

THE HIGH COURT - COURT 29

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON THURSDAY, 9th MARCH 2017 - DAY 18

18

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1 THE HEARING RESUMED AS FOLLOWS ON THURSDAY, 9TH MARCH  
2 2017

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

5 **REGISTRAR:** At hearing, Data Protection Commissioner  
6 -v- Facebook.

11:05

7  
8 **SUBMISSION BY MS. HYLAND:**

9  
10 **MS. HYLAND:** Good morning, Judge. Judge, I think  
11 yesterday I was just, I had just finished at the FRA  
12 Report, so if I could ask the court please to take it  
13 up again, and the court will recall that it's to be  
14 found in Tab 11 of book, well --

11:05

15 **MS. JUSTICE COSTELLO:** Oh, I'm using Tab 61.

11:05

16 **MS. HYLAND:** You're using it at a different place,  
17 I see, Judge, yes. It's the same document in any case  
18 that we were at yesterday. And, Judge, I think I had  
19 been on page 21.

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

11:06

21 **MS. HYLAND:** And I think in fact, Mr. Gallagher had  
22 just reminded me that there was a passage that was  
23 important just in relation to the German activities,  
24 and I wonder could I just open that. So looking at  
25 page 21 on the left-hand column, this is in respect of  
26 the SIGINT activities.

11:06

27  
28 And you may remember where we had left it off was the  
29 extent to which Member States provide for legislation

1 in respect of the signals intelligence as opposed to,  
2 if you like, the old fashioned targeted surveillance.  
3 The point that had been identified was that some Member  
4 States do not in their legislation have specific  
5 provisions dealing with signals intelligence or only 11:06  
6 have it in part.

7  
8 There had been an identification of *five* Member States  
9 where there were legal frameworks in place regulating  
10 signals intelligence and Germany was identified as one 11:06  
11 of them. But in fact when one looks in a bit more  
12 detail one sees that Germany, there is some, I think,  
13 detail about the way in which it is regulated and I'm  
14 just going to look at that.

15 11:07  
16 The paragraph on the left-hand side: "*Similarly, in*  
17 *Germany, some of the SIGINT activities that the Federal*  
18 *Intelligence Service may undertake is not regulated in*  
19 *detail by law, unlike other SIGINT activities in*  
20 *Germany. The Federal Intelligence Act states that the*  
21 *BND 'shall collect and analyse information required for*  
22 *obtaining foreign intelligence, which is of importance*  
23 *for the foreign and security policy of the Federal*  
24 *Republic of Germany' and that it 'may collect, process*  
25 *and use the required information, including personal*  
26 *data'. This definition of the BND's competences*  
27 *provides the legal basis for the German intelligence*  
28 *service to perform SIGINT activities abroad between two*  
29 *foreign countries or within one single foreign country,*

1       *provided that the intercepted signals have no*  
2       *connection - besides the actual data processing - with*  
3       *Germany. This SIGINT activity is referred to as 'open*  
4       *sky' and according to various commentators takes place*  
5       *outside any legal framework. So far however, no* 11:07  
6       *judicial decision, either in Germany or by the ECHR has*  
7       *confirmed this assessment. This surveillance method*  
8       *does not fall within the scope of the Act on*  
9       *Restricting the Privacy of Correspondence, Posts and*  
10       *Telecommunication (G10 Act)."* 11:07

11  
12       And you will remember, Judge, from yesterday G10 is  
13       still there.

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

15       **MS. HYLAND:** *"which was adopted in application of* 11:08  
16       *Article 10(2) of the Basic Law to lay down the specific*  
17       *conditions to restricting privacy of communications.*  
18       *Consequently, this surveillance method is outside the*  
19       *G10 Commission's remit (the expert body in charge of*  
20       *overseeing the intelligence services). The*  
21       *Parliamentary Control Panel is the sole body that*  
22       *oversees this surveillance method. The absence of*  
23       *tight control has triggered calls for reform, and the*  
24       *matter is being discussed before the NSA Committee of*  
25       *Inquiry."* And I think that's a different NSA. 11:08

26  
27       And, Judge, then can I ask the court please to go on to  
28       page 24. And at page 24, Judge, you'll see that there  
29       is a summary then of the various different legal

1 systems that have been considered. And on the  
2 left-hand side column, the second full paragraph down:

3  
4 *"In sum, despite legislative efforts to regulate the*  
5 *work of intelligence services, the Council of Europe*  
6 *Commissioner for Human Rights recently concluded that*  
7 *'in many countries, there are few clear, published laws*  
8 *regulating the work of these agencies'. The lack of*  
9 *clarity and hence necessary quality of the legal rules*  
10 *governing the work of intelligence services raises*  
11 *fundamental rights issues. It has furthermore*  
12 *triggered lawsuits in a number of Member States. The*  
13 *UN special Rapporteur on the promotion and protection*  
14 *of human rights and fundamental freedoms while*  
15 *countering terrorism, stated that bulk access to*  
16 *communications and content data without prior suspicion*  
17 *'amounts to a systematic interference with the right to*  
18 *respect for privacy of communications, and requires a*  
19 *corresponding compelling jurisdiction'.*

20 11:09

21 *Though it is too early to assess the full impact of the*  
22 *Snowden revelations on legal reforms, post-Snowden*  
23 *inquiries in some Member States indeed led to the*  
24 *conclusion that their current national legal frameworks*  
25 *need to be reformed. The annual report of the French*  
26 *Parliamentary Delegation on intelligence, the*  
27 *parliamentary oversight body, linked its assessment of*  
28 *the revelations to the need for overarching*  
29 *intelligence reform in France. In the United Kingdom,*

11:09



1        *the post-Snowden inquiry by the Intelligence Security*  
2        *Committee also resulted in the conclusion that the*  
3        *British legal framework is deserving of reform. This*  
4        *was supported by a report issued by the independent*  
5        *Reviewer of Terrorism Legislation."*

11:09

6  
7        And he criticises there the regulation of Investigatory  
8        Powers Act.

9  
10       Judge, can I just make a comment. Yesterday I talked  
11       about the requirement in accordance with law under the  
12       Convention and I said that in most of the cases that we  
13       were looking at yesterday that was not an issue because  
14       there was legislation in being and it was whether it  
15       was necessary in a democratic society test that the  
16       court was looking at. But in fact what's being talked  
17       about here is the provision *necessary in accordance*  
18       *with law*, where there aren't actually any legal  
19       frameworks governing the access at all, then that very  
20       first condition will not be met.

11:10

11:10

11:10

21  
22       And then, Judge, the heading "*Surveillance following a*  
23       *legitimate aim*" and there's a reference there to the  
24       Convention case law, and the court has looked at some  
25       of them.

11:10

26  
27       Then, Judge, just one discrete point on page 25, you  
28       will remember there was some discussion between  
29       yourself and Mr. Gallagher as to *state security* and

1       *national security* and the relationship between those  
2       two terms, and you will see that this report does  
3       identify a view on that. And the second column, the  
4       second last paragraph, starting with the words "*in some*  
5       *EU secondary legislation*", this is the next page, 25. 11:11

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

7       **MS. HYLAND:** "*'National security' is explained as state*  
8       *security, for instance in Article 15(1) of the*  
9       *e-Privacy Directive. Moreover, the CJEU in ZZ*  
10       *implicitly held that the notion of state security as* 11:11  
11       *used in EU secondary legislation is equivalent to the*  
12       *notion of 'national security' as used in the national*  
13       *law."*

14  
15       Then, Judge, can I ask the court to go on please to 11:11  
16       page 29. 29 is a new chapter dealing with the  
17       oversight of intelligence services. And oversight,  
18       I have already addressed the court on this, and you'll  
19       see there that the chapter, the very first paragraph,  
20       the chapter outlines how oversight mechanisms are 11:11  
21       established in the EU Member States. It looks at the  
22       accountability mechanisms imposed by law on the  
23       intelligence services.

24  
25       Then on the following column you'll see there: 11:11

26  
27       *"The general consensus taking from the Venice*  
28       *Commission report and academic studies, is that*  
29       *oversight should be a combination of: Executive*

1 control; parliamentary oversight; judicial review; and  
2 expert bodies.

3  
4 Judicial review, which mainly occurs as a result of a  
5 lawsuit, is covered under Chapter 3 of this report. 11:12  
6 Judicial involvement in oversight of intelligence  
7 services occurs via warranting and monitoring of  
8 surveillance measures. However, since these bodies are  
9 not exclusively judicial, the broader category of  
10 approval and review of surveillance measures has been 11:12  
11 used in this report. The role of the ombudspersons in  
12 the oversight of intelligence services is covered in  
13 Chapter 3, since it is mainly a complaints-handling  
14 body."

15 11:12  
16 Then, next line: "By giving diverse powers to an array  
17 of bodies that should complement each other, the  
18 maximum level of oversight is guaranteed. Their  
19 oversight, however, is only effective if they are  
20 independent and granted sufficient powers and 11:12  
21 resources, both human and financial, to fulfil their  
22 mandate."

23  
24 And then there's a reference to the UN.

25 11:12  
26 And then, Judge, something that Prof. Swire said in the  
27 American context is echoed here at the bottom of that  
28 left-hand column. You'll see the wording:  
29

1       *"To achieve the maximum level of protection, in*  
2       *addition to the four layers of legally-based oversight*  
3       *mentioned above, the media and civil society*  
4       *organisations also play an important role."*

11:13

6       And that's something that was identified by Prof. Swire  
7       in the US context. And the report observes that:  
8       *"NGOs have launched lawsuits in various EU Member*  
9       *States, promoted reforms, developed international*  
10       *principles and act as watchdogs."*

11:13

12       And then, Judge, you'll see that there's, on the second  
13       column, the third paragraph down: *"Control of the*  
14       *services, however, cannot be limited to external*  
15       *authorities. Intelligence services have a clear*  
16       *responsibility to act within the law, and the law*  
17       *itself can state such a responsibility. Though not*  
18       *strictly 'oversight', since that implies a certain*  
19       *measure of independence, internal control can be*  
20       *achieved by establishing a clear set of internal*  
21       *administrative policies that guide staff."*

11:13

11:13

23       And then, Judge, turning over the page, you will see a  
24       diagram which identifies what we have just been talking  
25       about here in relation to control and the various  
26       bodies that play a part in the control of intelligence  
27       services.

11:13

28  
29       And then, Judge, can I ask the court please to go to

1 page 42, although that chapter is important time is  
2 short and I want to move on in particular to Chapter 3.

3  
4 But, first, Judge, can I ask the court to look at page  
5 42 because it does identify in a table form --

11:14

6 **MS. JUSTICE COSTELLO:** Hmm.

7 **MS. HYLAND:** -- the relevant expert bodies in the  
8 various EU Member States. And you'll see there that in  
9 the Irish context, about half way down, the relevant  
10 oversight or expert body is the Complaints Referee and  
11 designated judge of the High Court, and I'll come to  
12 that when I'm looking briefly at the Irish situation.

11:14

13  
14 And in the UK, Judge, at the bottom of the page, you'll  
15 see there is three bodies identified: The Intelligence  
16 Services Commissioner, the Interception of  
17 Communications Commissioner and the Investigatory  
18 Powers Tribunal. I suppose it is also relevant, Judge,  
19 that there are some countries, some Member States, that  
20 it appears to be not applicable, but certainly they  
21 don't have relevant expert bodies and that does appear  
22 to be a gap having regard to what has already been said  
23 about the necessity for same.

11:14

11:14

24  
25 Can I ask the court then to go on please to page 47 and  
26 this is important I think in the context of data  
27 protection authorities, because obviously this is of  
28 relevance, the extent to which data protection  
29 authorities have a role in this field. And perhaps

11:15

1 I should ask the court just to look back one page to  
2 48 - sorry 46 - where the subject is taken up under the  
3 heading "*data protection authorities*". And you will  
4 see that it is stated that:

5  
6 "*Data protection authorities also constitute expert*  
7 *bodies in the context of oversight. They play a*  
8 *fundamental right in safeguarding the right to the*  
9 *protection of personal data.*"  
10

11:15

11 And there is a reference there to the EU primary and  
12 secondary law and then in particular the Data  
13 Protection Directive.  
14

11:15

15 And then --

11:15

16 **MS. JUSTICE COSTELLO:** Sorry, this is in the context,  
17 it's not just national securities surveillance?

18 **MS. HYLAND:** Exactly. Exactly, Judge. Because in  
19 fact, if one goes on, you will see they are just  
20 talking generally at this point and then we start  
21 honing in on the national security sphere. Because on  
22 the next page, left-hand column, second last paragraph:  
23

11:15

24 "*FRA findings show that, compared to other fields of*  
25 *data processing activities and other data controllers*  
26 *of the public and private sector, DPAs in most Member*  
27 *States have no competences over national intelligence*  
28 *services, or their powers are limited. As highlighted*  
29 *earlier, both the Data Protection Directive and the*

11:16

1 *e-Privacy Directive are subject to the national*  
2 *security exemption. Regulation of the competence of*  
3 *DPAs in respect of intelligence may, however, be*  
4 *provided in national law."*

5  
6 And then they identify: "Seven Member States where the  
7 DPAs have the same powers over national intelligence  
8 services as they do over any other data controller.  
9 This does not necessarily mean that national  
10 legislators have endowed the DPAs with the full range  
11 of powers listed above. It means that the legislators  
12 have not distinguished between intelligence services  
13 and other categories."

14  
15 Then: "In 12 Member States they have no powers over  
16 intelligence services. They are either expressly  
17 excluded by the general data protection law or by  
18 specific laws."

11:16

19  
20 And there is some examples there. And then in  
21 Luxembourg there is a reference made. Then moving on  
22 to the second last paragraph:

11:16

23  
24 "In nine Member States - including Ireland - DPAs have  
25 limited powers over intelligence services. While these  
26 DPAs have the power to issue non-binding  
27 recommendations on general matters related to national  
28 intelligence services' surveillance, limitations vary  
29 considerably by Member State."

11:17

1 Then, Judge, there is further detail given in respect  
2 of particular countries.

3  
4 Then if I could ask the court to go on to page 51.  
5 Sorry, I should just draw the court's attention to 11:17  
6 another helpful chart on page 49 which summarises the  
7 information that you have just been given there and  
8 identifies the various roles of DPAs.

