

THE HIGH COURT

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON TUESDAY, 7th FEBRUARY 2017 - DAY 1

1

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**THE HEARING COMMENCED AS FOLLOWS ON TUESDAY, 7TH
FEBRUARY 2017**

MS. JUSTICE COSTELLO: Good morning.

REGISTRAR: Matter for hearing, the Data Protection Commissioner -v- Facebook Ireland Ltd. and another. 11:14

MR. MICHAEL COLLINS: May it please the court. Judge, I appear with Ms. Catherine Donnelly and -- sorry, Mr. Brian Murray first, I should say, and Ms. Catherine Donnelly, instructed by Philip Lee solicitors for the Plaintiff. 11:14

MS. JUSTICE COSTELLO: Thank you.

MR. GALLAGHER: May it please you, Judge. I appear with Ms. Niamh Hyland and Ms. Francis Kieran for the first-named Defendant instructed by Mason Hayes Curran. 11:15

MR. MCCULLOUGH: Judge, I appear with Mr. James Doherty and Mr. Seán O'Sullivan for the second-named Defendant, Mr. Schrems, instructed by Ahern Rudden Quigley.

MS. JUSTICE COSTELLO: Thank you.

MS. BARRINGTON: Judge, I appear on behalf of the United States, instructed by McCann FitzGerald solicitors, with Ms. Suzanne Kingston. 11:15

MR. MAURICE COLLINS: And I appear on behalf of BSA The Software Alliance with Ms. Kelley Smith instructed by Frys solicitors, Judge. 11:15

MS. CAHILL: I appear on behalf of Digital Europe, Judge, with Michael Cush instructed by A&L Goodbody solicitors.

MS. JUSTICE COSTELLO: Thank you, Ms. Cahill.

MS. GILMORE: I appear with Mr. O'Dwyer on behalf of EPIC.

MS. JUSTICE COSTELLO: Thank you very much.

MR. GALLAGHER: Judge, just before Mr. Collins starts, two minor housekeeping matters. I want to hand in an additional affidavit of Mr. Bream with liberty to file. There's no issue in relation to it, just clarifying a matter.

MS. JUSTICE COSTELLO: Thank you.

MR. GALLAGHER: There is, as you know, an issue about Mr. Robertson's evidence. He has a short affidavit setting out in more detail his qualifications and experience. Unfortunately his father died yesterday so we haven't been able to get that sworn. He has had to go back to Australia, so it may be a few days before we can resolve that.

MS. JUSTICE COSTELLO: well I am sure that won't delay matters.

MR. GALLAGHER: I have just mentioned that to Mr. Collins.

MS. JUSTICE COSTELLO: Yes.

MR. GALLAGHER: It won't delay anything.

MR. MICHAEL COLLINS: Yes. As we mentioned before, Judge, we do have a concern about Mr. Robertson's affidavit, and it's not based on his qualifications. It's based on the subject matter and the nature of his testimony as to whether it's expert testimony or not. So I'm not sure what the supplemental affidavit as to his qualifications achieves, which I haven't seen, but

1 we can park it.

2 **MS. JUSTICE COSTELLO:** Mr. Gallagher, is there any
3 reason to believe that the affidavit might be changed
4 by Mr. Robertson when he does get to look at it? I am
5 just wondering whether a draft could be furnished to 11:16
6 Mr. Collins's solicitors.

7 **MR. GALLAGHER:** I would prefer if he gets a chance to
8 look at it, I don't think it will be. It won't delay
9 anything and if it were to delay we would give the
10 draft. But I don't think it will delay anything. 11:16

11 **MS. JUSTICE COSTELLO:** On the subject of housekeeping,
12 it struck me because of having to put Ms, is it Gorski,
13 in on Friday, would it assist the parties if I sat at
14 ten thirty in the morning?

15 **MR. GALLAGHER:** Yes. Thank you, Judge. 11:17

16 **MR. MCCULLOUGH:** Yes.

17 **MR. MICHAEL COLLINS:** That would be very good, thank
18 you very much, Judge.

19
20 Judge, as you know, this case has perhaps some unusual 11:17
21 features in relation to it and I might make two
22 preliminary observations about it. First of all, the
23 Commissioner is bringing these proceedings, not out of
24 any particular vested interest or any agenda that she
25 might have, but rather in terms of what her statutory 11:17
26 functions are as the Commissioner.

27
28 She is obliged, as she sees it, under the decision in
29 Schrems 1 as we call it to bring this matter before the

1 court if, having received the complaint which she did
2 receive from Mr. Schrems, she formed the view that
3 Mr. Schrems' complaints or some of them were well
4 founded. And if she found that view which he did which
5 he expressed in the Draft Decision she was obliged to 11:18
6 bring the court before the court because that's what
7 the European Court of Justice said she had to do.

8
9 The court said that the Member State had to provide a
10 mechanism by which she should come to court. No 11:18
11 specific mechanism is provided for a circumstance like
12 this so she has adopted the only mechanism that is
13 available to her really which is the ordinary
14 proceedings and, therefore, she has issued the plenary
15 summons in this case and commenced these proceedings. 11:18
16 But that brings me to the second feature of the case.

17
18 She is not in fact seeking any relief as against the
19 Defendants. It is simply a mechanism by which she has
20 named the two people who seem most directly interested, 11:18
21 namely Mr. Schrems who made the complaint and Facebook
22 as the party whose data Mr. Schrems is making, or the
23 transfer of data Mr. Schrems is making complaint about,
24 they were obviously parties who would need to be heard.

25 11:19
26 Because what the European court said is that the
27 Commissioner has to bring the matter before the
28 national court and if the national court shares her
29 concerns as to the validity of the particular

1 Commission decisions in question, which have to do with
2 these contractual clauses that the data transfer is
3 permitted under, if the court shares those concerns it
4 is then a matter for the European court to decide the
5 issue of the validity of these Commission decisions and 11:19
6 this court then makes a reference from here to the
7 European Court of Justice.

8
9 So, as you will see from the pleadings, Judge, the only
10 order in truth which we are seeking from this court is 11:19
11 in fact a reference on the issue from this court to the
12 European Court of Justice. As I say we're not seeking
13 any order against Facebook or as against Mr. Schrems.
14 They are defendants only to give them the opportunity
15 to participate in the proceedings, if they so wish. 11:20
16

17 You can see that, Judge, by thinking, supposing they
18 hadn't appeared and decided not to participate, it
19 wouldn't be like ordinary proceedings where some
20 judgment against them in default would be given, no 11:20
21 such order or judgment would be given against them. So
22 they are here at their own volition to participate and
23 express their views in relation to the matter.
24

25 That perhaps brings me to the third aspect of the 11:20
26 matter, Judge, which is that the ultimate decision, and
27 the decision has to be taken by the Court of Justice,
28 concerns the validity of the Commission decisions
29 containing the standard contractual clauses or the SCCs

1 as they are referred to. This court at the end of the
2 day doesn't in fact have to take a decision which
3 determines really any of the legal rights of the
4 parties. Certain issues will arise in the course of
5 analysing the Directive as to how the Directive should 11:21
6 be interpreted, for example, and what is the
7 appropriate comparison that one is to make between EU
8 law and US law, using that in a neutral sense for the
9 moment, and those are issues of interpretation. But
10 insofar as, we think that there are aspects of that 11:21
11 that are perfectly clear, but Facebook have put forward
12 a different interpretation of the Directive.

13
14 If you think there is any substance in that or that
15 there is a genuine dispute in relation to it or it's 11:21
16 not clear to you what the proper interpretation of the
17 Directive is, well then that interpretation has to be
18 referred to the European court or at least you have the
19 option to refer it to the Court of Justice as well.

20 11:21
21 So in each of these substantive issues bar one that
22 arise in terms of the legal interpretations, it's not
23 that you have to come to a final view in relation to
24 them, it's rather that you have to decide either that
25 you *can* come to a final view of them, but, if there is 11:22
26 a significant dispute in terms of particularly European
27 issues such as the interpretation of Directives and so
28 forth, well then that's a matter that can be referred
29 to the European court as well.

1 So the Commissioner sees her role here as being one
2 fundamentally to assist the court, to try to guide you
3 through what the issues are, there is a fair mass of
4 material that has been assembled.

5
6 I should say that it's the Commissioner's view that a
7 great deal of the factual evidence that has been put
8 forward by Facebook in particular is ultimately not
9 relevant to you certainly at this stage. I understand
10 why Facebook wish to put it before the court, and 11:22
11 I will explain that in due course, but it turns in part
12 on the issue of the interpretation of the Directive as
13 to whether or not one evaluates this matter by looking
14 at what is the legal remedy available to EU citizens as
15 a matter of EU law should there be a complaint about 11:23
16 breach of data protection privacy rights and what are
17 the US federal rules and remedies that are available to
18 an EU citizen in the US to access whatever remedies are
19 available in the US and that involves a comparison in a
20 sense of the two legal régimes in terms of what the 11:23
21 laws of those two jurisdictions provide for access for
22 such remedies.

23
24 That is an issue to which the US legal experts have
25 given testimony, that is an issue of fact for this 11:23
26 court because foreign law is a question of fact and
27 therefore you will have to decide what is the position
28 under US law in relation to a number of these issues.
29

1 But, as you will see, what Facebook say in particular
2 is well it's not just a matter of comparing what the
3 legal remedy is in respect of what the EU law is and
4 what the US law is, you have to in fact look at what
5 the practice is, not just in as a matter of EU law but 11:24
6 in the EU Member States themselves and in the US and
7 you look at the entirety of the system by which
8 people's data privacy rights are protected or in some
9 way subject to oversight, be it by administrative
10 bodies other than courts. They look at the whole 11:24
11 panoply of the type of protection that is available
12 because Facebook say what you are looking at ultimately
13 is the adequacy of the protection and whether it's
14 essentially equivalent to the sort of protection that
15 is available in EU Member States. 11:25

16
17 And, therefore, if on the ground, if I can use that
18 expression, it turns out that in Italy and in Latvia
19 and in the United Kingdom and so forth the protection
20 is not as good as it might appear to be from the way 11:25
21 the law is written, well that's something that you
22 should look at and take into account. And that's why
23 there are all these extra affidavits from Facebook
24 addressing a whole wide variety of issues relating to
25 these what I might call on the ground issues, if I can 11:25
26 use that colloquial expression.

27
28 The way the Commissioner has approached it, Judge, is
29 to say it is conceivable at some point that that type

1 of material could be relevant. What she has done is
2 she has looked first at the question of is there
3 essentially equivalence in terms of the protection as a
4 matter of law, do the legal rules in terms of access at
5 the EU level, not at an individual Member State level 11:26
6 but at the EU level, do the access rules which exist
7 under US law, are they essentially equivalent to the
8 form of access and remedy that is available to an EU
9 citizen in the EU. And I'm talking about the access
10 which EU citizens have in the US, not necessarily the 11:26
11 access that US citizens have because that may be
12 somewhat different.

13
14 And if on examining *that* comparison between what I'll
15 call the legal rules, using a shorthand expression, the 11:26
16 legal rules do not provide equivalent protection, well
17 then it really doesn't matter what the on-the-ground
18 practice is because you fail in a sense at the first
19 hurdle. If the rules aren't equivalent, then how the
20 legal rules are implemented is not going to make up for 11:26
21 an inadequacy in the legal rules if the correct rule or
22 protection of the legal rule isn't there to begin with.

23
24 So she has looked at, and has expressly said in the
25 decision, she has only looked at the question of this 11:27
26 equivalence on the basis of the EU law on the one hand
27 and US law on the other hand. And she formed the view
28 that in fact there were deficiencies in the rights of
29 EU citizens as a matter of US federal law to access

1 remedies under US law and that being so the question
2 simply doesn't arise as to what the other forms of
3 administrative oversight, other forms of State bodies
4 that may exist in the United States. Because one
5 feature that you will see from the law is, and I think 11:27
6 everybody is agreed on this, unlike in Europe, in EU
7 terms where there is fairly single comprehensive
8 directives which provide for the data protection
9 rights, in the United States it's a patchwork quilt of
10 labyrinthine proportions as to where you look to the 11:28
11 various pieces of legislation, executive orders,
12 presidential orders, bodies such as the Federal Trade
13 Commission and a wide variety of other places that one
14 can go to to get some form of a remedy.

15 11:28
16 She says that what you do is you look firstly, as
17 I say, at the essential equivalence of the legal rules
18 and if that test is failed, and she has the concern and
19 has expressed the view that the complaint that there
20 isn't essential equivalence at that legal rule level, 11:28
21 if that's not satisfied then she says well then there
22 is a problem and you have to then look at the standard
23 contractual clauses which are designed to operate in a
24 circumstance where the third country, i.e. the country
25 outside the EU, in this case the US - and we are only 11:28
26 concerned about the US, not about any other country -
27 if there is what I'll call an inadequate level of
28 protection in the US at that legal level then the SCCs
29 are designed to remedy that and they are designed to

1 bring about the situation where the recipients of the
2 data in the United States who subscribe to these
3 contractual clauses under the SCC decisions, does that
4 régime of SCCs in a sense make up for the inadequacy of
5 the legal protection and bring about the result in 11:29
6 essence that there is an equivalent form of protection.

7
8 She has examined the SCCs and has again expressed the
9 provisional view - and all of her views are
10 provisional, Judge, it's a Draft Decision and she 11:29
11 expressly has said that she reserves the right to hear
12 further submissions in relation to the matter and
13 obviously be guided by the outcome of decisions of this
14 court and the European court - but at the moment the
15 view that she has taken is that the SCCs do not in fact 11:30
16 amount to sufficient protection to bring about the
17 necessity equivalence of legal protection between the
18 two régimes.

19
20 But neither she nor this court or any national member 11:30
21 court has the jurisdiction to declare a Commission
22 decision to be invalid. Only the Court of Justice has
23 the jurisdiction to do that and that is why ultimately
24 you don't have to and cannot decide the issue of the
25 validity of the Commission decisions which make up the 11:30
26 SCCs, that's why you have to make a reference to the
27 European court if you are satisfied, in the way it was
28 put in the Schrems decision which we'll be coming to,
29 that you *share* the doubts that the Commissioner has.

1 So if you having heard the matter share her doubts, it
2 doesn't mean you have to be finally satisfied as if you
3 were taking the decision yourself that the SCCs are
4 invalid or the protection, legal protection is invalid
5 or inadequate, but you have to, if you share her doubts 11:31
6 well then you must make a reference to the European
7 court.

8
9 And as I say in analysing that, if it transpires that
10 there are issues between us as to precisely how the 11:31
11 Directive should be interpreted, for example what does
12 a particular provision in Article 25 or Article 26 mean
13 in terms of adequate protections and on, and there does
14 seem to be an issue about that interpretation, well
15 then that issue of interpretation may have to be the 11:31
16 first matter that is addressed.

17
18 If looking at it through that lens and in that
19 framework, Judge, the question of analysing all the
20 other forms of oversight that may be available in the 11:31
21 US, and that are said by Facebook and some of the amici
22 such as the US government to amount in the round to a
23 type of adequate protection, albeit not perhaps in
24 terms of a right of access to an independent judge for
25 the purpose of seeking the remedy, that issue simply 11:32
26 doesn't arise. It conceivably could arise at some
27 point in the future depending on what the outcome might
28 be in terms of what the European court might say.
29

1 Let us say, for example, ultimately the European court
2 said 'actually the correct way to go about this is one
3 has to look at the entirety of the thing in the round
4 and not just at the legal rules', one can see why the
5 sort of evidence that Facebook have put before the
6 court might be relevant in those circumstances.

11:32

7
8 I readily understand why that material has been filed
9 in the case and Facebook would wish, as indeed I'm sure
10 all the parties would wish, to ensure that, if and when
11 the matter comes before the European court, that the
12 court will have available to it as may be necessary or
13 as it may think appropriate such material as may be
14 necessary to take a decision.

11:32

15
16 But that's not ultimately a decision for you and I will
17 be suggesting that all of that material that has been
18 put forward by Facebook is ultimately not relevant to
19 the issue that you have to decide, which is why I said
20 just a few moments ago, that while there is a mass of
21 material certainly before the court, happily, I will
22 say, there is a much smaller body of material that you
23 will have to consider. And in essence, Judge, there's
24 a small number of factual affidavits that you have to
25 consider, but most importantly I think there are five
26 affidavits of US law because determining what the US
27 law is, as I say, the factual issue I think that is
28 before you, as distinct from any issues of law.

11:33

11:33

11:33

1 And the five affidavits are, Ms. Gorski has sworn an
2 affidavit on behalf of Mr. Schrems, we, the
3 Commissioner, has two US experts, Mr. Serwin and
4 Mr. Richards and Facebook have two experts, Prof. Swire
5 and Prof. Vladeck. Prof. Swire's report is extremely 11:34
6 long, I have made some complaint about that previously.
7 I still make complaint about it in the sense that it is
8 certainly too long, but I suppose we will deal with it
9 in some shape or form. Again I will be saying much of
10 it is in fact directed to many of these oversight and 11:34
11 on the grounds issues that you will ultimately not
12 necessarily have to deal with.

13
14 Facebook of course have a different view in relation to
15 that. They say that in fact you do have to approach it 11:34
16 on this much broader basis and we'll come to that in
17 due course.

18
19 So what I propose to do, Judge, is to bring you through
20 some of the critical provisions of, first of all, the 11:34
21 Charter of Fundamental Rights and the Directive, which
22 is the key framework within which all of this analysis
23 is to take place, and then to outline the story for you
24 as to how we got here through the original complaint
25 from Mr. Schrems, the decision of Hogan J, the 11:35
26 reference to the European court, the Schrems 1
27 decision, how it comes back to the Commissioner, her
28 Draft Decision, ultimately leading to the commencement
29 of these proceedings.

1 And in the course of going through that history or that
2 story I'll be referring to some of the key legal
3 documents and perhaps hopefully outlining to you what
4 the key legal issues are in relation to it.

5
6 And I reiterate, Judge, that the Commissioner's concern
7 is simply to get it right, not necessarily to advocate
8 any particular result, but simply to get it right and
9 to explain why she has taken the view that she has and
10 why she believes it's appropriate that a reference be 11:35
11 made to the European court so they can take whatever
12 the decision is which she will then implement of
13 course, whatever it might be.

14
15 So the main books, Judge, that I will be referring to 11:36
16 that you might need are -- as you know there are 12
17 which are called trial books and the only one of those
18 I'll be referring to, I think, at least in the near
19 future is Book 1. There are *five* books of EU
20 authorities, be it either legislation or authorities, 11:36
21 and I will be referring to Books 1, 2 and 3 of those.

22 **MS. JUSTICE COSTELLO:** I'm not quite sure how they've
23 been set up here for me.

24 **MR. MICHAEL COLLINS:** They may not have been handed in
25 to you yet, Judge, but I'll arrange for that to be done 11:36
26 now.

27 **MS. JUSTICE COSTELLO:** I have lots of books called
28 *trial* booklets in yellow.

29 **MR. MICHAEL COLLINS:** Trial booklets in yellow and it's

1 only Trial Book 1 I am concerned about.

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

3 **MR. MICHAEL COLLINS:** Actually what I'm going to start
4 with, however, are the three books of the five of EU
5 authorities. So there's another set of five called 11:37
6 Agreed Core Authorities which are --

7 **MR. GALLAGHER:** They are on the tablet as well, Judge.

8 **MR. MICHAEL COLLINS:** Yes. If you refer to access them
9 on the tablet, Judge, by all means do so.

10 **MS. JUSTICE COSTELLO:** Just a moment. I better take 11:37
11 these up anyway (SAME HANDED TO THE COURT).

12 **MR. MICHAEL COLLINS:** So if we start with Book 1 of the
13 core authorities, Judge.

14 **MS. JUSTICE COSTELLO:** Of the authorities?

15 **MR. MICHAEL COLLINS:** Of the authorities. At Tab 1 in 11:37
16 the book there's the Charter of Fundamental Rights of
17 the EU and, as you know, Judge, that Charter now has
18 the same legal value or legal status as the Treaties
19 themselves.

20 11:38
21 There's only a few articles we need to refer to, Judge.
22 Just before I refer to the individual ones, the other
23 general point to make about it, Judge, is that, as you
24 will see and as you already know, the Charter bears a
25 very close relationship to the European Convention on 11:38
26 Human Rights, but it is a different document and a
27 separate document. And while the rights guaranteed
28 under the Charter are at minimum the same rights as
29 guaranteed under the Convention; in other words, one

1 interprets it, if there's an equivalent provision, that
2 you get at least the same minimum level of protection
3 that you get under the Convention. It may be that
4 under the Charter, under certain provisions, you can
5 get more protection or the right may be more extensive, 11:38
6 depending on how it is interpreted, and in some
7 instances, as we'll see, there are Charter provisions
8 which have no parallel in the Convention itself.

9
10 So if you look, Judge, at Article 7 there's a provision 11:39
11 there headed "*Respect for private and family life*" and
12 it says: "*Everyone has the right to respect for his or*
13 *her private and family life, home and communications.*"

14
15 And then there is Article 8 which, as it happens, is 11:39
16 one of the ones which does not have a parallel in the
17 Convention, "*Protection of Personal Data*". And it
18 says:

19
20 "*1. Everyone has the right to the protection of 11:39*
21 *personal data concerning him or her.*
22 *2. Such data must be processed fairly for specified*
23 *purposes.*"

24
25 And the concept of *processing data* is one that comes or 11:39
26 arises under the Directive, Judge, and we'll come back
27 to it:

28
29 "*Must be processed fairly for specified purpose and on*

1 *the basis of the consent of the person concerned or*
2 *some other legitimate basis laid down by law."*

3
4 And those bases are laid down in the Directive:

5
6 *"Everyone has the right of access to data which has*
7 *been collected concerning him or her, and the right to*
8 *have it rectified."*

9
10 In other words, if you have a complaint that it's
11 inaccurate in some respect. And, thirdly: *"Compliance*
12 *with these rules shall be subject to control by an*
13 *independent authority."*

14
15 And again that's a matter of some importance, because
16 the remedies that must be provided in compliance with
17 Article 8 must involve an independent authority and
18 obviously not somebody who is in some sense responsible
19 to or under the control of the government itself.

20
21 I suppose in this context, Judge, if I just draw your
22 attention as well to, at Tab 2, I'm not finished with
23 the Charter, I'll come back to it, but you will find a
24 consolidated version of the TFEU, the Treaty on the
25 Functioning of the European Union and could I just
26 bring to you Article 16 of that very briefly. The
27 entire Treaty is not there, and Article 16 provides at
28 paragraph 1:

1 "Everyone has the right to protection of personal data
2 concerning them". And then says at 2:

3
4 "The European Parliament and the Council, acting in
5 accordance with the ordinary legislative procedure, 11:41
6 shall lay down the rules relating to the protection of
7 individuals with regard to the processing of personal
8 data by Union institutions, bodies, offices and
9 agencies, and by the Member States when carrying out
10 activities which fall within the scope of the Union 11:41
11 law, and the rules relating to the free movement of
12 such data. Compliance with these rules shall be
13 subject to the control of independent authorities."
14

15 And you find the same reflection there and I just draw 11:41
16 attention to that because it echoes in a sense what is
17 said in Article 8.

18
19 The other article in the Charter that's of relevance,
20 Judge, is Article 47 and under you find that under 11:41
21 title 6 headed "Justice". Article 47 is entitled:
22 "Right to an effective remedy and to a fair trial."
23 And it says: "Everyone whose rights and remedies
24 guaranteed by the law of the Union are violated."
25

26 So pause there. Article 47, therefore, is concerned
27 with the law of the Union, of the European Union:
28

29 "Are violated has the right to an effective remedy

1 *before a tribunal in compliance with the conditions*
2 *laid down in this Article.*

3
4 *Everyone is entitled to a fair and public hearing*
5 *within a reasonable time by an independent and* 11:42
6 *impartial tribunal previously established by law.*
7 *Everyone shall have the possibility of being advised,*
8 *defended and represented."*

9
10 And then legal aid shall be made available: "*To those* 11:42
11 *who lack sufficient resources in so far as such aid is*
12 *necessary to ensure effective access to justice."*

13
14 So you have the concept there, Judge, of peoples whose
15 rights and freedoms are guaranteed, firstly, by Union 11:42
16 law; secondly, there is a right to an effective remedy;
17 and, thirdly, it must be a determination by an
18 independent and an impartial tribunal.

19
20 Those are key criteria of the Article 47 protection 11:42
21 which the Commissioner has considered in her decision
22 and the analysis she has made is to look at it through
23 the lens of Article 47 and say, insofar as there are
24 breaches of people's, European Union citizens data
25 rights which, if they occur in the United States, does 11:43
26 that EU citizen have the same type of effective remedy
27 before an independent and impartial tribunal of the
28 type envisaged by Article 47?
29

1 obviously it's a matter entirely for the United States
2 as to what form of remedies and legislation and so on
3 they provide, and obviously it's not necessarily going
4 to be exactly a duplicate. In fact, as I say, it's
5 quite different because EU law is structured in a very 11:43
6 comprehensive way with Directives that are
7 comprehensive in how they deal with it and one can find
8 data protection laws in a relatively small number of
9 instruments in European Union law.

10
11 As I say you'll see it's radically different in the US 11:43
12 which is why the Commissioner has described the
13 remedies and the laws as *fragmented* in the US. But you
14 still can look at them and put them all together and
15 you see do they amount in terms of effective 11:44
16 equivalence to the same level of access and protection
17 that's there.

18
19 It's therefore very much an Article 47 analysis. It's
20 not concerned as such with the substance of Article 7 11:44
21 and 8, although obviously those are the articles which
22 give rise to the substantive rights. But what she is
23 looking at is effectively the extent of the access and
24 remedy that is available. And it is, therefore, a
25 relatively narrow focus that one looks at to see is 11:44
26 there the necessary equivalence as we see when we come
27 to the Directive itself.

