly a straight line of analysis,
4	which of course *my* client would say leads to the
5	conclusion that at the very least there are well	15:22
6	founded concerns as to the validity of the SCC which
7	should be determined and agitated in the forum which
8	has jurisdiction to do so.
9	
10	So, Judge, I want to move on to the list, having thus	15:23
11	summarised where I'm going, as it were, and to deal
12	with a number of the issues that I *haven't* addressed
13	which have been raised. And the first is, as you'll
14	see, whether the court is entitled to look at issues
15	that are not addressed in the draft decision or that	15:23
16	have arisen in the course of the hearing in deciding
17	whether to make a reference. And there are two issues
18	here, and I emphasise this. The first is whether, even
19	though I've come and made arguments before the court
20	and put them in my written submissions or indeed make	15:23
21	them now, whether I'm to be told 'You can't do that
22	because it's not in your draft decision'. And related
23	to but distinct from that is whether you, Judge, are
24	entitled to say 'Well, as the national court, *I* am now
25	concerned that there's an issue around these SCCs for a	15:23
26	reason that has *not* been spotted by anybody else and I
27	want this determined'.
28	
29	The two issues do elide, but I'll ask you to key them

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1	separate to some extent. And this has been largely
2	raised regarding the Ombudsman, which is really the
3	first question: Can I step outside the draft decision?
4	But it may be relevant to other issues which the court
5	has heard about and is concerned about, so I *am* going 15:24
6	to address you at a little length on this, because I
7	think it's important that the court have a complete
8	picture of the source and extent of its jurisdiction.
9	
10	And can I just say that we are surprised that this 15:24
11	argument has been advanced, because it appears to us
12	that it is absolutely fundamental to your role as a
13	national court that where you entertain a concern in
14	relation to an issue of European law which has arisen
15	before you, irrespective of whether it's raised by the 15:24
16	parties, that you have the entitlement, although not
17	obviously the obligation, to refer.
18	
19	I'm going to ask you to go back to the basic principles
20	and to start off with **CILFIT**, which is at tab 21. And 15:25
21	this is the oft-cited case dealing with the power of
22	national courts to refer. But I open it to you because
23	it does, Judge, identify, as it were, the *theory* of all
24	of this, which I think is important when the court
25	comes to resolve the argument which has been advanced 15:25
26	by Mr. Gallagher. And if you turn, Judge - and it's
27	tab 21 - to paragraph seven. 3248 is the page number
28	at the bottom.
29	**MS. JUSTICE COSTELLO:** 3428?

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

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

 3   **MR. MURRAY:** So there -- just three paragraphs I pant

 4   want to open.

 5

 6   "*7. That obligation to refer a matter to the Court of*

 7   *Justice is based on cooperation, established with a*

 8   *view to ensuring the proper application and uniform*

 9   *interpretation of Community law in* all *the Member*

10   *States, between national courts, in their capacity as*

11   *courts responsible for the application of Community*

12   *law, and the Court of Justice. More particularly, the*

13   *third paragraph of Article 177 seeks to prevent the*

14   *occurrence within the Community of divergences in*

15   *judicial decisions on questions of Community law.*"

16

17   And just perhaps to stop there, Judge. We'll see

18   perhaps immediately why the theoretical underpinnings

19   of this are so important. I mean, if *you* were to

20   decide, just to take this example as one random one, if 15:26

21   you were to decide 'Actually, I'm not going to refer

22   this, because in my view the national security laws of

23   the United States are completely outside the parameters

24   of European law' - now, that's a big statement of

25   principle to make, never having been made before, but   15:27

26   just imagine you did and your decision is handed down

27   and it's not appealed and that's the end of that, Irish

28   law now states as follows, on a fundamental question

29   which has *never* been determined in the Court of Justice

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

So, Judge, just to continue:

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

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

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

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

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

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

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1   Community institutions. And one example of that - and

2   there are many - but one simply because it's been

3   opened to you in another context, is the decision in

4   <u>Inuit</u>. And that was, I think, originally handed up,

5   Judge, by Ms. Barrington. And this does, to some   15:30

6   extent, intersect with the issues of direct action and

7   the structural relationship between the limitations on

8   the right of direct action on the one hand and the

9   power to --

10   **MS. JUSTICE COSTELLO:** I don't suppose you have an idea   15:30

11   where it is in this new supplement?