9  
10 And then, going on to page 51, one sees there expert 11:17  
11 bodies as alternatives to judicial supervision, and  
12 I am just looking at the box there.

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

14 **MS. HYLAND:** It's a quote from a case called Telegraaf  
15 Media Nederland and the Court of Human Rights there 11:17  
16 held:

17  
18 *"The Court has indicated when reviewing - sorry,*  
19 *I said, yes it is the Court of Human Rights decision -*  
20 *the Court has indicated when reviewing legislation 11:17*  
21 *governing secret surveillance in the light of*  
22 *Article 8, that in a field where abuse is potentially*  
23 *so easy in individual cases and could have such harmful*  
24 *consequences for democratic society as a whole, it is*  
25 *in principle desirable to entrust supervisory control 11:18*  
26 *to a judge."*

27  
28 And the court is familiar with the Klass quote there  
29 and I think there is nothing - and then there's a



1 reference to Kennedy and I think both of those quotes  
2 the court in fact already saw yesterday.

3  
4 And then if I could ask the court to look please at  
5 page 57. Sorry, there is one other helpful chart again 11:18  
6 on the next page, page 52, and this is the point about  
7 target, "*prior approval of targeted surveillance*  
8 *measures*", and you will remember that that was a  
9 question in the US context that the court was looking  
10 at. 11:18

11  
12 But I think it is important to remember here, Judge,  
13 that the phrase "*targeted surveillance measures*",  
14 you'll remember this morning when I started there is a  
15 distinction between drawn being *targeted surveillance* 11:18  
16 *measures* and *signals intelligence measures*, so I think  
17 this is, if you like, the old fashioned, if I may call  
18 it, warrant-type situation, and I think that's what  
19 that's being referred to there.

20 11:19  
21 Can I ask the court then please to go on to page 57,  
22 and the court sets out its key findings in this area  
23 and I won't go through those. I think I have dealt  
24 with them by and large, but it's a useful summary for  
25 the court to see the findings. 11:19

26  
27 Then moving on to the chapter that's possibly the most  
28 relevant at page 59, that on "*Remedies*". You'll see  
29 there that the court identifies the necessity for a

1 remedy to *"be effective in practice and in law"* and  
2 then on the first column on the second last paragraph:

3  
4 *"As presented by FRA reports on access to remedies for*  
5 *violations of data protection and on access to justice,* 11:19  
6 *a number of remedial avenues are available to victims*  
7 *of privacy and data protection violations."*

8  
9 But again, Judge, that is in the general sphere.  
10 Because on the next paragraph it states: 11:19

11  
12 *"when an individual wishes to complain about*  
13 *interference with his or her right to privacy and data*  
14 *protection by intelligence services, the remedial*  
15 *landscape appears even more complex. The different* 11:19  
16 *remedial avenues are often fragmented and*  
17 *compartmentalised, and the powers of remedial bodies*  
18 *curtailed when safeguarding national security is*  
19 *involved. In fact, data collected for this research*  
20 *shows that only a very limited number of cases* 11:20  
21 *challenging surveillance practices have been*  
22 *adjudicated at the national level since the Snowden*  
23 *revelations."*

24  
25 And there's a number of important points about that. 11:20  
26 First of all, the word *"fragmentation"*, because you  
27 have seen that as part of the DPA's criticism. This  
28 was a report that was out by the time the DPA made her  
29 decision. This is a 2015 report, she made her decision

1 on May 2016. She does not appear to have reverted to  
2 the existence of this report, but it does seem very  
3 important in our submission that in the European  
4 context also this fragmentation is identified.

11:20

5  
6 Now you will remember yesterday from Silva and from  
7 Leander that in fact the court says that in certain  
8 circumstances a grouping or a mix of different remedies  
9 will be acceptable under the Court of Human Rights  
10 jurisprudence, but nonetheless it does appear to be 11:21  
11 identified here as a criticism of the European system  
12 by the FRA.

13  
14 Then, Judge, just moving on to the last paragraph on  
15 that page: 11:21

16  
17 *"Various actors have highlighted loopholes in the*  
18 *remedial landscape. In the UK, for example, the*  
19 *Information Commissioner pointed out in written*  
20 *submissions to the Intelligence and Security Committee*  
21 *of Parliament that 'state surveillance of individuals'*  
22 *communications, be this content or metadata, engages*  
23 *significant privacy and data protection concerns. The*  
24 *Data Protection Act provides only limited reassurance*  
25 *as a wide ranging exemption from its provisions can be*  
26 *relied on where safeguarding national security is*  
27 *engaged. The current legal and regulatory régime is*  
28 *fragmented.*"

1 Again we see that word: *"And needs review to ensure*  
2 *that it is fit for purpose in providing appropriate and*  
3 *effective oversight and redress mechanisms given the*  
4 *communications technologies and networks in use today*  
5 *and likely to be in use in the foreseeable future."* 11:21

6  
7 That's a long quote from the Information Commissioner  
8 but cited with approval by the FRA.

9  
10 You'll see then that there's an identification by way 11:21  
11 of diagram of the various avenues for persons, the  
12 Ombudsman - I beg your pardon, Ombudsperson  
13 institutions, the courts, ordinary and specialised, the  
14 oversight bodies other than DPAs with remedial powers  
15 and the DPAs. And that's, I think, an important 11:22  
16 identification there of remedial avenues at the  
17 national level because again the DPC treated the  
18 remedial avenue as only being litigation by an  
19 individual person, and that is a narrow approach  
20 particularly in this context because of all of the 11:22  
21 limitations on that type of redress that we have  
22 already identified.

23  
24 And, Judge, you'll see there that, when one looks at  
25 the ECHR case law in respect of Article 13, the 11:22  
26 remedies provision of the Convention, that you already  
27 have looked at yesterday, you'll see there there's a  
28 case that I didn't open, Wiberg -v- Sweden where they  
29 --

1 MS. JUSTICE COSTELLO: which page are you on now?

2 MS. HYLAND: Sorry, Judge, I'm on page 60, the same  
3 page that that diagram is on, and there's a box there  
4 with an extract from the Convention case law.

5 MS. JUSTICE COSTELLO: Oh, Segerstedt-Wiberg. 11:23

6 MS. HYLAND: Yes, exactly, I am sorry, you are right.  
7 I took the easy way out there. You will see:

8  
9 *"The 'authority' referred to in Article 13 [of the*  
10 *ECHR] may not necessarily in all instances be*  
11 *a judicial authority in the strict sense.*  
12 *Nevertheless, the powers and procedural guarantees an*  
13 *authority possesses are relevant in determining whether*  
14 *the remedy is effective. Furthermore, where secret*  
15 *surveillance is concerned, objective supervisory*  
16 *machinery may be sufficient as long as the measures*  
17 *remain secret. It is only once the measures have been*  
18 *divulged that legal remedies must become available to*  
19 *the individual."*

20 11:23  
21 And then turning over the page, Judge, you'll see there  
22 a precondition obligation to inform and the right to  
23 access. And at 3.1 FRA deals with this point:

24  
25 *"The obligation to inform and the right to access one's 11:23*  
26 *own data can generally be perceived as a strong*  
27 *safeguard for ensuring the effectiveness of a remedial*  
28 *action, and, ultimately, legal scrutiny by judicial or*  
29 *non-judicial bodies. From the point of view of the*

1       *right to data protection, these safeguards also ensure*  
2       *transparency of data processing and the exercise of*  
3       *other rights of the individual, i.e. the rectification*  
4       *and/or deletion of data being processed unlawfully. In*  
5       *the context of surveillance, even with necessary*  
6       *restrictions, the obligation to inform and the right to*  
7       *access also enhance transparency and accountability of*  
8       *the intelligence services and help to develop citizens'*  
9       *trust in government actions. Legal and judicial or*  
10       *non-judicial bodies from the point of view of the right* 11:23  
11       *of data protection these safeguards also ensure*  
12       *transparency of exercise of other rights of the*  
13       *individual, i.e. the rectification and/or deletion of*  
14       *data being processed unlawfully in the context of*  
15       *surveillance even with necessary restrictions, the* 11:24  
16       *obligation to in fact the right to access also enhance*  
17       *transparency and accountable of the intelligence*  
18       *services and help citizens trust in government actions.*  
19       *To safeguard national security, obligations under*  
20       *Article 13 may be restricted to the extent necessary* 11:24  
21       *and properly justified."*

22  
23       And then there's a discussion of the Court of Justice  
24       case law. Then there's also a reference to Klass as  
25       well, and the court has already seen that, and if 11:24  
26       I could ask the court to turn over then.

27  
28       Then, Judge, just looking at the situation in the  
29       Member States, the first column on the left-hand side:

1       *"The legal frameworks of all Member States allow*  
2       *restrictions on the obligation to information and the*  
3       *right to access on the basis of a threat to national*  
4       *security and/or the intelligence services objectives.*

11:24

5  
6       *Differences are, however, observed as to the conditions*  
7       *and levels of restrictions. Some Member States do not*  
8       *provide for the obligation to inform and the right of*  
9       *access. Others provide for restrictions on the grounds*  
10       *of existing threat to national security, yet these*  
11       *restrictions are not identical. Finally, some*  
12       *Member States balance the restrictions by giving*  
13       *oversight bodies the mandate to a) check whether the*  
14       *invoked national security threat justification is*  
15       *reasonable in fact and/or b) to exercise the right to*  
16       *access indirectly, i.e. on individuals' behalf."*

11:24

11:25

17  
18       And I suppose, Judge, one must just bear in mind here  
19       that the FRA have already said that they have only  
20       looked at five Member States in the context of *signals*  
21       intelligence. So what's being looked at here is in the  
22       context of *targeted* intelligence, and I think that is  
23       important to remember so as not to assume that what's  
24       being discussed here is in the context of signals  
25       intelligence because we know that in only five cases  
26       they were in fact able to consider the relevant laws in  
27       being.

11:25

11:25

28  
29       And then: *"The obligation to information and the right*

1 to access are not provided for in eight Member States -  
2 and they identify those Member States including  
3 Ireland - This is attributable either to national data  
4 protection laws, which do not apply, or to derogations  
5 enshrined in specific laws."

11:25

6  
7 And that also includes the United Kingdom.

8  
9 Then half about half way down: "In some Member States,  
10 States, the obligation to inform and/or the right to  
11 access are restricted because of rules applicable to  
12 classified documents and official secrets. In Latvia,  
13 the specific law on the intelligence services  
14 stipulates that information gained by the intelligence  
15 services is of restricted access or classified as an  
16 official secret."

11:26

17  
18 And then the last paragraph: "In the other 20 Member  
19 States, the obligation to inform and right to access  
20 are provided for in the law, albeit with restrictions.  
21 The conditions vary regarding when the individual must  
22 be informed or may exercise the right to access, or  
23 other qualifying aspects."

11:26

24  
25 And then there's an identification of the various laws.  
26 And then just at the very bottom line:

11:26

27  
28 "In five Member States, specific laws exempt the  
29 intelligence services' activities from the remit of



1           *general data protection legislation.*

2  
3           *Independent of whether this is done on the basis of*  
4           *a general data protection law or in accordance with*  
5           *specific legislation, individuals' right to access and*  
6           *the services' obligation to inform tend to be*  
7           *restricted on the ground that the information would*  
8           *threaten the objectives of the intelligence services or*  
9           *national security. This restriction applies for the*  
10          *entire period during which such a threat exists. An*  
11          *assessment of the threat should therefore be performed*  
12          *over time to ensure that the restriction is justified."*

13  
14          Judge, this is important, particularly important this  
15          section, because you will remember that it was asserted 11:27  
16          by Mr. Murray that the Tele2 case in particular,  
17          I think at paragraph 120, has a right to notification.  
18          And we have already said, Mr. Gallagher has already  
19          said that this is in the context of criminal  
20          enforcement in any case. It's easy to see, in my 11:27  
21          submission, why that must be right. Because it could  
22          not be the case that the Court of Justice unilaterally  
23          would have imposed an obligation on all intelligence  
24          services to notify without any caveat or possibility  
25          for that notification right to be restricted where the 11:27  
26          national security demands that to be the case.

27  
28          And in fact when one looks at the wording of paragraph  
29          120 there is a reference to "*in accordance with the*

1       *national laws*". So even in the criminal sphere there's  
2       a --

3       **MS. JUSTICE COSTELLO:** Paragraph 120 of what?

4       **MS. HYLAND:** I beg your pardon, of Tele2, of the  
5       decision of the Court of Justice in Tele2, which of 11:28  
6       course came after the data protection's decision in any  
7       way. But it is just important to reflect on the fact  
8       that, as we have already said, there is no EU  
9       obligation to notify. There *is* no obligation under the  
10      Convention of Human Rights to notify. There are some 11:28  
11     cases where the Convention, where the Court of Human  
12     Rights have said that a Member State lack of  
13     notification coupled with the régime as a whole is a  
14     breach of Article 8.

15  
16     But the notion that there's a *standalone* EU law right  
17     to notify without exception in the national security  
18     side is just simply not borne out by anything that has  
19     been opened to this court and it is in my submission  
20     important because it seems to be a core aspect of what 11:28  
21     the *DPC* believed to be the EU law and we say that's  
22     quite mistaken.

23  
24     Can I ask the court then please to go to page 65, just  
25     some two pages on. Now we move into the specific 11:28  
26     signals intelligence area. You'll see there that, on  
27     the second column on the last paragraph:

28  
29     *"Only two of the five Member States authorised to*

1        *conduct signals intelligence distinguish between the*  
2        *obligation to inform an individual in case of targeted*  
3        *surveillance versus their obligation to do so when an*  
4        *individual is affected as a result of signals*  
5        *intelligence. These provisions focus on the obligation* 11:29  
6        *to inform an individual regarding data collection that*  
7        *is conducted automatically and according to predefined*  
8        *filters. In this phase, the laws provide for the*  
9        *lifting of the obligation to inform. In particular,*  
10       *the obligation to inform does not apply if a) the* 11:29  
11       *search terms are not directly related to the individual*  
12       *(Sweden) or b) the data are immediately deleted after*  
13       *they have been captured through use of the selectors*  
14       *(Germany)."*

15  
16       I think what that flags to the court in my submission  
17       is that the question of notification in the context of  
18       signals intelligence is a delicate and difficult one  
19       which is very different to that where there is the  
20       traditional warrant authorising tapping of a person's 11:30  
21       phone. And in that situation it is of course  
22       considerably easier to provide notification. But where  
23       one is looking at signals intelligence, with all the  
24       complexities that this court has already been exposed  
25       to, the situation is, I think, one that could only be 11:30  
26       dealt with in detailed legislation and hasn't been  
27       dealt with at the EU level in detailed legislation.  
28       There is some national legislation, not very many  
29       Member States as we can see, but nonetheless it is not

1 something that is susceptible, if you like, to a  
2 one-size-fits-all answer, if I may describe it in that  
3 way.