28
29 Can I -- sorry, I said that was the only other one

1 I wanted to look at, but I might draw your attention to
2 Article 52 and 53 as well, Judge, because they are of
3 some importance in terms of general principles under
4 the Charter.

5
6 And Article 52(1) says: *"Any limitation on the*
7 *exercise of the rights and freedoms recognised by this*
8 *Charter must be provided for by law and respect the*
9 *essence of those rights and freedoms."*

10
11 And that's an important concept, this concept of the
12 essence of the rights and freedoms. Because the
13 principle is that the essence cannot be impaired and
14 you have to ascertain what the essence of any
15 particular right is and then see if any circumstances
16 that have arisen has that essence in fact been
17 impaired. We'll come and we'll look at some of the
18 case law that has discussed that concept of the
19 essence.

20
21 Article 52(1) goes on to say: *"Subject to the*
22 *principle of proportionality, limitations may be made*
23 *only if they are necessary and genuinely meet*
24 *objectives of general interest recognised by the Union*
25 *or the need to protect the rights and freedoms of*
26 *others."*

27
28 I would also draw your attention to Article 52(3), this
29 is a reflection of the principle I mentioned a moment

1 ago about the minimum protection under the Charter
2 being at least equivalent to the Convention but may be
3 more. 3 says:

4
5 *"In so far as this Charter contains rights which*
6 *correspond to rights guaranteed by the Convention for*
7 *the Protection of Human Rights and Fundamental*
8 *Freedoms, the meaning and scope of those rights shall*
9 *be the same as those laid down by the said Convention.*
10 *This provision shall not prevent Union law providing*
11 *more extensive protection."*

11:46

11:46

12
13 As I say sometimes it does and, as I say, there are
14 some provisions in the Charter that don't have a
15 parallel in the Convention such as the Article 8 to
16 which I have referred.

11:46

17
18 Then over the page, Judge, there is Article 53 and it
19 is headed *"Level of Protection"*. It says:

20
21 *"Nothing in this Charter shall be interpreted as*
22 *restricting or adversely affecting human rights and*
23 *fundamental freedoms as recognised, in their respective*
24 *fields of application, by Union law and international*
25 *law and by international agreements to which the Union*
26 *and all the Member States are party, including the*
27 *Convention and by the Member States' constitutions."*

11:46

11:47

28
29 And again that features in some of the case law and

1 I will come back to it, I just want to draw your
2 attention to it at the moment.

3
4 So our story begins in effect, Judge, with the
5 Directive. If you look at the index to this book of 11:47
6 effectively legislation, you'll see that the first
7 section of it, A, Judge, is the Charter and the
8 relevant extracts from the TFEU and also the Treaty and
9 European Union Articles 4 and 19 that I will come back
10 to. And then we have the Directive which is the core 11:47
11 directive in this context, Directive 95/46/EC and I'll
12 explain what the others are as we go through the story
13 to say what they are.

14
15 So if I bring you to Tab 4 to the Directive. This 11:47
16 dates from 1995, although it was amended in 2003, this
17 is as amended. And the core articles that we're going
18 to be concerned with, Judge, are Articles 25 and 26.
19 But, before I come to that, can I just bring you
20 through perhaps some of the recitals and other 11:48
21 provisions of the Directive that have some relevance to
22 understanding its interpretation.

23
24 You will see that its heading is that it's a directive
25 on the: "*Protection of individuals with regard to the* 11:48
26 *processing of personal data and the free movement of*
27 *such data.*"

28
29 And, as we will see, the free movement of such data is

1 fundamentally concerned with free movement within the
2 EU, because this Directive is designed to facilitate
3 the internal market, but Articles 25 and 26 are dealing
4 with the question of transfer *outside* the EU, to third
5 countries outside the EU, and it is also concerned with 11:48
6 the *processing* of the data and as I say processing is a
7 term that we'll come back to.

8
9 If you look at the second recital at the beginning it
10 states: "*whereas data-processing systems are designed 11:49*
11 *to serve man -- women too presumably -- whereas they*
12 *must, whatever the nationality or residence of natural*
13 *persons, respect their fundamental rights and freedoms,*
14 *notably the right to privacy, and contribute to*
15 *economic and social progress, trade expansion and the 11:49*
16 *well-being of individuals.*"

17
18 That of course is, as in many of these recitals, may be
19 seen as high-flown language, but there is substance to
20 it and in particular the point that whatever the 11:49
21 nationality or residence of natural persons, it must
22 respect their fundamental rights and freedoms,
23 including the right to privacy.

24
25 Over the page, Judge, at recitals 7 and 8, 7 says: 11:49

26
27 "*whereas the difference in levels of protection of the*
28 *rights and freedoms of individuals, notably the right*
29 *to privacy, with regard to the processing of personal*

1 *data afforded in the Member States may prevent the*
2 *transmission of such data from the territory of one*
3 *Member State to that of another Member State; whereas*
4 *this difference may therefore constitute an obstacle to*
5 *the pursuit of a number of economic activities at*
6 *Community level, distort competition and impede*
7 *authorities in the discharge of their responsibilities*
8 *under Community law; whereas this difference in levels*
9 *of protection is due to the existence of a wide variety*
10 *of national laws, regulations and administrative*
11 *provisions."*

12
13 So what it is identifying there is that there may be
14 differences in levels of protection between individual
15 Member States, and notably with regard to the right to 11:50
16 privacy and how the data is processed and the level of
17 protection that an individual Member State may be
18 giving to it, and it is identifying that difference as
19 a problem, something that in effect is impeding the
20 internal market and something that this Directive is 11:50
21 designed to address.

22
23 So it goes on in 8: "*whereas, in order to remove the*
24 *obstacles to flows of personal data*". So it is
25 designed to facilitate the flow of personal data within 11:51
26 the Member States of the EU:

27
28 "*The level of protection of the rights and freedoms of*
29 *individuals with regard to the processing of such data*

1 *must be equivalent in all Member States; whereas this*
2 *objective is vital to the internal market -- there you*
3 *will see the express acknowledgment of the purpose of*
4 *it -- but cannot be achieved by the Member States*
5 *alone, especially in view of the scale of the* 11:51
6 *divergences which currently exist between the relevant*
7 *laws in the Member States and the need to coordinate*
8 *the laws of the Member States so as to ensure that the*
9 *cross-border flow of personal data is regulated in a*
10 *consistent manner that is in keeping with the objective* 11:51
11 *of the internal market as provided for in Article 7a of*
12 *the Treaty; whereas Community action to approximate*
13 *those laws is therefore needed."*

14
15 So there are differences in the laws between the Member 11:51
16 States and the idea of this Directive is to harmonise
17 those as much as possible to facilitate the free
18 transfer within the EU.

19
20 Then at recital 10, towards the bottom of the page, it 11:51
21 says:

22
23 *"whereas the object of the national laws on the*
24 *processing of personal data is to protect fundamental*
25 *rights and freedoms, notably the right to privacy,* 11:52
26 *which is recognised both in Article 8 of the European*
27 *Convention and in the general principles of Community*
28 *law."*

1 And that's why I have referred, Judge, in particular to
2 the provision in the TFEU as well as Article 8:

3 *"whereas, for that reason, the approximation of those*
4 *laws must not result in any lessening of the protection*
5 *they afford but must, on the contrary, seek to ensure a* 11:52
6 *high level of protection in the Community."*

7
8 Now that's a phrase that you will see cropping up time
9 and again, Judge, *"seek to ensure a high level of*
10 *protection in the Community"*. There is two things to 11:52
11 note about it.

12
13 First of all, we are speaking about protection at the
14 Community level. By definition we're not speaking
15 about it at Member State level because the whole point 11:52
16 is that there may be differences at the Member State
17 levels which this Directive is designed to achieve. So
18 this Directive is setting out what the Community law,
19 the Union law as we now call it, is in terms of the
20 level of protection; and, secondly, it is a high level 11:52
21 of protection. And the idea of the Directive and all
22 the laws that are meant to implement it is to achieve
23 this high level of protection. That becomes relevant
24 when we come to consider the concept of adequacy which
25 is a concept that comes up in Articles 25 and 26 as 11:53
26 we'll see in a moment.

27
28 The other thing to note about these recitals, Judge, is
29 that, and we will see it particularly from the

1 definition of "*processing of data*", the processing of
2 data by means of data transfer is essentially what this
3 Directive is about. This Directive is covering the
4 activity of the transfer of data because the transfer
5 of data is itself part of the processing of the data. 11:53
6 And again we come back to that when we will see the
7 definitions.

8
9 Over the page I draw attention to recital 16 where it
10 says: "*whereas, as far as the processing of sound and 11:54*
11 *image data, such as in cases of video surveillance,*
12 *does not come within the scope of this Directive if it*
13 *is carried out for the purposes of public security,*
14 *defence, national security or in the course of State*
15 *activity relating to the area of criminal law or in 11:54*
16 *other activities which do not come within the scope of*
17 *Community law.*"

18
19 And we you will see from an Article in just a moment,
20 Judge, there are provisions in relation to national 11:54
21 security within the EU where this Directive is not
22 applicable. This Directive is concerned with, in a
23 sense, the transfer of data for, if I can put it
24 loosely, for commercial type purposes.

25 11:54
26 If I go on a few pages, Judge, to recital 43, it says:

27
28 "*whereas restrictions on the rights of access and*
29 *information and on certain obligations of the*

1 *controller may similarly be imposed by Member States,*
2 *insofar as they are necessary to safeguard, for*
3 *example, national security, defence, public safety, or*
4 *important economic or financial interests of a Member*
5 *State or the Union, as well as criminal investigations* 11:54
6 *and prosecutions and action in respect of breaches of*
7 *ethics in the regulated professions."*

8
9 And then it says the listing of those tasks doesn't
10 affect the legitimacy of exceptions or restrictions for 11:55
11 reasons of State security or defence.

12
13 Over the page, Judge, at recital 56 it says: "*whereas*
14 *cross-border flows of personal data are necessary to*
15 *the expansion of international trade"*. So here, as you 11:55
16 will see, Judge, they are not now talking about just
17 transfers of data within the EU, they are talking about
18 international transfers of data:

19
20 "*whereas the protection of individuals guaranteed in* 11:55
21 *the Community by this Directive does not stand in the*
22 *way of transfers of personal data to third countries*
23 *which ensure an adequate level of protection."*

24
25 I think this is the first time that one sees this 11:55
26 concept in the Directive of "*an adequate level of*
27 *protection"* and it arises where the Directive expressly
28 envisages that it's not covering just the question of
29 data flows within the EU, it's covering transfers of

1 data from the EU or an EU country to somebody, a third
2 country, as they call it, i.e. a country outside the
3 EU.

4
5 And to protect, to make sure that your rights which you 11:56
6 have as an EU citizen under Union law are protected, it
7 effectively insists that you can only make this
8 transfer to the third country if that third country
9 ensures, that's the word "*ensures*", an adequate level
10 of protection. And we'll come to look at more 11:56
11 specifically in the context of Articles 25 and 26 what
12 "*adequate level of protection*" means.

13
14 Then it goes on in recital 56: "*whereas the adequacy*
15 *of the level of protection afforded by a third country* 11:56
16 *must be assessed in the light of all the circumstances*
17 *surrounding the transfer operation or the set of*
18 *transfer operations.*"

19
20 So it is clearly envisaging that it's the actual 11:57
21 transfer itself that is the relevant thing that has to
22 be looked at for the purpose of this because it's going
23 to end up residing on servers or somewhere else in the
24 third country, being the United States which is what we
25 are concerned with here. 11:57

26
27 Then at 57 it spells out the corollary of that:

28
29 "*whereas, on the other hand, the transfer of personal*

1 *data to a third country which does not ensure an*
2 *adequate level of protection must be prohibited."*

3
4 And so if you come to the view that, despite whatever
5 arrangements are put in place such as the standard 11:57
6 contractual clauses or whatever, that doesn't give an
7 adequate level of protection to your data once it gets
8 to the third country such as the US, well then you have
9 to prohibit that transfer of data. And that indeed is
10 what Mr. Schrems was inviting the Commissioner to do in 11:58
11 this case, although the Commissioner obviously didn't
12 think it appropriate to do that because there are a lot
13 of issues to be determined before one would get to that
14 and that would be a very serious thing to do obviously
15 with very significant economic implications as we see 11:58
16 from much of the evidence that's been put before the
17 court.

18
19 If I move over to recital 59, it says: "*whereas*
20 *particular measures may be taken to compensate for the* 11:58
21 *lack of protection in a third country in cases where*
22 *the controller offers appropriate safeguards."*

23
24 So I pause there. The controller is the person who is
25 in control of the data, in this instance, for example, 11:58
26 Facebook who have the data of EU citizens. If that
27 controller can offer appropriate safeguards, so he can
28 say I know 'well maybe the law in the foreign country
29 doesn't have the necessary adequate protection but I'm

1 going to put in place certain safeguards as the
2 controller of the data and you can rest assured that by
3 virtue of those safeguards you're going to get the same
4 equivalent level of protection that you would get',
5 well this Directive is making allowance for that
6 possibility and lay down procedures for that to happen.

11:59

7
8 That compensates for the lack of protection in a third
9 country. So whatever these safeguards, as I say in
10 this case the standard contractual clauses, the SCCs,
11 they must be such as to compensate for the lack of
12 protection. They are supposed to make up for the lack
13 of protection and bring you to the position that they
14 would be in if there was the same level of protection
15 or an equivalent level of protection, so it fills the
16 gap, if I can use a colloquial term.

11:59

11:59

17
18 And it goes on: "*whereas, moreover, provision must be*
19 *made for procedures for negotiations between the*
20 *Community and such third countries.*"

11:59

21
22 So obviously envisaging that it's not just something
23 that a controller can perhaps unilaterally do, you may
24 have to come to agreements between the EU on the one
25 hand and the third country such as the US with regard
26 to these matters and indeed that has happened as we
27 will see.

12:00

28
29 Then at 60:

1 *"whereas, in any event, transfers to third countries*
2 *may be effected only in full compliance with the*
3 *provisions adopted by the Member States pursuant to*
4 *this Directive, and in particular Article 8 thereof."*

12:00

5
6 And we'll come to Article 8. And if I go to recital
7 62:

8
9 *"whereas the establishment in Member States of*
10 *supervisory authorities, exercising their functions*
11 *with complete independence, is an essential component*
12 *of the protection of individuals with regard to the*
13 *processing of personal data."*

12:00

14
15 So that is the establishment of people like the
16 controller in this case set up in Member States and
17 every Member State has a data protection authority of
18 one sort or another.

12:00

19 **MS. JUSTICE COSTELLO:** When you say "*controller*", do
20 you mean the Commissioner?

12:00

21 **MR. MICHAEL COLLINS:** Commissioner, I am sorry. Did
22 I says "*controller*", Commissioner, yes. Commissioner
23 obviously. I think I've been making that mistake
24 throughout, I think, when I think about it.

12:01

25
26 It says -- and they must exercise their functions with
27 complete independence and the independence of the
28 Commissioners or the equivalent authority is an
29 essential component of the protection of individuals.

1 Again that feeds into some of the tests and the
2 ingredients of adequacy when you are coming to compare
3 the protection that's available in a third country such
4 as the US.

5
6 63 says: *"whereas such authorities must have the*
7 *necessary means to perform their duties, including*
8 *powers of investigation and intervention, particularly*
9 *in cases of complaints from individuals, and powers to*
10 *engage in legal proceedings; whereas such authorities* 12:01
11 *may help to ensure transparency of processing in the*
12 *Member States within whose jurisdiction they fall."*

13
14 So such authorities must have the power themselves to
15 commence legal proceedings for these purposes. 12:02
16

17 And at 66, it says: *"whereas, with regard to the*
18 *transfer of data to third countries, the application of*
19 *this Directive calls for the conferment of powers of*
20 *implementation on the Commission and the establishment* 12:02
21 *of a procedure as laid down in Council 87/373."*

22
23 And again the Commission has been given those powers as
24 we will see in a moment.

25
26 So they are just some of the recitals, Judge. Then if
27 I come to the Directive itself and the provisions of
28 it. Article 1 sets out the object:
29

1 *"1. In accordance with this Directive, Member States*
2 *shall protect the fundamental rights and freedoms of*
3 *natural persons, and in particular their right to*
4 *privacy with regard to the processing of personal*
5 *data."*

12:02

6
7 Now there's a few terms there that are of importance
8 and that are dealt with in the definitions sections in
9 Article 2. First of all, *"personal data"* is defined in
10 Article 2(a) as meaning: *"Any information related to*
11 *an identified or identifiable natural person (data*
12 *subject)."*

12:02

13
14 In other words, you may not at the time necessarily
15 know who the data subject is because they may not be
16 identified, but they are capable of being identified
17 because they are a human or natural person. So the
18 protection isn't contingent on being identified, the
19 protection extends even to people who may not be
20 identified:

12:03

21
22 *"An identifiable person is one who can be identified,*
23 *directly or indirectly, in particular by reference to*
24 *an identification number or to one or more factors*
25 *specific to his physical, physiological, mental,*
26 *economic, cultural or social identity."*

12:03

27
28 So there's an extremely wide definition of what
29 personal data covers and the type of people and the

1 level of identification of people necessary to come
2 within the definition.

3
4 And, secondly, and a crucial definition, *"processing of*
5 *personal data"*: 12:03

6
7 *"Processing shall mean any operation or set of*
8 *operations which is performed upon personal data,*
9 *whether or not by automatic means, such as collection,*
10 *recording, organisation, storage, adaption or* 12:04
11 *alteration, retrieval, consultation, use, disclosure by*
12 *transmission, dissemination or otherwise making*
13 *available, alignment or combination, blocking, erasure*
14 *or destruction."*

15 12:04
16 And I put emphasis on the phrase *"or otherwise making*
17 *available"*. The very fact of making the data available
18 to somebody else is the processing of personal data.
19 So the processing of personal data occurs simply by
20 virtue of the transfer of the data that takes place 12:04
21 from an organisation in the EU such as Facebook,
22 Facebook Ireland, to an organisation in a third country
23 such as the United States.

24
25 That becomes important, Judge, when we look at one of 12:04
26 the issues that Facebook have raised in terms of
27 whether the Directive covers this transfer or not on
28 the grounds that maybe it's excluded because it has to
29 do with or what we are concerned about is national

1 security concerns in the United States, and we will
2 come to that in just a moment.

3
4 At (d) there's a definition of "controller" shall mean:
5 *"The natural or legal person, public authority, agency 12:05*
6 *or any other body which alone or jointly with others*
7 *determines the purposes and means of the processing of*
8 *personal data; where the purposes and means of*
9 *processing are determined by national or Community laws*
10 *or regulations, the controller or the specific criteria 12:05*
11 *for his nomination may be designated by national or*
12 *Community law."*

13
14 And then there are other definitions I don't think --
15 well "processor" is perhaps important: "A processor 12:05
16 *shall mean a natural or legal person, public authority,*
17 *agency or any other body which processes personal data*
18 *on behalf of the controller."*

19
20 And then you come to Article 3 "Scope". And this is an 12:05
21 article that's relied upon by Facebook because they say
22 that this in fact means that the Directive doesn't
23 apply to the transfer of data from Facebook Ireland to
24 Facebook Inc. because, when it gets to the United
25 States, it appears that it is at least open to the 12:06
26 possibility that it is going to be subject to various
27 forms of surveillance by national security agencies in
28 the United States. I'll let the stenographers change.
29

1 So Article 3(1) says:

2
3 *"This Directive shall apply to the processing of*
4 *personal data wholly or partly by automatic means, and*
5 *to the processing otherwise than by automatic means of*
6 *personal data which form part of a filing system or are*
7 *intended to form part of a filing system."*

8
9 Then (2) is the one that -- more important:

10
11 *"This Directive shall not apply to the processing of*
12 *personal data:*
13 *- in the course of an activity which falls outside the*
14 *scope of Community law, such as those provided for by*
15 *Titles V and VI of the Treaty on European Union and in*
16 *any case to processing operations concerning public*
17 *security, defence, State security (including the*
18 *economic well-being of the State when the processing*
19 *operation relates to State security matters) and the*
20 *activities of the State in areas of criminal law."*

21
22 And what Facebook say is, one of the points they've
23 raised is, well, this data is being transferred to the
24 United States, it's subject, or potentially subject to
25 interception and surveillance at different levels and
26 of various sorts that we'll see when we come to look at
27 the US law, most of which is done for the purposes of
28 national security or foreign -- gathering of foreign
29 intelligence and things of that sort and, therefore,

12:07

1 it's outside the scope of the Directive and so none of
2 this matters and none of it applies. And we
3 respectfully say that that's simply not correct, it's a
4 misreading of it

5
6 This is an exclusion for processing operations - and
7 you'll remember we've just looked at the fact that
8 processing operations includes the act of transfer
9 itself - concerning public security. And that is
10 clearly designed to cover forms of processing within 12:08
11 the EU which concern public security. But the transfer
12 that is made by Facebook Ireland to Facebook in the
13 United States is not a transfer that concerns public
14 security in itself. On the contrary, as Facebook
15 themselves say in their affidavits, it's for commercial 12:08
16 purposes that they are transferring the data from
17 Facebook Ireland to Facebook in the US.

18
19 what may happen to the data thereafter, insofar as it
20 is intercepted or the subject of surveillance and 12:09
21 insofar as that surveillance is for the purpose of US
22 national security is a separate matter that occurs
23 after the transfer has taken place and in the course of
24 perhaps onward transmission through fibre optic cables
25 in the United States or whatever it may be. But the 12:09
26 actual transfer which is the relevant processing from
27 Facebook Ireland to Facebook United States does not
28 concern public security in itself and, therefore, this
29 exclusion does not apply.

1
2 And that's an issue in the case, Judge, which I think
3 you will either -- certainly have to look at and then,
4 if appropriate, that could be one of the issues that
5 you would say 'well, I'm going to refer that to the 12:09
6 European Court to see what is the meaning of this
7 particular exclusion of public security', *if* you felt
8 that it wasn't clear. I will be submitting to you that
9 in fact it is perfectly clear and in due course I'll go
10 back to that argument and make some submissions to you 12:09
11 in relation to it.

12
13 Just while I'm on that, can I just -- no, sorry, that's
14 fine. So I can move on then, Judge, I think, to the
15 core articles, which are Articles 25 and 26. Sorry, 12:10
16 just before I do that, can I just draw your attention
17 to Articles 18 and 19 just very briefly. Article 18(1)
18 says:

19
20 *"Member States shall provide that the controller or his*
21 *representative, if any, must notify the supervisory*
22 *authority referred to in Article 28 before carrying out*
23 *any wholly or partly automatic processing operation or*
24 *set of such operations intended to serve a single*
25 *purpose or several related purposes."*
26

27 Then in the course of carrying out that notification,
28 Article 19 sets out what has to be in the notification;
29 it's headed "Contents of Notification". And Article

1 19(1) says:

2
3 *"Member States shall specify the information to be*
4 *given in the notification. It shall include at least."*

5
6 And then it contains a number of things - the names and
7 addresses and so on. But at (e) you'll see: *"Proposed*
8 *transfers of data to third countries."* So clearly the
9 Directive is, as you see already from the provisions,
10 clearly envisaging and is encompassing the whole concept 12:11
11 of transfers to third countries.

12
13 Article 22 and 23 are perhaps of some importance.
14 Article 22 says:

15
16 *"without prejudice to any administrative remedy for*
17 *which provision may be made, inter alia before the*
18 *supervisory authority referred to in Article 28, prior*
19 *to referral to the judicial authority, Member States*
20 *shall provide for the right of every person to a*
21 *judicial remedy for any breach of the rights guaranteed*
22 *him by the national law applicable to the processing in*
23 *question."*

24
25 So there's a provision dealing expressly with remedies 12:11
26 that says that Member States must provide a right for
27 every person to a judicial remedy for breach of the
28 rights guaranteed under the national law applicable to
29 the processing.

1
2 Similarly, there's an entitlement to compensation laid
3 down in Article 23:

4
5 *"Member States shall provide that any person who has*
6 *suffered damage as a result of an unlawful processing*
7 *operation or of any act incompatible with the national*
8 *provisions adopted pursuant to this Directive is*
9 *entitled to receive compensation from the controller*
10 *for the damage suffered."*

11
12 So the controller of the data, if he breaches the
13 principles, has to be, in principle, liable for
14 compensation. And again these are, in a sense, core
15 principles under the Directive that feed into and are 12:12
16 relevant to a comparison of the adequacy of protection
17 when you look at other jurisdictions and see what form
18 of remedies are provided in the other jurisdiction.

19
20 Then we come to Chapter IV, "Transfer of Personal Data 12:12
21 to Third Countries". And these are the two core
22 articles, Judge, with which you will be concerned.
23 Article 25 sets out, first of all, the principles:

24
25 *"1. The Member States shall provide that the transfer*
26 *to a third country of personal data which are*
27 *undergoing processing or are intended for processing*
28 *after transfer may take place only if, without*
29 *prejudice to compliance with the national provisions*

1 *adopted pursuant to the other provisions of this*
2 *Directive, the third country in question ensures an*
3 *adequate level of protection."*

4
5 So you can provide for a transfer from any Member State 12:13
6 to a third country such as the United States, but only
7 if that third country ensures an adequate level of
8 protection; again a reflection of the phrase that we
9 saw in the recital a moment ago. And that's commonly
10 referred to as the adequacy test. And as I say, 12:13
11 precisely what that means is something that was
12 elaborated upon by both the Advocate General and the
13 court in the Schrems 1 decision, and we'll come to that
14 in just a moment.