12   **MR. GALLAGHER:** It was meant to be in 45, remember, and

13   it was empty and I think we handed it in again

14   yesterday.

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

16   thank you.

17   **MR. MURRAY:** So, Judge, I know this has been opened to

18   you at least twice, but not in this context. If I

19   could ask you to look at paragraph 94?

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

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

22   structure, says:

23

24   "... *it must be emphasised that, in proceedings before*

25   *the national courts, individual parties have the right*

26   *to challenge before the courts the legality of any*

27   *decision or other national measure relative to the*

28   *application to them of a European Union act of general*

29   *application, by pleading the invalidity of such an*

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1   *act.*"

3   That's before the *national* courts.

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

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

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

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

1

2 *"Having regard to the protection conferred by Article*

3 *47... it must be observed that that article is not*

4 *intended to change the system of judicial review laid*

5 *down by the Treaties, and particularly the rules*

6 *relating to the admissibility of direct actions brought*

7 *before the Courts of the European Union."*

8

9 And then authority is cited in reference to that. And

10 as it happens, Judge - and I relish the prospect of   15:32

11 opening a paragraph in **Schrems** which I don't think has

12 been opened yet, and there must be very few - the issue

13 actually was raised, the ruling of the Advocate General

14 in **Schrems**, paragraph 36.

15 **MS. JUSTICE COSTELLO:** While you're finding that, I'll   15:32

16 ask you this question. When I was addressing a

17 question to Mr. Gallagher in relation to this point

18 about whether I could consider matters of my own motion

19 or as things had arisen in the course of the hearing,

20 he said not in the particular circumstances of this   15:33

21 case, where in effect you were going for a review type

22 procedure --

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

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

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

26 **MS. JUSTICE COSTELLO:** And that that, therefore,

27 precluded me from relying on "of your own motion"

28 jurisdiction.

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

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was planning was to take out the transcript of that

very exchange. Because this is what Mr. Gallagher said

- now that you raise it, I can deal with it now - he

said 'Well, the first thing is it's a bit like a tax or

planning reference that comes up to the court, it's on   15:33

its own path'. Now, just to stop there. That's a

particularly *unfortunate* example, because of course, if

An Bord Pleanála make a reference to the High Court or

the Tax Appeals Commission states a case and the High

Court sees an issue of European law - and they arise   15:34

frequently in *both* contexts - there is and can be *no*

doubt but that the court is under -- has the

jurisdiction of its own motion to refer those issues to

the Court of Justice. That's the first thing. So that

actually doesn't withstand analysis.   15:34

But he then proceeded, because you pressed him and you

said 'But what's the difference in theory between the

judicial review of the Commissioner's decision where

it's clear that the court *does* have the jurisdiction to   15:34

refer it itself under the formula in **Schrems** and the

next paragraph where the Commissioner brings it to

court?' And Mr. Gallagher responded in that very way.

But there is in fact *no* difference. And that is   15:34

demonstrable by both the theoretical and the practical.

There is no difference *in theory*, because you are still

functioning as a national court. And if you, as a

national court, come upon what you believe to be an

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

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

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

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1   proposition which underlies it.

2

3   So that, as it were, is the pre-existing legal position

4   in -- and, sorry, I was going to refer you just to the

5   Advocate General in **Schrems**.   15:36

6   **MS. JUSTICE COSTELLO:** Yes, sorry, I interrupted you

7   while we were digging it up.