4  
5 Now just turning over the page to 66 "*Judicial*  
6 *Authorities*":

11:30

7  
8 *"Courts provide an avenue for individuals to complain*  
9 *about interference with their privacy and to seek*  
10 *a remedy, including in the area of surveillance.*  
11 *However, several obstacles stand in place for an*  
12 *individual complaining about signals intelligence: The*  
13 *courts' lack of specialisation; general procedural*  
14 *obstacles, such as costs, delays or complexity; and*  
15 *a lack of concrete evidence and a high burden of proof*  
16 *for establishing the veracity of evidence, or possible*  
17 *invocation of state secrecy privilege, including*  
18 *'neither confirm nor deny' stances. These major*  
19 *obstacles can, in some cases, be mitigated in systems*  
20 *with specialised tribunals/courts, where judges possess*  
21 *the knowledge necessary to decide on often technical*  
22 *matters and are also allowed to access secret material.*  
23 *Other elements that can facilitate an individual's*  
24 *access to remedies include more relaxed standing proof*  
25 *rules, class actions and effective protection of*  
26 *whistle-blowers. The Parliamentary Assembly of the*  
27 *Council of Europe has stated that whistleblowing is*  
28 *'the most effective tool for enforcing the limits*  
29 *placed on surveillance'. The Committee of Ministers of*

11:31

1       *the Council of Europe adopted a Recommendation on the*  
2       *protection of whistleblowers."*

3  
4       And then there's a reference to whistleblowers.

5  
6       But that paragraph, Judge, the importance of it in this  
7       case in our submission cannot be overemphasised.  
8       Because it shows that all of the obstacles that were  
9       identified in the US context are also present in the  
10      European context in the different Member States and  
11      that is vital, we say.

12  
13      *"Lack of specialisation and procedural obstacles"* and  
14      then there's an identification of the Schrems case.

15  
16      Then turning over the page, Judge, to page 67 and going  
17      to the top of the page:

18  
19      *"Furthermore, for individuals to obtain adequate*  
20      *redress for a suffered harm, they must usually bring*  
21      *sufficient evidence of unlawful surveillance in the*  
22      *context of targeted or signals intelligence,*  
23      *individuals often do not have the fully-fledged right*  
24      *to be notified that they have been the subject of*  
25      *surveillance measures and/or to have access to such*  
26      *data. There is often no information provided in*  
27      *practice. In the United Kingdom, for instance, there*  
28      *is a well-established policy of 'neither confirm nor*  
29      *deny' responses to questions about sensitive matters of*

1       *national security. Individuals have therefore little*  
2       *opportunity to submit concrete evidence, which often*  
3       *makes the courts (but in some cases also non-judicial*  
4       *bodies) inaccessible avenues in practice. The Council*  
5       *of Europe Commissioner for Human Rights stated that*  
6       *'such modifications to proceedings can make it*  
7       *difficult or impossible to have a fair trial'. The*  
8       *Irish High Court acknowledged the inability to provide*  
9       *evidence of such situations."*

11:32

10  
11       Then there's a reference to the German case that  
12       Mr. Gallagher had already identified to you, about the  
13       37 million communications, 12 being considered relevant  
14       and the Federal Administrative Court holding the  
15       complaint was:

11:33

16  
17       *"Inadmissible as complaints against strategic*  
18       *surveillance of telecommunications under the relevant*  
19       *domestic law were only admissible if it was evident the*  
20       *complainants had been affected. The court added that*  
21       *the right to an effective remedy does not mean that the*  
22       *burden of proof must be eased on the ground that the*  
23       *individual is not informed when data collected through*  
24       *the search terms are immediately deleted."*

11:33

25  
26       And the court then goes on or, sorry, the FRA goes on  
27       to say:

11:33

28  
29       *"In this context and in light of existing ECtHR*

1       *jurisprudence on victim status, the possibility to*  
2       *challenge the constitutionality of the mere existence*  
3       *of legislation permitting secret measures, without*  
4       *having to allege that such measures were in fact*  
5       *applied to an individual, is an important safeguard."*

11:33

6  
7       And then there's a reference to Weber and Saravia that  
8       the court has already seen. And then:

9  
10       *"The applicants in what became known as the Weber and*  
11       *Saravia case complained about the expansion of the*  
12       *Federal Intelligence Service's powers of strategic*  
13       *telecommunications surveillance. The German*  
14       *Constitutional Court ruled that the legal provisions on*  
15       *the competences of the BND regarding surveillance for*  
16       *the purposes of pre-empting money laundering, the use*  
17       *of obtained data, the transfer of data to other*  
18       *authorities and on the limited obligation to notify*  
19       *affected persons, were not compatible with the German*  
20       *Basic Law. The court also demanded stronger oversight*  
21       *by the G10 Commission. Because of this judgment, the*  
22       *law was substantially revised in June 2001. The court*  
23       *applied similar rules to the burden of proof as the*  
24       *European Court of Human Rights."*

11:33

25  
26       And in fact, Judge, I think that was the ruling of the  
27       constitutional court prior to it going to the Court of  
28       Human Rights because in the Weber case you see them  
29       referring back to the constitutional challenge.

11:34

1 And then, bottom of the page: *"In addition to these*  
2 *specific procedural obstacles and the fact that*  
3 *individuals often simply do not know that they are a*  
4 *target or encompassed by surveillance, going to court*  
5 *often exposes individuals to lengthy, time-consuming,* 11:34  
6 *complicated and costly procedures. That is why*  
7 *individuals may prefer to access justice via*  
8 *non-judicial avenues or through intermediaries, such as*  
9 *relevant civil society organisations. The latter may*  
10 *play a vital role in taking such complaints to court*  
11 *when class actions are allowed, as well as in bringing*  
12 *cases of a more general nature requesting access to*  
13 *specific information on the activities and*  
14 *investigative methods of intelligence authorities to*  
15 *contribute to greater transparency and accountability*  
16 *in this area. However, civil society organisations*  
17 *often lack adequate resources, and few are able to*  
18 *offer comprehensive services to victims of data*  
19 *protection violations."*

20  
21 And then, Judge, to the next column, just looking at  
22 the Irish case:

23  
24 *"In Ireland, a complaint can be made to the Complaints*  
25 *Referee, a judge of the Circuit Court nominated to hold*  
26 *this specialised position. The referee may investigate*  
27 *whether there has been a contravention of the relevant*  
28 *provisions of the Act on interception of*  
29 *communications. If a complaint is upheld, the*



1        *Complaints Referee will quash the interception, report*  
2        *the matter to the Taoiseach (prime minister) and*  
3        *recommend a compensatory payment. To date, this has*  
4        *not occurred. In parallel, a civil action for damages*  
5        *for breach of privacy protected by the constitution can*  
6        *also be taken in the High Court."*

7  
8        And it is noticeable - I beg your pardon *notable* - in  
9        the Irish context that there is no right to  
10       notification here, and the DPC obviously must have been 11:35  
11       aware of that being in this jurisdiction. There is a  
12       different remedial approach which is to make a  
13       complaint to the Complaints Referee and I will deal  
14       with that.

15  
16       Can I ask the court then please to go to page 70 and  
17       then there is a consideration of "*non-judicial*  
18       *remedies, independence, mandate and powers*". Actually,  
19       Judge, could I just ask you to look at the UK, just on  
20       the previous page, page 69, on the left-hand column 11:36  
21       there is just a brief summary of the UK approach.

22  
23       *"It has been the long-standing policy of the*  
24       *United Kingdom government to give a 'neither confirm*  
25       *nor deny' (NCND) response to questions about matters*  
26       *sensitive to national security. The IPT - that's the*  
27       *Investigatory Powers Tribunal - recognised the*  
28       *legitimate purpose and value of such a response in*  
29       *several cases. It held that 'the NCND policy is needed*

1 to help to preserve secrecy', and that it does not  
2 interfere with the right to privacy in cases where  
3 there is no relevant information held on the  
4 complainant. In 2010 for example, 30% of the 164  
5 complaints received by the IPT were directed against  
6 security and intelligence services", and then there is  
7 some detail about that.

11:36

8  
9 Judge, then there's an identification of the various  
10 types on page, the following page, page 70, the various  
11 non-judicial remedies and the types of non-judicial  
12 bodies. At 3.3.2, the issue of independence of those  
13 bodies, and then if I could ask the court to turn to  
14 page 72 and you'll see there at 3.3.3 "powers and  
15 specialisation of non-judicial remedial bodies" and the  
16 FRA notes that:

11:37

17  
18 "Any non-judicial body tasked must have the power to  
19 conduct a thorough review of the case which includes  
20 having access to all relevant materials and having the  
21 power to grant a binding remedy. Although this section  
22 focuses on the powers of non-judicial remedial bodies,  
23 the question of specialisation of such bodies is also  
24 briefly touched on."

11:37

25  
26 And then there is a reference in the box to a case, the  
27 case that we have already looked at, or sorry the case  
28 the court already identified Segerstedt-Wiberg, and  
29 that is in respect of the parliamentary Ombudsman and

11:37

1 its role in Sweden. In that particular case it was not  
2 considered to be effective for the very good reason,  
3 Judge, that, about half way down:

4  
5 *"They both lack the power to render a legally binding*  
6 *decision. In addition, they exercise general*  
7 *supervision and do not have specific responsibility for*  
8 *enquiries into secret surveillance or into the entry*  
9 *and storage of information on the security register."*

11:38

10  
11 So it seems that they have general powers but not one  
12 specific to the surveillance area.

11:38

13  
14 Then, Judge, just coming to the end of that report, at  
15 page 75 one sees the key findings, and again I don't  
16 think I need to set them out because I have gone  
17 through them.

11:38

18  
19 So, Judge, that, I think, is an important report. It  
20 shows the very grave issues on the European side as  
21 well as on the US side and shows that there can be no  
22 complacency or assumption that on the European side  
23 there is unhindered access to courts for the purposes  
24 of vindicating privacy rights in the area of  
25 surveillance.

11:38

11:38

26  
27 Some of that arises because of the particular issues  
28 with surveillance. It's, if you like, the structural  
29 issue and the FRA Report recognises that oversight is

1 the correct response in that situation, that there must  
2 be a holistic approach.

3  
4 Judge, can I move now please to the United Kingdom and  
5 I'm going to just deal very briefly with the David 11:39  
6 Anderson report known as the report of the bulk powers  
7 review. This is an August 2016 report. David Anderson  
8 is the independent or was, he is now changed, there is  
9 a new person, independent reviewer of terrorism. He  
10 had done the report called a "*Question of Trust*" in 11:39  
11 2015 which was referred to in the FRA Report, but this  
12 is a different report.

13  
14 And, I suppose, why am I asking the court to look at  
15 it? well, for a number of reasons. First of all, 11:39  
16 I think it's helpful in describing the kinds of  
17 surveillance that take place in the United Kingdom,  
18 much of which you will see echoes of from the US  
19 system. It directly compares the US surveillance, some  
20 of the various different avenues, with the UK, and 11:39  
21 I think that's a useful. It makes reference to the  
22 PCLOB, it makes reference to the Snowden disclosure.  
23 It shows that the same types of activities are going on  
24 in the United Kingdom as are going on in the US and one  
25 cannot see the US as any kind of outlier in this 11:40  
26 respect. And I'm going to move quite briefly through  
27 it, Judge.

28 **MS. JUSTICE COSTELLO:** where is this report and who has  
29 exhibited it.

1           **MS. HYLAND:** Yes.

2           **MS. JUSTICE COSTELLO:** And what status does it have in  
3           these proceedings?

4           **MS. HYLAND:** So it has been exhibited by Mr. Clarke and  
5           Mr. Robertson. Sorry, both of them refer to it, 11:40  
6           neither of them actually exhibited it, but both of them  
7           refer to it, said that they had read it and said that  
8           they took on board its conclusions.

9           **MS. JUSTICE COSTELLO:** But I still haven't read a word  
10          of Mr. Robertson's affidavit. 11:40

11          **MS. HYLAND:** Yes. Well, I can do that straight way.

12          **MS. JUSTICE COSTELLO:** Well, there was an issue as to  
13          what was to be allowed --

14          **MR. GALLAGHER:** It's resorted or resolved, sorry.

15          **MS. HYLAND:** Yes, that's now been -- and the reason I'm 11:40  
16          doing it last is --

17          **MS. JUSTICE COSTELLO:** Does that mean I can read it or  
18          I can't read it?

19          **MS. HYLAND:** You can, Judge. You can only read  
20          parts -- you can read parts of it basically. We have 11:40  
21          identified --

22          **MS. JUSTICE COSTELLO:** How do I know which parts?

23          **MS. HYLAND:** I'm going to hand that up, sorry, Judge.  
24          The reason I was doing it at the end, I will hand it up  
25          straight away to you now. 11:40

26          **MR. GALLAGHER:** It's a party trick.

27          **MS. HYLAND:** Yes. I hope it doesn't disappoint, Judge,  
28          after the --

29          **MS. JUSTICE COSTELLO:** In which cup is the pea.