15
16 Then the criteria for assessing adequacy are set out: 12:13

17
18 *"2. The adequacy of the level of protection afforded by*
19 *a third country shall be assessed in the light of all*
20 *the circumstances surrounding a data transfer operation*
21 *or set of data transfer operations; particular*
22 *consideration shall be given to the nature of the data,*
23 *the purpose and duration of the proposed processing*
24 *operation or operations, the country of origin and*
25 *country of final destination, the rules of law, both*
26 *general and sectoral, in force in the third country in*
27 *question and the professional rules and security*
28 *measures which are complied with in that country."*
29

1 So there's a series of criteria that are set out there.
2 And one of them are the rules of law in force in the
3 third country. And what the Commissioner has done is
4 she has looked at the rules of law in force in the US,
5 having taken advice from Mr. Serwin, who was her US 12:14
6 legal advisor in relation to it and she has compared it
7 with the rules of law in terms of the protection and
8 remedies available as a matter of Union law here and
9 she came to the conclusion that there was not an
10 essential equivalence between the two; in other words, 12:15
11 that the adequacy test was not satisfied. And she has
12 not considered and has not attempted to consider all
13 the other matters which are there. Because if you fail
14 on the fundamental question of the rules of law then in
15 her submission, that is a critical failure, that you 12:15
16 cannot have equivalent protection if you don't, at the
17 first step, have, in the rules of law have the
18 necessary degree of protection. And in particular, the
19 mere fact that there may be non-judicial oversight in
20 all sorts of ways isn't in itself part of that 12:15
21 particular test.

22
23 In 3, it says:

24
25 *"The Member States and the Commission shall inform each*
26 *other of cases where they consider that a third country*
27 *does not ensure an adequate level of protection within*
28 *the meaning of paragraph 2.*
29

1 4. where the Commission finds, under the procedure
2 provided for in Article 31(2), that a third country
3 does not ensure an adequate level of protection within
4 the meaning of paragraph 2 of this Article, Member
5 States shall take the measures necessary to prevent any
6 transfer of data of the same type to the third country
7 in question."

8
9 So the Commission itself can take decisions on the
10 adequacy of the protection afforded by a third country 12:16
11 - sometimes called an adequacy decision - and if it
12 finds that that level of protection is inadequate,
13 well, then the Member States have to prevent transfers
14 of data to that third country.

15
16 Then at 5 it says:

17
18 *"At the appropriate time, the Commission shall enter*
19 *into negotiations with a view to remedying the*
20 *situation resulting from the finding made pursuant to*
21 *paragraph 4."*

22
23 So you try to negotiate with both the third country and
24 with the controllers in question to see can you come to
25 some arrangement that might resolve the situation. And 12:17
26 as we'll see, that has been done from time to time.

27
28 Then in 6:

1 *"The Commission may find, in accordance with the*
2 *procedure referred to in Article 31 (2), that a third*
3 *country ensures an adequate level of protection within*
4 *the meaning of paragraph 2 of this Article, by reason*
5 *of its domestic law or of the international commitments*
6 *it has entered into."*

7
8 So again that's important. The Commissioner can look
9 at it and say 'Actually, I'm satisfied that there is an
10 adequate level of protection, because of your domestic 12:17
11 law and/or the international commitments that you've
12 entered into'. And it says:

13
14 *"Particularly upon conclusion of the negotiations*
15 *referred to in paragraph 5, for the protection of the*
16 *private lives and basic freedoms and rights of*
17 *individuals."*

18
19 So the Commission might look at this foreign country
20 and say in the first instance 'I don't think you have 12:17
21 the necessary adequate protection', but then you enter
22 into negotiations with the country and perhaps it
23 changes its domestic law or it enters into some form of
24 commitment, an international commitment, be it to the
25 EU or to the Member States, it comes to some 12:18
26 international agreement and the Commission, if
27 satisfied that, as a consequence of that, the domestic
28 law or the international agreements, that there is then
29 an adequate level of protection, then it makes its

1 adequacy decision and you can make the transfers.

2
3 And as we see, that's what happened here originally
4 with what's known as the Safe Harbour agreement, that
5 became the subject, of course, of Schrems 1 and, in a 12:18
6 sense, is, similarly, now under the arrangement with
7 the SCC's, the standard contractual clauses. And I'll
8 look at that in just a second.

9
10 So that's Article 25. Then Article 26 is headed 12:18
11 "Derogations". And this says:

12
13 *"1. By way of derogation from Article 25 and save where*
14 *otherwise provided by domestic law governing particular*
15 *cases, Member States shall provide that a transfer or a*
16 *set of transfers of personal data to a third country*
17 *which does not ensure an adequate level of protection*
18 *within the meaning of Article 25(2) may take place on*
19 *condition that."*

20
21 Then there are six conditions set out, alternative
22 conditions. Now, before I come to the conditions,
23 Judge, the first thing to notice is Article 25 lays
24 down the essential principle; if it's not adequate
25 protection in the third country, you can't make the 12:19
26 transfers. But you *can* make the transfers if you enter
27 into some agreement or the domestic law of the third
28 country is such that it does afford the necessary level
29 of protection. If that doesn't happen, here's an

1 alternative way in which you can make the transfers.
2 And what it then does is it sets out these six
3 conditions.

4
5 But the wording just before it is important; if you're 12:19
6 in a situation where the third country does *not* ensure
7 an adequate level of protection within the meaning of
8 Article 25(2). So the object at all times in
9 Article 26, just as much as in Article 25, is to get to
10 the level of adequate protection that is provided for 12:20
11 in Article 25. It's the Article 25 adequate level of
12 protection is the gold standard that you have to meet.
13 And you can meet it either by the sort of international
14 agreement or change in domestic law referred to in
15 Article 25 or you can meet it if you come within one of 12:20
16 these six conditions that are now referred to in
17 Article 26. But it must at all times get you to home
18 base in terms of get you to the level of protection,
19 the adequate level of protection that is provided for
20 within the meaning of Article 25(2). 12:20

21
22 You'll see that a number of conditions are set out:
23 Consent; it's necessary for the performance of a
24 contract between the data subject and the controller;
25 or, in the next one, between a controller and the third 12:21
26 party; it's necessary and important on public interest
27 grounds; or it's necessary to protect the vital
28 interests of the data subject; or the transfer is made
29 from a register according to laws and regulations that

1 is intended to provide information to the public. And
2 so on. And those are specific exceptions that are set
3 out there.

4
5 But then the one -- we're not concerned with any of 12:21
6 those, Judge, none of those apply in the present case.
7 But in paragraph 2 it says:

8
9 *"without prejudice to paragraph 1, a Member State may*
10 *authorise a transfer or a set of transfers of personal*
11 *data to a third country which does not ensure an*
12 *adequate level of protection within the meaning of*
13 *Article 25(2), where the controller adduces adequate*
14 *safeguards with respect to the protection of the*
15 *privacy and fundamental rights and freedoms of*
16 *individuals and as regards the exercise of the*
17 *corresponding rights; such safeguards may in particular*
18 *result from appropriate contractual clauses."*

19
20 So you've got in Article 26.1 perhaps a different type 12:22
21 of exception, the ones that are specifically there -
22 for example, somebody could give their consent to a
23 transfer even though the third country doesn't achieve
24 the adequate level of protection, but because he's
25 consented to it, it's permitted. So there's a number 12:22
26 of exceptions under 26(1). But 26(2) has a slightly
27 different criteria, it's not just a question of an
28 exception. 26(2) is the one that has to achieve what
29 I've referred to as the gold standard of the adequate

1 protection under Article 25(2). And so you mightn't
2 achieve that under Article 26(1), for example, by way
3 of some of the specific exceptions that are there, but
4 under Article 26(2), you *do* have to achieve the gold
5 standard of the adequate level of protection. And 12:22
6 that's apparent just from its construction and its own
7 wording, Judge.

8
9 If you look at it; first of all, by definition you're
10 talking about transfers to a third country which does 12:23
11 *not* ensure an adequate level of protection within the
12 meaning of Article 25(2). And then, when can you make
13 the transfer? Where the controller adduces *adequate*
14 safeguards. So there you have that word again, the
15 *adequate* safeguards - which obviously means the same as 12:23
16 "adequate" as used four or five words earlier in the
17 same sentence - adequate level of protection within the
18 meaning of Article 25(2). That's not there, but the
19 controller adduces adequate safeguards with respect to
20 the protection of the privacy and fundamental rights 12:23
21 and freedoms of the individuals and as regards the
22 exercise of the corresponding rights.

23
24 So it identifies the very specific rights that this
25 Directive is all about and it refers to the, in a 12:23
26 sense, the failure to -- "failure" is perhaps the wrong
27 word, but the difference in the level of protection
28 afforded in the third country, it's not adequate within
29 the meaning of Article 25(2), but the controller puts

1 in place some safeguards that are adequate for that
2 purpose. So you have to get back to the gold standard
3 of Article 25 adequacy of protection by means of these
4 mechanisms under Article 26(2). And "*such safeguards*
5 *may in particular result from appropriate contractual*
6 *clauses.*" 12:24

7
8 Then if you look at paragraph 4, it says:

9
10 "*where the Commission decides, in accordance with the* 12:24
11 *procedure referred to in Article 31 (2), that certain*
12 *standard contractual clauses offer sufficient*
13 *safeguards as required by paragraph 2"* - now, the
14 sufficient safeguards are clearly the adequate
15 safeguards that are referred to in paragraph 2 - 12:24
16 "*Member States shall take the necessary measures to*
17 *comply with the Commission's decision.*"

18
19 So the Commission can decide in particular here are
20 certain standard contractual clauses which will form 12:25
21 part of an agreement between the controller who's
22 transmitting the data from the EU - Facebook Ireland in
23 this case - to the person who is receiving the data in
24 the United States - Facebook Inc. in this particular
25 case - and if that relationship is regulated by these 12:25
26 particular set of contractual clauses, well, then --
27 and the Commission then decides that that is adequate
28 safeguards within the meaning of adequacy or protection
29 under Article 25, well, then the Commission can take

1 such a decision and you can then make the transfers on
2 that particular basis.

3
4 And that is what has happened. There have been three,
5 or, technically, four decisions taken by the Commission 12:25
6 with regard to particular sets of contractual clauses
7 that can be incorporated into the agreements. And if
8 you look at the index, Judge, to this book at the
9 beginning, if you see the item at number -- I'm not
10 asking to you look at them themselves, just at the 12:26
11 index just to identify them. You'll see item number
12 six is a Commission decision from 2001 under the
13 Directive, and that was a decision about a particular
14 set of standard contractual clauses. That was then
15 amended somewhat by the decision at number eight, which 12:26
16 is the decision in 2004. And then there was another
17 Commission decision setting out another set of
18 contractual clauses which has since been repealed,
19 Judge, and has been replaced by number 10, and that's
20 Commission decision 2010 of 5th February 2010, dealing 12:26
21 with processors established in third countries.

22
23 So those three Commission decisions there at six, eight
24 - eight is amending six - and ten are the Commission
25 decisions which set out these standard contractual 12:27
26 clauses. And it's those Commission decisions, the
27 validity of which ultimately is what the Commissioner
28 is seeking to have a reference made to the European
29 Court to adjudicate on their validity. Because as

1 we'll see, Judge, one of the key points in Schrems, as
2 you already know, is that although Commission decisions
3 are, of course, binding when the Commission takes a
4 decision to say 'On foot of this, I think there is
5 adequate protection in that third country', that 12:27
6 doesn't preclude the national commissioner or data
7 protection authority from nonetheless looking at it to
8 see, well, in fact in these particular circumstances
9 does that in fact occur? And that was the whole point
10 of the reference that was made in Schrems, as we'll see 12:27
11 in just a moment.

12
13 So I respectfully submit that on any ordinary
14 construction, therefore, of Article 26(2), what you
15 have to look at is to see whether or not these 12:28
16 safeguards in the present case in the form of the
17 standard contractual clauses amount to providing an
18 adequate level of protection within the meaning of
19 Article 25(2). And as you'll see from the case law,
20 that concept of an adequate level of protection has 12:28
21 been interpreted to mean a very *high* level of
22 protection - that phrase that we saw in the recitals a
23 few moments ago earlier on.

24
25 And this is a point of interpretive difference, I 12:28
26 think, between ourselves and Facebook. Because
27 Facebook, I think, make the argument that the test
28 under Article 26(2) for the controller adducing
29 adequate safeguards *doesn't* mean that the adequate

1 safeguards necessarily have to meet the standard of
2 adequacy as referred to in Article 25(2) and it's, in a
3 sense, a sort of a freestanding concept of adequacy
4 that simply has to be assessed. And we say no, the
5 reference to the controller adducing adequate 12:29
6 safeguards in Article 26(2) can only, on any ordinary
7 principles of Community law interpretation of the
8 article, must mean the concept of adequate level of
9 protections within the meaning of Article 25(2), and
10 that it would be almost inconceivable that, having 12:29
11 expressly referred to an adequate level of protection
12 within the meaning of Article 25(2), when the very next
13 *phrase* refers to the controller adducing adequate
14 safeguards, that the Commission was talking about
15 something different and some other concept of adequacy 12:29
16 to the very concept of adequacy that it's just
17 identified, that within the meaning of Article 25(2).

18
19 So that's an issue in the case, Judge. And as I say,
20 it's my submission that on a clear and ordinary 12:30
21 reading, in light of the teleological principles and
22 the normal principles by which one construes Union
23 instruments, as distinct from common law statutory
24 instruments, but even on *either* the common law basis or
25 on a Union basis of interpretation, that has a 12:30
26 perfectly straightforward meaning.

27
28 But if you thought otherwise or were minded to think
29 there was doubt about what the meaning of that was,

1 well, then it is open to you to make a reference as
2 part of the reference to the European Court to raise
3 that issue and say 'Look, what is this concept of
4 adequate safeguards that is being referred to in
5 Article 26(2)?' And as I say, we respectfully submit 12:30
6 that you won't *have* to do that, that it is clear what
7 it means, but -- and no doubt Mr. Gallagher will submit
8 to you that it's equally clear that it means the
9 opposite, it means what he says it means. And as I say
10 it's a matter for you as to whether you feel you can 12:31
11 decide that as a very clear issue or whether it's
12 appropriate to make a reference in relation to that.

13
14 The other relevant provisions there in Article 28 are
15 the reference to the supervisory authority. And the 12:31
16 powers in particular are set out in Article 28(3), that
17 each authority is endowed with investigative powers and
18 effective powers of intervention, the power to engage
19 in legal proceedings where the national provisions
20 adopted pursuant to this Directive have been violated, 12:31
21 or to bring these violations to the attention of
22 judicial authorities. Then at 4:

23
24 *"Each supervisory authority shall hear claims lodged by*
25 *any person, or by an association representing that*
26 *person, concerning the protection of his rights and*
27 *freedoms in regard to the processing of personal data.*
28 *The person concerned shall be informed of the outcome*
29 *of the claim."*

1
2 So when somebody like Mr. Schrems makes a claim or a
3 complaint to the Commissioner, she has to entertain
4 that and then deal with it.

5
6 There's also Article 29, Judge. You'll see references
7 throughout to the Article 29 working party. Article 29
8 sets up a working party on the protection of
9 individuals for the processing of personal data. It
10 just has advisory status and acts independently. And
11 it has produced reports from time to time, some of
12 which are referred to in some of the authorities and
13 are of relevance. But that's where Article 29 derives
14 from.

15
16 So that's the Directive, Judge. And I will come back
17 before I finish the opening perhaps just to discuss in
18 a little bit more detail that issue of interpretation
19 of Article 26. But I'm going to move on, in the
20 interests of time, to try to get through more of the
21 material.

22
23 One of the things which happened in the story then was
24 that the Commission was concerned about the level of
25 protection afforded to EU citizens in the United States
26 and it then entered into an agreement, which is
27 commonly referred to as the Safe Harbour agreement.
28 And again I don't have to open that to you, Judge, but
29 just to identify it for you, it's item number five if

1 you're looking at the index to the book and it's so
2 identified there, Commission decision 2000/520.

3
4 The Safe Harbour agreement and decision set out a
5 series of principles which companies could voluntarily 12:33
6 subscribe to in the United States - these are the
7 United States people who would be receiving
8 information. And in addition, there were a set of
9 frequently asked questions which were prepared/drafted
10 by the US Department of Commerce and which elaborated 12:33
11 upon and set out how these principles were to operate,
12 and you could self-certify that you subscribed to the
13 Safe Harbour principles and these frequently asked
14 questions. And if you did so, well, then it was
15 permissible pursuant to the Commission decision, the 12:34
16 Safe Harbour decision, to transfer the data from the EU
17 to the particular organisations who self-certified that
18 they met with and were abiding by those particular
19 principles.

20 12:34
21 That was in 2000. The Directive itself was transposed
22 into Irish law in 2003 by the Data Protection
23 (Amendment) Act of 2003. And as you'll see in a moment
24 from the judgment, Judge, there's a particular
25 statutory provision - I don't need to open it, because 12:34
26 it's referred to in Hogan J's judgment - Section 11(2),
27 which said that the Commission findings were binding on
28 the Data Protection Authority - which, of course,
29 raised the question as to what if there's an agreement

1 like the Safe Harbour decision, but what if the
2 authority thinks 'Actually, that doesn't in fact afford
3 adequate protection', are you simply bound by that or
4 not? And there's also a specific statutory provision
5 dealing with the standard contractual clauses, that's 12:35
6 Section 11(4)(c).
7

8 As you're then aware, Judge, in June 2013, Mr. Edward
9 Snowden, in Hong Kong, made a variety of revelations in
10 relation to the way in which the National Security 12:35
11 Agency and others in the United States was conducting
12 surveillance of various forms of data that was
13 occurring in the United States. And Mr. Schrems filed
14 a complaint with the Commissioner on 25th June 2013,
15 claiming that the transfer of data from Facebook 12:35
16 Ireland to Facebook Inc. was unlawful both under Irish
17 law and under EU data protection law. And his
18 complaint was that the Safe Harbour decision couldn't
19 legitimise that type of EU/US data transfer, where,
20 firstly, he said that there weren't adequate 12:36
21 protections in US law similar to those under the
22 Charter of Fundamental Rights.
23

24 Secondly, he referred to two programmes which had been
25 identified in the Snowden revelations, which were known 12:36
26 as Prism and Upstream. And these were programmes which
27 were implemented or administered, I think, under
28 certain statutory provisions in the US, in particular a
29 section called Section 702 that you'll be hearing about

1 in due course. And there was subsequent controversy as
2 to whether Mr. Snowden's description of these
3 programmes were accurate in some respects or not; he
4 had produced, for example, a series of slides that he
5 said was from, I think, the NSA showing how these
6 programmes operated.

12:37

7
8 But in very broad terms - and you're not going to be
9 concerned with the detail of this, Judge - the Prism
10 programme is fundamentally concerned with internet
11 service providers and it was a means of carrying out
12 surveillance on the transfer of data involving internet
13 service providers. The Upstream programme, on the
14 other hand, was concerned with telephone operators or
15 telephone companies whose data was, I think the way it
16 was put was, a collection of communications on fibre
17 cables and infrastructure as the data flows passed.
18 And under Section 702, it wasn't necessary to get a
19 warrant in relation to this, but there was authority
20 given to the Director of the National Security Agency
21 and the Attorney General to authorise particular types
22 of surveillance of, be it the internet service
23 providers or the telephone companies, who would be
24 served with a particular order directing them to make
25 available certain types of data.

12:37

12:37

12:37

12:38

26
27 I think in the Snowden revelations it was suggested
28 that the NSA were directly accessing the servers of
29 many of these internet companies and so forth. It was

1 subsequently said that that wasn't so, it was done
2 pursuant to an order by the Director of the NSA and the
3 Attorney General which would be served on the
4 companies, rather than accessing it directly and
5 presumably unknownst to them.

12:38

6
7 The Prism programme, as I understand it, was targeting
8 non-US persons, that was the purpose behind it. And
9 therefore, Mr. Schrems' complaint, or one of his
10 complaints was that it was involving access, therefore,
11 to European citizens whose data had been transferred to
12 the US and, as non-US persons, were potentially being
13 accessed under the Prism programme. He complained that
14 the Safe Harbour arrangements gave no means to the
15 people concerned that they were the subject of such
16 surveillance and that there was no means of redress for
17 them.

12:38

12:39

18
19 The Commissioner at the time - not the current
20 Commissioner - felt that he was bound by the Commission
21 decision which said that the Safe Harbour decision, if
22 you came within the Safe Harbour principles, it then
23 was permissible to transfer the data and, therefore, he
24 rejected the complaint on the grounds that he couldn't
25 go behind the Commission decision. And it was of that
26 decision that Mr. Schrems then brought a judicial
27 review of that decision, which was the decision that
28 came before Hogan J.

12:39

1 Now, in the interim, following the Snowden revelations,
2 there was an ad hoc group set up between the EU and the
3 US which established a working group in July 2013 --

4 **MS. JUSTICE COSTELLO:** Is this different to the working
5 group referred to in the --

12:39

6 **MR. MICHAEL COLLINS:** It is different. This is not
7 the Article 29 -- oh, we're only starting, Judge. It's
8 different to the Article 29 working group. And this
9 was an ad hoc working group that published a report on
10 27th November 2013. And I might just look briefly at
11 that report, Judge, to give context to it. You'll find
12 that in book one of the trial books. It's an exhibit
13 to Mr. John O'Dwyer's grounding affidavit for the
14 purpose of this application and it's at tab 14 in book
15 one.

12:40

12:40

16
17 One reason I refer to it, Judge, is that although there
18 have been changes in the US law since this time, which
19 I'll identify for you in just a moment, it does contain
20 a useful enough summary, certainly a useful starting
21 point in trying to understand, as I think I said
22 earlier, the somewhat labyrinthine laws of the United
23 States in relation to that. So do you see on section
24 two - I'm not sure there are page numbers in this,
25 Judge, at least not that I can see - but it is on the
26 second page.

12:40

12:41

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

28 **MR. MICHAEL COLLINS:** And there's a heading: "2. The
29 Legal Framework". And it sets out, in particular in

1 the third paragraph, there's an Act called the Foreign
2 Intelligence Surveillance Act of 1978, popularly known
3 as FISA, and that's where the Section 702 that I
4 referred to can be found...

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

12:41

6 **MR. MICHAEL COLLINS:** ... which authorised, or at
7 least which enabled the Director to authorise these
8 Prism and Upstream programmes. There's also Section
9 215 of the USA PATRIOT Act of 2001, which was enacted
10 subsequent to the 9/11 atrocities. The PATRIOT Act is
11 not just a name picked in that sense, it is actually an
12 acronym, although presumably deliberately designed, for
13 uniting and strengthening America by Providing
14 Appropriate Tools Required to Intercept and Obstruct
15 Terrorism Act of 2001. That is, if you look at the
16 lettering of it, is the acronym for PATRIOT.

12:41

12:42

17 **MS. JUSTICE COSTELLO:** Yes. Is this section 2.2 that
18 you're at?

19 **MR. MICHAEL COLLINS:** Section 2 of the working paper
20 report, under the heading "The Legal Framework".

12:42

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

22 **MR. MICHAEL COLLINS:** Tab 14.

23 **MS. JUSTICE COSTELLO:** Am I still on the second page or
24 do I move further in?

25 **MR. MICHAEL COLLINS:** Just on the second page. And
26 just in the third paragraph there it refers to the
27 relevant sections, 2 in particular, Section 702 of the
28 Foreign Intelligence Surveillance Act and Section 215
29 of the USA PATRIOT Act, which also amended FISA. And

12:42

1 we'll come to that in a moment.

2
3 Under that FISA Act, Judge, as we'll see in due course,
4 a particular court is set up, called the FISA Court or
5 the Foreign Intelligence Surveillance Court, which at 12:42
6 the time certainly held hearings in private, in secret
7 and it was only the US Government, in effect, that
8 appeared before it - there wasn't any countervailing
9 party - and they would come for approval of certain
10 things that were required to be approved, such as 12:43
11 certain types of procedures under FISA, sometimes known
12 as targeting and minimisation procedures that we'll
13 come back to.

14
15 Over the page at section 2.1 they set out the details 12:43
16 of Section 702 in FISA. And if you look at the third
17 paragraph, it says:

18
19 *"The US confirmed that it is under Section 702 that the*
20 *National Security Agency (NSA) maintains a database*
21 *known as PRISM."*

22
23 Then it describes that. And it says that the access
24 was provided through the orders that they made to a
25 variety of internet companies that are referred to 12:43
26 there as being mentioned in the media. Now, one of
27 those is Facebook. But as I understand it from the
28 Facebook evidence - Mr. Gallagher will correct me if
29 I'm wrong - he says, or Facebook say that although they

1 accept that such an order *could* be made vis-à-vis
2 Facebook, it wasn't in fact made vis-à-vis Facebook, if
3 I've understood that correctly.
4

5 It goes on:

12:44

6
7 *"The US also confirmed that Section 702 provides the*
8 *legal basis for so-called 'upstream collection'; this*
9 *is understood to be the interception of Internet*
10 *communications by the NSA as they transit through the*
11 *US (e.g. through cables, at transmission points).*
12

13 *Section 702 does not require the government to identify*
14 *particular targets or give the Foreign Intelligence*
15 *Surveillance Court (hereafter 'FISC') Court a rationale*
16 *for individual targeting.*
17

18 *Section 702 states that a specific warrant for each*
19 *target is not necessary. The US stated that no blanket*
20 *or bulk collection of data is carried out under Section*
21 *702, because collection of data takes place only for a*
22 *specified foreign intelligence purpose. The actual*
23 *scope of this limitation remains unclear as the concept*
24 *of foreign intelligence has only been explained in the*
25 *abstract terms set out hereafter."*
26

27 And it goes on to explain that the US Government
28 couldn't provide further explanations or it would
29 reveal specific operational details of intelligence

1 collection programmes. At the bottom of the page it
2 says:

3
4 *"Foreign intelligence could, on the face of the*
5 *provision, include information concerning the political*
6 *activities of individuals or groups, or activities of*
7 *government agencies, where such activity could be of*
8 *interest to the US for its foreign policy. The US*
9 *noted that 'foreign intelligence' includes information*
10 *gathered with respect to a foreign power or a foreign*
11 *territory as defined by FISA, 50 USC 1801."*

12
13 As you know, Judge, individual Acts of congress are,
14 apart from standing in the statutes at large, they are
15 then codified into a form of the United States Code. 12:45
16 And the code is organised in a number of different
17 titles and so you get sections from pieces of Acts
18 dropped into the appropriate titles. So you find the
19 same sections but with totally different section
20 numbers in the Code. So we commonly refer here to 12:45
21 Section 702, but as you'll see from the top, it is in
22 fact Section 1881a of the Title 50 of the United States
23 Code. And we have all that delight ahead of us yet,
24 Judge, to plough through that.