8   **MR. MURRAY:** Tab 36. So if you go to the Advocate

9   General's decision, which is the second tab in tab 36,

10   and go forward, Judge, to paragraph 125 and 126.   15:37

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

12   **MR. MURRAY:** I'm going to actually, just for another

13   reason now that we have it open, ask you to begin at

14   paragraph 123. This comes back to the national

15   security point I made earlier: 15:37

16

17   "... *the referring court itself observes that the*

18   *guarantee provided by Article 7 of the Charter and by*

19   *the core values common to the constitutional traditions*

20   *of the Member States would be compromised if the public*

21   *authorities were allowed access to electronic*

22   *communications on a casual and generalised basis*

23   *without the need for objective justification based on*

24   *considerations of national security*" - there, *nobody* is

25   under *any* doubt as to what the precise considerations   15:38

26   are - "*or the prevention of crime specific to the*

27   *individuals concerned and attended by appropriate and*

28   *verifiable safeguards. The referring court thus*

29   *indirectly casts doubts on the validity of* [that

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Decision].

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

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

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

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

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

15:39

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

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

Now, Judge, in my respectful submission, one takes that
principle and now looks at how it's applied in the
relevant paragraphs in <u>Schrems</u>. And Mr. Gallagher
again, in the course of, or just before the exchange
that we had been discussing, constructs these two
paragraphs as if they're a statute. And his basic
point as I understand it is, well, in paragraph 64
there's reference to the court having the power to
refer these matters of its own motion and that *isn't*
said in paragraph 65 and, therefore, the court is
saying in paragraph 65 that you don't have the power to
refer. You know, that's essentially the approach
adopted.

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

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another, the Court of Justice has *displaced* a
fundamental principle of European law, well established
in the jurisprudence, itself a product of the
obligation of sincere co-operation so as to put this
court in a situation where, even though an issue is   15:41
presented before it which it believes of moment or to
be well founded, that it does not refer.

So, Judge, to look at paragraph 64:

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

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

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1 And I'm doing so simply because it features there in
2 the court's ruling in **Schrems** (Same Handed). And if
3 you turn, Judge, to paragraph 48, which is the
4 paragraph that's referred to, you see a recitation very
5 similar to that in the **Inuit** case and in fact referring 15:42
6 back to the **Inuit** case. Paragraph 48 is what the court
7 refers to.
8 **MS. JUSTICE COSTELLO:** Mm hmm.
9 **MR. MURRAY:** "... *it must be borne in mind that where a*
10 *national court or tribunal considers that one or more*
11 *arguments for invalidity of a European Union act, put*
12 *forward by the parties or, as the case may be, raised*
13 *by it of its own motion, are well founded, it is*
14 *incumbent upon it to stay proceedings and to make a*
15 *reference to the Court for a preliminary ruling on the*
16 *act's validity, the Court alone having jurisdiction to*
17 *declare* [the act] *invalid.*"
18
19 Then:
20
21 "*49. As regards persons who do not fulfil the*
22 *requirements of the fourth paragraph of Article 263*
23 *TFEU for bringing an action before the Courts of the*
24 *European Union, it is for the Member States to*
25 *establish a system of legal remedies and procedures*
26 *which ensure respect for the fundamental right to*
27 *effective judicial protection.*"
28
29 And that again, I suppose, restates another point

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

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

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

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

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

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

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

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in relation to the Ombudsman and how it fits into
Article 47. So to say because it's not in the draft
decision she can't raise it and that you can't refer it
is, in my respectful submission, fundamentally
misconceived.   15:46

But even if that's wrong, you're *still* entitled, being
conscious and aware of the issue, to refer of your own
motion, which is the point at which the two issues
coalesce, I suppose.   15:46

Then it proceeds:

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

Not to put forward a final decision or a draft decision
or to be defined or *confined* by either, but simply to   15:47
put forward the objections and then for the national
court, if it shares the doubts, to make a reference.