1           **MS. HYLAND:** The anxious waiting. Judge, it quotes a  
2           lot from the FRA Report and the bulk powers review and  
3           that's why I was intending to go to them first.  
4           **MS. JUSTICE COSTELLO:** Yes.  
5           **MS. HYLAND:** But the court obviously -- 11:41  
6           **MS. JUSTICE COSTELLO:** No, no, that's fine. I just  
7           want to know where I'm going.  
8           **MS. HYLAND:** Yes, exactly. So, Judge, I can identify  
9           that, perhaps if I could then, subject to the court,  
10          I could just open the parts of the bulks powers review 11:41  
11          first and then go back.  
12          **MS. JUSTICE COSTELLO:** Yes.  
13          **MS. HYLAND:** Because it means I won't be, if you like,  
14          repeating that again. So, Judge, if I could just ask  
15          you then please to look at page 1 of the bulk powers 11:41  
16          report.  
17          **MS. JUSTICE COSTELLO:** which? Is this exhibited in  
18          this document?  
19          **MS. HYLAND:** I am so sorry, I beg your pardon, no.  
20          What I'm going to do, Judge, is, I'm going to give it 11:41  
21          to you in a paper form, the bulk powers report. It is  
22          on the tablet in some of the additional materials, but  
23          I think it may be as easy just to give it to the court  
24          in a bulk, well in a bulk version. It certainly is  
25          quite bulky. I'm only going to move through it quite 11:41  
26          briefly because of its size, but there is very valuable  
27          and important material contained in there. I can also  
28          give, the tablet is at, that particular report is on  
29          the tablet at present.

1 Can I just ask the court then to look please at page 1  
2 of it, the executive summary, and you will see what the  
3 report is doing. He is evaluating the operational case  
4 for four of the powers in the Investigatory Powers Bill  
5 currently before the Parliament at that time. It has 11:42  
6 now been passed into law and those four powers were  
7 bulk interception, bulk acquisition, bulk equipment  
8 interference and bulk personal data sets, and I'm only  
9 going to look at the first two.

10  
11 You'll see the third bullet point:

12  
13 *"The security-cleared review team comprised technical,*  
14 *investigatory and legal experts who consulted widely."*

15 11:42  
16 You'll see that in the fifth bullet point the report  
17 concludes there was a proven operational case for three  
18 of the bulk powers and a distinct though not proven  
19 operational case for bulk equipment interference.

20 11:43  
21 And you'll see then at the, I think it's the seventh  
22 bullet point:

23  
24 *"The bulk powers play an important part in identifying,*  
25 *understanding and averting threats in Great Britain,*  
26 *Northern Ireland and further afield. Where alternative*  
27 *methods exist, they are often less effective, more*  
28 *dangerous, more resource-intensive, more intrusive or*  
29 *slower."*

1 And the next bullet point: *"The Review was not asked*  
2 *to reach conclusions as to the proportionality of*  
3 *desirability of the bulk powers."*

4  
5 And then if I could just ask the court please to go to 11:43  
6 page 4, paragraph 1.9, you'll see there this term *"mass*  
7 *surveillance"* that has been --

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

9 **MS. HYLAND:** -- before the courts. You will see there  
10 it is stated: 11:43

11  
12 *"whether a broader or narrower definition is preferred,*  
13 *it should be plain that the collection and retention of*  
14 *data in bulk does not equate to so-called 'mass*  
15 *surveillance'. Any legal system worth the name will*  
16 *incorporate limitations and safeguards designed*  
17 *precisely to ensure that access to stores of sensitive*  
18 *data (whether held by the Government or by*  
19 *communications service providers [CSPs]) is not given*  
20 *on an indiscriminate or unjustified basis. Such*  
21 *limitations and safeguards certainly exist in the*  
22 *Bill."*

23  
24 Then turning over to paragraph 1.17 there is a  
25 reference there to the Snowden revelations and you will 11:44  
26 see about a third of the way down he says:

27  
28 *"The material taken by him through access to US*  
29 *National Security Agency [NSA] systems, and the*



1        *articles subsequently published in outlets including*  
2        *the Guardian and the New York Times, have been the*  
3        *basis for suggestions that in the UK as elsewhere,*  
4        *broad and obscure powers were being exercised in a*  
5        *manner that few had understood. Litigation, fuelled by*  
6        *those allegations, has persuaded the IPT - the*  
7        *Investigative Powers Tribunal - to indicate that some*  
8        *powers have lacked the necessary accessibility and*  
9        *foreseeability to comply with international human*  
10       *rights standards."*

11:44

11  
12       Then if I could ask the court to go to page 10 please,  
13       and I think this is very important. The "*bulk*  
14       *acquisition capability*", and later in the report we see  
15       that described. You will see that it is stated there  
16       the top of the page, paragraph (d), top of page 11:

11:44

17  
18       *"The bulk acquisition capability which MI5 and GCHQ had*  
19       *under section 94 TA 1984 was not publicly avowed*  
20       *until November 2015."*

11:45

21  
22       And what that means, Judge, and we will see a case  
23       called Privacy International about that. In litigation  
24       brought by Privacy International, and in the context of  
25       the Bill in respect of the new UK legislation, it was  
26       admitted by the UK intelligence services that in fact  
27       they had been carrying out bulk acquisition since 2001  
28       but it had never been a matter of public record or  
29       known at all, and, as one will see from here, it was a

11:45

1 very sensitive collection programme.

2 **MS. JUSTICE COSTELLO:** So even though he makes the  
3 distinction about mass surveillance and there is an  
4 acceptance of bulk acquisition.

5 **MS. HYLAND:** Yes.

11:45

6 **MS. JUSTICE COSTELLO:** Are we talking about 'a rose is  
7 a rose by any other name', or are we talking about a  
8 distinction?

9 **MS. HYLAND:** No, I think what he is saying is that,  
10 even when it was not avowed, when it was not known,  
11 when there was no legislation about it, it was still  
12 not *mass surveillance* in the way that he referred to  
13 earlier on with no limitations or no controls or no  
14 winnowing down. But I think his point here is that it  
15 was not in any way known about, it was not in any way  
16 subject to legal controls. So there are two, if you  
17 like, different points. One, I suppose, is operational  
18 and the other is perhaps legal.

11:45

11:46

19  
20 Then just turning to page 16 you will see that there's  
21 a reference at 1.44 onwards to *oversight bodies* and the  
22 reviewer had access to oversight bodies with access to  
23 classified information. And at paragraph 1.47 there is  
24 a reference to the PCLOB and the assistance that a  
25 member of the PCLOB had given to the Independent  
26 Reviewer in this context.

11:46

11:46

27  
28 Then, moving on to page 20, you will see he identifies  
29 the various, four types of powers, bulk powers, that he

1 is looking at and he has a chart there at page 20. And  
2 the bulk power in question, there is four,  
3 interception, acquisition, EI, which is equipment  
4 interference, and BPD which is bulk personal data sets  
5 and he categorises them depending on various  
6 approaches.

11:47

7  
8 Then, just to turn on to page 21, the definition of  
9 "*bulk interception*". And at 2.7:

10  
11 "*Bulk interception is a capability designed to obtain*  
12 *foreign-focused intelligence and identify individuals,*  
13 *groups and organisations overseas that pose a threat to*  
14 *the UK. It allows the security and intelligence*  
15 *agencies to intercept the communications of individuals*  
16 *outside the UK and then filter and analyse that*  
17 *material in order to identify communications of*  
18 *intelligence value.*"

19  
20 So in some respects similar to 702.

11:47

21  
22 Then at page 23 paragraph 2.13 "*how bulk interception*  
23 *works*" and there is some very clear, in my submission,  
24 Judge, very clear explanations in this report:

25  
26 "*Interception is the process of collecting*  
27 *communications in the course of transit, such that the*  
28 *content becomes available to someone other than the*  
29 *sender or recipient. The fruits of interception (the*

11:47

1       *main focus of which must be overseas-related: Can*  
2       *include both the content of such communications and*  
3       *information about them. Bulk interception typically*  
4       *involves the collecting of communications as they*  
5       *transit bearers (communication links)."*

11:48

6  
7       And in that respect it may be more similar to 12333  
8       there, he appears to be talking about direct access on  
9       the bearers: "*Bulk interception involves three stages*  
10       *which may be called collection, filtering and selection*  
11       *for examination"* and he goes through those at 2.15  
12       onwards.

11:48

13  
14       At 2.18 he identifies the method of selection, he says:  
15       "*The application of these queries - and he's been*  
16       *talking about the various selectors - may still lead*  
17       *too many items for analysts to examine, so GCHQ must*  
18       *then carry out a triage process to determine which will*  
19       *be of most use. This triage process means that the*  
20       *vast majority of all the items collected are never*  
21       *looked at by analysts. Even where communications are*  
22       *known to relate to specific targets, GCHQ does not have*  
23       *the resources to examine them all. Analysts use their*  
24       *experience and judgment to decide which of the results*  
25       *returned by their queries are most likely to be of*  
26       *intelligence value and will examine only these."*

11:48

11:49

27  
28       Then he talks about, at 2.19, the "*strong selector*  
29       *process"* and the "*complex query"* process. Then, moving

1 on to paragraph 29, he identifies some case law of the  
2 Court of Justice. At 2.28, he says:

3  
4 *"More fundamentally, it has been suggested on the basis  
5 of CJEU case law that any bulk collection of the  
6 content of communications is per se unlawful."* 11:49

7  
8 And at footnote 78 he refers to the Schrems case. And,  
9 interestingly, he says, by way of comment on that:

10 11:49  
11 *"The bulk interception régime does allow for the  
12 collection of content in bulk, though the Government  
13 may be expected to argue, if necessary, that access to  
14 that content is not granted on a generalised basis, and  
15 that the distinction suggested by the CJEU is hardly a 11:49  
16 binary one, given that content is held for only a few  
17 seconds under the procedure outlined at 2.19(a) above."*

18  
19 Then, Judge, turning on to page 31, you'll see there's  
20 a description there of how bulk acquisition works. 11:50  
21 And, Judge, this is a different, we have now moved from  
22 bulk interception to bulk *acquisition* and this,  
23 I think, can be analogised to section 215 in the US  
24 context.

25 11:50  
26 This is the point, this is the collection, Judge, that  
27 was not identified and accepted until 2015 that I just  
28 mentioned a moment ago. And you will see at paragraph  
29 2.35:

1       *"Secret directions under section 94 have since at least*  
2       *2001 the GCHQ and from 2005 (MI5) enabled the SIAs to*  
3       *acquire."*

4  
5       They are the different intelligence bodies. 11:50

6       **MS. JUSTICE COSTELLO:** SIAs are?

7       **MS. HYLAND:** They are the - sorry. Yes, they are  
8       signals intelligence agencies, it's a generic term for  
9       a number of different agencies:

10  
11       *"Enabled the SIAs to acquire communications data in*  
12       *bulk, including in particular records of domestic*  
13       *communications, for the purposes there set out."*

14  
15       And there's a description of that. 11:50

16  
17       And at paragraph 2.41, he says: *"It can be said*  
18       *however that: (a) that the existing power and the*  
19       *power in Part 6 Chapter 2 of the Bill both enable the*  
20       *SIAs to obtain large amounts of communications data,*  
21       *most of it relating to individuals who are unlikely to*  
22       *be of any intelligence interest; but (b) content cannot*  
23       *be obtained under either power, and it is not currently*  
24       *envisaged that the bulk acquisition power in the Bill*  
25       *will be used to obtain internet connection records."* 11:51

26  
27       Then, Judge, turning on, please, to page 40, in fact  
28       this is in relation to EI, and I think I'm going to  
29       move on past that. But if I could ask the court to

1 look at page 57 there's an interesting comparison of  
2 Section 215 powers and the bulk acquisition powers.

3  
4 At page 57 you will see at paragraph 3.47: "*Section*  
5 *215 telephone records programme.*" Then there's a 11:51  
6 reference to the PCLOB's first report, which the court  
7 knows about:

8  
9 "*was on the telephone records programme conducted under*  
10 *an order issued by FISC under Section 215 of the USA* 11:52  
11 *PATRIOT Act.*"

12  
13 And there is a summary there of that particular  
14 programme and the history of that programme. And then  
15 under the heading "*comparison with UK bulk powers*", 11:52  
16 3.50:

17  
18 "*On the basis of the summary description quoted above,*  
19 *the Section 215 programme has obvious similarities with*  
20 *the bulk acquisition power described above:* 11:52

21  
22 (a) *each programme allows for the storage of telephone*  
23 *communications data (or metadata) in a single database;*  
24 (b) *the 'call detail records' described by the PCLOB*  
25 *fall within the definition of the 'traffic data'.* 11:52

26  
27 But then, interestingly, he goes on and he says:

28  
29 "*It would be wrong to assume the two programmes are*

1           *identical or even close equivalent.*" 3.51.

2  
3           And what he concludes is that in fact the UK programme  
4           was much broader and much wider and allowed for much  
5           greater collection than the section 215. At 3.51(a) he 11:52  
6           says:

7  
8           *"Nature of communications: The s215 power is limited to*  
9           *the collection of 'telephone records' relating to*  
10           *'calls'. The UK bulk acquisition power relates to*  
11           *'communications data', a category which is capable of*  
12           *including data relating also to e-mails, texts and*  
13           *voice over internet protocol telephony."*

14  
15           *"Types of providers", that's (b). In both cases* 11:53  
16           essentially what he is saying is that it's not clear,  
17           both in the US and in the UK, whether or not records  
18           were obtained from *mobile* providers as well as landline  
19           providers.

20 11:53  
21           *"(c) Categories of records. The records collected*  
22           *under the Section 215 power, again according to PCLOB,*  
23           *typically included 'the date and time of a call, its*  
24           *Duration, and the participating telephone numbers'.*  
25           *They did not include cell site location information.*  
26           *The UK category of 'traffic data', to which each of the*  
27           *current s94 directions relates, is potentially broader:*  
28           *In particular, it extends to location data and other*  
29           *related material. Under the Bill, the power will*



1 *continue to extend to 'any communications data', with*  
2 *no statutory exclusion even for ICRs."*

3 **MS. JUSTICE COSTELLO:** I am sorry, you will have to  
4 help me, ICRs?

5 **MS. HYLAND:** I think they are internet communicate - 11:53  
6 there is a, Judge, I will move the annex which had the  
7 key in it so I will come back to you in one moment.

8 **MS. JUSTICE COSTELLO:** I told I'm lost with these  
9 abbreviations.

10 **MS. HYLAND:** It's not a case for someone who doesn't 11:54  
11 like acronyms, Judge. Then *"permitted uses": "The*  
12 *only purpose for which 'NSA analysts were permitted to*  
13 *search the s215 calling records housed in the agency's*  
14 *database' was 'to conduct queries designed to build*  
15 *contact chains leading outward from a target to other*  
16 *telephone numbers', on the basis of 'a reasonable,*  
17 *articulable suspicion (RAS) that the number is*  
18 *associated with terrorism'. But as demonstrated by the*  
19 *IO."*

20 11:54  
21 Sorry, that's a UK supervisory body: *"And by the fact*  
22 *that no reasonable articulable suspicion is required*  
23 *under current UK law or under the Bill. UK analysts*  
24 *have a considerably wider range of uses for their*  
25 *records."* 11:54

26  
27 So again a difference between the two programmes. And  
28 then *"scale of use"*, very interesting.  
29

1 Yes, Judge, sorry, ICR is internet connection records.

2 **MS. JUSTICE COSTELLO:** Okay.