25
26 It then, at 2.1.2, deals with the personal scope of
27 Section 702:

28
29 *"Section 702 governs the 'targeting of persons*

1 *reasonably believed to be located outside the United*
2 *States to acquire foreign intelligence information'.*
3 *It is aimed at the targeting of non-US persons who are*
4 *overseas.*

5
6 *This is confirmed by the limitations set forth in*
7 *Section 702(b) which exclusively concern US citizens or*
8 *non-US persons within the US."*

9
10 Then certain prohibitions on what can be done are set
11 out: It has to be conducted in a manner consistent with
12 the Fourth Amendment - that's the prohibition on
13 unreasonable searches and seizures. And now on the
14 page that begins with "*(i) intentionally target*", two
15 paragraphs down:

12:46

12:46

16
17 *"As far as US persons are concerned, the definition of*
18 *'foreign intelligence information' requires that the*
19 *information to be collected is necessary for the*
20 *purpose pursued. Concerning non-US persons, the*
21 *definition of 'foreign intelligence information' only*
22 *requires the information to be related to the purpose*
23 *pursued."*

24
25 So there was a difference there between US and non-US
26 persons. Then it refers to what are called the
27 targeting and minimisation procedures. These are
28 procedures, Judge, set out under the Act that the NSA
29 is supposed to draw up, first of all targeting

12:47

1 procedures, which are the principles by which they go
2 about targeting a particular foreign power or foreign
3 agent or whatever for the purpose of intelligence. And
4 the minimisation procedures are supposed to be
5 procedures that are designed to *minimise* the extent to 12:47
6 which that surveillance will gather information
7 unrelated to what they're supposed to be targeting.
8 Now, I'm sure that's too simplistic a description of
9 them, but that gives you the general idea of it. And I
10 think that once a year the NSA have to come to the 12:47
11 Foreign Surveillance Intelligence Court and they put
12 before them the minimisation and the targeting
13 procedures that they have in place and that they're
14 operating and they get approval from the court for
15 those. And I think that certification has to take 12:47
16 place on an annual basis.

17
18 There's then a discussion of the geographical scope of
19 Section 702. And then over the page, Judge, in section
20 2.2 there's a discussion of Section 215 of the US 12:48
21 PATRIOT Act 2001 that I referred to a moment ago. And
22 fundamentally, Judge, that is a procedure that allows
23 the FBI to make an application for a court order for
24 the production of what are called *tangible* claims - and
25 that's books, records, documents and so on - if it's 12:48
26 relevant for an investigation to obtain foreign
27 intelligence information *not* concerning a United States
28 person or to protect against international terrorism or
29 clandestine international activities. The order is

1 secret and may not be disclosed.

2
3 I think insofar as telecommunications providers were
4 concerned, those orders were used not to obtain the
5 content of the phone calls in themselves, but to 12:48
6 provide what is called non-content telephony meta-data.
7 And I think meta-data is all the other ancillary
8 information to do, such as the phone number from which
9 it's dialled or to which the call is made and other
10 associated identifying information about the phone call 12:49
11 and the receivers and so forth, but not necessarily the
12 actual content of the phone call itself. And more
13 explanation about that is set out there.

14
15 Towards the bottom of the page it says: 12:49

16
17 *"The US explained that section 2515 allows for 'bulk'*
18 *collection of telephony meta-data maintained by the*
19 *company to whom the order is addressed."*

20 12:49
21 But the further processing of it is limited to the
22 purpose of investigation of international terrorism.
23 So at that time at least - and there have been changes
24 since, Judge - they could collect it in bulk, but they
25 couldn't process it in bulk, they'd have to only 12:49
26 process it for the purpose of investigating
27 international terrorism. And that could cover both US
28 persons and non-US persons.
29

1 It then went on to deal with something called Executive
2 Order - you'll see there, Judge, it's 12333; I think
3 it's commonly referred to as twelve triple three.

4 That's one of the Executive Orders that the President
5 can make. And as you may be aware, Judge, the 12:50
6 Executive Orders are not in themselves, I think, law
7 but they are orders which the President makes pursuant
8 to his constitutional function of implementing the laws
9 of the United States. And analogies are very
10 dangerous, Judge, and one might perhaps very roughly 12:50
11 draw an analogy perhaps with a statutory instrument or
12 something of that sort, but I'm wary even of drawing
13 that analogy.

14
15 In any event, the President can make these Executive 12:50
16 Orders, as we know, and does so frequently. And this
17 particular 12333 was the basis on which the US engaged
18 in intelligence gathering, particularly outside the
19 United States. I think it technically covered inside
20 and outside the United States, but was in practice, if 12:51
21 I understand it correctly - and I'm subject to
22 correction on all of these things - was focused
23 primarily outside the United States.

24
25 At the bottom of the page: Judicial approval was not 12:51
26 required for that order and there wasn't judicial
27 oversight of its use.

28
29 Then the report dealt with the collection and further

1 processing of the data. At section 4 it dealt with the
2 oversight and redress mechanisms:

3
4 *"The US explained that activities authorised by Section*
5 *702 FISA and Section 215 of the PATRIOT Act are subject* 12:51
6 *to oversight by executive, legislative and judicial*
7 *branches".*

8 **MS. JUSTICE COSTELLO:** Sorry, I haven't quite got to
9 section 4 yet. Oh, I have it now, thank you.

10 **MR. MICHAEL COLLINS:** It sets those out in some 12:51
11 detail. It provides the executive oversight in section
12 4.1, Congressional oversight in 4.2, and 4.3 judicial
13 oversight. And it describes the role of the Foreign
14 Intelligence Surveillance Court, which is set out
15 there. And perhaps of some relevance is the second 12:51
16 paragraph in 4.3:

17
18 *"what exactly is subject to judicial oversight depends*
19 *on the legal basis of collection."*

20 12:52
21 And you've got three things then here, Judge. The
22 first one is:

23
24 *"Under section 215, the Court is asked to approve*
25 *collection in the form of an order to a specified*
26 *company for production of records."*

27
28 Then the second one is:
29

1 *"Under Section 702, it is the Attorney General and the*
2 *Director of National Intelligence that authorise*
3 *collection, and the Court's role consists of*
4 *confirmation that the certifications submitted contain*
5 *all the elements required and that the procedures are*
6 *consistent with the statute."*

7
8 Then thirdly:

9
10 *"There is no judicial oversight of programmes conducted*
11 *under Executive Order 12333."*

12
13 Then it goes on to describe how the court works; it's
14 non-adversarial at the time and there was no
15 representation by anybody other than the government. 12:52
16 That has since been amended, Judge. There are, I
17 think, six lawyers now nominated with the necessary
18 security clearance who play the role of amicus curiae
19 of some sort before the court on the occasion of
20 certain forms of application. And some of their 12:53
21 decisions are now made public, albeit redacted
22 obviously for security reasons, from time to time in a
23 way that was not done previously.

24
25 Then the summary of the main findings are set out at 12:53
26 section 5.

27
28 So although some of those things have changed since
29 then, Judge, it's relevant in two respects; one is it's

1 perhaps a starting point to understand some of these
2 provisions, and secondly, it was the position, I think,
3 as dealt with by Hogan J. and as understood by him at
4 that time when he comes to his decision.

12:53

5
6 On the same day that the ad hoc group published their
7 report, Judge, the Commission also published a
8 communication on the functioning of the Safe Harbour
9 regime from the perspective of EU citizens. That's at
10 tab 15 in book one, but I'm not going to refer to that. 12:53
11 So Mr. Schrems' judicial review proceedings came on for
12 hearing and Hogan J. then gave judgment on 18th June
13 2014. And I'm going to ask you to look at that
14 decision, Judge.

15 **MS. JUSTICE COSTELLO:** which booklet is that it? 12:54

16 **MR. MICHAEL COLLINS:** It's in book two at tab 20.
17 Book two of the authorities, not the trial books. And
18 if you see the head-note there, Judge, he quotes from
19 the relevant provisions of the Data Protection Act of
20 1988 and in particular you'll see Section 11(2)(a) that 12:54
21 I referred to a few moments ago, where it says:

22
23 *"where in any proceedings under this Act a question*
24 *arises –*

25 *(i) whether the adequate level of protection specified*
26 *in subsection (1) of this section is ensured by a*
27 *country or territory outside the European Economic Area*
28 *to which personal data are to be transferred, and*
29 *(ii) a Community finding has been made in relation to*

1 *transfers of the kind in question, the question shall*
2 *be determined in accordance with that finding."*

3
4 Then it quotes Article 25(6) that we've looked at
5 already, it quotes Article 7 and 8 of the Charter that 12:55
6 we've already looked at, describes briefly the
7 complaint by Mr. Schrems that I've already described in
8 relation to the Safe Harbour principle, and if you look
9 at the bottom of page, it says:

10
11 *"The applicant commenced judicial review proceedings*
12 *and sought, inter alia, certiorari of the decision of*
13 *the respondent not to investigate his complaint, but he*
14 *did not directly challenge the Commission decision" -*
15 *that's the Safe Harbour decision - "nor the Directive. 12:55*
16 *The hearing proceeded on the basis that personal data*
17 *transferred to the United States was thereafter capable*
18 *of being accessed by the United States authorities in*
19 *the course of alleged mass and indiscriminate*
20 *surveillance. The applicant contended that the Safe 12:55*
21 *Harbour regime had been overtaken by events and that*
22 *given the apparent weakness of the United States data*
23 *protection practice and the subsequent entry into force*
24 *of Article 8 of the Charter, a re-evaluation of how*
25 *Commission decision" - that the Safe Harbour decision - 12:55*
26 *"and the Directive should be interpreted as necessary.*

27
28 *Held by Hogan J. in referring questions to the European*
29 *Court of Justice:*

1
2 1. That the essential question which arose for
3 consideration was whether, as a matter of European
4 Union law, the respondent was absolutely bound by the
5 prior European Commission decision, having regard in 12:56
6 particular to the subsequent entry into force of
7 Article 8 of the Charter of Fundamental Rights. Unless
8 that question was answered in a manner that enabled the
9 respondent either to look behind the decision or
10 otherwise disregard it, the applicant's complaints were 12:56
11 bound to fail. Given the novelty and importance of
12 those issues, which had considerable practical
13 implications for the Member States of the EU, it was
14 appropriate that that question be determined by the
15 European Court of Justice. 12:56

16
17 2. That the essence of the right to data privacy was
18 that privacy should remain inviolate and not be
19 interfered with, save in a manner provided for by law;
20 a person was entitled to object to a state of affairs 12:56
21 where their data was transferred to a jurisdiction that
22 appeared to provide only limited protection against
23 interference by the security authorities of that
24 jurisdiction, even if it were considered unlikely that
25 such data had ever been accessed or would ever be 12:56
26 accessed by those security authorities."

27
28 And some of this is important, Judge, from the
29 viewpoint of one of the issues that will arise in US

1 law, which is the question of standing, to compare the
2 extent to which people, EU citizens, under EU law, what
3 degree of interference with their rights do they have
4 to show in order to assert standing and the court will
5 hear them and to what extent do they have to -- or what 12:57
6 do they have to show to get standing in the United
7 States? And one of the grounds of difference between
8 the two systems, in the Commissioner's view, is that
9 the standing rules are more restrictive in the United
10 States in various ways than they are under the EU. And 12:57
11 I obviously will be coming back to that in due course.
12

13 Secondly, it says that: "*The essence of the right to*
14 *data privacy was that privacy should remain inviolate*
15 *and not be interfered with*" -- sorry, I've read that. 12:57
16 And then there was an issue about frivolous or
17 vexatious, which doesn't arise. Then finally:
18

19 "*That the general protection for privacy/personal*
20 *security in Article 40.5 of the Constitution would be* 12:57
21 *entirely compromised by mass undifferentiated*
22 *surveillance by the state authorities of conversations*
23 *and communications that took place in the home.*"
24

25 Now, it's fair to say, Judge, that the criticism has 12:58
26 been made subsequently that the impression and the
27 assumption that there was necessarily mass and
28 indiscriminate - what's the phrase - undifferentiated
29 surveillance by US state authorities is one that the US

1 authorities differed with and say 'No, it isn't so'.
2 And that's why when we've been looking at Section 702
3 and Section 215 and how they operate, you will see the
4 extent to which they may or may not be so
5 characterised. But there was criticism that it was it 12:58
6 was too accepting of too broad an allegation in that
7 respect.

8
9 You needn't be ultimately concerned about that, it's
10 not going to affect the issues that you have to decide, 12:58
11 but it's only fair to point out for the relevant
12 authorities that they disagree with that
13 characterisation and say that that isn't so. For
14 example, there's no, it appears there's no direct
15 access to the servers of the internet companies; the 12:58
16 National Security Director makes the order and serves
17 the order on the company, although they are then bound
18 to comply with it. So there are those differences and
19 clarifications.

20 12:59
21 Hogan J's judgment then starts at page 79, Judge. He
22 sets out the background to the Snowden revelations,
23 which I don't think I need to go through. He then
24 refers to the reports of those revelations in the
25 Washington Post and The Guardian newspaper and others. 12:59
26 At paragraph 14 - this is page 82 - he describes the
27 operation of the Foreign Intelligence Surveillance
28 Court. And he sets out the background to Mr. Schrems
29 at 16 and 17. Then he deals with the Irish statutory

1 provisions. He deals then with the Safe Harbour
2 decision and quotes extensively from that. Then from
3 page 86, in paragraph 29 onwards he sets out the
4 various complaints that were made by Mr. Schrems, which
5 I think I've already dealt with. He discusses whether 13:00
6 the complaint was frivolous or vexatious, all of which
7 I can skip over.

8
9 He then deals with the locus standi of the applicant
10 from paragraph 91 onwards. And perhaps I might refer 13:00
11 to some of that, Judge, but I don't know whether that's
12 an appropriate moment to break?

13 **MS. JUSTICE COSTELLO:** Yes, I think two o'clock would
14 be appropriate.

15 **MR. MICHAEL COLLINS:** Thank you, Judge. 13:00

16
17
18 (LUNCHEON ADJOURNMENT)
19
20
21
22
23
24
25
26
27
28
29

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

3
4 **REGISTRAR:** Matter at hearing, Data Protection
5 Commissioner -v- Facebook Ireland Ltd. and another. 14:08

6 **MR. MICHAEL COLLINS:** May it please you, Judge.

7 **MS. JUSTICE COSTELLO:** Yes.

8 **MR. MICHAEL COLLINS:** Judge, I was dealing with the
9 decision of Hogan J in Schrems and I was turning to
10 page 91 of the report -- 14:09

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

12 **MR. MICHAEL COLLINS:** -- dealing with the locus standi
13 of the applicant. He says at paragraph 41:

14
15 *"The Commissioner contends that as there is no evidence 14:09*
16 *by which he could have concluded that the Safe Harbour*
17 *Principles were in fact being violated in the case of*
18 *data transfers between Facebook Ireland and Facebook,*
19 *it was submitted that these complaints were essentially*
20 *hypothetical and speculative in nature. Nor, it was*
21 *further submitted, was any evidence ever adduced to*
22 *suggest that there was an imminent risk of grave harm*
23 *to him or that any of his data had been or was likely*
24 *to be accessed by the NSA.*

25
26 *42. For my part, I do not think that this objection is*
27 *well founded. The Snowden revelations demonstrate -*
28 *almost beyond peradventure - that the US security*
29 *services can routinely access the personal data of*

1 European citizens which has been so transferred to the
2 United States and, in these circumstances, one may
3 fairly question whether US law and practice in relation
4 to data protection and State security provides for
5 meaningful or effective judicial or legal control. It
6 is true that the applicant cannot show any evidence
7 that his data has been accessed in this fashion, but
8 this is not really the gist of the objection.

9
10 43. The essence of the right to data privacy is that,
11 so far as national law is concerned and by analogy with
12 the protection afforded by Article 40.5 of the
13 Constitution, that privacy should remain inviolate and
14 not be interfered with save in the manner provided for
15 by law, i.e. by means of a probable cause warrant
16 issued under s.6 of the 1993 Act, on the basis that the
17 interception of such communications involving a named
18 individual is necessary in the interests of either the
19 suppression of serious crime or the protection of
20 national security.

21
22 44. This is also clearly the position under European
23 Union law as well, a point recently confirmed by the
24 Court of Justice in Digital Rights Ireland -v-
25 Communications Minister, Case C-293/12, in a case where
26 the Data Retention Directive was held to be invalid by
27 reason of the absence of sufficient safeguards in
28 respect of the accessing of such data by national
29 authorities at page 173."

1
2 And I will be opening that case to you, Judge, because
3 it's an important case.
4

5 But the passage that Hogan J quotes here is 14:10
6 particularly important from the viewpoint of the
7 standing issue that I referred to earlier.
8

9 *"By requiring the retention of the data listed in*
10 *Article 5(1) of Directive 2006/24 and by allowing the*
11 *competent national authorities to access those data,*
12 *Directive 2006/24... derogates from the system of*
13 *protection of the right to privacy established by*
14 *Directives 95/46 with regard to the processing of*
15 *data."*
16

17 And he continues. Then at 33: *"To establish the*
18 *existence of an interference with the fundamental right*
19 *to privacy, it does not matter whether the information*
20 *on the private life and sensitive or whether the person* 14:11
21 *concerned to be inconvenienced in any way."*
22

23 Now that's quite important, Judge. It doesn't matter
24 from a standing perspective in EU law as to whether the
25 persons concerned have been inconvenienced in any way, 14:11
26 and I'll be inviting you in due course to draw a
27 comparison between what the US Supreme Court have said
28 in relation to the standing issues under the US
29 constitution:

1 *"34. As a result, the obligation imposed by Articles 3*
2 *and 6 of Directive 2006/24 on providers of publicly*
3 *available electronic communications services or of*
4 *public communications networks to retain, for a certain*
5 *period, data relating to a person's private life and to*
6 *his communications, such as those referred to in*
7 *Article 5 of the directive, constitutes in itself an*
8 *interference with the rights guaranteed by Article 7 of*
9 *the Charter."*

10
14:12

11 So that case, as we will see when we come to look at
12 it, it was dealing with a case where data is simply
13 stored, there were various conditions under which it
14 could be stored, but the very fact that it was stored
15 constitutes in itself an interference with the rights
16 guaranteed by Article 7.

14:12

17
18 *"Furthermore, the access of the competent national*
19 *authorities to the data constitutes a further*
20 *interference with that fundamental right. Accordingly,*
21 *Articles 4 and 8 -- this was the Storage Directive if*
22 *I call it that -- laying down rules relating to the*
23 *access of the competent national authorities to the*
24 *data also constitute an interference with the rights*
25 *guaranteed by Article 7 of the Charter.*

14:12

26
27 *Likewise, Directive 2006/24 constitutes an interference*
28 *with the fundamental right to the protection of*
29 *personal data guaranteed by Article 8 of the Charter*

1 *because it provides for the processing of personal*
2 *data.*

3
4 *It must be stated that the interference caused by the*
5 *Directive with the fundamental rights laid down in* 14:12
6 *Article 7 and 8 of the Charter is...and it must be*
7 *considered to be particularly serious. Furthermore, as*
8 *the Advocate General has pointed out in paragraphs 52*
9 *and 72 of his Opinion, the fact that data are retained*
10 *and subsequently used without the subscriber or* 14:13
11 *registered user being informed is likely to generate in*
12 *the minds of the persons concerned the feeling that*
13 *their private lives are the subject of constant*
14 *surveillance."*

15
16 So again under European Union law the feeling that your
17 private life is under constant surveillance is one of
18 the ingredients that was sufficient to give standing.
19 And again I will be looking at that in a US context and
20 seeing would that satisfy US requirements. 14:13

21
22 Then Hogan J goes on: "*The same reasoning applies*
23 *here. Quite obviously the applicant cannot say whether*
24 *his own personal data has ever been accessed or whether*
25 *it would ever be accessed by the United States*
26 *authorities. But even if this were considered to be*
27 *unlikely, he is nonetheless certainly entitled to*
28 *object to a state of affairs where his data is*
29 *transferred to a jurisdiction which, to all intents and*

1 *purposes, appears to provide only a limited protection*
2 *against any interference with that private data by the*
3 *United States security authorities."*

4
5 And then he refers to the importance of the case.

14:13

6
7 He then deals with the position under the Constitution,
8 Judge, and I think I can skip over the Irish
9 constitutional provisions and if I bring you to page 96
10 at paragraph 57, he says:

14:14

11
12 *"57. It is, however, agreed that the matter is only*
13 *partially governed by Irish law and that, in reality,*
14 *on this key issue Irish law has been pre-empted by*
15 *general EU law in this area. This is because section*
16 *11(2)(a) of the 1988 Act effects a renvoi of this wider*
17 *question in favour of EU law. Specifically, section*
18 *11(2)(b) of the 1988 Act provides that the Commissioner*
19 *must determine the question of the adequacy of*
20 *protection in the third State 'in accordance' with a*
21 *Community finding made by the European Commission*
22 *pursuant to Article 25 of the 1995 Directive. It is*
23 *accordingly for this reason that we must therefore turn*
24 *to a consideration of the position at European Union*
25 *law.*

14:14

14:14

26
27 *58. The position under EU law is equally clear and,*
28 *indeed, parallels the position under Irish law, albeit*
29 *perhaps that the safeguards for data protection under*

1 the EU Charter of Fundamental Rights thereby afforded
2 are perhaps even more explicit than under our national
3 law. These fundamental protections are contained in
4 Article 7 and Article 8 of the 8 of the Charter."

14:14

5
6 And then he quotes 7 and 8. And at 60, he says:

7
8 "Given the validity of the administrative decision
9 taken by the Commissioner is contingent on the proper
10 interpretation and application of a Directive and,
11 indeed, a Commission Decision taken pursuant to that
12 Directive, it is plain that this is a case concerning
13 the implementation of European Union law by a Member
14 State within the meaning of Article 51(1) of the
15 Charter, sufficient - at least so far as this part of
16 the case is concerned - to trigger the application of
17 the Charter.

14:14

14:15

18
19 In **Digital Rights -v- Communications Minister** the
20 European Court of Justice held that the Data Retention
21 Directive was invalid, precisely because not only did
22 it not contain appropriate safeguards, but it failed to
23 provide for the retention of the data within the
24 European Union with supervisions by an independent
25 authority in the manner required by Article 8(3) of the
26 Charter. As the Court observed:

27
28 'It follows from the above that Directive 2006/24 does
29 not lay down clear and precise rules governing the

1 extent of the interference the interference with the
2 fundamental rights enshrined in Articles 7 and 8 of the
3 Charter. It must therefore be held that Directive
4 2006/24 entails a wide-ranging and particularly serious
5 interference with those fundamental rights in the legal
6 order of the EU, without such an interference being
7 precisely circumscribed by provisions to ensure that it
8 is actually limited to what is strictly necessary.
9

10 Moreover, as far as concerns the rules relating to the 14:15
11 security and protection of data retained by providers
12 of publicly available electronic communications
13 services or of public communications networks, it must
14 be held that Directive 2006/24 does not provide for
15 sufficient safeguards, as required by Article 8 of the
16 Charter, to ensure effective protection of the data
17 retained against the risk of abuse and against any
18 unlawful access and use of that data."
19

20 And you can see how the European court is taking the 14:16
21 criteria in the Charter and Article 7 and 8 such as
22 "effective remedy" and so forth and is applying them
23 directly to the analysis of the Directive to see
24 whether it's compliant and consistent with the Charter
25 requirements.
26

27 The court goes on: "In the first place, Article 7 of
28 the Directive does not lay down rules which are
29 specific and adapted to (i) the vast quantity of data

1 *whose retention is required by that directive, (ii) the*
2 *sensitive nature of that data and (iii) the risk of*
3 *unlawful access to the data."*

4
5 And he elaborates on that. Then he says:

14:16

6
7 *"Article 7 of the Directive, read in conjunction with*
8 *Article 4(1) and so on, does not ensure that a*
9 *particularly high level of protection and security is*
10 *applied by those providers by means of technical and*
11 *organisational measures, but permits those providers in*
12 *particular to have regard to economic considerations*
13 *when determining the level of security which they*
14 *apply, as regards the costs of implementing security*
15 *measures. In particular, the Directive does not ensure*
16 *the irreversible destruction of the data at the end of*
17 *the data retention period.*

14:17

18
19 *In the second place it should be added that the*
20 *Directive does not require the data in question to be*
21 *retained within the European Union, with the result*
22 *that it cannot be held that the control, explicitly*
23 *required by Article 8(3) of the Charter, by an*
24 *independent authority of compliance with the*
25 *requirements of protection and security, as referred to*
26 *in the two previous paragraphs, is fully ensured. Such*
27 *a control, carried out on the basis of EU law, is an*
28 *essential component of the protection of individuals*
29 *with regard to the processing of personal data."*

14:17

1 And then he concluded that the EU legislature had
2 exceeded the appropriate limits. And then Hogan J goes
3 on:

4
5 "62. Judged by these standards it is not immediately 14:17
6 apparent how the present operation of the Safe Harbour
7 Regime can in practice satisfy the requirements of
8 Article 8(1) and Article 8(3) of the Charter,
9 especially having regard to the principles articulated
10 by the European Court of Justice in Digital Rights 14:18
11 Ireland -v- Communications Minister. Under this
12 self-certification regime, personal data is transferred
13 to the United States where, as we have seen, it can be
14 accessed on a mass and undifferentiated basis by the
15 security authorities." 14:18

16
17 I think I have qualified that previously:

18
19 "while the FISA Court doubtless does good work, the
20 FISA system can at best be described as a form of
21 oversight by judicial personages in respect of
22 applications for surveillance by the US security
23 authorities. Yet the very fact that this oversight is
24 not carried out on European soil and in circumstances
25 where the data subject has no effective possibility of
26 being heard or making submissions and, further, where
27 any such review is not carried out by reference to
28 European Union law are all considerations which would
29 seem to pose considerable legal difficulties. It must

1 *be stressed, however, that neither the validity of the*
2 *1995 Directive nor the Commission Decision providing*
3 *for the Safe Harbour Regime are, as such, under*
4 *challenge in these judicial review proceedings.*

5
6 *63. The Safe Harbour Regime was, of course, not only*
7 *drafted before the Charter came into force, but its*
8 *terms may also reflect a somewhat more innocent age in*
9 *terms of the data protection."*

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14:18

And he talks about it happening before various
terrorist outrages.