Now, if I can ask you, Judge, then to turn to the
transcript of Mr. Gallagher's submissions on this? And   15:47
I'm not going to engage in the unedifying prospect of
asking you to pick words that he has used and pars them
and analyse them and raise your eyebrows that they
changed in a later formulation, I'm simply going to ask

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 1    you to look at the argument, because this is where it's
 2    laid out.  It's day number -- sorry, Judge.
 3    MS. JUSTICE COSTELLO:  I didn't bring my transcripts
 4    down, I'm afraid.  And my tablet has gone off-line.
 5    MR. MURRAY:  It's day 17, Judge.  And we can --          15:48
 6    MS. JUSTICE COSTELLO:  Perhaps I can borrow a tablet,
 7    just so I'm following it.
 8    MR. MURRAY:  We can arrange that (Same Handed to the
 9    Court).
10    MS. JUSTICE COSTELLO:  Thank you.                        15:48
11    MR. MURRAY:  Day 17.
12    MS. JUSTICE COSTELLO:  Thank you.
13    MR. MURRAY:  And, judge, the issue commences at page
14    65.  And...
15    MS. JUSTICE COSTELLO:  Day 17, okay.                     15:48
16    MR. MURRAY:  Day 65, Judge.  We can give you a hard
17    copy, Judge, if you would prefer?
18    MR. GALLAGHER:  Day 17, *page* 65.
19    MR. MURRAY:  Yeah, day 17, page 65.
20    MS. JUSTICE COSTELLO:  I have it.  Thank you.            15:48
21    MR. MURRAY:  I don't think anyone thinks we're here on
22    day 65, although...
23    MS. JUSTICE COSTELLO:  No comment.
24    MR. MURRAY:  ...it may feel that way.  But, Judge, if
25    you turn to page 65 you'll see Mr. Gallagher starts      15:48
26    off:
27
28    "*I've drawn your attention to the passages in...*
29    *Commission -v- Germany... its independence and the*
```

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1   *importance... I suppose, the analogue we would be more*

2   *familiar with here is where you have a procedure within*

3   *a taxation statute or a planning statute where there's*

4   *a procedure to be followed and you then come to the*

5   *court as part of that procedure. But it's not*

6   *something that can be raised by the court separately,*

7   *given that this is the procedure by which it's come*

8   *before the court."*

9

10   And I've already alluded to that, that that's just

11   *wrong*. In *all* of those contexts where there are

12   procedures where matters come to the court, the court,

13   of course, retains that power to refer.

14

15   And then he quotes paragraph 64 and he says:

16

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

18   *DPC.*"

19

20   And he says:

21

22   "*So in the context that the claim is rejected*" - I'm on

23   page 66 now - "*as* unfounded, *the court must review*

24   *that. And in that context it may decide that it's*

25   *appropriate to put it forward on its own motion. Then*

26   *that is distinguished in 65.*"

27

28   And there's *no* distinction drawn in 65, no distinction

29   whatsoever. The very point that presents itself from

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1   this analysis is that if the court had been drawing a

2   distinction to the intent of saying that this

3   fundamental feature which characterises *all* proceedings

4   before a national court is *disapplied* here, that is, of

5   course, exactly what it would say.   15:50

6

7   So he then quotes paragraph 65. And he says over at

8   page 67: "*So the distinction is drawn between the*

9   *procedures*" - that's true, of course. 64 is where the

10   objector, if I can use that phrase, brings judicial   15:50

11   review. 65 is where the Commissioner comes to court.

12   But it's a distinction drawn between the procedure, not

13   the consequence in terms of the scope of the court's

14   power to review.

15   15:50

16   "*We, in our procedure, have a judicial review on that*

17   *basis and in that context; when it comes before the*

18   *court, the court can send it forward*" - that, I think,

19   means make a reference - "*the converse case, there's no*

20   *mechanism provided for in the Act and in our general*   12:38

21   *system where the DPC shares the view that the concerns*

22   *are well founded. But the DPC can't declare that,*

23   *that's a Commission decision that's binding on her, as*

24   *Schrems explains, so all she can do is put it before*

25   *the court, having carried out that analysis, analysis*   12:38

26   *in respect of which she seeks deference to be given to*

27   *her decision in* [our] *submissions.*"

28

29   Then you ask this question: 'Well, what's the