3 **MS. HYLAND:** Then just finally, Judge, on "scale of  
4 use":

5  
6 *"The scale of use of the two programmes is very*  
7 *different. In 2012, the NSA (which is a*  
8 *foreign-focused organisation) queried only 'around 300*  
9 *seed numbers'. In 2015 MI5 made 20,042 applications to*  
10 *access communications data obtained pursuant to s94*  
11 *directions, relating to 122,579 items of communications*  
12 *data, and GCHQ identified 141,251 communications*  
13 *addresses or identifiers of interest from such*  
14 *communications data, which directly contributed to an*  
15 *intelligence report. That is despite the fact that*  
16 *data under s215 was retained for five years, as against*  
17 *12 months under the UK power."*

11:55

18  
19 So, Judge, I think that's probably all I can do in the  
20 time available. But it is absolutely clear that one  
21 cannot, when one looks at this report, I suppose have  
22 any feeling that the US system is set apart or  
23 different. Judge, there is many other points in that  
24 report that one could look at, but for the moment  
25 that's, I think, all I can do.

11:55

11:56

26  
27 Judge, can I just ask the court now, please, to go on  
28 to the affidavit of Mr. Robertson. Much of what he  
29 says relates back to the FRA and to that report we have

1 just looked at so I hope I'll be able to go through  
2 that relatively quickly. I think the court should have  
3 a copy of it with --

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

5 **MS. HYLAND:** -- highlighted in yellow. Yes, very good. 11:56  
6 So what we have done, Judge, is the parts that we have  
7 identified are of evidential value are identified in  
8 yellow and the rest is commentary by --

9 **MR. MURRAY:** well, sorry, the parts that are in yellow  
10 are the parts that I have agreed to admit into 11:56  
11 evidence. The rest are not admitted into evidence,  
12 that's my firm understanding.

13 **MS. HYLAND:** Yes, and I am explaining why they are  
14 there.

15 **MS. JUSTICE COSTELLO:** I read the yellow bits. 11:56

16 **MS. HYLAND:** Yes, but I am simply explaining why the  
17 court is being presented in this way with the report.  
18

19 The introduction, Judge: *"I am the founder and co-head*  
20 *of Doughty Street Chambers, a large human rights*  
21 *practice in London comprising 35 QCs and 101*  
22 *barristers. I hold BA and LLB (hons) degrees from*  
23 *Sydney University, a BCL degree from Oxford (which I*  
24 *attended as a Rhodes Scholar) and honorary doctorates*  
25 *from the Universities of Sydney, Brunel (UK) and the*  
26 *National University of Political and Constitutional*  
27 *Studies (Bucharest). I am a visiting professor in*  
28 *human rights law at the New College of Humanities and*  
29 *Queen Mary College (University of London) and a senior*

1        *fellow at Regents University. I was admitted to the*  
2        *English Bar in 1974 and was made a Queen's Counsel in*  
3        *1988, and have been a Master of the Middle Temple since*  
4        *1997. I served as a Recorder (part-time judge) in*  
5        *London for 17 years (1993-2010), and as a United*  
6        *Nations appeal judge in the Special Court for Sierra*  
7        *Leone (2002-07) acting as the Court's first President.*  
8        *I was appointed by the Secretary General as a*  
9        *'distinguished jurist' member of the UN's Internal*  
10       *Justice Commission (2008-12), responsible, among other*  
11       *things, for interviewing and nominating UN judges, and*  
12       *in 2011 I received the New York Bar Association award*  
13       *for Distinction in International Law and Affairs. My*  
14       *book 'Crimes against Humanity - the Struggle for Global*  
15       *Justice' has been published in five editions in the UK*  
16       *and the US. As an advocate I have appeared in some 200*  
17       *reported cases in international, media and*  
18       *constitutional law in superior courts in England, in*  
19       *the Privy Council, in the European Court of Human*  
20       *Rights, the European Court of Justice and in other*  
21       *national and international courts. I am author of the*  
22       *International Bar Association's thematic paper on the*  
23       *Independence of the Judiciary.*

24  
25       *2. Specifically in relation to national security*  
26       *interception, this is an area to which I have given*  
27       *special study and has been a significant aspect of my*  
28       *practice since 1977, when I defended Duncan Campbell in*  
29       *the ABC official secrets case in which he was accused*

1 of exposing for the first time the interception role of  
2 GCHQ. Thereafter I represented and/or advised a number  
3 of 'whistleblowers' and publishers which wished to  
4 report their revelations about matters of public  
5 interest relating to national security, and have  
6 written and lectured on the problems of balancing the  
7 right of individual privacy with the operations of  
8 intelligence services. I authored the 6th and 7th  
9 edition of what was then the main textbook on civil  
10 liberties 'Freedom - the Individual of the Law' with  
11 chapters on these subjects, and my current textbook  
12 'Media Law' (written with Mr Justice Andrew Nicol) also  
13 deals with the UK and European position. I advised  
14 Messrs Heinemann, the publishers of 'Spycatcher', a  
15 book about MI5 by a former employee, which the UK  
16 government sought to ban on national security grounds,  
17 and I represented the MI5 agent David Shayler in the  
18 House of Lords case, dealing with his prosecution for  
19 exposing 'national security' surveillance of public  
20 figures (this is the most authoritative determination  
21 of issues under the UK's Official Secrets Act). I have  
22 acted for many years as an advisor to international  
23 newspapers (the Wall Street Journal, New York Times,  
24 Barrons and others) and national media outlets in  
25 respect of public interest reporting that could impinge  
26 on national security, and advised the editor of 'The  
27 Guardian' in relation to publication of material from  
28 Edward Snowden. I have acted for Julian Assange and  
29 for Wikileaks. I am a member of the Advisory Panel of

11:58

1           the Australian Privacy Foundation.

2  
3           3. I do not believe that I have any conflict of  
4           interest in providing what I trust is an objective  
5           expert opinion. I have, as a Queen's Counsel, been  
6           instructed to give an opinion to Facebook as to the  
7           consequences of the Schrems decision, but I have no  
8           other or continuing connection with that or any other  
9           of the organisations which may be affected by this  
10          case. In any event I am bound by my duty to the Court  
11          to assist it as best I can in respect of matters within  
12          my field of expertise and this duty overrides any  
13          conceivable obligation I may owe to the party  
14          instructing me or paying my fees. I should mention  
15          that I am a pro bono trustee of the Bureau of  
16          Investigative Journalism, which in 2014 brought a  
17          complaint, as yet unheard, to the ECtHR alleging that  
18          data interception violated journalists' rights under  
19          Article 10 to protect their sources, but I have no  
20          involvement in the case and it will not produce any  
21          financial benefit to the Bureau. I have cross-examined  
22          officials and agents of the UK intelligence services,  
23          and appeared with former directors of GCHQ (for  
24          example, at Chatham House) but I have not been  
25          'positively vetted' or otherwise inculcated with the  
26          ethos of the secret world of signals intelligence - my  
27          knowledge of it partly comes from defending  
28          'whistleblowers' and journalists prosecuted for  
29          exposing it. In this course I have had my telephone

1       *tapped - easily ascertainable in Britain in the 1970's*  
2       *by declining to pay the telephone bill and observing*  
3       *that it was not cut off (the state's appetite for*  
4       *information being greater than its appetite for*  
5       *money)."*

12:00

6  
7       I think the stenographer just wishes to change there.

8  
9       *"I expect, more recently, that certain of my telephone*  
10       *calls and e-mails may have been picked up in PRISM or*  
11       *Tempura programmes which work on 'key word' (i.e.*  
12       *'selector') interception" --*

12:00

13       **MS. JUSTICE COSTELLO:** The Tempura programme? Am I  
14       missing something? Is that a new word?

15       **MS. HYLAND:** I think it's a UK programme. I think it's  
16       -- well, I saw reference to it in David Anderson's  
17       report. But I'll see if I can find the references to  
18       where --

12:01

19       **MS. JUSTICE COSTELLO:** But it doesn't appear it be a US  
20       one anyway.

12:01

21       **MS. HYLAND:** It doesn't appear to be a US one, no.

22  
23       *"The key word being the mention of my client, Julian*  
24       *Assange. At other times I have had the benefit of*  
25       *secret surveillance against potential threats to*  
26       *myself, such as when I was with my client Salman*  
27       *Rushdie, who was the subject of a terrorist 'fatwa' and*  
28       *when I was counsel to an inquiry involving the Medellin*  
29       *cartel and when I was President of the UN Court in*

1 *Sierra Leone. I have no opposition to national*  
2 *security surveillance: I believe that it is necessary*  
3 *and sometimes effective in countering terrorism. I*  
4 *have expressed a general criticism of the composition*  
5 *of its oversight bodies because they lack persons with*  
6 *expertise in privacy and human rights - those I have*  
7 *termed 'patriotic sceptics', a class that would include*  
8 *Mr Schrems."*

9  
10 Then turning over the page, paragraph five:

12:02

11  
12 *"I was invited to provide this opinion by way of*  
13 *instruction from Gibson Dunn and Crutcher LLP on August*  
14 *24th, 2016, which I append (without the enclosures) as*  
15 *Appendix 1 to this affidavit. As will be appreciated*  
16 *from the issues I was asked to address... these*  
17 *included a description and analysis of protections and*  
18 *remedies available in the 28 EU Member States in*  
19 *respect of national security protection. This is a*  
20 *vast undertaking, and I am relieved to report that it*  
21 *has already been undertaken by the European Agency for*  
22 *Fundamental Rights, as part of its project for the*  
23 *mapping of Member States' legal frameworks in respect*  
24 *of privacy... personal data... and rights to remedies"*  
25 *- Articles 7, 8 and 47 - "Its report in November 2015,*  
26 *'surveillance by Intelligence Services: Fundamental*  
27 *rights, safeguards and remedies in the EU' is the most*  
28 *comprehensive and authoritative account of this*  
29 *subject, inspired by the Snowden revelations and*



1 written with the shadow of terrorist attacks in Europe  
2 well in mind. I have considered it carefully and adopt  
3 it as providing a sound factual basis for my opinion in  
4 respect of the disarray and disparity in law and  
5 practice in the European States. It is appended as  
6 Appendix 2, and I have additionally drawn upon the FRA  
7 country studies which backgrounded it, and on its  
8 Case-Law Database which compiles case law from the CJEU  
9 and ECHR and some national jurisdictions in respect of  
10 privacy, data protection and remedies. The FRA project  
11 is ongoing: I consider that its work so far serves to  
12 endorse my opinion about the unreality of the  
13 assumptions concerning EU law made in Schrems.

14  
15 6. I have indicated, in Appendix 3 and in the course of  
16 this opinion, the published material upon which I have  
17 relied for information which is not directly known  
18 through my work and experience. In relation to  
19 contemporary US law and practice I have been supplied  
20 with an article, 'US Surveillance Law, Safe Harbour,  
21 and Reforms since 2013' by Peter Swire, and with  
22 Professor Swire's draft report in these proceedings. I  
23 have also found helpful and authoritative two reports  
24 by David Anderson, a UK Queen's Counsel whom I know and  
25 consider to be an important, quasi-official exponent of  
26 issues relating to the law and practice of national  
27 security surveillance by the UK ( especially by GCHQ)  
28 in respect to the combating of terrorism, notably his  
29 June 2015 Report 'A Question of Trust', and his August

1           2016 'Report of the Bulk Powers Review'."

2  
3           And that's what we've just looked at, Judge.

4  
5           *"I consider the facts emerging therefrom to be*  
6           *reliable. The former report sets out the powers and*  
7           *duties of European States in respect to surveillance*  
8           *systems which encroach on personal privacy, and the*  
9           *latter makes what is in my view (and, more importantly,*  
10          *the view of the UK Government) an unanswerable case*  
11          *both as to the legality of bulk (or 'generalised')*  
12          *surveillance with appropriate oversight and as to its*  
13          *utility in identifying and investigating terrorist*  
14          *threats before they result in mass murder."*

15  
16          Judge, can I skip on then please to the next section.  
17          And that section may be found in -- sorry, Judge, I  
18          actually had a marked-up version and I'll find that in  
19          one second. If I could ask you again, Judge, please to  
20          go to page 27.

12:04

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

22          **MS. HYLAND:** *"European rights and remedies against*  
23          *SIGINT.*

24  
25  
26          *The human rights provisions which apply to 47 Council*  
27          *of Europe States, which include the 28 EU states, are*  
28          *those in the European Convention which in the case of*  
29          *national security operations permits a wide 'margin of*

1       *appreciation'* (see later). Article 8 requires respect  
2       *for privacy, and Article 13 guarantees an effective*  
3       *remedy. But the Council of Europe Commissioner for*  
4       *Human Rights has said that 'In many Council of Europe*  
5       *member states, bulk untargeted surveillance by security*  
6       *services is either not regulated by any publicly*  
7       *available law or regulated in such a nebulous way that*  
8       *the law provides few restraints and little clarity on*  
9       *these measures'."*

10  
11       That's a quote from the report that Mr. Gallagher  
12       opened to you yesterday -- or, sorry, the day before, I  
13       think, Judge.