Then he deals with the conclusion and in particular the
issue about section 11 of the Act which in a sense
compels the Commissioner to accept the Commission's
decision and at paragraph 65 he says:

14:19

"All of this means that the Commissioner cannot arrive
at a finding inconsistent with that Community finding,
so that if, for example, the Community finding is to
the effect that a particular third party state has
adequate and effective data protection laws, the
Commissioner cannot conclude to the contrary. The
Community finding in question was, as we have already
seen, to the effect that the US does provide adequate
data protection for data subjects in respect of data
handled or processed by firms (such as Facebook Ireland
and Facebook) which operate the Safe Harbour regime.

1 66. It follows, therefore, that if the Commissioner
2 cannot look beyond the European Commission's Safe
3 Harbour Decision of July 2000, then it is clear that
4 the present application for judicial review must fail."

14:19

5
6 And then he elaborates on that and sets it out again.
7 And at 68, he says:

8
9 "while the applicant maintains the Commissioner has not
10 adhered to the requirements of European Union law in
11 holding that the complaint was unsustainable in law,
12 the opposite is in truth the case. The Commissioner
13 has rather demonstrated scrupulous steadfastness to the
14 letter of the Directive and the decision of 2000.

14:19

15
16 69. The applicant's objection is, in reality, to the
17 terms of the Safe Harbour Regime itself rather than to
18 the manner in which the Commissioner has actually
19 applied the Safe Harbour Regime. There is, perhaps,
20 much to be said for the argument that the Safe Harbour
21 Regime has been overtaken by events. The Snowden
22 revelations may be thought to have exposed gaping holes
23 in contemporary US data protection practice and the
24 subsequent entry into force of Article 8 of the Charter
25 suggests that a re-evaluation of how the 1995 Directive
26 and 2000 Decision should be interpreted in practice may
27 be necessary."

28
29 And again he stresses the validity of the Directive or

1 the Safe Harbour Decision was not challenged.

2
3 But then he goes on to say even so: "*The essential*
4 *question which arises for consideration is whether, as*
5 *a matter of European Union law, the Commissioner is*
6 *nonetheless absolutely bound by that finding of the*
7 *European Commission as manifested in the decision of*
8 *2000. In relation to the adequacy of data protection*
9 *in the law and practice of the US having regard in*
10 *particular to the subsequent entry into force of*
11 *Article 8 of the Charter, the provisions of Article*
12 *25(6) of the 1995 Directive notwithstanding. For the*
13 *reasons which I have already stated, it seems to me*
14 *that unless this question is answered in a manner which*
15 *enables the Commissioner either to look behind that*
16 *Community finding or otherwise disregard it, the*
17 *applicant's complaint is going to fail.*

18
19 71. *Given the general novelty and practical importance*
20 *of these issues which have considerable practical*
21 *implications for all 28 Member States of the European*
22 *Union, it is appropriate that this question should be*
23 *determined by the European Court of Justice."*

24
25 Then he sets out the question that he referred to the
26 European court and he sets out his conclusions in a
27 summary that I don't think I need read.

14:21

28
29 But if you go to the very end of the report, Judge, the

1 reporters added a little bit of procedural history that
2 is helpful. He says:

3
4 *"On 6th October 2015 the Grand Chamber of the European*
5 *Court of Justice answered the question posed as*
6 *follows."*

14:21

7
8 And I'm going to open --

9 **MS. JUSTICE COSTELLO:** Just a moment, Mr. Collins, I am
10 following with the broadcasting and they were a little
11 behind you there, what page were you on?

14:21

12 **MR. MICHAEL COLLINS:** I am on page 104, Judge, just at
13 the very end of the decision, after he has decided to
14 refer.

15 **MS. JUSTICE COSTELLO:** Thank you. Yes, I have it now.

14:21

16 **MR. MICHAEL COLLINS:** The reporter gives the answer
17 that the European court gave, so I am skipping to the
18 end of that, but I am going to open obviously the
19 Schrems decision to you.

14:21

20
21 But the answer which they gave was that: *"Article*
22 *25(6) of the Directive, read in light of Articles 7, 8*
23 *and 47 of the Charter, must be interpreted as meaning*
24 *that a decision adopted pursuant to that provision does*
25 *not does not prevent a supervisory authority of a*
26 *Member State from examining the claim of a person*
27 *concerning the protection of his rights and freedoms in*
28 *regard to the processing of personal data relating to*
29 *him which has been transferred from a Member State to*

1 *that third country when that person contends that the*
2 *law and practices in force in the third country do not*
3 *ensure an adequate level of protection."*

4
5 And, secondly, they went on to hold that the Safe
6 Harbour Decision was invalid.

14:22

7
8 The matter was then remitted back to Hogan J who, on
9 consent, then made an Order of Certiorari and he
10 remitted the matter back to the Data Protection
11 Commissioner on 20th October 2015.

14:22

12
13 So I want to turn to that decision of the European
14 court, Judge, now to see how they dealt with it. You
15 will find that, you have to go back to Book 1 of the
16 Book of Authorities -- sorry, I beg your pardon, it's
17 not Book 1, it's Book 3. It's at Tab 36. The court's
18 decision is first and the Advocate General's decision
19 is after it, but I'll deal with the court's decision,
20 Judge, although there are a few passages in the
21 Advocate General's decision I want to refer to.

14:22

14:23

22
23 So the court sets out the background summarising the
24 Directive and I can skip over all of that, Judge,
25 because I opened most of the relevant provisions of
26 that. From page 9 - you see the page numbers are at
27 the bottom right or left-hand corner of the page.

14:23

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

29 **MR. MICHAEL COLLINS:** It sets out the Safe Harbour

1 Decision and again the detailed terms of that I don't
2 think I need refer to. It sets out the privacy
3 principles on page 12 and the frequently asked
4 questions on page 13.

5
6 On page 16 paragraph 11 it says:

7
8 *"On 27th November 2013 the Commission adopted the*
9 *communications of the European --"*

10 **MS. JUSTICE COSTELLO:** Sorry, paragraph?

11 **MR. MICHAEL COLLINS:** Paragraph 11 page 16.

12 **MS. JUSTICE COSTELLO:** well, I have page 16 but they
13 seem to start at 35 and 36.

14 **MR. MICHAEL COLLINS:** Oh.

15 **MR. GALLAGHER:** Schrems is in Book 2 at 36. It's
16 Book 2 at 36.

17 **MS. JUSTICE COSTELLO:** I was told Book 3.

18 **MR. MICHAEL COLLINS:** Book 3.

19 **MS. JUSTICE COSTELLO:** This is a judgment of 6/10/2015?

20 **MR. MICHAEL COLLINS:** Yes.

21 **MS. JUSTICE COSTELLO:** Okay.

22 **MR. MICHAEL COLLINS:** Which is in my Book 3 at Tab 36.

23 **MR. GALLAGHER:** It's divide 36 in any event, Judge.

24 **MR. MICHAEL COLLINS:** It's divider 36. I think
25 Mr. Gallagher has, well he has different books to me,
26 I think. We'll go with the tab number, Judge, to be
27 absolutely sure, it's Tab 36.

28 **MS. JUSTICE COSTELLO:** I was in Tab 36, it's just it is
29 in Book 2, it is in Book 3.

1 **MR. MICHAEL COLLINS:** It is in Book 3, exactly. Just
2 ignore Mr. Gallagher, Judge, he is just misleading you.

3 **MR. GALLAGHER:** Well at least I was able to direct you
4 to the correct tab which Mr. Collins was unable to do.

5 **MS. JUSTICE COSTELLO:** well, I think I was on page, was 14:25
6 it 16?

7 **MR. MICHAEL COLLINS:** 16, exactly.

8 **MS. JUSTICE COSTELLO:** My query was that the paragraphs
9 seem to be numbered 35, 36, 37 and 38, I don't have any
10 11. It starts off, the first paragraph at 35 is "*the* 14:25
11 *High Court further observes*"?

12 **MR. MICHAEL COLLINS:** That is paragraph 35.

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

14 **MR. MICHAEL COLLINS:** But it is paragraph 11 I want to
15 go to. 14:25

16 **MS. JUSTICE COSTELLO:** Okay. I'll go back and find
17 paragraph 11.

18 **MR. MICHAEL COLLINS:** we'll stick with the paragraph
19 numbers. It's conceivable, Judge, that I have a
20 slightly different version of the print. 14:25

21 **MS. JUSTICE COSTELLO:** This is Communications,
22 COM/2013.

23 **MR. MICHAEL COLLINS:** Yes.

24 **MS. JUSTICE COSTELLO:** I have that, which seems to be
25 page 12. 14:25

26 **MR. MICHAEL COLLINS:** Yes. I obviously have a
27 different print-off of the judgment, Judge.

28
29 At paragraph 11, it says:

1 *"On 27th November 2013 the Commission adopted the*
2 *communication of the European Parliament and Council*
3 *entitled rebuilding trust in EU-US data flows."*

4
5 And this was, they referred to it earlier, one of the 14:26
6 documents produced by the Commission following the
7 Snowden revelations: *"The communication was*
8 *accompanied by the report on the findings of the EU*
9 *Chairs of the ad hoc EU-US working group on data*
10 *protection."* 14:26

11
12 That was the document I was opening to you earlier.

13
14 *"This report was drawn up at as stated at point 1*
15 *thereof in cooperation with the US after the existence* 14:26
16 *in that country of a number of surveillance programmes*
17 *involving the large-scale collection and processing of*
18 *personal data was revealed. The report contained,*
19 *inter alia, a detailed analysis of US law as regards,*
20 *in particular, the legal bases authorising the*
21 *existence of surveillance programmes and the collection*
22 *and processing of personal data by US authorities."*

23
24 And then they quote from that document, Judge, and
25 I don't think I need to go through it in any detail. 14:26
26 I have very briefly referred to that document already.

27
28 You will see at paragraph 15, for example, at the end,
29 it says:

1 *"It observes that Safe Harbour also acts as a conduit*
2 *for the transfer of the personal data of EU citizens*
3 *from the European Union to the US by companies required*
4 *to surrender data to US intelligence agencies under the*
5 *US intelligence collection programmes."*

6
7 And that reference to it being required to surrender
8 data I think is a reference to the orders that the
9 national security director can make under section 702
10 that I had referred to.

14:27

11
12 At paragraph 17, it says: *"The same date, 27 November*
13 *2013, the Commission adopted the communication to the*
14 *European Parliament and the Council on the Functioning*
15 *of the Safe Harbour from the Perspective of EU Citizens*
16 *and Companies Established in the European Union. As is*
17 *clear from point 1 thereof, that communication was*
18 *based inter alia on information received in the ad hoc*
19 *EU-US Working Group and followed two Commission*
20 *assessment reports published in 2002 and 2004."*

14:27

21
22 And they summarise that. The court sets out in
23 paragraph 22 in the middle of the page, or middle of
24 the paragraph:

25
26 *"The Commission noted in point 7.1 of that*
27 *communication that 'a number of legal bases under US*
28 *law allow large-scale collection and processing of*
29 *personal data that is stored or otherwise processed by*

14:27

1 *companies based in the US' and 'the large-scale nature*
2 *of these programmes may result in data transferred*
3 *under Safe Harbour being accessed and further processed*
4 *by US authorities beyond what is strictly necessary and*
5 *proportionate to the protection of national security as*
6 *foreseen under the exception in the Directive'."*

7
8 Then it says in 23: *"In point 7.2 'limitations and*
9 *redress possibilities', the Commission noted that*
10 *safeguards that are provided under US law are mostly* 14:28
11 *available to US citizens or legal residents' and that,*
12 *'moreover, there are no opportunities for either EU or*
13 *US data subjects to obtain access, rectification or*
14 *erasure of data, or administrative or judicial redress*
15 *with regard to collection and further processing of*
16 *their personal data taking place under the US*
17 *surveillance programmes'."*

18
19 And it deals with that a little bit further.

20 14:28
21 It then sets out the background to Mr. Schrems'
22 complaint. It deals with the High Court decision over
23 the next number of paragraphs and then deals with the
24 questions referred. And the first question which it
25 summarises in paragraph 37 is the question as to the 14:29
26 extent to which the national authority can depart from
27 a Commission decision.

28
29 And at 38, it says:

1 *"It should be recalled first of all that the provisions*
2 *of Directive 95/46, inasmuch as they govern the*
3 *processing of personal data liable to infringe*
4 *fundamental freedoms, in particular the right to*
5 *respect for private life must necessarily be*
6 *interpreted in the light of the fundamental rights*
7 *guaranteed by the Charter."*

14:29

8
9 That's an important point. Because many of the
10 principles and statements here set out in Schrems,
11 Judge, I say are relevant to the issue I was outlining
12 to you this morning of the interpretation of Articles
13 25 and 26 and in particular those two issues
14 I identified, the concept of adequacy, adequate
15 safeguards in Article 26, and the broader question of
16 whether you analyse the question of adequacy by
17 reference to the legal rules or whether you must
18 analyse them by reference to all the other broader
19 considerations that are referred to.

14:29

14:29

20
21 So the first thing to note is that any evaluation and
22 interpretation of the Directive has to be interpreted
23 in light of the fundamental rights guaranteed in the
24 Charter.

14:30

25
26 The court went on in paragraph 39: *"It is apparent*
27 *from Article 1 of the Directive and recitals 2 and 10*
28 *in its preamble that that directive seeks to ensure not*
29 *only effective and complete protection of the*

14:30

1 *fundamental rights and freedoms of natural persons, in*
2 *particular the fundamental right to respect for private*
3 *life with regard to the processing of personal data,*
4 *but also a high level of protection of those*
5 *fundamental rights and freedoms."*

14:30

6
7 And there again you see that, the reference to a high
8 level of protection which occurs in both the recitals
9 to the Directive and in the body of the Directive that
10 I opened this morning.

14:30

11
12 The court goes on: "*The importance of both the*
13 *fundamental right to respect for private life*
14 *guaranteed by Article 7 of the Charter, and the*
15 *fundamental right to the protection of personal data,*
16 *guaranteed by Article 8 thereof, is, moreover,*
17 *emphasised in the case law of the court."*

14:30

18
19 And it refers in particular to the Digital Rights
20 Ireland case and others.

14:31

21
22 It then refers in 40 to the requirement to set up one
23 or more public authorities responsible for monitoring.
24 And then in 41, it says:

25
26 "*The guarantee of the independence of the national*
27 *supervisory authorities is intended to ensure the*
28 *effectiveness and reliability of the monitoring of*
29 *compliance with the provisions concerning protection of*

14:31

1 *individuals with regard to the processing of personal*
2 *data and must be interpreted in the light of that aim.*
3 *It was established in order to strengthen the*
4 *protection of individuals and bodies affected by the*
5 *decisions of those authorities. The establishment in*
6 *Member States of independent supervisory authorities is*
7 *therefore, as stated in recital 62 in the preamble to*
8 *Directive 95/46 an essential component of the*
9 *protection of individuals with regard to the processing*
10 *of personal data."*

14:31

11
12 So one essential ingredient if we are looking at the
13 question of equivalence is whether or not in the law of
14 a foreign country there is provision for that type of
15 independent authority to determine the complaints and
16 the rights of the person.

14:31

17
18 In 42 it says: "*In order to guarantee that protection,*
19 *the national supervisory authorities must, in*
20 *particular, ensure a fair balance between on the one*
21 *hand observance of the fundamental right to privacy*
22 *and, on the other hand, the interests requiring free*
23 *movement of personal data."*

14:31

24
25 Then after referring to the various powers of the
26 national supervisory authorities in 43, it goes on in
27 44:

14:32

28
29 "*It is, admittedly, apparent from Article 28(1) and (6)*

1 of the Directive that the powers of the national
2 supervisory authorities concern processing of personal
3 data carried out on the territory of their own Member
4 State, so that they do not have powers on the basis of
5 Article 28 in respect of the processing of such data
6 carried out in a third country."

14:32

7
8 Again that's important there, Judge, because that draws
9 the distinction between the processing of data which
10 can occur in the third country; in other words, when
11 the data has actually arrived in the third country, but
12 there is also the question of the transfer from the
13 European Union to the third country, that act of
14 transfer is itself an act of processing.

14:32

15
16 At 45 it says: "*However, the operation consists in*
17 *having personal data transferred from a Member State to*
18 *a third country constitutes, in itself, processing of*
19 *personal data within the meaning of Article 2(b) of the*
20 *Directive.*"

14:32

14:33

21
22 That's the point I have been making. So the fact that
23 after it gets to the US it may be subject to some form
24 of intelligence scrutiny on behalf of US authorities at
25 that point doesn't affect the fact that the transfer
26 from the European Union to the United States is itself
27 and in itself an act of processing and therefore the
28 exemption that is referred to in Article 3 of the
29 Directive, when the act of processing is done for

14:33

1 security processes, doesn't in fact apply. Because the
2 act of transfer which is the relevant act of processing
3 here is done for commercial purposes, it's not done for
4 some security purpose within the EU. There is a
5 separate and subsequent bit of processing that's done 14:33
6 by the US authorities in the US subjecting the data to
7 whatever form of surveillance that they subject it to.
8 That's a separate act of processing, but that's not the
9 act of the transfer of the data from Facebook Ireland
10 to Facebook Inc. and hence the importance of that 14:34
11 finding there in paragraph 45.

12
13 Having referred to the definition in Article 2(b) they
14 quote the definition including disclosure by
15 transmission, dissemination or otherwise making 14:34
16 available. And you will recall I emphasised those
17 words this morning when I was opening up that
18 definition in the Directive.

19
20 The court goes on in 46: *"Recital 60 in the preamble 14:34*
21 *to Directive states the transfers of personal data from*
22 *to third countries may be effected only in full*
23 *compliance with the provisions adopted by the Member*
24 *States pursuant to the directive. In that regard,*
25 *Chapter IV of the directive, in which Articles 25 and*
26 *26 appear, has set up a regime intended to ensure that*
27 *the Member States oversee transfers of personal data to*
28 *third countries."*

1 That's complimentary to the general régime of the
2 Directive in Chapter II on the lawfulness of the
3 processing of personal data.
4

5 47: *"As, in accordance with Article 8(3) of the* 14:34
6 *Charter and Article 28 of the Directive, the national*
7 *supervisory authorities are responsible for monitoring*
8 *compliance with EU rules concerning the protection of*
9 *individuals with regard to the processing of personal*
10 *data, each of them is therefore vested with the power* 14:35
11 *to check whether a transfer of personal data from its*
12 *own Member State to a third country complies with the*
13 *requirements laid down by Directive 95/46."*

14
15 So the national authority has the function to make sure 14:35
16 and check that any particular transfer does in fact
17 comply with the Directive which is why the national
18 authority, the Commissioner here, is entitled to see
19 whether or not the transfer is in accordance with, the
20 SCCs for example, are in compliance with the 14:35
21 requirements of the Directive.
22

23 *"while acknowledging in recital 56 the transfers of*
24 *personal data from Member States to third countries are*
25 *necessary of the expansion of international trade, the* 14:35
26 *Directive lays down as a principle in Article 25(1),*
27 *that such transfers may take place only if the third*
28 *country ensures an adequate level of protection.*
29

1 Furthermore, recital 57 states that transfers of
2 personal data to third countries not ensuring an
3 adequate level of protection must be prohibited.

4
5 In other words to control transfers of personal data to 14:36
6 third countries according to the level of protection
7 accorded to it in each of those countries, Article 25
8 imposes a series of obligations on the Member States
9 and the Commission. It is apparent in particular from
10 that Article that the finding that a third country does 14:36
11 or does not ensure an adequate level of protection may,
12 as the Advocate General has observed in point 86 of his
13 Opinion, be made either by the Member States or by the
14 Commission.

15
16 The Commission may adopt, on the basis of Article 25(6)
17 of Directive 95/46, a decision finding that a third
18 country ensures an adequate level of protection. In
19 accordance with the second subparagraph of that
20 provision, such a decision is addressed to the Member
21 States, who must take the measures necessary to comply
22 with it. Pursuant to the fourth paragraph of Article
23 288 TFEU, it is binding on all the Member States to
24 which it is addressed and is therefore binding on all
25 their organs." 14:36

26
27 And it goes on to describe in 52 that, until such time
28 as the Commission decision is declared invalid, then
29 they can't adopt measures contrary to that decision.

1 But then at 53 they say:

2
3 *"However, a Commission decision adopted pursuant to*
4 *Article 25(6) of Directive 95/46, such as Decision*
5 *2000/520 - that's the Safe Harbour Decision - cannot* 14:37
6 *prevent persons whose personal data has been or could*
7 *be transferred to a third country from lodging with the*
8 *national supervisory authorities a claim, within the*
9 *meaning of Article 28(4) of that directive, concerning*
10 *the protection of their rights and freedoms in regard* 14:37
11 *to the processing of the data."*

12
13 So you may be bound by the Commission decision but that
14 cannot prevent somebody from making the complaint to
15 the national authority. And then it goes on at 54: 14:37

16
17 *"Neither Article 8(3) of the Charter nor Article 28 of*
18 *the Directive excludes from the national supervisory*
19 *authorities' sphere of competence the oversight of*
20 *transfers of personal data to third countries which*
21 *have been the subject of a Commission decision pursuant*
22 *to Article 25(6) of Directive 95/46.*

23
24 *In particular, the first subparagraph of Article 28(4)*
25 *of Directive 95/46, under which the national*
26 *supervisory authorities are to hear 'claims lodged by*
27 *any person ... concerning the protection of his rights*
28 *and freedoms in regard to the processing of personal*
29 *data', does not provide for any exception in this*

1 *regard where the Commission has adopted a decision*
2 *pursuant to Article 25(6) of that directive.*

3
4 *Furthermore, it would be contrary to the system set up*
5 *by Directive 95/46 and to the objective of Articles 25*
6 *and 28 thereof for a Commission decision adopted*
7 *pursuant to Article 25(6) to have the effect of*
8 *preventing a national supervisory authority from*
9 *examining a person's claim.*

10
11 *57. On the contrary, Article 28 of Directive 95/46*
12 *applies, by its very nature, to any processing of*
13 *personal data. Thus, even if the Commission has*
14 *adopted a decision pursuant to Article 25(6) of that*
15 *directive, the national supervisory authorities, when*
16 *hearing a claim lodged by a person concerning the*
17 *protection of his rights and freedoms in regard to the*
18 *processing of personal data relating to him, must be*
19 *able to examine, with complete independence, whether*
20 *the transfer of that data complies with the*
21 *requirements laid down by the directive.*

22
23 *If that were not so, persons whose personal data has*
24 *been or could be transferred to the third country*
25 *concerned would be denied the right, guaranteed by*
26 *Article 8(1) and (3) of the Charter, to lodge with the*
27 *national supervisory authorities a claim for the*
28 *purpose of protecting their fundamental rights"*
29

1 And again by analogy looking at the Digital Rights
2 Ireland case.

3
4 "A claim within the meaning of Article 28(4) of
5 Directive 95/46, by which a person whose personal data
6 has been or could be transferred to a third country
7 contends, as in the main proceedings, that,
8 notwithstanding what the Commission has found in a
9 decision adopted pursuant to Article 25(6) of that
10 directive, the law and practices of that country do not
11 ensure an adequate level of protection must be
12 understood as concerning, in essence, whether that
13 decision is compatible with the protection of the
14 privacy and of the fundamental rights and freedoms of
15 individuals.

16
17 In this connection, the Court's settled case-law should
18 be recalled according to which the European Union is a
19 union based on the rule of law in which all acts of its
20 institutions are subject to review of their
21 compatibility with, in particular, the Treaties,
22 general principles of law and fundamental rights."

23
24 And its set out the citations.

25
26 At 61: "That said, the court alone has jurisdiction to
27 declare an EU act, such as a Commission decision
28 adopted pursuant to Article 25(6) is invalid." And it
29 sets out the reason for the exclusivity is to ensure

14:39

1 that EU law is applied uniformly.