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difference in theory between the two?' And at the
bottom of page 67 Mr. Gallagher says:

"Well, it seems that the principle of the decision,
Judge, is that if the matter comes before the -- sorry,   12:39
if the DPC has concerns that are well founded, there is
no procedure, as I said, in the law that that goes any
further. The court mechanism is only engaged to allow
it go further to comply with the obligation that it's
the CJEU that must make the pronouncement.   12:39

And all the court is being asked to do in these terms
is do you share the concerns of somebody who, in this
instance, has carried out an investigation, who is the
person, as you'll see when I go back to paragraphs 41   12:40
to 43, that is given this special position and has this
special expertise?"

The special expertise which I understand *every other*
part of their submission says isn't there insofar as   15:51
these issues are concerned, because they say she's not
entitled to deference.

"And what the court is saying is if that person has
carried out the wrong analysis then you don't have any   12:40
valid analysis which you can share. The procedure is
the DPC will go back" - and this is the point I made to
you now, apparently - *"the DPC go back, will examine it*
again and then *it may come forward to the court. But*

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1   *what is envisaged in the normal way by this procedure*
2   *is that the analysis be done by the DPC. And*
3   *therefore, all the court is being asked to do is to*
4   share *those doubts by reference to what the DPC has*
5   *done. And in the normal way, where somebody who is in*   12:40
6   *a statutory position - as it would be under Irish law -*
7   *has failed to carry out the proper analysis of the*
8   *decision is not effective, then you say it goes back,*
9   *there's nothing to stop the DPC looking at the matter*
10   *again, taking into account criteria that the court has*   12:41
11   *identified and the court explaining why it doesn't*
12   *share the doubts.*"
13
14   So this *astonishing* procedure is what is apparently
15   envisaged, that the DPC comes with *some* doubts, the   15:52
16   court says 'No, I think they're wrong, but I have my
17   own ones, here they are', the DPC goes back, thinks
18   about those, comes back and then says 'This is now why
19   I think it's...' and the court refers. I mean, it
20   seems, with respect, absurd. And certainly, *had* this   15:52
21   been the extraordinary process envisaged, one would've
22   expected it to be elaborated upon in somewhat greater
23   detail.
24
25   Page 69, over the page: 15:53
26
27   "*But the court is not being asked in this context to do*
28   *some freestanding analysis.*"
29

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Now, just to stop there. You are being asked to do an
analysis - I'm sure you'll be delighted to be told that
you've been released from that obligation - but that is
what the purpose of the last four weeks has been;
you're being asked to do an analysis. And it is that
fact, that very consideration, that you *have* to do an
analysis and weigh up and consider all of the arguments
and issues and evidence that have been presented to you
that puts you in no different position from *any* other
court in *any* other case in addressing your obligation
to, or your power to refer.

So, Judge, to perhaps conclude with this issue. The
argument is ill-founded. First, the power of the court
to refer is critical, it's long standing, if it's going
to be ousted that has to be stated, and it isn't;
second, the argument would involve the extraordinary
prospect that the court, faced with an apparent
illegality under European law, but a decision that
cannot be determined by the CJEU because it wasn't
raised by the Commissioner; thirdly, the judgment
doesn't state what Mr. Gallagher suggests and the only
way of reaching that conclusion is to pars it as if it
were a statute; fourth, there's no *principled* reason
why such a power would exist on a judicial review but
not on the procedure with which you were concerned - in
both situations you're being asked to conduct an
assessment of whether a reference is required; and
finally, *none* of this arises insofar as the issue

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around the Ombudsman is concerned, because that is an
issue that we have *in fact* brought to the court, albeit
not within our draft decision, but as I've explained,
in our respectful submission it does not have to be.