14  
15       *"According to this report only five states have laws*  
16       *applicable to Signals Intelligence intercepts, and in*  
17       *general 'national legal frameworks lack clear*  
18       *definitions indicating the categories of persons and*  
19       *scope of activities that may be subject to intelligence*  
20       *collection'.*

21  
22       40. As for oversight:

23       *'There is no Council of Europe member state whose*  
24       *system of oversight comports with all the*  
25       *internationally or regionally recognised principles and*  
26       *good practices' ... 'Diversity in politics and legal*  
27       *systems has translated into a great variety of bodies*  
28       *that oversee intelligence services. EU member states*  
29       *have vastly different oversight systems. As for*

1        *remedies against surveillance abuses, 'The remedial*  
2        *landscape appears ever more complex: The powers of*  
3        *remedial bodies are curtailed when safeguarding*  
4        *national security is involved'.*

5  
6        *41. The Snowden revelations galvanised the European*  
7        *Parliament to call for a fundamental rights analysis of*  
8        *the powers of intelligence services, and various EU*  
9        *bodies concerned with digital data embarked on*  
10       *enquiries about the law and practices relating to*  
11       *national security intercepts within the twenty eight*  
12       *member states. Just as the enquiries began to report*  
13       *the absences of safeguards and remedies, with*  
14       *recommendations for reform especially in respect of*  
15       *bulk digital interception, Europe was hit with a series*  
16       *of terrorist atrocities, beginning with the attack on*  
17       *the offices of Charlie Hebdo magazine in January 2015*  
18       *and various Paris locations in November 2015 and*  
19       *continuing the following year with horrific attacks in*  
20       *Brussels and Nice. States of emergency were declared*  
21       *and governments (especially in France and the UK)*  
22       *became more concerned with enhancing the powers of the*  
23       *security services, which in the case of digital*  
24       *interception were already very wide. The most*  
25       *comprehensive analysis is the [FRA report].*

26  
27       *"42. This FRA Report highlights 'the great diversity*  
28       *among member states regarding how intelligence services*  
29       *are organised and perform their essential tasks'."*

1  
2 And I've already read that aspect of the amount of  
3 staff they have and the statutory basis for targeted  
4 surveillance in 26 of the 28, but only five having any  
5 legislation in respect of signals intelligence.

12:07

6  
7 *"The Council of Europe Commissioner for Human Rights*  
8 *has recently concluded that 'in many countries, there*  
9 *are few clear, published laws regulating the work of*  
10 *these agencies'.*

11  
12 *In relation to oversight, the FRA report examines:*

13  
14 *(a) Executive Control."*

12:07

15  
16 Then, Judge, there is a summary of the various -- and I  
17 think I'll read this, because he has identified what he  
18 considers to be important.

19  
20 *"This means, inevitably, an exercise of political power*  
21 *through the President/Prime Minister or ministers*  
22 *responsible for national security. It is not*  
23 *independent of government - it is government. The*  
24 *Report reveals a considerable measure of political*  
25 *direction and control. In France, the President chairs*  
26 *the National Intelligence Council, which includes the*  
27 *Prime Minister and other relevant ministers, and the*  
28 *Prime Minister is responsible for the Inspectorate*  
29 *which oversees the intelligence services. Bulgaria,*

1 Croatia, Italy and Portugal have similar arrangements,  
2 whilst in Greece the intelligence services are under  
3 the direct authority of a government minister. In the  
4 UK, ministers rather than judges authorise surveillance  
5 warrants, and the Prime Minister exerts powerful  
6 influence by appointing the two Commissioners  
7 responsible for oversight and by nominating members of  
8 Parliament's Intelligence and Security Committee. In  
9 Germany, the Federal Chancellery supervises the work of  
10 the intelligence service (the BND). In short, the  
11 report demonstrates how control is exercised by the  
12 executive in most states through its powers to task the  
13 services, to appoint and dismiss its leading officials,  
14 to appoint members of oversight bodies, to issue  
15 instructions and to approve surveillance measures.  
16 Executive control is, in my judgement, a very  
17 unsatisfactory safeguard - indeed, it is not a  
18 safeguard at all against politicisation and malicious  
19 abuse of data for political reasons to undermine or  
20 damage data subjects. Nor is it a safeguard against  
21 intelligence service error or overreach: Ministers in  
22 my experience almost always issue the surveillance  
23 warrants that their officials request because they are  
24 elected politicians and afraid of embarrassment if they  
25 do not and it later emerges that, had they done so,  
26 information might have been gleaned that would have  
27 helped to avoid a terrorist atrocity. They do not have  
28 the time or the judicial mindset to study each case,  
29 and tend to act as 'rubber stamps'. Human rights

1           *require safeguards against the involvement of*  
2           *politicians in the secret surveillance process.*

3  
4           *(b) Parliamentary Oversight*

5  
6           44. *Most EU States, with the exception of Malta,*  
7           *Finland and Portugal, have parliamentary committees*  
8           *that concern themselves with the intelligence services.*  
9           *However, as the Council of Europe Commissioner puts it,*  
10          *'The nature of these bodies means that most are not in*  
11          *a position to undertake regular, detailed oversight of*  
12          *operational activities including the collection,*  
13          *exchange and use of personal data.'* *Most are concerned*  
14          *with budgetary allocation and receive reports from*  
15          *security chiefs, some in secret and some in public.*  
16          *Only four committees in EU Parliaments can receive and*  
17          *investigate complaints and involve themselves in*  
18          *authorisation measures - in Romania, Hungary,*  
19          *Luxembourg and Germany. All the others must operate on*  
20          *trust - and in my experience security services cannot*  
21          *be trusted where they are concerned to cover up*  
22          *embarrassing failures or to over-promote success in an*  
23          *effort to obtain a higher budgetary allocation. The*  
24          *FRA report notes a confusion in the composition of*  
25          *parliamentary committees: Some cannot obtain access to*  
26          *classified information, and some have members 'vetted'*  
27          *by the intelligence services before they can obtain*  
28          *access. Security clearance of MP's is required in*  
29          *Estonia, Hungary, Latvia, Lithuania and Poland, but in*

1 other countries it is regarded as violative of the  
2 separation of powers. Whether MP's are vetted or not,  
3 these Parliamentary committees do not represent a  
4 'safeguard' of any great weight, as they cannot  
5 investigate and the majority of MP's will in any event  
6 be drawn from the governing party. Their lack of  
7 curiosity about the development of bulk interception or  
8 the omnipresence of GCHQ/NSA surveillance power prior  
9 to the Snowden revelations speaks for itself. The FRA  
10 report notes that 'Remarkably, the majority of  
11 Parliamentary Committees do not have access to  
12 classified information received from foreign secret  
13 services ... Therefore in practice there is for the  
14 most part no oversight of intelligence sharing.'

15  
16 (c) Expert Oversight

17  
18 45. Only 15 of the 28 member states have established  
19 expert committees for intelligence service oversight.  
20 These could provide independent oversight, if properly  
21 resourced, although most are appointed by Government  
22 and most members are 'vetted' by the intelligence  
23 services. There are questions over their independence  
24 from government or the intelligence services or both -  
25 and some states do not supply them with the resources  
26 necessary to be effective. Only Ireland, the report  
27 notes, 'has established the position of a specialised  
28 judge, who is in charge of adjudicating matters of  
29 communications interception'. Judges are favourite



1       appointees to expert bodies (intelligence commissions  
2       and the like) in all member states, although 'Judges  
3       are legal, not technology specialists ... and do not  
4       necessarily have the expertise required to oversee  
5       intelligence services'. The report endorses the  
6       recommendation of the Council of Europe Commissioner  
7       for Human Rights, that oversight bodies 'should, to the  
8       greatest extent possible, be composed of individuals  
9       with diverse backgrounds' including experts who can  
10      'provide them with a better understanding of  
11      surveillance systems and their human rights  
12      implications.' However, in a lengthy review of  
13      oversight bodies, I note that none of them seem to have  
14      places reserved for experts on human rights or civil  
15      liberties and may require 'vetting or membership of the  
16      intelligence establishment'.

17  
18      46. A study of Data Protection authorities in Europe  
19      reveals that in 12 member states they have no power  
20      over intelligence services at all, since this work is  
21      expressly excluded from their remit by the general data  
22      protection law. In a further 9 member states, they  
23      only have a limited power to make non-binding  
24      recommendations. The 2014 recommendations of their  
25      representative body, the Article 29 Data Protection  
26      Working Party (WP 29), that effective and independent  
27      supervision of intelligence services is necessary and  
28      should be carried out by Data Protection authorities,  
29      has not been heeded. Among the FRA Report's

1       conclusions are that 'EU Member States have vastly  
2       different oversight systems' and 'In some member  
3       states, the authorisation of surveillance measures does  
4       not involve any institutions that are independent of  
5       the intelligence services and the executive.'  
6       Importantly, it comments:

7  
8       'Access to information and documents by oversight  
9       bodies is essential. while information gathered by  
10      intelligence services is sensitive, and safeguards must  
11      guarantee that it will be dealt with accordingly,  
12      oversight bodies cannot carry out their tasks without  
13      first having access to all relevant information. The  
14      opposite, however, seems to be the norm'."

15  
16      Then, Judge, if I could just ask the court please to go  
17      on then to page 49...

18      **MS. JUSTICE COSTELLO:** You want me to leave 33 and  
19      following?

20      **MS. HYLAND:** Oh, I'm so sorry, yes, I've actually  
21      missed -- sorry, I beg your pardon, Judge. So then the  
22      heading "Remedies in Europe". And then turning over to  
23      33:

12:12

24  
25      "The FRA report on 'Remedies' in Europe demonstrates  
26      that they are subject to even more severe limitations  
27      and problems than remedies in the US.

28  
29      49. I refer to pages 59-76 in the FRA Report I have

1           *appended as Appendix 2. It finds that, in seeking a*  
2           *remedy against the intelligence services, 'the*  
3           *different remedial avenues are often fragmented and*  
4           *compartmentalised, and the powers of remedial bodies*  
5           *curtailed when national security is involved'. Only a*  
6           *few cases challenging surveillance practices have been*  
7           *brought at the national level... Moreover, 'strict*  
8           *procedural rules on evidence and legal standing' deter*  
9           *recourse to the courts.*

10  
11           *50. The first and obvious reason for the lack of remedy*  
12           *is that targets or victims of national security*  
13           *surveillance are not notified of the fact that their*  
14           *communications have been intercepted. The FRA reports*  
15           *that 8 member states do not provide any right to*  
16           *information or access."*

17  
18           *Then there's a reference to the Czech Republic.*

19  
20           *"In the other 20 countries, rights to be informed come*  
21           *with conditions that exempt provision of information,*  
22           *e.g. in respect of 'necessary measures in the interest*  
23           *of national security'... In 5 of these states, data*  
24           *protection laws specifically exempt intelligence*  
25           *services from compliance. In only 6 member states does*  
26           *there appear to be a generalised right to be informed*  
27           *after surveillance has ended, although in (for example)*  
28           *Germany this is subject to the threat having*  
29           *disappeared - a question that arises in respect of*

1       *'sleepers' and ISIS indoctrinees who may be*  
2       *'resuscitated' in the future (the G10 Commission can*  
3       *decide that information can be withheld, even after 5*  
4       *years, if release would endanger the national*  
5       *interest), while in Cyprus and Greece the intelligence*  
6       *services may request the Data Protection Authority to*  
7       *bar release on the grounds of national security. In*  
8       *some member states, the oversight body neither confirms*  
9       *nor denies SIGINT data processing when requested by a*  
10       *potential target. Only 2 member states have specific*  
11       *provisions on the obligation to inform SIGINT targets,*  
12       *and in one case the obligation does not apply to bulk*  
13       *collection and in the other it does not apply if the*  
14       *data has been immediately deleted."*

15  
16       I think this is Germany and Sweden, Judge, from the  
17       report we looked at.

18  
19       *"51. In rare cases where targets obtain information*  
20       *that they have been targeted, further difficulties*  
21       *arise, over and beyond the general procedural obstacles*  
22       *- costs, delay and complexity. There is a high burden*  
23       *of proof, invocation of 'state secrecy' privilege and*  
24       *rules related to standing. Courts lack expertise in*  
25       *dealing with intelligence matters and tend to defer to*  
26       *the intelligence services."*

27  
28       Then there's a quote from the report which the court  
29       has already looked at, I think that's page 67 of the

1 report. Then going on to paragraph 52:

2  
3 *"Given the problems with taking cases to the courts,*  
4 *some states offer specialised judges and quasi judicial*  
5 *tribunals. In Ireland the Complaints Referee has the*  
6 *power to quash interception, report to the Prime*  
7 *Minister and recommend a compensatory payment, although*  
8 *there had been none by the date of the Report. In the*  
9 *UK, the Investigatory Powers Tribunal (IPT) has*  
10 *exclusive jurisdiction to hear claims about SIGINT and*  
11 *the conduct of intelligence agencies, but it usually*  
12 *sits in secret and its powers are strictly limited to*  
13 *deciding whether legislation has been complied with and*  
14 *whether the agencies have acted 'reasonably'. It has*  
15 *upheld the UK policy of 'neither confirm nor deny'*  
16 *which prevents complainants from learning whether they*  
17 *have anything to complain about, and it has upheld the*  
18 *sharing of intelligence from PRISM on the grounds that*  
19 *there were 'sufficient safeguards in place'. In a*  
20 *landmark decision published in October 2016, the IPT*  
21 *ruled that bulk personal data collected by GCHQ and*  
22 *other intelligence agencies in years prior to the*  
23 *avowal of the practice in March 2015 was collected*  
24 *unlawfully, in contravention of ECHR principles as to*  
25 *the accessibility of law and the need for oversight.*  
26 *However, this was a pyrrhic victory for Privacy*  
27 *International: The Tribunal pointed out that*  
28 *individuals who could not prove that they had reason to*  
29 *believe that their data had been examined would have no*

1           *right to personal action.*

2  
3           *53. The FRA considers certain non-judicial remedies*  
4           *available in some EU countries, but it concludes that*  
5           *Data Protection Authorities, powers over intelligence*  
6           *services are weak, and that ombudsmen, although*  
7           *theoretically useful as a means of circumventing legal*  
8           *rules about standing, can only offer non-binding*  
9           *recommendations in cases of maladministration. It*  
10          *questions whether any such non-judicial bodies have*  
11          *true independence from government and the intelligence*  
12          *services, and notes that only 5 have the power to make*  
13          *binding decisions.*

14  
15          *54. The FRA report is the most comprehensive and*  
16          *authoritative account of the laws and practices in*  
17          *relation to signals intelligence of the 28 member*  
18          *states of the EU. It confirms my opinion that national*  
19          *remedies for abuse of data gathered by way of digital*  
20          *interception by intelligence agencies are ineffective*  
21          *and inadequate. I have found no case, whether before*  
22          *or after the Snowden revelations, where an individual*  
23          *has been compensated by a court for being improperly*  
24          *targeted by SIGINT or for having their data misused to*  
25          *their detriment."*

26  
27          Then a heading "The Question of Aliens":