2
3 *"whilst the national courts are admittedly entitled to*
4 *consider the validity of an EU act, such as a*
5 *Commission decision adopted pursuant to Article 25(6)* 14:39
6 *of Directive 95/46, they are not, however, endowed with*
7 *the power to declare such an act invalid themselves."*

8
9 And they elaborate on that. At 63:

10
11 *"Having regard to those considerations, where a person*
12 *whose personal data has been or could be transferred to*
13 *a third country."* 14:40

14
15 It goes on to describe where he lodges a claim. At the 14:40
16 end of the paragraph: *"It is incumbent upon the*
17 *national supervisory authority to examine the claim*
18 *with all due diligence."*

19
20 And then we come to two paragraphs, Judge, 64 and 65 14:40
21 that are critical for the purposes of this case. At 64
22 the courts says:

23
24 *"In a situation where the national supervisory*
25 *authority comes to the conclusion that the arguments* 14:40
26 *put forward in support of such a claim are unfounded*
27 *and therefore rejects it, the person who lodged the*
28 *claim must, as is apparent from the second subparagraph*
29 *of Article 28(3) of the Directive, read in the light of*

1 *Article 47 of the Charter, have access to judicial*
2 *remedies enabling him to challenge such a decision*
3 *adversely affecting him before the national courts."*
4

5 Just to pause there for a moment, Judge. It is 14:41
6 important there is that the court is relying here on
7 Article 47 of the Charter and what are the rights under
8 Article 47 of the Charter and one of the critical
9 rights is that you must have access to judicial
10 remedies. If you make a complaint and you say 14:41
11 'I believe my privacy rights, my data protection rights
12 have been infringed', you must have somebody to whom
13 you can go to make a complaint and if that person turns
14 you down you must have access to a judicial remedy in
15 relation to that refusal. The court goes on. 14:41

16 **MS. JUSTICE COSTELLO:** So it's two tiered?

17 **MR. MICHAEL COLLINS:** Well it can be. I mean you could
18 have a right directly to the court, I suppose. But if
19 the right is a right in the first instance to go to one
20 of the national authorities that are set up in the 14:41
21 Member States, and you are refused, it is said that
22 your complaint is unfounded, then you must have access
23 to a judicial remedy to enable you to challenge that
24 decision.

25 14:41
26 And then they go on: "*Having regard to the case law*
27 *cited at paragraph 61 and 62 of the present judgment,*
28 *those courts must stay proceedings and make a reference*
29 *to the court for a preliminary ruling on validity where*

1 *they consider that one or more of the grounds for*
2 *invalidity put forward by the parties, or as the case*
3 *may be, raised by them of their own motion are well*
4 *founded."*

14:42

5
6 So the national authority has turned them down but he
7 goes to court and if the court considers that one or
8 more of the grounds for invalidity are in fact well
9 founded then the court, although it cannot declare the
10 Commission decision invalid obviously because it
11 doesn't have jurisdiction to do that, it must make a
12 reference to the European court because that's the only
13 body that can in fact examine the issue of the validity
14 of the relevant Commission decision.

14:42

15
16 Then paragraph 65 is: "*In the converse situation - and*
17 *this is the situation which arose ultimately - In the*
18 *converse situation, where the national supervisory*
19 *authority considers that the objections advanced by the*
20 *person who has lodged with it a claim concerning the*
21 *protection of his rights and freedoms in regard to the*
22 *processing of his personal data are well founded, that*
23 *authority must, in accordance with the third indent of*
24 *the first subparagraph of Article 28(3) of Directive*
25 *95/46, read in the light in particular of Article 8(3)*
26 *of the Charter, be able to engage in legal*
27 *proceedings."*

14:42

28
29 So this is an entitlement, in fact not just an

1 entitlement, an *obligation* on the part of the national
2 authority such as the Commissioner in the present case.
3 The Commissioner hears a complaint, if the Commissioner
4 considers that the objections which are lodged are well
5 founded, as the Commissioner did ultimately in this 14:43
6 case, then the authority must, the Commissioner must be
7 able to engage in legal proceedings. And it goes on:

8
9 *"It is incumbent upon the national legislature to*
10 *provide for legal remedies enabling the national* 14:43
11 *supervisory authority concerned to put forward the*
12 *objections which it considers well founded before the*
13 *national courts."*

14
15 Pausing there. So there has to be some mechanism 14:43
16 provided by the Member State to enable the Commissioner
17 to come before the court, to put before the court the
18 concerns, the objections which she considers to be well
19 founded. I say under our system there is no specific
20 procedure for the Commissioner to do that, that is 14:44
21 unique to the Commissioner and therefore she has
22 adopted the standard procedure of a plenary summons
23 naming the interested parties or the parties who might
24 wish to be heard in relation to it as defendants which,
25 as I explained this morning, is simply to, that's the 14:44
26 mechanism adopted to bring the matter before the court
27 as required under this paragraph 65 and not because of
28 any claim that she is making as against the parties.
29

1 The court goes on: *"To put forward the objections*
2 *which it considers well founded before the national*
3 *courts in order for them - that's the national courts*
4 *and that's you in this case - if they share its doubts*
5 *as to the validity of the Commission decision."*

14:44

6
7 So that's the test for you. If you share the
8 Commissioner's doubts as to the validity of the
9 Commission decision: *"To make a reference for a*
10 *preliminary ruling for the purpose of examination of*
11 *the decision's validity."*

14:45

12
13 So you don't and cannot decide on whether the
14 Commission decision, the SCC clauses decisions are
15 valid because that's not within your jurisdiction, only
16 the Court of Justice can do that. So you don't have to
17 come to a conclusion in relation to that, you don't
18 even have to come to a conclusion that you necessarily
19 agree that the Commissioner is right, but you have to
20 share the Commissioner's doubts as to the validity of
21 the Commission decision.

14:45

14:45

22
23 That is, I suppose, consistent, Judge, with the way in
24 which references are always dealt with. Because by
25 definition a reference from a national court is a
26 reference, when the national court normally says
27 'I need to get the answer to this point of
28 interpretation of the Treaty or of the Directive or
29 whatever it may be to enable me ultimately to make up

14:45

1 my mind and come to a decision'. So when the court
2 makes a reference, it hasn't made any decision yet in
3 terms of any conclusion as to what the rights and
4 wrongs of the parties are, on the contrary by
5 definition it is saying 'I can't make that decision 14:46
6 until the reference occurs and it come backs to me'.
7

8 And similarly here you don't have to make a decision, a
9 conclusive decision, and one that is not in any event
10 within your jurisdiction, but if you share the 14:46
11 Commissioner's doubts, if you think 'look, this is
12 something that does need adjudication by the court
13 because I share the doubt that the Commissioner has',
14 then without expressing a final view on it, which the
15 Commissioner herself even hasn't of course expressed a 14:46
16 final view in the sense that it's a Draft Decision,
17 then you'll make the reference to the European court.
18 It then decides whether or not the decisions are valid.
19 And, as I say, we may have supplementary questions to
20 go with that fundamental reference as to the particular 14:46
21 test or standard to be used under Article 25, for
22 example, that I was discussing this morning and I will
23 come back, and there may be one or two others such as
24 'I say it's clear', but if you didn't think it was
25 clear that the national security exception has no 14:47
26 relevance whatsoever to this case but if you thought it
27 might you could make a reference asking that question
28 as well. There's a number of such issues that I am
29 going to address to you, Judge, in due course in

1 relation to that.

2
3 But the fundamental obligation is for you to consider
4 the Commissioner's decision and to look at her decision
5 and say 'do you share her doubts in relation to that'. 14:47
6 And that's where the evidence in relation to the US law
7 becomes relevant. Because a key component of her
8 decision is to look at two parts of American law, or US
9 law if I can broadly describe them. One is a series of
10 statutory provisions which provide remedies of one sort 14:47
11 or another or don't provide remedies as the case may be
12 for various violations of statutory provisions
13 governing privacy and data protection in the US. And,
14 as we will see, some of those have certain requirements
15 such as you can only sue for damages if, for example, 14:48
16 there's a wilful violation of the particular provision.
17 So a negligent violation would not be enough, it would
18 have to be wilful. And there are various other
19 statutory obstacles that have been identified by the
20 Commissioner that she says 'that doesn't look to me as 14:48
21 if it is providing the same type of access to remedies
22 that a European citizen gets under European Union law'.
23 So there is what I will call the statutory side of it
24 and then there's the more general standing issue which
25 is the constitutional requirement of standing and what 14:48
26 are the requirements there.

27
28 So she has looked at that, she has taken a view on that
29 based on the expert legal advice as to US law which she

1 got in relation to it and you will have before you
2 evidence from US legal experts on those particular
3 issues and you have to evaluate that evidence with a
4 view to deciding, I say not necessarily in a conclusive
5 way, but you do have to decide I think as a question of 14:49
6 fact what you considerate US law to be and then ask
7 yourself the question, in light of that, do I share the
8 Commissioner's doubts as to whether in fact the sort of
9 protection that the EU citizen has in terms of remedies
10 under US federal law is essentially equivalent to what 14:49
11 it is under EU law. And if you share those doubts well
12 then you make the reference and that's the essential
13 order that the Commissioner is asking you to make. As
14 I say there may be tacked on to that other questions
15 bearing on the interpretation of the Directive and so 14:49
16 forth as I say which we can identify for you.

17
18 So if I continue with the decision. Then at 66:
19 *"Having regard to the foregoing considerations, the*
20 *answer to the questions referred is that Article 25(6) 14:49*
21 *of the Directive, read in the light of Articles 7, 8*
22 *and 47 of the Charter, must be interpreted as meaning*
23 *that a decision adopted pursuant to that provision,*
24 *such as the Safe Harbour Decision by which the*
25 *Commission finds that a third country ensures an 14:50*
26 *adequate level of protection, does not prevent a*
27 *supervisory authority of a Member State, within the*
28 *meaning of Article 28 of that Directive, from examining*
29 *the claim of a person concerning the protection of his*

1 *rights and freedoms in regard to the processing of*
2 *personal data relating to him which has been*
3 *transferred from a Member State to that third country*
4 *when that person contends that the law and practices in*
5 *force in the third country do not ensure an adequate* 14:50
6 *level of protection."*

7
8 And so although the Commission decisions that we are
9 concerned with here, Judge, the SCCs decisions, by
10 definition of course the Commission decision is saying 14:50
11 I think in light of these contractual clauses the level
12 of protection will be adequate when the data is
13 transferred to the US, but that's not binding in the
14 sense that it doesn't stop the Commissioner looking at
15 the complaint, on the contrary she is obliged to look 14:50
16 at the complaint. She can't ultimately decide it but
17 she does invoke this mechanism that is laid down in
18 paragraphs 64 and 65, particularly 65, to bring the
19 matter before the court in order to bring it before the
20 European court. 14:51

21 **MS. JUSTICE COSTELLO:** Just before you move on to the
22 next piece, I was just wondering if Ms. Bolger could
23 moved the page, I can't mark it. There is a
24 broadcasting mode which means you don't control it.
25 We're on the next page. Sorry, what paragraph? 14:51

26 **MR. MICHAEL COLLINS:** I am about to go on to 67.

27 **MS. JUSTICE COSTELLO:** Yes, that's what I thought. The
28 next page. Thank you. No, it has gone too far. Thank
29 you.

1 **MR. MICHAEL COLLINS:** The court then went on, Judge, to
2 deal with an issue that perhaps arguably wasn't in one
3 sense directly before it, but the question of the
4 validity of the Safe Harbour Decision itself. Because,
5 as Hogan J had indicated, in truth the substance of
6 Mr. Schrems' complaint had been to say that the Safe
7 Harbour Decision didn't provide adequate protection.
8 So the court says as follows:

14:52

9
10 *"As is apparent from the referring court's explanations*
11 *relating to the questions submitted, Mr. Schrems*
12 *contends in the main proceedings that United States law*
13 *and practice do not ensure an adequate level of*
14 *protection within the meaning of Article 25. As the*
15 *Advocate General has observed in points 123 and 124 of*
16 *his Opinion, Mr. Schrems expresses doubts, which the*
17 *referring court indeed seems essentially to share,*
18 *concerning the validity of the Safe Harbour Decision."*

19
20 And again you see the way they frame the test, that
21 there are doubts expressed by the person who is
22 concerned and the national court ends up sharing those
23 concerns or doubts:

14:52

24
25 *"In the present circumstances, in regard to what's been*
26 *held above, and in order to give the referring court a*
27 *full answer, it should be examined whether that*
28 *decision complies with the requirements stemming from*
29 *the Directive 95/46 read in light of the Charter."*

14:52

1 Again it's important there what they are actually
2 looking at. They are looking at whether the decision
3 complies with the requirements stemming from the
4 Directive read in light of the Charter. They are
5 looking at the law, they are looking at the legal 14:53
6 rules, what does the Directive provide and what does it
7 mean and provide in light of the Charter and it
8 compares that then with the level of protection and
9 redress that is afforded under that case, the Safe
10 Harbour Decision, in this case the SCC decisions. 14:53

11
12 So then it goes on to discuss the requirements stemming
13 from Article 25(6). And at 69 he says:

14
15 *"However, for the purpose of overseeing such transfers, 14:53*
16 *the first subparagraph of 25(6) provides that the*
17 *Commission 'may find that a third country ensures an*
18 *adequate level of protection within the meaning of*
19 *paragraph 2 of the Article, by reason of its domestic*
20 *law or of the international commitments that it has 14:53*
21 *entered into for the protection of private lives and*
22 *basic freedoms and rights of individuals."*

23
24 But again the court is identifying that you can decide
25 that there is adequacy, or the Commission can or the 14:54
26 European court can decide that there is an adequate
27 level of protection by analysis of the domestic law of
28 the foreign state or the international commitments it
29 enters into. So you look at its domestic law and you

1 say 'well maybe that's not good enough' but it has
2 entered into this international agreement with the EU
3 countries or with the EU itself and by virtue of that
4 I am now satisfied that there is adequate protection.

14:54

6 At 70: *"It is true that neither Article 25(2) of the*
7 *Directive nor any other provision of the Directive*
8 *contains a definition of the concept of an adequate*
9 *level of protection. In particular, Article 25(2) does*
10 *no more than state that the adequacy of the level of*
11 *protection 'shall be assessed in the light of all the*
12 *circumstances surrounding a data transfer operation or*
13 *set of data transfer operations' and lists, on a*
14 *non-exhaustive basis, the circumstances to which*
15 *consideration must be given when carrying out such an*
16 *assessment.*

14:54

14:54

18 *However, as is apparent from the very working of*
19 *Article 25(6), that provision requires that a third*
20 *'ensures' an adequate level of protection by reason of*
21 *its domestic law or its international commitments.*
22 *Secondly, according to the same provision, the adequacy*
23 *of the protection ensured is assessed 'for the*
24 *protection of the private lives and basic freedoms and*
25 *right of individuals'.*

14:55

14:55

27 *Thus, Article 25(6) of the Directive implements the*
28 *express obligation laid down in Article 8(1) of the*
29 *Charter to protect personal data and, as the Advocate*

1 *General has observed in point 139 of his opinion, it is*
2 *intended to ensure that the high level of that*
3 *protection continues where personal data is transferred*
4 *to a third country."*

14:55

6 Now just think about that for a moment. We have got
7 Article 25 and 26. Article 25 sets out the fundamental
8 principle that you must have this concept of an
9 adequate level of protection and the fundamental
10 principle is that, if the data is transferred out of
11 the EU, then that same adequate level of protection or
12 something equivalent to that adequate level of
13 protection must continue and the data must continue to
14 be protected or the person's rights in relation to the
15 data must be continued to be protected at that same
16 level of adequate protection.

14:55

14:56

17
18 So when there's a reference to adequate safeguards in
19 Article 26, that isn't some freestanding reference cut
20 off from its moorings floating like a hot air balloon
21 above the Directive trying to find out well what does
22 it mean, adequate safeguards means something different
23 from adequacy within Article 25, clearly, in my
24 respectful submission, on any sane and sensible view of
25 the matter, can only mean that adequate safeguards are
26 those which achieve the equivalent adequate protection
27 that is envisaged by Article 25(2) and that it itself
28 is expressly referred to in Article 26.

14:56

14:56

1 The court goes on in at 73 to say: "The word
2 'adequate' in Article 25(6) admittedly signifies that a
3 third country cannot be required to ensure a level of
4 protection identical to that guaranteed in the EU legal
5 order. However, as the Advocate General has observed 14:57
6 in point 141 of his Opinion, the term 'adequate level
7 of protection' must be understood as requiring the
8 third country in fact to ensure, by reason of its
9 domestic law or its international commitments, a level
10 of protection of fundamental rights and freedoms that 14:57
11 is essentially equivalent to that guaranteed within the
12 European Union by virtue of Directive 95/46 read in the
13 light of the Charter."

14
15 There is two things about that. First of all, we are 14:57
16 again looking at a comparison of the laws of the legal
17 rules in terms of redress and remedy; and, secondly,
18 what is required under Article 26, with its reference
19 to adequate safeguards, is to achieve the essentially
20 equivalent level of protection guaranteed by the 14:58
21 Directive, not some different or some lesser level of
22 protection envisaged by some Jesuitical distinction in
23 Article 26 between an adequate level of protection and
24 adequate safeguards, but by reference to the single
25 concept of what the Directive requires which is 14:58
26 adequate protection in the sense that you are
27 essentially, have essentially equivalent protection so
28 that, as the data goes out of the EU, the protections
29 that surround it when it arrives on the shores of the

1 US are essentially equivalent for the EU citizen as
2 they were before it left the shores of the EU.

3
4 The court goes on: *"If there were no such requirement,*
5 *the objective referred to in the previous paragraph of*
6 *the present judgment would be disregarded."*

14:58

7
8 So you had some different standard in Article 26 you
9 would effectively be disregarding the requirements of
10 the Directive and the objective of the Directive and
11 that is, with respect, the interpretation that Facebook
12 are urging upon you. Because they do argue for a
13 different, some undefined different freestanding
14 standard, a lower standard presumably under Article 26
15 and that simply makes no sense in my respectful
16 submission and doesn't in any way conform with either
17 the logical, sensible, ordinary reading of Articles 25
18 and 26, doesn't conform with the ordinary method of
19 interpretation of directives, having regard to the
20 objection of the Directive, and doesn't conform with
21 the clear wording of what the European court is saying
22 here as to how the Directive is to be interpreted and
23 in particular how the concept of *adequacy* is to be
24 interpreted.

14:59

14:59

14:59

25
26 *"Furthermore, the high level of protection."*

14:59

27
28 And there is that phrase again that the court
29 repeatedly uses:

1 *"The high level of protection guaranteed by Directive*
2 *95/46 read in the light of the Charter could easily be*
3 *circumvented by transfers of personal data from the*
4 *European Union to third countries for the purpose of*
5 *being processed in those countries."*

6
7 So you could drive a coach and four through the
8 European Union protections by the simple device of
9 transfers the data to third countries and then let
10 loose on it whatever form of intelligence surveying or 15:00
11 other interference with the rights that you saw fit.

12
13 At 74 the court goes on: *"It is clear from the express*
14 *wording of Article 25(6) of the Directive that it is*
15 *the legal order of the third country covered by the* 15:00
16 *Commission decision that must ensure an adequate level*
17 *of protection."*

18
19 And that's an important sentence: It is the legal
20 order in the third country that must ensure this, not 15:00
21 presidential oversights, not well meaning commissions
22 who write reports and make recommendations, but the
23 legal order itself:

24
25 *"Even though the means to which that third country has* 15:01
26 *recourse, in its connection, for the purpose of*
27 *ensuring such a level of protection may differ from*
28 *those employed within the European Union in order to*
29 *ensure that the requirements stemming from the*

1 *Directive reading in the light of the Charter are*
2 *complied with, those means must nonetheless prove in*
3 *practice effective in order to ensure protection*
4 *essentially equivalent to that guaranteed within the*
5 *European Union."*

15:01

6
7 And you cannot have essentially equivalent protection
8 if you don't start with the proposition that the legal
9 rules provide the necessary level of protection and the
10 necessary level of redress because all the supervision 15:01
11 in the world does you no good if the core of the legal
12 rules don't give you the necessary protection. I will
13 let the stenographers change.

14
15 The court continues in paragraph 75:

15:02

16
17 *"Accordingly, when examining the level of protection*
18 *afforded by a third country, the Commission is obliged*
19 *to assess the content of the applicable rules in that*
20 *country resulting from its domestic law or*
21 *international commitments and the practice designed to*
22 *ensure compliance with those rules, since it must,*
23 *under Article 25(2) of Directive 95/46, take account of*
24 *all the circumstances surrounding a transfer of*
25 *personal data to a third country."*

26
27 So there are two ingredients that you look at.
28 Firstly, you look at the content of the applicable
29 rules resulting from the foreign state's domestic law,

1 or whatever international commitments it's entered
2 into, and secondly, the practice designed to ensure
3 compliance with those rules - that is, the legal rules
4 in question. And that finds reflection, Judge, in the
5 Advocate General's opinion at paragraph 143 - you might 15:03
6 just note it perhaps, I'll be coming to the Advocate
7 General's opinion in just a moment.

8
9 At 76 it says:

10
11 *"Also, in the light of the fact that the level of*
12 *protection ensured by a third country is liable to*
13 *change" --*

14
15 And of course, that is, may I comment there, Judge, 15:03
16 that is particularly so if the protections that are
17 relied upon are to a large extent, as the Commissioner
18 takes the view that they are in the United States, the
19 product of Executive Orders or policy directives and
20 matters of that sort, which are liable to change with 15:03
21 the policy of governments and so forth, as distinct
22 from laws. Laws themselves even, of course, can
23 change. And that's what the court is talking about
24 here, the fact that there can be change. But there's
25 an even greater likelihood of change if an 15:04
26 administration changes, for example, and there's a
27 different policy introduced in relation to matters.
28 And I'll come back to that.

1 Then it says, so because it is liable to change:

2
3 *"It is incumbent upon the Commission, after it has*
4 *adopted a decision pursuant to Article 25(6) of*
5 *Directive 95/46, to check periodically whether the*
6 *finding relating to the adequacy of the level of*
7 *protection ensured by the third country in question is*
8 *still factually and legally justified. Such a check is*
9 *required, in any event, when evidence gives rise to a*
10 *doubt in that regard."*

11
12 And he points out that, as the Advocate General has
13 said, account must also be taken of circumstances that
14 have arisen after that decision's adoption.

15:04

16 *"In this regard, it must be stated that, in view of,*
17 *first, the important role played by the protection of*
18 *personal data in the light of the fundamental right to*
19 *respect for private life and, secondly, the large*
20 *number of persons whose fundamental rights are liable*
21 *to be infringed where personal data is transferred to a*
22 *third country not ensuring an adequate level of*
23 *protection, the Commission's discretion as to the*
24 *adequacy of the level of protection ensured by a third*
25 *country is reduced, with the result that review of the*
26 *requirements stemming from Article 25 of Directive*
27 *95/46, read in the light of the Charter, should be*
28 *strict."*

1 So because of the importance of this, because of the
2 danger posed to people who may never know that their
3 data is being scrutinised in some shape or form if it's
4 transferred to a country without the adequate level of
5 protection, in effect a strict view should be taken in 15:05
6 relation to this. And I say that is particularly of
7 importance both when one is looking at the issue in
8 substance, and also I'll be saying that when one looks
9 at the Commissioner's decision, who is the expert in
10 this area on the statutory authority appointed, one of 15:05
11 the principles is the court, I think, should be slow to
12 disagree with the Commissioner's assessment of the
13 matters in question. That's not a determinative point,
14 but it is, I think, a point of some relevance that the
15 court has to take into account 15:06

16
17 They then go on to discuss in some detail that I don't
18 need to discuss the particular principles of the Safe
19 Harbour agreement that they were dealing with. But one
20 of the points of criticism, for example, that they 15:06
21 made, at paragraph 82, is, the last sentence:

22
23 *"Those principles are therefore applicable solely to*
24 *self-certified United States organisations receiving*
25 *personal data from the European Union, and United*
26 *States public authorities are not required to comply*
27 *with them."*

28
29 And of course, if you think about the standard

1 contractual clauses, Judge, they are - and one of the
2 points the Commissioner makes in her decision, as we'll
3 see when we come to it is - they are ultimately
4 contractual obligations that are voluntarily entered
5 into between the person in the EU and the person in the 15:06
6 foreign state receiving the particular data. But it
7 isn't an obligation in itself imposed on a state
8 authority, it's a private contractual obligation as
9 between two parties.

10
11 The court goes on at 83 to say:

12
13 *"Moreover, [the Safe Harbour decision] 'concerns only*
14 *the adequacy of protection provided in the United*
15 *States under the [safe harbour principles]'....*
16 *without, however, containing sufficient findings*
17 *regarding the measures by which the United States*
18 *ensures an adequate level of protection, within the*
19 *meaning of Article 25(6) of that directive, by reason*
20 *of its domestic law or its international commitments."*

21
22 And it's important to note, Judge, that the court
23 didn't actually find that the level of protection in
24 the United States was inadequate in itself. What it
25 actually said was that the Safe Harbour decision, which 15:07
26 is the Commission decision which is being relied upon,
27 didn't in fact contain sufficient findings to say there
28 *is* an adequate level of protection in the United States
29 having regard to the Safe Harbour provisions. So it

1 was, in a sense, criticising the absence of those
2 findings in the decision, which it said, in effect,
3 were necessary to *justify* the decision as *amounting* to
4 what it *should've* amounted to, namely a finding that
5 the necessary level of adequate protection is provided. 15:08

6
7 And they go on with other criticisms there of the Safe
8 Harbour decision.