Judge, I think I can deal with the mootness issue *very*
quickly. I'm in the court's hands as to whether you're
-- I'll do it in five minutes I'd say.

MS. JUSTICE COSTELLO: Very good.

MR. MURRAY: Okay. So this was actually the first
issue Mr. Gallagher raised. And we were surprised by
that, I must say. The principles are not controversial
- nobody disputes that a moot arises where a decision
will not have the effect of resolving a controversy.
We don't dispute that the CJEU *may* decide not to
investigate a reference because it's hypothetical -
<u>Gasparini</u>. But what we have difficulty with is
understanding *how* exactly this is said to arise *at all*.

And there were a number of aspects to this flown and,
in our respectful submission, on consideration, none of
them bear analysis. First it was said, well, this is
conjectural and the conjecture is that you exclude the
Privacy Shield, that's what you were -- it's
conjectural because you exclude the Privacy Shield.
And that goes back to the point I made earlier on; this
is not *about* the Privacy Shield, this is a freestanding
claim which operates independently of the Privacy
Shield, except as regards the Ombudsman. Nobody's

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asking you to exclude or include or do anything else
with the Privacy Shield, it simply does not arise.

Second, Mr. Gallagher never actually said this until
the court raised the issue when you said 'Well, are you 15:56
saying it's moot because if the SCCs were struck down
then you would just move over to the Privacy Shield and
do all of your transfers under that?' And Mr. Gallagher
agreed with that, and I've referred to that already.
But of course, the court cannot proceed on that 15:57
assumption. And it doesn't even *know*, and it has never
been said by Facebook that they would wish to or
necessarily *could* simply transfer over to the Privacy
Shield. It may well be that they could, but it may
well be that it's difficult or there may well be 15:57
commercial or business reasons for not doing so. But
insofar as *you're* concerned, that has not occurred.

And just to observe, Judge, to do that at the very
least would involve significant logistics. Facebook 15:57
would have to comply with additional requirements that
do *not* apply under the SCCs; they include rules on
onward transfers to controllers and processors, which
are *different* under Privacy Shield; controllers have to
comply with the Privacy Shield principles; there are 15:57
limitations on the purposes for which information can
be transferred to processors; the importer is subject
to a degree of regulation that's not applicable under
the SCCs and in some circumstances may not wish to

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become so subject; the complaints handling procedures are more onerous; the dispute resolution procedure is more detailed. So there are significant differences. So that's not a basis for a moot.

Thirdly, he said 'Well, Privacy Shield is going to be reviewed in July'. But what has that got to do with *anything*? (A) because we're not concerned with the Privacy Shield, and (B) because it *hasn't* been reviewed.

Fourthly, it was said it was moot because there's a new regulation. Now, the new regulation takes effect in May 2018. And although it was *said* that it was moot because of the new regulation, you were not referred to a *single* provision *of* the new regulation which would render it moot in any way. So we're at a loss to understand what exactly happens when the new regulation comes into effect that renders it moot. In fact footnote 207 to the Privacy Shield records that the Privacy Shield is suspended once the new regulation takes effect in May 2018 for a period of six months -- of at least six months. So it's not apparent to us on what basis it can be said this is moot.

There's an issue raised by Mr. Schrems that it's hypothetical because we should perhaps have considered the rest of his complaint first. And we'll come to that, Judge, when I look at the Mr. Schrems-specific

1   complaints.
2
3   I'm going to move on, Judge, to the next item on the
4   list, which is the Privacy Shield and that's...
5   **MS. JUSTICE COSTELLO:** Well, I think we can certainly   15:59
6   give ourselves a break until Tuesday.
7   **MR. MURRAY:** May it please the court.
8   **MS. JUSTICE COSTELLO:** May I hand down the tablet that
9   was handed up to me pro tem (Same Handed). Thank you
10   very much.   16:00
11
12   <u>**THE HEARING WAS THEN ADJOURNED UNTIL TUESDAY, 14TH**</u>
13   <u>**MARCH AT 11:00**</u>
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