28  
29          *"55. There has been no study, at least to my knowledge,*

1       *about digital surveillance of foreigners ('aliens') in*  
2       *Europe, although a number of state laws do single them*  
3       *out for special treatment. Thus Article 5(2) of*  
4       *Germany's Artikel 10 Gesetz G10 restricts the German*  
5       *intelligence services in monitoring German citizens,*  
6       *but this restriction does not apply to citizens of*  
7       *other EU countries or foreigners - including, of*  
8       *course, Americans. There is a new bill which passed*  
9       *its first reading in the Bundestag in July 2016 which*  
10       *permits the German Foreign Intelligence Agency (the*  
11       *BND) to place foreigners under surveillance without a*  
12       *court order in the interests of national security, with*  
13       *certain safeguards applicable only to EU citizens (i.e.*  
14       *not to Americans). It allows the BND to share the*  
15       *information with foreign intelligence agencies - so*  
16       *that Americans in Germany could have their personal*  
17       *data intercepted without court order and passed on to*  
18       *the CIA. In the UK, sections 8(4) and 16(3) of the*  
19       *Regulation of Investigatory Powers Act offers greater*  
20       *protection to communications sent and received within*  
21       *the UK than are afforded to 'external communications'*  
22       *that are either sent from within the UK or received*  
23       *from outside, and hence more likely to involve a*  
24       *foreign communicant. In Poland, a Surveillance law*  
25       *introduced in Parliament in January 2016 gives police*  
26       *the power to intercept the communications of foreigners*  
27       *without a court order in circumstances where such an*  
28       *order would be required for monitoring citizens.*  
29

1       56. *These discriminatory initiatives have been*  
2       *justified by terrorism concerns over the refugee*  
3       *influx, and it remains to be seen how courts will*  
4       *react."*

5  
6       Then, Judge, turning on to the next page, heading "Bulk  
7       Data Collection". And you'll see there:

8  
9       *"In my opinion bulk collection is acceptable, in a*  
10       *national security context if (but only if) it is*  
11       *subject to safeguards that ensure it remains strictly*  
12       *necessary and proportionate to the protection of*  
13       *national security."*

14  
15       Then going on to 58:

12:18

16  
17       *"I do think that the legitimacy of bulk collection in*  
18       *the above context has now been put beyond doubt by the*  
19       *'Report of the Bulk Powers Review' presented to the UK*  
20       *Parliament in August 2016 by an expert panel chaired by*  
21       *David Anderson QC. This followed concern over the*  
22       *admission by the UK Government in 2015 that GCHQ had*  
23       *long had a bulk acquisition capacity, used not only in*  
24       *respect of UK residents but residents throughout Europe*  
25       *(so much, incidentally, for European remedies: GCHQ had*  
26       *been bulk-collecting Euro data without let or hindrance*  
27       *for many years). The Review noted the internal*  
28       *safeguards in terms of retention and destruction*  
29       *procedures, and the external safeguards - a Government*



1        *minister must sign the interception warrant (not a*  
2        *satisfactory safeguard in my view), and noted (at p.29)*  
3        *that until 4th November 2015 'the existence of the*  
4        *capability was an extremely tightly-controlled secret.'*  
5        *It endorsed the 'firm and reasoned conclusions" of the*  
6        *US Privacy and Civil Liberties Board on the utility of*  
7        *bulk collection, which under the 702 programme 'makes a*  
8        *substantial contribution to the Government's efforts to*  
9        *learn about the membership, goals and activities of*  
10       *international terrorist organisations, and to prevent*  
11       *acts of terrorism from coming to fruition.'* *So far as*  
12       *ECHR law was concerned, it relied on Weber to endorse*  
13       *the conclusion in Mr. Anderson's previous report, 'A*  
14       *Question of Trust' that '... bulk data collection and*  
15       *analysis in the absence of suspicion is not itself a*  
16       *disproportionate interference with the right to respect*  
17       *private life'...*

18  
19       *59. The 2016 review closely considered GCHQ's*  
20       *anti-terrorist operations, including 19 case studies*  
21       *where bulk intercept information was used to apprehend*  
22       *terrorists or abort their plans. It found that over*  
23       *half of GCHQ's intelligence reporting on*  
24       *counterterrorism was based on data from*  
25       *counterterrorism warrants (in the year 2015, GCHQ*  
26       *identified from bulk surveillance no less than 141,251*  
27       *particular communications or addresses of 'interest' to*  
28       *its intelligence operations. The report concludes*  
29       *that 'bulk acquisition has been demonstrated to be*

1       *crucial (to) counterterrorism, counter-espionage and*  
2       *counter (nuclear) proliferation ... bulk acquisition*  
3       *has contributed significantly to the disruption of*  
4       *terrorist operations and, through that disruption, to*  
5       *the saving of lives'.*

6  
7       *60....I have my own doubts (shared by Mr Anderson) as*  
8       *to whether a warrant granted by a Government minister*  
9       *is an appropriate safeguard for GCHQ bulk collection*  
10       *operations: Ministers are not independent of the*  
11       *Government, they are the Government, and in my*  
12       *experience they act as 'rubber stamps', hardly ever*  
13       *refusing to endorse warrants put before them by their*  
14       *secret services, this is because they are politicians,*  
15       *and overly afraid of political consequences if they*  
16       *were to turn down a request to monitor someone who*  
17       *later committed a terrorist crime. But there can be no*  
18       *doubt that bulk collection serves a legitimate aim and*  
19       *(with strong and appropriate safeguards) is necessary,*  
20       *in the sense of responding to a pressing social need,*  
21       *to protect democracy."*

22  
23       Then, Judge, I think the next point that I'd ask the  
24       court to look at is at page 49, which is headed up  
25       "'Below the waterline' Arrangements". And it's  
26       paragraph 77:

27  
28       *"I should mention one important development in juristic*  
29       *thinking about how 'adequacy' and 'sufficiency' tests*

12:21

1 are to be applied to the operations of secret  
2 surveillance organisations. It derives from recent  
3 case-law of the UK's Investigatory Powers Tribunal,  
4 when it has been asked by NGO's to consider the  
5 legality of PRISM and of other operations conducted by  
6 GCHQ. It has overridden the claimant's objections and  
7 determined to take into account, in determining the  
8 adequacy of safeguards, what it terms 'below the  
9 waterline' arrangements, namely the internal rules,  
10 codes and supervisory directions and oversight  
11 provisions that bind the administrators of secret  
12 surveillance, even though they may not be made public.  
13 The phrase, taken from naval warfare where ships are  
14 torpedoed - 'holed below the waterline' - is not  
15 entirely apt, but it does signify the administrative  
16 and disciplinary rules and codes, often unknown to the  
17 public, which are designed to ensure compliance with  
18 Article 8 within a large spying organisation. Evidence  
19 about these administrative rules and safeguards, which  
20 are not law but which have practical importance in  
21 day-to-day surveillance operations by GCHQ, have been  
22 deemed relevant and admissible in deciding whether  
23 safeguards against misconduct by security service  
24 officers are 'adequate'."

25  
26 Then, Judge, I can take the court, please, to the  
27 conclusion section, which is at page 63.

28  
29 "104. In summary, looking at the present position in

1 relation to national security data collection in the US  
2 and comparing it with the European equivalent, I have  
3 no doubt that Europeans have more real protection for  
4 their data in the US than they do at home. For  
5 example, Europeans have very little protection against  
6 national security surveillance from the ECHR, given its  
7 'fairly wide' margin of appreciation doctrine.  
8 European law does not necessarily require court  
9 approval for it, and European Governments have no clear  
10 prohibition against spying on foreigners. Europeans  
11 have been spied upon for many years by GCHQ, and have  
12 had data of interest transferred by that organisation  
13 to the NSA and to DSD in Australia, and to New Zealand  
14 and Canada in relation to which they have had no  
15 knowledge and no remedy. In some respects, US  
16 standards are not 'essentially equivalent' but  
17 effectively superior. I endorse Timothy Edgar's  
18 comment in Foreign Affairs:

19  
20 'The US has an impressive array of privacy safeguards,  
21 and it has even imposed new ones that protect citizens  
22 of every country. Despite their weaknesses, these  
23 safeguards are still the strongest in the world ... the  
24 US government should urge other countries to follow its  
25 lead'.  
26

27 106. In this respect, Europeans cannot ignore the  
28 importance of the US intelligence agencies to their own  
29 security. International terrorism is a blight in

1       *Europe, as the Paris, Nice and Brussels atrocities*  
2       *demonstrate, and information from the NSA, which is*  
3       *usually volunteered to its European counterparts, may*  
4       *save lives. Article 8(2) expressly permits derogation*  
5       *when this is necessary in the interests of national*  
6       *security and public safety. The PCLOB report anxiously*  
7       *interrogated the value of PRISM: It concluded:*

8  
9       *'The programme has proven valuable in the government's*  
10       *effort to combat terrorism - monitoring terrorist*  
11       *networks under 702 has enabled the government to learn*  
12       *how they operate and to understand their priorities,*  
13       *strategies and tactics... (and) to identify previously*  
14       *unknown individuals who are involved in international*  
15       *terrorism and it has played a key role in discovering*  
16       *and disrupting specific terrorist plots aimed at the US*  
17       *and other countries'.*

18  
19  
20       *107. So I am satisfied - and I think the plaintiff*  
21       *should be satisfied - that US law and practice post*  
22       *PPD-28 is 'adequate' - sufficient, at least, to prevent*  
23       *any reversion to the secret world exposed by Snowden in*  
24       *which personal metadata was "hoovered up" without court*  
25       *or any other lawful authorisation and without any*  
26       *prospect for, redress. I am reinforced in this view by*  
27       *the history and tradition of a country with*  
28       *constitutional protection for privacy long before*  
29       *European countries; with elected representatives*

1 prepared to investigate through congressional  
2 committees the conduct of the intelligence services  
3 (which are in any event obligated by statute to keep  
4 them 'fully and currently informed' of all intelligence  
5 activities); with a media that is more than willing to  
6 expose secret agencies, and powerful NGOs, like the  
7 ACLU, which take legal action when privacy rights are  
8 infringed on grounds of national security. At the  
9 present moment I consider that US privacy protections  
10 in respect of data sought for national security  
11 purposes are, in reality, more effective than any such  
12 protections in the EU."

13  
14 Then at paragraph 109:

15  
16 "The US has a long history of balancing Fourth  
17 Amendment rights against the needs of law enforcement  
18 and national security: Its procedures are much more  
19 transparent and its oversight more formidable than that  
20 which obtains in European states. Citizens in the US  
21 are better protected in this area of national security  
22 interception than citizens in Europe.

23  
24 110. However, the question is whether the personal data  
25 of European citizens is 'adequately' protected in the  
26 US. On close study of the regulatory foreground at  
27 intelligence agencies it is evident that PPD-28  
28 foreshadowed an end to disparate treatment and that all  
29 foreign data is now being protected to a considerable

1       *extent by administrative rules and arrangements, both*  
2       *above and below the waterline - which implement that*  
3       *directive without actually bestowing enforceable legal*  
4       *rights on foreign data subjects."*

5  
6       Turning over the page, Judge, to paragraph 112:

7  
8       *"I have been engaged, as advocate, advisor and author,*  
9       *in matters relating to signals intelligence over the*  
10       *past 45 years. In the 1970's, when the Cold War was*  
11       *still in progress, the subject was impressed with utter*  
12       *secrecy: Communism, which threatened the West, was the*  
13       *main target, and the criminal law was used to suppress*  
14       *journalistic enquiries about the UK/USA agreement and*  
15       *about GCHQ and its bases in Cyprus and Hong Kong and*  
16       *Australia and the NSA base in Turkey. There was a*  
17       *mystique about SIGINT, derived in part from the role of*  
18       *code breaking in allied success in World War Two. As*  
19       *the Cold War receded, SIGINT emerged from the shadows*  
20       *and although GCHQ was not recognised by legislation in*  
21       *the UK until 1989, it had begun to work against IRA*  
22       *terrorism and now, of course, it is in the front line*  
23       *of defence against Islamic extremism, with a role to*  
24       *play in identifying cyber attacks and nuclear*  
25       *proliferation.*

26  
27       113. Evidence has emerged of abuse during the Cold War  
28       era, both in the CIA/NSA overreach established by the  
29       Church and Pike Committees and in cases in the UK and

1       Europe where individuals had been damaged or their job  
2       opportunities destroyed by leaks from the intelligence  
3       services as to their supposed 'subversive' tendencies.  
4       Protection against abuses of this kind came with the  
5       development through Article 8 of the 'privacy pillars':  
6       clear definition of allowable targets, warrant  
7       authorisation, and rules about third party access and  
8       data retention and destruction. In respect of  
9       'ordinary' criminal surveillance, there were  
10      requirements for notification and, in consequence, for  
11      legal remedies. This was not possible, however, in  
12      national security cases where surveillance was often  
13      longstanding of suspected communist cells and  
14      'sleepers', and I am unaware of any SIGINT organisation  
15      in Europe voluntarily notifying interception targets  
16      and then being successfully sued. The rare cases  
17      brought against government agencies by targeted  
18      organisations (such as the Campaign for Nuclear  
19      Disarmament) were a result of information from  
20      whistleblowers, not from laws requiring notification.