9
10 Then it says at 87: 15:08

11
12 *"In the light of the general nature of the derogation*
13 *set out in the fourth paragraph of Annex I to [the Safe*
14 *Harbour decision], that decision thus enables*
15 *interference, founded on national security and public*
16 *interest requirements or on domestic legislation of the*
17 *United States, with the fundamental rights of the*
18 *persons whose personal data is or could be transferred*
19 *from the European Union to the United States. To*
20 *establish the existence of an interference with the*
21 *fundamental right to respect for private life, it does*
22 *not matter whether the information in question relating*
23 *to private life is sensitive or whether the persons*
24 *concerned have suffered any adverse consequences on*
25 *account of that interference."*

26
27 And we've seen that language before, Judge, in the
28 Digital Rights Ireland case that they cite, which was
29 relied upon by Hogan J. And here's the court again

1 reiterating that in a sense, as a matter of standing,
2 to establish the interference and for somebody to make
3 a complaint in relation to this, it doesn't matter
4 whether you can show, for example, that the information
5 is something sensitive about your private life or 15:09
6 perhaps something very minor about your private life or
7 that some people might consider minor - if I prefer
8 Corn Flakes to Weetabix it might be a matter most
9 people might think would be minor, but maybe I'm really
10 sensitive about the cereal choice I make in the morning 15:09
11 - or whether the persons concerned have suffered any
12 adverse consequences on account of that interference.
13 So it doesn't *matter* whether the person has suffered an
14 adverse consequence - something that you see judges'
15 distinctly approach taken in the United States to the 15:09
16 question of standing.

17
18 At 88 the court says:

19
20 *"In addition, [the Safe Harbour decision] does not 15:09*
21 *contain any finding regarding the existence, in the*
22 *United States, of rules adopted by the State intended*
23 *to limit any interference with the fundamental rights*
24 *of the persons whose data is transferred from the*
25 *European Union to the United States, interference which*
26 *the State entities of that country would be authorised*
27 *to engage in when they pursue legitimate objectives,*
28 *such as national security."*
29

1 Again a criticism of a lack of a finding about the
2 adequacy of the protection in the US.

3
4 "89. Nor does [the Safe Harbour decision] refer to the
5 existence of effective legal protection against
6 interference of that kind. As the Advocate General has
7 observed in points 204 to 206 of his Opinion,
8 procedures before the Federal Trade Commission – the
9 powers of which, described in particular in FAQ 11 set
10 out in Annex II to that decision, are limited to
11 commercial disputes – and the private dispute
12 resolution mechanisms concern compliance by the United
13 States undertakings with the safe harbour principles
14 and cannot be applied in disputes relating to the
15 legality of interference with fundamental rights that
16 results from measures originating from the State."

17
18 what they're talking about there, Judge, is that the
19 Federal Trade Commission, for example, one of the many
20 administrative bodies in the United States, has powers 15:10
21 – and I hope I'm speaking correctly here – to take
22 action if somebody's engaged in deceptive trade
23 practices. So if, for example, you were a company who
24 said that you adhered to the Safe Harbour principles or
25 you adhered to the standard contractual clauses and you 15:11
26 didn't in fact do so, the Federal Trade Commission
27 could take some form of action against you, I think,
28 for the purpose of saying 'well, that's a deceptive
29 trade practice'. So you bring it within the rubric of

1 deceptive trade practices and you could go after the
2 person in those sort of circumstances. Or there are
3 sometimes provided in these mechanisms that you
4 subscribe to a private alternative dispute resolution
5 mechanism, as you'll see when we come to look at
6 something called the privacy shield in due course, and
7 you can sign up for these private dispute resolution
8 mechanisms.

15:11

9
10 But the point the court is making here is that's fine
11 insofar as commercial disputes are concerned in
12 relation to what's happening pursuant to either the
13 contractual provisions or the alleged deception,
14 misleading statements you've made or whatever it may
15 be, but it doesn't deal with the question of state
16 interference at some level with your fundamental
17 rights.

15:11

18
19 Paragraph 90 says:

20
21 *"Moreover, the foregoing analysis of [the Decision] is*
22 *borne out by the Commission's own assessment of the*
23 *situation resulting from the implementation of that*
24 *decision."*

25
26 And again it's important to see that phrase "The
27 foregoing analysis of the Safe Harbour decision." what
28 the court was doing was analysing as a matter of law
29 what the Safe Harbour decision meant and what it

1 provided for. And they quote from the Commission
2 communications - this is the 2013 communications
3 following the ad hoc working group that had discussed
4 all these issues with the US and the EU - and said:

5
6 *"The Commission found that the United States*
7 *authorities were able to access the personal data*
8 *transferred from the Member States to the United States*
9 *and process it in a way incompatible, in particular,*
10 *with the purposes for which it was transferred, beyond*
11 *what was strictly necessary and proportionate to the*
12 *protection of national security."*

13
14 So pause there. Frequently, the purpose, of course,
15 for which the US authorities are accessing the data is 15:12
16 the perfectly legitimate purpose many times of
17 attempting to fight terrorism and crime and so forth
18 and very essential things, naturally, have to be done.
19 But that's not the purpose for which the data was
20 originally transferred. So accessing the data for that 15:13
21 purpose is a purpose incompatible in particular with
22 the purposes for which it was transferred. Because
23 when Facebook Ireland are transferring the data to
24 Facebook in the United States, they're not doing so in
25 order to participate in some US surveillance or 15:13
26 interception programme of the data, they're doing so
27 for commercial purposes. And therefore, there's an
28 incompatibility between the subsequent processing done
29 by the intelligence service with the original purpose.

1
2 The court goes on:

3
4 *"Also, the Commission noted that the data subjects had*
5 *no administrative or judicial means of redress*
6 *enabling, in particular, the data relating to them to*
7 *be accessed and, as the case may be, rectified or*
8 *erased."*

9
10 One of the issues, Judge, you'll have to look at is 15:14
11 there were some amendments made to the US law
12 subsequent to this decision which improved the rights
13 of access and gave certain rights to EU citizens that
14 they didn't have at the time of this decision and what
15 you'll have to examine is what is the state of those 15:14
16 rights and remedies as they stand at the moment as a
17 matter of US law and whether they are sufficient to
18 amount to the adequate level or whether you've concerns
19 in that regard.

20 15:14
21 The court goes on at 91:

22
23 *"As regards the level of protection of fundamental*
24 *rights and freedoms that is guaranteed within the*
25 *European Union, EU legislation involving interference*
26 *with the fundamental rights guaranteed by Articles 7*
27 *and 8 of the Charter must, according to the Court's*
28 *settled case-law, lay down clear and precise rules*
29 *governing the scope and application of a measure and*

1 *imposing minimum safeguards, so that the persons whose*
2 *personal data is concerned have sufficient guarantees*
3 *enabling their data to be effectively protected against*
4 *the risk of abuse and against any unlawful access and*
5 *use of that data."*

6
7 So there are a number of criteria there: Clear and
8 precise rules; the imposition of minimum safeguards;
9 the data must be effectively protected against the risk
10 of abuse. And they're the sort of criteria that you
11 look at when examining the US law to see are those
12 remedies in accordance with those criteria provided?

15:15

13
14 The court goes on:

15
16 *"The need for such safeguards is all the greater where*
17 *personal data is subjected to automatic processing and*
18 *where there is a significant risk of unlawful access to*
19 *that data...*

20
21 *92. Furthermore and above all, protection of the*
22 *fundamental right to respect for private life at EU*
23 *level requires derogations and limitations in relation*
24 *to the protection of personal data to apply only*
25 *insofar as is strictly necessary."*

26
27 So again you're not looking at the law of individual
28 Member States, you're looking at the law as it is set
29 out at EU level and what are the rights that you have

1 at EU level. And the criticism is made by some of the
2 experts on behalf of Facebook to say 'well, actually a
3 lot of the European countries don't actually live up to
4 this standard, they don't actually necessarily
5 implement the Directive properly and if you go through 15:16
6 various Member States you can find efficiencies in what
7 the Member States are doing. So really shouldn't you
8 be taking account of that? And actually, if it turns
9 out that the European Member States are pretty hopeless
10 themselves at doing this, maybe the United States is 15:16
11 actually *better* at it than the European Member States
12 are'. And that's basically the thrust of the argument
13 that a number of the witnesses on behalf of Facebook
14 advance.

15 15:16
16 But that, with respect, isn't the test and certainly
17 isn't the test that the Commissioner has adopted in the
18 course of her decision, where we say you look at it at
19 an EU law level, as is said here, look at the
20 protection that the Directive and the Charter require 15:16
21 at EU level and then see whether, at the equivalent
22 Federal law level in the United States, is the same
23 level of protection provided? Because it may be that if
24 the answer to that question was yes, they *are* actually
25 essentially equivalent, you might then have to go on 15:17
26 and say 'well, how are they implemented in practice?
27 what are the other safeguards? what's all the other
28 things you have to do?'
29

1 And that's why I said this morning at some point it's
2 conceivable, if some court, you or the European Court
3 or whatever, decided that the *legal* protections, if I
4 can call them that, were equivalent, it might be that
5 an examination would have to be done of these other 15:17
6 matters in relation to it. But if it fails at the
7 first hurdle, if it fails at the level of the
8 comparison of the legal remedies then you don't have to
9 go into the subsequent question that *might* arise if the
10 first test was passed to see if the actual 15:17
11 implementation of it in practice is satisfactory, you
12 just don't have to go there if you agree or share the
13 Commissioner's concern that at the legal level the
14 protections are not equivalent.

15
16 At 93 the court says:

17
18 *"Legislation is not limited to what is strictly*
19 *necessary where it authorises, on a generalised basis,*
20 *storage of all the personal data of all the persons*
21 *whose data has been transferred from the European Union*
22 *to the United States without any differentiation,*
23 *limitation or exception being made in the light of the*
24 *objective pursued and without an objective criterion*
25 *being laid down by which to determine the limits of the*
26 *access of the public authorities to the data, and of*
27 *its subsequent use, for purposes which are specific,*
28 *strictly restricted and capable of justifying the*
29 *interference which both access to that data and its use*

1 entail."

2
3 And of course, as we'll see from the evidence, I say
4 there have been some changes in the law. And we can
5 look at that. But it's interesting that what they're 15:18
6 focusing on here is legislation. The paragraph begins
7 "Legislation is not limited to what's strictly
8 necessary when it does this, that and the other." And
9 again citing the Digital Rights Ireland case.

10
11 At 94 it says:

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

19
20 Again the Digital Rights Ireland case. 15:19

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

1 So in other words, if there are certain exclusions from
2 the remedies in certain circumstances, that's not
3 compliance with the essence of the Article 47 right.
4 And as we will see when we look at the US law, Judge,
5 there are, of course, remedies and a wide variety of 15:19
6 remedies provided under law in a whole variety of
7 situations. But equally, and particularly with regard
8 to non-US citizens, or non-US persons which I think is
9 what the relevant definition is, there are
10 circumstances where those remedies are not available 15:19
11 and the non-US persons are excluded, albeit it is only
12 fair and right to acknowledge - and all the experts, I
13 think, agree on this - that the level of protection
14 both for US persons in general and including non-US
15 persons has increased since 2013 and it has improved 15:20
16 under a number of things done under the Obama
17 administration, and it's fair and right to acknowledge
18 that.

19
20 The court goes on: 15:20

21
22 *"The first paragraph of Article 47 of the Charter*
23 *requires everyone whose rights and freedoms guaranteed*
24 *by the law of the European Union are violated to have*
25 *the right to an effective remedy before a tribunal in*
26 *compliance with the conditions laid down in that*
27 *article. The very existence of effective judicial*
28 *review designed to ensure compliance with provisions of*
29 *EU law is inherent in the existence of the rule of*

1 law".

2 MS. JUSTICE COSTELLO: Sorry, I just lost you there.
3 which paragraph were you on?

4 MR. MICHAEL COLLINS: Paragraph 95. The last sentence
5 in 95 before the case citations

15:20

6 MS. JUSTICE COSTELLO: Yes.

7 MR. MICHAEL COLLINS: They are pitching there the
8 necessity for an effective remedy of judicial review at
9 the very heart of the constitutional structure of the
10 EU and at the very heart of the constitutional rights
11 that EU citizens have under the Treaties as being an
12 integral part of something inherent in the existence of
13 the rule of law itself.

15:20

14
15 At 96 they say:

15:21

16
17 *"As has been found in particular in paragraphs 71, 73*
18 *and 74 of the present judgment, in order for the*
19 *Commission to adopt a decision pursuant to Article*
20 *25(6)... it must find, duly stating reasons, that the*
21 *third country concerned in fact ensures, by reason of*
22 *its domestic law or its international commitments..."*

23
24 And again that qualification; you have to look to the
25 domestic law or the international agreements they've
26 entered into.

15:21

27
28 *"... a level of protection of fundamental rights*
29 *essentially equivalent to that guaranteed in the EU*

1 *legal order, a level that is apparent in particular*
2 *from the preceding paragraphs of the present judgment."*

3
4 And there's no suggestion there *anywhere* in the
5 judgment of some distinction between the level of
6 protection under Article 25 as distinct from the level
7 of protection under Article 26. On the contrary, it
8 talks all the time about the single objective of the
9 high level of protection and the question of the
10 adequacy of the protection.

15:21

15:22

11
12 At 97 it says:

13
14 "*However, the Commission did not state, in [the Safe*
15 *Harbour decision], that the United States in fact*
16 *'ensures' an adequate level of protection by reason of*
17 *its domestic law or its international commitments.*

18
19 *98. Consequently, without there being any need to*
20 *examine the content of the safe harbour principles, it*
21 *is to be concluded that Article 1 of [the Directive]*
22 *fails to comply with the requirements."*

23
24 So they were striking it down not because of any
25 positive finding necessarily that there was inadequacy,
26 but that the Commission decision itself was invalid
27 because it failed to comply with something that the
28 Commission decision needed to do to be a valid
29 Commission decision, namely to make these findings in

15:22

1 relation to adequacy.

2
3 It then went on to deal with Article 3 of the decision
4 and it refers to the obligation on the national
5 supervisory authorities, who *"must be able to examine,* 15:22
6 *with complete independence, any claim concerning the*
7 *protection of a person's rights and freedoms in regard*
8 *to the processing of personal data relating to him."*

9
10 Then it recites some of the provisions from the Safe 15:23
11 Harbour decision and then, at 102, says:

12
13 *"The first subparagraph of Article 3(1) of [the Safe*
14 *Harbour decision] must therefore be understood as*
15 *denying the national supervisory authorities the powers*
16 *which they derive from Article 28 of [the Directive],*
17 *where a person, in bringing a claim under that*
18 *provision, puts forward matters that may call into*
19 *question whether a Commission decision that has found,*
20 *on the basis of Article 25(6) of the directive, that a*
21 *third country ensures an adequate level of protection*
22 *is compatible with the protection of the privacy and of*
23 *the fundamental rights and freedoms of individuals."*

24
25 And again you see there the reference to Article 25(6), 15:23
26 the reference to ensuring an adequate level of
27 protection, one that's compatible with the protection
28 of privacy and of the fundamental rights and freedoms
29 of the individuals. No suggestion that that means

1 something different from the adequate level of
2 protection that is referred to in Article 25 and in
3 Article 25(2).
4

5 The court goes on at 103:

15:23

6
7 *"The implementing power granted by the EU legislature*
8 *to the Commission in Article 25(6) of [the Directive]*
9 *does not confer upon it competence to restrict the*
10 *national supervisory authorities' powers referred to in*
11 *the previous paragraph of the present judgment.*
12

13 *104. That being so, it must be held that, in adopting*
14 *Article 3... the Commission exceeded the power which is*
15 *conferred upon it."*
16

17 And since those articles were inseparable from the
18 other articles, they struck down the validity of the
19 entire decision.
20

15:24

21 There are just some parts of the opinion of the
22 Advocate General I'd like to draw attention to, Judge -
23 and he gave an opinion with which the court had agreed.
24 You'll see it, it's at the very next page. And there's
25 only a couple of passages I want to draw attention to
26 here, Judge. First of all, if I can bring you to
27 paragraph 61 -- well, perhaps paragraph 60:
28

15:24

29 *"In the Commission's submission, the national*

1 *supervisory authorities would encroach upon its power*
2 *to renegotiate the terms of that decision with the*
3 *United States or, if necessary, to suspend that*
4 *decision if they were to take action on the basis of*
5 *complaints raising only structural and abstract*
6 *concerns.*

7
8 *61. I do not share the Commission's opinion. To my*
9 *mind, the existence of a decision adopted by the*
10 *Commission on the basis of Article 25(6) of [the*
11 *Directive] cannot eliminate or even reduce the national*
12 *supervisory authorities' powers under Article 28 of*
13 *that directive. Contrary to the Commission's*
14 *contention, if the national supervisory authorities*
15 *receive individual complaints, that does not in my view*
16 *prevent them, by virtue of their investigative powers*
17 *and their independence, from forming their own opinion*
18 *on the general level of protection ensured by a third*
19 *country and from drawing the appropriate conclusion*
20 *when they determine individual cases."*

21
22 *So notwithstanding a Commission decision,*
23 *notwithstanding the SCC's that are the subject of the*
24 *three Commission decisions with which the Commissioner*
25 *was concerned and notwithstanding the binding nature of*
26 *those Commission decisions, none of that stops the*
27 *Commissioner from actually looking at it and forming*
28 *her own view in relation to it, even though she can't,*
29 *obviously, strike them down as being invalid.*

15:25

1
2 Over the page in paragraph 71, Mr. Bot, the Advocate
3 General says:

4
5 *"In the light of the importance of the role played by*
6 *the national supervisory authorities in the protection*
7 *of individuals with regard to the processing of*
8 *personal data, their powers of intervention must remain*
9 *intact even when the Commission has adopted a decision*
10 *on the basis of Article 25(6)...*

11
12 *72. I note, in this connection, that there is nothing*
13 *to suggest that arrangements for the transfer of*
14 *personal data to third countries are excluded from the*
15 *substantive scope of Article 8(3) of the Charter, which*
16 *enshrines at the highest level of the hierarchy of*
17 *rules in EU law the importance of control by an*
18 *independent authority of compliance with the rules on*
19 *the protection of personal data."*

20
21 So the mere fact that there is a transfer to a third
22 country where - and we're dealing with the possibility
23 that the protections are not adequate in that country,
24 so therefore the possibility of surveillance for
25 national security purposes and so forth - that doesn't
26 knock it out of the Directive; it is still a transfer
27 that is firmly within the scope of the Directive. And
28 there's no suggestion anywhere in the Advocate
29 General's decision or in the court's decision that the

15:26

1 mere fact that the data, when it gets to the shores of
2 the United States, may be subjected to surveillance or
3 interception for national security purposes, that that
4 somehow triggers the operation of Article 3 of the
5 Directive about scope and somehow takes the transfer 15:27
6 out of the domain of the Directive at all. And in my
7 respectful submission, that would be utterly contrary
8 to what Article 3 says, which is clearly talking about
9 transfers within the EU concerning public security.
10 This is not a transfer of data from one Facebook 15:27
11 company to another that is concerned - and that's the
12 word in Article 3 - it is concerned with national
13 security, it's done for commercial purposes. And I'll
14 come back to that point in just a moment.

15
16 At 73 he says: 15:28

17
18 *"If the national supervisory authorities were*
19 *absolutely bound by decisions adopted by the*
20 *Commission, that would inevitably limit their total*
21 *independence. In accordance with their role as*
22 *guardians of fundamental rights, the national*
23 *supervisory authorities must be able to investigate,*
24 *with complete independence, the complaints submitted to*
25 *them, in the higher interest of the protection of*
26 *individuals with regard to the processing of personal*
27 *data."*

28
29 And it's just important there that the Commissioner is

1 cast in the role of a guardian of fundamental rights.
2 And she's coming to this court in that role as a
3 guardian of fundamental rights, seeking to invoke the
4 remedy of inviting the European court to consider these
5 matters.

6
7 The Advocate General, at paragraph 97, reiterates the
8 objective of the Directive as a high level of
9 protection. He says:

10
11 *"The provisions of Directive 95/46 must therefore be*
12 *interpreted in accordance with its objective of*
13 *guaranteeing a high level of protection of the*
14 *fundamental rights and freedoms of natural persons, in*
15 *particular their right to privacy, with respect to the*
16 *processing of personal data within the European Union."*

17
18 If I move to paragraph 106:

19
20 *"Furthermore, as the Italian Government stated in its*
21 *observations, the fact that the Commission has adopted*
22 *an adequacy decision cannot have the effect of reducing*
23 *the protection of citizens of the Union with regard to*
24 *the processing of their data when that data is*
25 *transferred to a third country by comparison with the*
26 *level of protection which those persons would enjoy if*
27 *their data were processed within the European Union."*

28
29 Now, that's relevant to both the adequacy test in

1 itself and to any suggestion that there's some
2 difference in the adequacy test as between Article 25
3 and 26.

4
5 He goes on:

15:29

6
7 *"The national supervisory authorities must therefore be*
8 *in a position to intervene and to exercise their powers*
9 *with respect to transfers of data to third countries*
10 *covered by an adequacy decision. Were that not so,*
11 *citizens of the Union would be less well protected than*
12 *they would be if their data were processed within the*
13 *European Union."*

14
15 So there, in perhaps ordinary common or garden
16 language, is the test set out there.

15:30

17
18 If I move on to paragraph 139, under a heading, a
19 section 2 heading called "The Concept of an Adequate
20 Level of Protection". And these two paragraphs of the
21 Advocate General's opinion are, I think, helpful and
22 instructive with regard to this concept of an adequate
23 level of protection. He says at 139:

15:30

24
25 *"Article 25 of [the Directive] is based entirely on the*
26 *principle that the transfer of personal data to a third*
27 *country cannot take place unless that third country*
28 *guarantees an adequate level of protection of such*
29 *data. The objective of that article is thus to ensure*

1 *the continuity of the protection afforded by that*
2 *directive where personal data is transferred to a third*
3 *country. It is appropriate, in that regard, to bear in*
4 *mind that that directive affords a high level of*
5 *protection of citizens of the Union with regard to the*
6 *processing of their personal data.*

7
8 *140. In view of the important role played by the*
9 *protection of personal data with regard to the*
10 *fundamental right to privacy, this kind of high level*
11 *of protection must, therefore, be guaranteed, including*
12 *where personal data is transferred to a third country."*

13
14 Now, he's not saying where it's transferred to a third
15 country just under *some* particular article or in *some*
16 particular circumstances. He's saying this applies
17 across the board. Whether it's transferred under
18 Article 25 or whether it's transferred under
19 Article 26, this is the objective.

20
21 *"141. It is for that reason that I consider that the*
22 *Commission can find, on the basis of Article 25(6) of*
23 *[the Directive], that a third country ensures an*
24 *adequate level of protection only where, following a*
25 *global assessment of the law and practice in the third*
26 *country in question, it is able to establish that that*
27 *third country offers a level of protection that is*
28 *essentially equivalent to that afforded by the*
29 *directive, even though the manner in which that*

1 *protection is implemented may differ from that*
2 *generally encountered within the European Union.*

3
4 142. Although the English word 'adequate' may be
5 understood, from a linguistic viewpoint, as designating
6 a level of protection that is just satisfactory or
7 sufficient, and thus as having a different semantic
8 scope from the French word 'adéquat' ('appropriate'),
9 the only criterion that must guide the interpretation
10 of that word is the objective of attaining a high level
11 of protection of fundamental rights, as required by
12 Directive 95/46".

13 **MS. JUSTICE COSTELLO:** Sorry, just a moment. I just
14 might ask you to change the page please, from the
15 "Receiving" to the next page. I'm following here on
16 the written as well, but I'm marking it. 15:32

17 **MR. MICHAEL COLLINS:** Yes, certainly, Judge.

18 **MS. JUSTICE COSTELLO:** It should be the page with
19 paragraph 142 please. It's the next page. Not
20 possible to move that to paragraph 142? 15:33

21 **UN-NAMED SPEAKER:** It should be there, Judge.

22 **MS. JUSTICE COSTELLO:** well, I'm still on "Receiving"
23 and it won't move.

24 **MR. GALLAGHER:** Judge, it's on ours, so there's
25 obviously some glitch. But if you go back to "view" 15:33
26 and then go forward a page, you'll get to it and it may
27 work from there on.

28 **MS. JUSTICE COSTELLO:** Yes, I know, but I'm just trying
29 to follow it. Oh, there, thank you. In and out works,

1 in terms of switch it off and switch it on. I beg your
2 pardon, sorry, Mr. Collins. I'll stick with your
3 method I think.

4 **MR. MICHAEL COLLINS:** So again what's interesting
5 there is that he focuses on the word "adequate", as he 15:33
6 rightly identifies, that in perhaps the ordinary use of
7 the English language you might think "adequate" just
8 means something barely sufficient. But clearly that's
9 not what he's talking about and, on the contrary, he's
10 making point 'Actually the objective is a *high* level of 15:34
11 protection'.
12

13 Then in 143 he says something that found an echo in the
14 court's judgment that I already identified when he
15 identified the two components of what you have to look 15:34
16 at:
17

18 *"Examination of the level of protection afforded by a*
19 *third country must focus on two fundamental elements,*
20 *namely the content of the applicable rules and the*
21 *means of ensuring compliance with those rules."*
22

23 So your content has to be right, in the sense it has to
24 be equivalent, and then the means by which that content
25 is enforced and availed of has to be adequate or 15:34
26 satisfactory. And if you fail on the first of those,
27 if you fail on the content - in other words, you fail
28 on what the rules require, what the legal remedies are
29 - well, then your test has failed. It's only, as I

1 say, if you've passed that test that you might have to
2 go on to do the more global evaluation and then you
3 might have to consider as to what level of global
4 evaluation would have to be done. But you only get to
5 that if you were satisfied that there was equivalence
6 at the level of the legal rules.

7
8 He goes on at 144:

9
10 *"To my mind, in order to attain a level of protection*
11 *essentially equivalent to that in force in the European*
12 *Union, the safe harbour scheme, which is largely based*
13 *on self-certification and self-assessment by the*
14 *organisations participating voluntarily in that scheme,*
15 *should be accompanied by adequate guarantees and a*
16 *sufficient control mechanism. Thus, transfers of*
17 *personal data to third countries should not be given a*
18 *lower level of protection than processing within the*
19 *European Union.*

20
21 *145. In that regard, I would observe at the outset that*
22 *within the European Union the prevailing notion is that*
23 *an external control mechanism in the form of an*
24 *independent authority is a necessary component of any*
25 *system designed to ensure compliance with the rules on*
26 *the protection of personal data."*

27
28 Further down the page, Judge, at paragraph 149, he
29 says:

1
2 *"It must be emphasised that the power conferred on the*
3 *Commission by the EU legislature in Article 25(6)...*
4 *to find that a third country ensures an adequate level*
5 *of protection is expressly conditional on the*
6 *requirement that that third country ensures such a*
7 *level of protection, within the meaning of Article*
8 *25(2)."*
9

10 So he then gives it the interpretation that the 15:36
11 Commissioner has given to it and that I am urging on
12 you and what I say is the obvious interpretation of it,
13 that the level of protection and the adequate
14 safeguards that are spoken about in Article 25(6) are
15 to be such as to achieve the level of protection within 15:36
16 the meaning of Article 25(2). And I say it would be
17 simply extraordinary if any other interpretation were
18 possible or contemplated. And if it were to be so, it
19 would be extraordinary that the court didn't advert to
20 it or analyse it, and on the contrary, they clearly 15:36
21 agreed with the Advocate General's opinion, they
22 themselves have set it out in similar terms and here he
23 is setting it out in very express terms indeed.
24

25 Can I move on to paragraph 170 of his opinion? He says: 15:37
26

27 *"It also follows from the case-law of the Court that*
28 *the communication of the personal data collected to*
29 *third parties, whether public or private, constitutes*

1 *an interference with the right to respect for private*
2 *life, 'whatever the subsequent use of the information*
3 *thus communicated'. Furthermore, in its judgment in*
4 ***Digital Rights Ireland and Others**, the Court confirmed*
5 *that authorising the competent national authorities to*
6 *access such data constitutes a further interference*
7 *with that fundamental right."*

8
9 And as you'll see, Judge, when we come to look at
10 particularly the Irish decision in **Digital Rights**
11 **Ireland**, the mere fact that data was authorised by a
12 Garda Commissioner and providers were directed to hold
13 and store the data, even without the Commissioner
14 necessarily accessing it, that in itself was regarded
15 as an interference with the privacy rights in question.

15:37

15:38

16
17 *"In addition, any form of processing of personal data*
18 *is covered by Article 8 of the Charter" - and you'll*
19 *recall the broad definition of "processing" - "and*
20 *constitutes an interference with the right to the*
21 *protection of such data. The access enjoyed by the*
22 *United States intelligence services to the transferred*
23 *data therefore also constitutes an interference with*
24 *the fundamental right to protection of personal data*
25 *guaranteed in Article 8 of the Charter, since such*
26 *access constitutes a processing of that data."*

27
28 So you've got two different types of processing; you've
29 got the processing that is the transfer from Europe to

1 the US and you've got the processing in the US

2
3 At 172 they say:

4
5 *"An additional factor is that the citizens of the Union*
6 *who are Facebook users are not informed that their*
7 *personal data will be generally accessible to the*
8 *United States security agencies."*

9
10 And towards the end of this opinion, Judge - just a
11 couple of other paragraphs - at paragraph 210:

15:38

12
13 *"The intervention of independent supervisory*
14 *authorities is in fact at the heart of the European*
15 *system of personal data protection. It is therefore*
16 *natural that the existence of such authorities was*
17 *considered from the outset to be one of the conditions*
18 *necessary for a finding that the level of protection*
19 *afforded by third countries was adequate; and it is a*
20 *condition that must be satisfied in order for data*
21 *flows from the territory of the Member States to the*
22 *territory of third countries not to be prohibited under*
23 *Article 25... As noted in the working document*
24 *adopted by the Working Party established by Article 29*
25 *of that directive, in Europe there is broad agreement*
26 *that 'a system of "external supervision" in the form of*
27 *an independent authority is a necessary feature of a*
28 *data protection compliance system'.*

1 211. I observe, moreover, that the Foreign Intelligence
2 Surveillance Court does not offer an effective judicial
3 remedy to citizens of the Union whose personal data is
4 transferred to the United States. The protection
5 against surveillance by government services provided
6 for in section 702 of the Foreign Intelligence
7 Surveillance Act of 1978 applies only to United States
8 citizens and to foreign citizens legally resident on a
9 permanent basis in the United States. As the
10 Commission itself has observed, the oversight of United
11 States intelligence collection programmes would be
12 improved by strengthening the role of the FISC and by
13 introducing remedies for individuals. Those mechanisms
14 could reduce the processing of personal data of
15 citizens of the Union that is not relevant for national
16 security purposes."

17
18 And on those we see, Judge, there has been an amendment
19 made, as I mentioned earlier, I think a provision for,
20 I think it's six nominated suitably qualified lawyers 15:40
21 to appear now as amici before the FISC. As far as I
22 understand it, there's no provision for a person who is
23 himself the subject of a complaint, or makes a
24 complaint or is the subject of surveillance or
25 interception to appear and make submissions to the FISC 15:40
26 - and of course, subject to correction on that if I'm
27 wrong.

28
29 If I go over finally, Judge, to paragraph 227:

1
2 *"In its assessment of the level of protection afforded*
3 *by a third country, the Commission must examine not*
4 *only the internal laws and international commitments of*
5 *that third country, but also the manner in which the*
6 *protection of personal data is guaranteed in practice."*

7
8 So you look first at the question of what the internal
9 laws are and, as I say, if you pass that test then you
10 look at -- that's not enough, you've got to look and 15:41
11 see how does it work in practice and how is it
12 guaranteed in practice? But of course, if you *don't*
13 pass the first test and you don't have even the legal
14 protection to begin with then all the practice in the
15 world is not going to help you. 15:41

16
17 It says:

18
19 *"where the examination of practice reveals that the*
20 *arrangements are not working correctly, the Commission*
21 *must take action and, where appropriate, suspend its*
22 *decision or adapt it without delay."*

23
24 So that was the Schrems decision, that was what came
25 back to Hogan J. He then made the order that is 15:41
26 referred to at the end of the Irish Reports, where, on
27 consent, he made an order quashing the Commission's
28 decision not to entertain the complaint that
29 Mr. Schrems had made. And the matter was then remitted

1 to the Commissioner, I think the new, the current
2 Commissioner, I think, at that stage, for consideration
3 of the matter.

4
5 Before I go on to deal with what she did, Judge, in 15:42
6 relation to it, we have been referring to the Digital
7 Rights Ireland case and that's in the book at, whatever
8 book, your book at tab 35, I think it is, book three of
9 yours, Judge, and I think I probably should, it might
10 be just convenient to refer to the Digital Rights 15:42
11 Ireland case just at the moment. Much of the relevant
12 bits of it have already been referred to in some of the
13 other provisions, so I don't need to necessarily refer
14 to all of it.

15 **MS. JUSTICE COSTELLO:** I promise you I had nothing to 15:42
16 do with that noise. It's not a comment on the case,
17 it's the battery running low.

18 **MR. MICHAEL COLLINS:** Can I refer briefly first to the
19 opinion of the Advocate General, which actually comes
20 first on this occasion, in tab 35 and then the 15:43
21 decision? Mr. Cruz Villalón is the Advocate General.
22 At paragraph 60 of the Advocate General's opinion, he
23 says:

24
25 *"First of all, the fact that Directive 2006/24" - this 15:43*
26 *is the Storage Directive - "may satisfy fully the*
27 *requirements of Article 8(2) and (3) of the Charter and*
28 *be considered not to be incompatible with Article 8 of*
29 *the Charter in no way means that it is fully compatible*

1 *with the requirements resulting from the right to*
2 *privacy guaranteed by Article 7 of the Charter.*

3
4 *61. Since the 'private sphere' forms the core of the*
5 *'personal sphere', it cannot be ruled out that*
6 *legislation limiting the right to the protection of*
7 *personal data in compliance with Article 8... may*
8 *nevertheless be regarded as constituting a*
9 *disproportionate interference with Article 7 of the*
10 *Charter."*

11
12 The reason I refer to that, Judge, is it makes an
13 important point, which is that you can comply with one
14 provision of the Charter, you might comply with Article
15 7 of the Charter, but that doesn't mean that you 15:43
16 thereby comply with Article 8 of the Charter. So each
17 provision of the Charter has to be looked at
18 independently - and they may, of course, relate to each
19 other. But in particular, Article 47, though providing
20 for effective remedies and so forth, is an article in 15:44
21 its own right and has to be looked at in its own right
22 as well and to see whether the type of remedies and
23 effective access to the court contemplated by
24 Article 47 is in fact provided.

25
26 Also in the Advocate General's opinion, if I go to
27 paragraph 120, he says:

28
29 *"The European Union legislature cannot, when adopting*

1 *an act imposing obligations which constitute serious*
2 *interference with the fundamental rights of citizens of*
3 *the Union, entirely leave to the Member States the task*
4 *of defining the guarantees capable of justifying that*
5 *interference. It cannot content itself either with*
6 *assigning the task of defining and establishing those*
7 *guarantees to the competent legislative and/or*
8 *administrative authorities of the Member States called*
9 *upon, where appropriate, to adopt national measures*
10 *implementing such an act or with relying entirely on*
11 *the judicial authorities responsible for reviewing its*
12 *practical application. It must, if it is not to render*
13 *the provisions of Article 51(1) of the Charter*
14 *meaningless, fully assume its share of responsibility*
15 *by defining at the very least the principles which must*
16 *govern the definition, establishment, application and*
17 *review of observance of those guarantees."*

18
19 If I turn to the judgment itself, Judge. As you'll see
20 from paragraph one, it is concerned with the Directive 15:45
21 about the retention of data - it sets out various
22 provisions in relation to it. And I don't need to go
23 through the detail of that, Judge. The relevant
24 summary of the case and the facts of the case are at
25 paragraph 17. And it says: 15:45

26
27 *"On 11 August 2006, Digital Rights brought an action*
28 *before the High Court in which it claimed that it owned*
29 *a mobile phone which had been registered on 3 June 2006*

1 *and that it had used that mobile phone since that date.*
2 *It challenged the legality of national legislative and*
3 *administrative measures concerning the retention of*
4 *data relating to electronic communications..."*

5
6 I pause there. That was the direction from the Garda
7 Commissioner, I think it was, to telecommunications
8 companies to retain the data for certain periods. Not
9 that they were doing anything with it, but just to
10 retain it, presumably in case it *needed* to be accessed 15:46
11 for --

12 **MS. JUSTICE COSTELLO:** It was to be made available for
13 subsequent investigations that might arise.

14 **MR. MICHAEL COLLINS:** Exactly.

15
16 *"... and asked the national court, in particular, to*
17 *declare the invalidity of [the Directive] and of Part 7*
18 *of the Criminal Justice (Terrorist Offences) Act 2005,*
19 *which requires telephone communications service*
20 *providers to retain traffic and location data relating*
21 *to those providers for a period specified by law in*
22 *order to prevent, detect, investigate and prosecute*
23 *crime and safeguard the security of the State."*

24
25 Then the High Court had referred some questions, 15:46
26 including:

27
28 *"1. Is the restriction on the rights of the plaintiff*
29 *in respect of its use of mobile telephony arising from*

1 *the requirements of Articles 3, 4... and 6 of [the*
2 *Directive] incompatible with [Article 5(4)] TEU in that*
3 *it is disproportionate and unnecessary or inappropriate*
4 *to achieve the legitimate aims of:*

5
6 *(a) Ensuring that certain data are available for the*
7 *purposes of investigation, detection and prosecution of*
8 *serious crime?*

9
10 *And/or*

11
12 *(b) Ensuring the proper functioning of the internal*
13 *market of the European Union?"*

14
15 Then it asked more specific questions about compliance 15:47
16 with particular provisions of the Charter and the
17 Convention. So it's an interesting case, I suppose,
18 because it was mere possession of the phone - I have
19 the phone, I'm not saying that anybody has actually
20 accessed my data at all, so I'm not saying there's any 15:47
21 interference, nobody has looked at my text messages, or
22 Mr. Gallagher's text messages, God help us, or whatever
23 it may be. But what it does do is it simply stores the
24 data. And that in itself was said to be the necessary
25 level of interference. 15:47

26
27 If you move over to paragraph 31, it says:

28
29 *"In the light of the foregoing considerations, it is*

1 *appropriate, for the purposes of answering the second*
2 *question... and the first question" - in the case I've*
3 *referred to - "to examine the validity of the directive*
4 *in the light of Articles 7 and 8 of the Charter."*

5
6 Then at 33 and 34 - and I'm sorry, Judge, these
7 passages *have* been already referred to, but they are
8 fundamentally important:

9
10 *"To establish the existence of an interference with the*
11 *fundamental right to privacy, it does not matter*
12 *whether the information on the private lives concerned*
13 *is sensitive or whether the persons concerned have been*
14 *inconvenienced in any way...*

15
16 34. *As a result, the obligation imposed by Articles 3*
17 *and 6 of [the Directive] on providers of publicly*
18 *available electronic communications services or of*
19 *public communications networks to retain, for a certain*
20 *period, data relating to a person's private life and to*
21 *his communications, such as those referred to in*
22 *Article 5 of the directive, constitutes in itself an*
23 *interference with the rights guaranteed by Article 7 of*
24 *the Charter."*

25
26 And again the reason I'm stressing this, of course, is
27 to be inviting you to compare it with the position
28 under US law.

1 "35. Furthermore, the access of the competent national
2 authorities to the data constitutes a further
3 interference with that fundamental right...
4 Accordingly, Articles 4 and 8 of [the Directive] laying
5 down rules relating to the access of the competent
6 national authorities to the data also constitute an
7 interference with the rights guaranteed by Article
8 7..."

9
10 They held it's also an interference because it provides 15:49
11 for the processing of personal data. "It must be
12 stated that the interference caused... with the
13 fundamental rights laid down" is particularly serious
14 etc.

15
16 Then it deals with the justification under Articles 7
17 and 8 and again emphasises the necessity to look at the
18 essence. So at 39 it says:

19
20 "So far as concerns the essence of the fundamental
21 right to privacy and the other rights laid down in
22 Article 7 of the Charter."

23
24 And it goes on to discuss that. And the point is it's
25 looking at it to identify the essence of it. 15:49

26
27 At paragraph 42 it identifies the objective of fighting
28 international terrorism and maintaining international
29 peace and security as an objective of general interest

1 and that Article 6 of the Charter lays down the right
2 of any person not only to liberty but also to security.
3 And therefore, at 45 they say it's necessary to verify
4 the proportionality of the interference found to exist.
5 And they discuss then the principle of proportionality 15:50
6 and the extent as to whether this retention could be
7 sufficient to be regarded as proportionate. And at 51,
8 while emphasising the importance of the fight against
9 serious crime and terrorism, they say in the last
10 sentence: 15:50

11
12 *"However, such an objective of general interest,*
13 *however fundamental it may be, does not, in itself,*
14 *justify a retention measure such as that established by*
15 *[the Directive] being considered to be necessary for*
16 *the purpose of that fight."*

17
18 It goes on to say that the derogations and limitations
19 have to be strictly construed, it talks about the
20 importance of the right to respect for private life 15:50
21 enshrined in Article 7 and says, therefore, that the EU
22 legislation had to lay down clear - this is 54 - clear
23 and precise rules governing the scope and application
24 of the measure in question and imposing minimum
25 safeguards so the persons whose data had been retained 15:51
26 had sufficient guarantees to effectively protect their
27 personal data against the risk of abuse and against any
28 unlawful access and use of the data.
29

1 At 55:

2
3 *"The need for such safeguards is all the greater where,*
4 *as laid down in [the Directive], personal data are*
5 *subjected to automatic processing and where there is a*
6 *significant risk of unlawful access to those data."*
7

8 And that's an important point too, Judge. Because when
9 we come to look at the US law you will see the
10 circumstances under which it can be targeted perhaps 15:51
11 for one particular purpose, but can nonetheless
12 inadvertently either sweep up communications with other
13 persons or under some sections gather what I understand
14 to be an effective chain of e-mail correspondence. And
15 we'll come to that when we look at the relevant US 15:51
16 rules.
17

18 If I bring you to -- there's criticisms then laid down
19 in relation, from about paragraphs 58 onwards, Judge,
20 and I don't think I need bring you through those 15:52
21 criticisms of the retention period, the proportionality
22 of it and the absence of clear rules that were laid
23 down in the Directive. And they conclude at 68:
24

25 *"... it should be added that that directive does not*
26 *require the data in question to be retained within the*
27 *European Union, with the result that it cannot be held*
28 *that the control, explicitly required by Article 8(3)*
29 *of the Charter, by an independent authority of*

1 compliance with the requirements of protection and
2 security, as referred to in the two previous
3 paragraphs, is fully ensured. Such a control, carried
4 out on the basis of EU law, is an essential component
5 of the protection of individuals with regard to the
6 processing of personal data."

7
8 So I think that's all I need to say, Judge, in relation
9 to the Digital Rights case. So the matter then came
10 back before the Commissioner. There was some 15:52
11 correspondence with Mr. Schrems at that point. And of
12 course, his original complaint in terms of the Safe
13 Harbour provision now, in effect, being partly dealt
14 with in the sense that the Safe Harbour decision itself
15 had been struck down by the European courts - so a 15:53
16 spectacular, I suppose, victory in that sense - and
17 therefore the Commissioner invited Mr. Schrems to
18 reformulate his complaint as he saw fit. And he did
19 so. And if you go to tab one of book one -- sorry,
20 book one, tab 17, I should say. This is book one of 15:53
21 the trial books, Judge.

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

23 **MR. MICHAEL COLLINS:** There are various exhibits to
24 Mr. O'Dwyer's affidavits and tab 17 is Mr. Schrems'
25 reformulated complaint which came before the 15:53
26 Commissioner. And I'm not going to read it out in
27 detail, Judge, but I just want to draw attention to one
28 particular part, which I think I've omitted to mark --
29 no, I haven't.

1
2 Can I just bring you to page 11? First of all, the
3 complaint is directed again to the transfer from
4 Facebook Ireland to Facebook, but this time not, of
5 course, based on the Safe Harbour decision, but now 15:54
6 based on the use of the standard contractual clauses,
7 which I think it is common case and not in dispute in
8 this case, Judge, *is* the basis upon which data is
9 transferred from Facebook Ireland to Facebook Inc. And
10 you'll see he begins his complaint in relation to 15:54
11 standard contractual clauses on page nine -- sorry, I
12 think I said page 11...
13 **MS. JUSTICE COSTELLO:** My page numbers are, in the
14 actual book...
15 **MR. MICHAEL COLLINS:** Are different. It's section 15:54
16 five of the letter and there's --
17 **MS. JUSTICE COSTELLO:** I've got the bit that starts:
18 "Vienna, December 1st." And then we've got "Facts".
19 Is that the one? It's page nine in that bit?
20 **MR. MICHAEL COLLINS:** Yes, there's a legal analysis in 15:55
21 a section B. There's a section A that is facts and
22 then about five or six pages on - at least my pages
23 aren't numbered, Judge - but on page seven there's a
24 heading "Legal Analysis".
25 **MS. JUSTICE COSTELLO:** Yes, I have that. 15:55
26 **MR. MICHAEL COLLINS:** Then if you move to page nine...
27 **MS. JUSTICE COSTELLO:** Thank you.
28 **MR. MICHAEL COLLINS:** ... after he's discussed the
29 Directive and some constitutional provisions and so

1 forth, he refers specifically to the Standard
2 Contractual Clauses. And you see there in section
3 5(a)...

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

5 **MR. MICHAEL COLLINS:** Then at (1) he deals with what
6 he terms the validity of the arrangement provided. And
7 he deals with various criticisms he makes of the SCC's.
8 Then on page 11 he has a heading "Summary on the
9 validity of the SCC's Used" and he says Facebook can't
10 rely on decision 2010/87/EU. That's the third SCC
11 decision - you may remember I identified for you the
12 three SCC decisions in the index. And he makes the
13 criticisms that he's done there. And at the end of
14 that section, under the summary he says:

15
16 *"'Facebook Ireland Ltd.' has not proven that the*
17 *alternative agreement was authorized by the DPC under*
18 *Section 10 [of the Act]. Even if it would be, such an*
19 *authorization would be invalid and void in the light of*
20 *the judgements... and Schrems... and therefore*
21 *irrelevant."*

22
23 Then under heading 2, "Exceptions to the SCC's
24 decisions":

25
26 *"Even if the current and all previous agreements*
27 *between 'Facebook Ireland Ltd. and 'Facebook Inc' would*
28 *not suffer from the countless formal insufficiencies*
29 *above and would be binding for the DPC (which it is*

1 *not), 'Facebook Ireland Ltd' could still not rely on*
2 *them in the given situation of factual 'mass*
3 *surveillance' and applicable US laws that violate*
4 *Articles 7, 8 and 47 of the CFR... and the Irish*
5 *Constitution."*

6
7 It appeared to the Commissioner, although Mr. Schrems
8 seems to take a different view now in relation to it,
9 that he was attacking the validity of the SCC's, and
10 she went on to consider the question of the validity of 15:57
11 the SCC's on foot of that complaint.

12
13 That complaint, as I say, was submitted on 1st December
14 2005. The Commissioner then carried out her
15 investigation. And there's just a short summary, 15:57
16 Judge, perhaps -- Mr. O'Dwyer's grounding affidavit is
17 at tab 12 in this book. And if I just bring you
18 perhaps to just a few paragraphs in it. At paragraph
19 77 he describes the investigation and he says -- this
20 is page 17, paragraph 77. 15:57

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

22 **MR. MICHAEL COLLINS:** *"In practical terms, the*
23 *Commissioner's investigation into the Reformulated*
24 *Complaint has proceeded in two distinct strands,*
25 *running in parallel.*

26
27 *78. Strand 1 has comprised a factual investigation*
28 *focused on establishing whether" - "FBI" is Facebook*
29 *Ireland - "has continued to transfer subscribers'*

1 *personal data to the US subsequent to the CJEU Ruling*
2 *of 6 October 2015. If and to the extent that it does,*
3 *the Commissioner's investigation has also sought to*
4 *examine the legal bases upon which such transfers are*
5 *effected."*

6
7 And there's no controversy now about that; they are
8 continuing and they are done on the basis of the SCC's.

9
10 *"79. Separately, Strand 2 has sought to examine*
11 *whether, by reference to the Reformulated Complaint -*
12 *as it relates to alleged interferences with citizens'*
13 *data privacy rights on national security grounds and*
14 *having regard to the adequacy criteria identified in*
15 *Article 25(2) of the Directive - the US ensures*
16 *adequate protection for the data protection rights of*
17 *EU citizens.*

15:58

18
19 *80. For the sake of completeness, I add that, during*
20 *the course of the Commissioner's investigation, the*
21 *Commissioner's Office was contacted by the United*
22 *States government and was furnished with documentation*
23 *that had previously been supplied by the US government*
24 *to the Commission, in support of what is known as the*
25 *Privacy Shield Framework."*

26
27 You'll be hearing a lot about the Privacy Shield
28 Framework, Judge, but again, more recently and last
29 year, an arrangement, an agreement has been entered

1 into between the EU and the US with regard to
2 arrangements which, in effect, are in substitution for
3 the Safe Harbour arrangements and they are known as the
4 Privacy Shield arrangements. And we'll come to that in
5 due course.

15:59

6
7 Then he says:

8
9 *"81. The Privacy Shield Framework is an agreement which*
10 *has been reached between the Commission and the US*
11 *Department of Commerce for transatlantic exchanges of*
12 *personal data for commercial purposes, and which, if*
13 *implemented" - and it now has been implemented - "is*
14 *intended to protect the fundamental rights of EU*
15 *citizens where their data is transferred to the US.*
16 *The Privacy Shield Framework is the result of around*
17 *two years of negotiations between the Commission and*
18 *the US Department of Commerce. A revised draft*
19 *decision implementing the Privacy Shield Framework is*
20 *currently progressing through the Union legislative*
21 *process."*

22
23 And it was in fact, I think, maybe signed in - I
24 haven't got the exact date - I think it was June 2016
25 and it has been implemented. It was to extend to what
26 were known as certain covered countries. But we'll
27 come to that in due course as well.

15:59

28
29 So the Commissioner then considered the matter and she

1 issued a draft decision on 25th May 2016, which is at
2 tab 18. And I just --

3 **MS. JUSTICE COSTELLO:** I wonder whether we should take
4 that up tomorrow?

5 **MR. MICHAEL COLLINS:** I think that's the appropriate 16:00
6 point to take that up.

7 **MS. JUSTICE COSTELLO:** Very well. So 10:30 tomorrow.

8 **MR. MICHAEL COLLINS:** 10:30. May it please the court.

9 **MS. JUSTICE COSTELLO:** I was indicating this morning
10 that in order to make up time, if that suited the 16:00
11 parties --

12 **MR. GALLAGHER:** Oh, certainly

13 **MS. JUSTICE COSTELLO:** -- I could sit at 10:30 this
14 week.

15 **MR. GALLAGHER:** That's perfect, yes. 16:00

16 **MS. JUSTICE COSTELLO:** Because I'm conscious of the
17 fact that we want to try to get through the stuff
18 before we start with Ms. Gorsky.

19 **MR. GALLAGHER:** Yes. Thank you very much.

20 **MR. MICHAEL COLLINS:** Very good. Thank you, Judge. 16:01

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22 **THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 8TH**
23 **FEBRUARY AT 10:30**

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