21  
22      114. The scourge in Europe in recent years of Islamic  
23      extremist terrorism has provided a strong justification  
24      for new forms of SIGINT surveillance, including  
25      measures of bulk collection, provided they can be  
26      demonstrated to work. That demonstration must  
27      necessarily be secret, to person or bodies of  
28      sufficient distinction that their publically-announced  
29      satisfaction carries credibility. Since the Snowden



1           *revelations, the PCLOB in the US and the Anderson*  
2           *Reports in the UK have provided that credibility in*  
3           *relation to the utility for counter terrorism of*  
4           *operations which incidentally invade the privacy of*  
5           *numerous innocent persons. The consequence, in order*  
6           *to keep faith with privacy rights, has been for the*  
7           *Courts to insist on more stringent oversight, including*  
8           *oversight by persons independent of the security*  
9           *agencies.*

10  
11           *115. In my opinion, this is being reflected in the US,*  
12           *where overseers within the surveillance organisations*  
13           *include lawyers experienced in privacy whilst external*  
14           *overseers include persons of distinction who have*  
15           *experience in technical matters and in civil liberties*  
16           *advocacy that qualify them to take the necessary*  
17           *sceptical approach the behaviour of SIGINT agencies.*  
18           *This development has not taken place in Europe, as the*  
19           *FRA Report demonstrates: Judges are generally used to*  
20           *provide the 'independence' necessary for oversight,*  
21           *although they tend to be deferential to the state, lack*  
22           *technical experience and are not usually assisted by*  
23           *privacy advocates as amici. In my opinion, in order to*  
24           *fulfil their purpose, oversight bodies must include*  
25           *persons whom I would describe as 'patriotic sceptics' -*  
26           *citizens whose loyalty to democracy is not in doubt" --*

27  
28           *Sorry, Judge, this mass reading is taking it out of me.*  
29

1            "... whose experience and qualifications in civil  
2            liberties will give confidence that they will look  
3            critically and intelligently at SIGINT conduct and  
4            claims. The introduction of such persons in oversight  
5            positions is resisted on the basis that they are not  
6            'vetted' or otherwise inculcated into the secret world  
7            of SIGINT, but this is the very reason why patriotic  
8            sceptics should be counted amongst its overseers."  
9

10          So, Judge, you have that report now, after some delay.            12:29  
11          And I wonder could I just then deal with two other  
12          topics, or three other topics before I finish, Judge?  
13          And they are, very briefly, the position in Irish law,  
14          a number of points about SCCs and the position in  
15          respect of standing in the EU context. And I'll just            12:29  
16          try and deal with them all briefly, Judge.  
17

18          Can I just ask the court to look please at the Irish  
19          position? And what I'm going to just do, Judge, is hand  
20          in three pieces of legislation. There is *some*            12:30  
21          legislation in the books, but they're not the updated  
22          versions, so we have taken the liberty, Judge, of  
23          effectively updating the legislation with any  
24          amendments so the court has the most up to date  
25          version. I should say that it's not an official            12:30  
26          consolidation, because that isn't available, it's a  
27          consolidation that's been prepared by my solicitors in  
28          relation to the Interception of Postal Packets and  
29          Telecommunications Messages Regulation Act 1993 (Same

1 Handed). So that *is* in your book, Judge, that section,  
2 but the section that's in your book is not the  
3 completely updated one. And then, Judge, I'm also  
4 going to ask the court to look at Communications  
5 (Retention of Data) Act as well.

12:30

6  
7 Judge, just very briefly, before I open the legislation  
8 though, I'll just summarise what the position is in  
9 Ireland. First of all, what if Mr. Schrems made a  
10 complaint in Ireland about how his data was being  
11 treated by the security services? well, the DPC, it's  
12 very unlikely, in our submission, that the DPC would be  
13 able to provide any redress, because Section 1(4) of  
14 the 1988 Data Protection Act, as amended, states that  
15 the Act does *not* apply to personal data that, in the  
16 opinion of the Minister or the Minister for Defence,  
17 are or at any time were kept for the purpose of  
18 safeguarding the security of the State. So we say the  
19 DPC would not have a role because of Section 1,  
20 subsection 4.

12:31

12:31

12:31

21  
22 Judge, in relation to prior judicial authorisation, we  
23 say that there's no requirement for same under either  
24 of the two Acts that I've identified to the court. In  
25 the 1993 Act the Minister gives an authorisation and in  
26 fact in the Communications (Retention of Data) Act,  
27 that isn't even required - that's in relation to a  
28 direction to telecommunications operators and there's  
29 no need even for a Ministerial decision in that

12:31

1 respect. There are no notification requirements.

2  
3 There *is* a facility to complain to a complaints  
4 referee, who can look into the matter, and in certain  
5 respects that is similar to the Ombudsperson provision 12:32  
6 that we have under the Privacy Shield.

7  
8 In relation to standing, we're not aware of any cases  
9 where a challenge has been brought in respect of  
10 signals intelligence and where a court has adjudicated 12:32  
11 or dealt with this issue at all.

12  
13 In relation to the state secrets issue, the court will  
14 be aware of case law such as Ambiorix and Murphy -v-  
15 Dublin Corporation where the courts are entitled to 12:32  
16 refuse the production of a document. In Murphy the  
17 court held that where the vital interests of the State,  
18 such as the security of the State, may be adversely  
19 affected by disclosure or production of a document,  
20 greater harm may be caused by ordering rather than 12:33  
21 refusing disclosure or production of the document. So  
22 that's an approach that is known in Irish law just as  
23 it is in the US.

24  
25 In relation to standing, Judge, in the case of White 12:33  
26 -v- Dublin City Council - and I know much of these the  
27 court will be well familiar with, Irish rules on  
28 standing, so I'm only just identifying a number of  
29 cases we think are relevant - Fennelly J. held that a

1 challenge, it's well established that a challenge to  
2 the constitutionality of a statute will not normally be  
3 addressed unless the person mounting the challenge  
4 shows he is affected by the provision. In Cahill -v-  
5 Sutton, Henchy J. observed that a person must be able to 12:33  
6 assert that his interests have been *adversely* affected  
7 or stand in real or *imminent* danger of being *adversely*  
8 affected by the operation of the statute.

9  
10 There's no targeting or minimisation statutory 12:33  
11 provisions as far as we can ascertain, unlike, for  
12 example, in the US. In respect of what's known as  
13 meta-data - in other words, data that's not  
14 content-based data - particularly in relation to  
15 telephone calls, the who, why, where, when - in other 12:34  
16 words, information *about* the call, as opposed to the  
17 content of the call - that's governed by the 2011 Act.  
18 And as I've mentioned, it's not even necessary to have  
19 a Ministerial warrant to obtain, to direct a service  
20 provider to supply data. 12:34

21  
22 I should say, Judge, the 2011 Act is based -- it was  
23 adopted to give effect to the Data Retention Directive.  
24 That is the Directive that was quashed in Digital  
25 Rights Ireland - so I should draw the court's attention 12:34  
26 to that - but it remains law in Ireland at present. It  
27 *is* being challenged, I understand, I don't know any  
28 more about it than that, but that is still extant law  
29 in Ireland.

1  
2 Judge, in relation to oversight and ex post facto  
3 review, there are powers given to a judge of the High  
4 Court. And essentially the judge is designated under  
5 the two Acts I've talked about, the 1993 Act and the 12:35  
6 2011 Act. And that judge is charged with keeping the  
7 operation of the Acts under review and of providing  
8 reports. And I'm just going to ask the court to  
9 hand -- if I may hand up the reports that have been  
10 provided by the judge. I think the judge is Judge 12:35  
11 McDermott at present. And there have been reports, we  
12 have been able to access reports for the years 2014,  
13 2015 and 2016. But the court will see that the reports  
14 are very summary in form, don't disclose any  
15 substantive information, if I may say that. 12:35

16  
17 And I suppose when one contrasts them with, for  
18 example, the kind of reports we saw in the US  
19 context -- I think the court was handed up a report, a  
20 semiannual assessment of compliance with 702 in the US 12:36  
21 context and it was a six-monthly report from, I think,  
22 June to November 2015 and I think there were some  
23 considerable number of pages, with a considerable  
24 amount of detail in the report. And I'm going to  
25 contrast the report not by any way of criticism of the 12:36  
26 High Court judge in question, but by way of, I suppose,  
27 identification of the fact that the resources have not  
28 been put in place by the government to carry out the  
29 kind of detailed assessment of compliance that one sees

1 in the US context. Those reports are just being handed  
2 up there and I'll just take the court through them  
3 (Same Handed).

4  
5 You'll see, Judge, that the report that I think the 12:36  
6 court is being given is the 2015 report under Section  
7 8(2) of the Interception of Postal Packets and  
8 Telecommunications Messages and the Communications  
9 (Retention of Data) Act 2011. And it's in similar form  
10 to other years. You'll see there: 12:37

11  
12 *"As the designated judge under the above mentioned*  
13 *Acts, I arranged to visit the relevant authorities to*  
14 *examine files and records concerning the operation of*  
15 *the powers vested in them under the above Acts.* 12:37

16  
17 *1. On 23rd October 2011 I attended at the office of the*  
18 *Department of Justice and Equality and met with*  
19 *officials, who made available to me documents and*  
20 *records relating to the operation of the Acts as* 12:37  
21 *requested. I examined the files and records furnished*  
22 *and spoke to the officials responsible for the*  
23 *operation of the Acts and liaised on with other Irish*  
24 *authorities in respect of same. All documents*  
25 *requested by me were furnished and all questions posed* 12:37  
26 *by me in relation to the files and records produced*  
27 *were answered to my satisfaction.*

28  
29 *2. On 30th October 2015 I attended at the Office of*

1 the Revenue Commissioners and the Headquarters of the  
2 Defence Forces in McKee Barracks. In each of these  
3 locations, such documents and records relating to the  
4 operation of the above Acts as were requested by me  
5 were made available and examined. I spoke to the 12:37  
6 officers and personnel responsible for the operation of  
7 the above Acts. I had a number of questions in  
8 relation to the files produced, which were answered to  
9 my satisfaction.

10 12:38  
11 3. On 30th October 2015 I attended at the headquarters  
12 of An Garda Síochána at the depot at the Phoenix Park,  
13 where I met with officers and personnel responsible for  
14 the operation of the above Acts. I examined computer  
15 records and hard copy files relating to the operation 12:38  
16 of the above Acts which were made available for my  
17 inspection and all documents and records which I  
18 requested were furnished and examined. All questions  
19 posed by me in relation to the operation of the Acts  
20 and the documents and records produced were answered to 12:38  
21 my satisfaction.

22  
23 4. On 3rd November 2015 I attended the Office of An  
24 Garda Síochána Ombudsman Commission and I met with  
25 members of the Commission and personnel responsible for 12:38  
26 the operation of the above Acts. All documents  
27 relevant to the operation of the acts which I requested  
28 were furnished and questions posed by me were answered  
29 to my satisfaction.



1  
2       5. I am satisfied, having examined the records and  
3 documents produced to me and from the information  
4 conveyed to me at these meetings that the relevant  
5 state authorities are in compliance with the provisions 12:38  
6 of the above Acts as of the date of this report."  
7

8       Judge, that's for the year 2015. And in relation -- I  
9 think you've also been handed up a report from  
10 O'Neill J. of 2013, a single-page document; I don't 12:38  
11 know if the court has that?

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

13       **MS. HYLAND:** Yes. And you'll see that it's in a  
14 similar form. And then another report from  
15 McDermott J. in 2014 and again in a similar form. 12:39  
16

17       And I suppose if one contrasts again bodies such as  
18 PCLOB - and obviously it is in a different context and  
19 Ireland's a very different size - but it's just, I  
20 suppose, to identify the level at which oversight is 12:39  
21 being carried out in the US and perhaps not in the same  
22 respect in an Irish context. And this is something  
23 that one would expect the DPC to be aware of, because  
24 it is part of -- obviously she's operating in this  
25 country and these reports are publicly available. 12:39  
26

27       Judge, just in relation then to the Irish Acts, I'm not  
28 going to go through them in any great detail, but if I  
29 could just ask the court to look please at the

1 complaints referee and the kind of responses that that  
2 complaints referee may have to a complaint. And one  
3 can see that, if you like, it's a closed system, if I  
4 may describe it in that way. Can I ask the court to  
5 look at the 2011 Act? It's in very similar terms in 12:40  
6 fact to the 1993 Act in terms of how one complains and  
7 what one does. And it's at Section 10, Judge, of that  
8 Act. And you'll see it's headed up "Complaints  
9 Procedure".

10 **MS. JUSTICE COSTELLO:** Yes. 12:40

11 **MS. HYLAND:** *"10. (1) A contravention of section 6 in*  
12 *relation to a disclosure request shall not of itself*  
13 *render that disclosure request invalid or constitute a*  
14 *cause of action at the suit of a person affected by the*  
15 *disclosure request, but any such contravention shall be*  
16 *subject to investigation in accordance with the*  
17 *subsequent provisions of this section and nothing in*  
18 *this subsection shall affect a cause of action for the*  
19 *infringement of a constitutional right.*

20  
21 *(2) A person who believes that data that relate to the*  
22 *person and that are in the possession of a service*  
23 *provider have been accessed following a disclosure*  
24 *request may apply to the Referee for an investigation*  
25 *into the matter.*

26  
27 *(3) If an application is made under this section (other*  
28 *than one appearing to the Referee to be frivolous or*  
29 *vexatious), the Referee shall investigate –*

1 (a) whether a disclosure request was made as alleged...  
2 and

3 (b) if so, whether any provision of section 6 has been  
4 contravened in relation to the disclosure request."

5  
6 I think the reference to "frivolous and vexatious" is  
7 important, because it may well be that the referee may  
8 take the view that *if* somebody writes in and says 'I  
9 think I've been surveilled', but gives absolutely no  
10 basis for their reason for that, the referee may decide 12:41  
11 that it's a frivolous and vexatious complaint. Of  
12 course one cannot know, because there's no transparency  
13 about the decisions of the referee - as far as we can  
14 ascertain, there are no decisions of the referee that  
15 we've been able to find; and in fact there's no 12:41  
16 provision for them to be public, so that makes sense.  
17 So there is a complete lack of transparency in this  
18 respect. But the legal test in respect of "frivolous  
19 and vexatious", I think, is not *irrelevant* in this  
20 context. 12:41

21  
22 Then going on:

23  
24 "(4) If, after investigating the matter, the Referee  
25 concludes that a provision of section 6 has been  
26 contravened, the Referee shall -  
27 (a) notify the applicant in writing of that conclusion,  
28 and  
29 (b) make a report of the Referee's findings to the

1           *Taoiseach.*

2  
3           *(5) In addition, in the circumstances specified in*  
4           *subsection (4), the Referee may, if he or she thinks*  
5           *fit" - so it's an unfettered discretion on the part of* 12:42  
6           *the referee - "by order do either or both of the*  
7           *following -*

8           *(a) direct the Garda Síochána, the Permanent Defence*  
9           *Force or the Revenue Commissioners to destroy the*  
10          *relevant data and any copies of the data,*

11          *(b) make a recommendation for the payment to the*  
12          *applicant of such sum by way of compensation as may be*  
13          *specified in the order.*

14  
15          *(6) The Minister shall implement any recommendation...*

16  
17          *(7) If, after investigating the matter, the Referee*  
18          *concludes that section 6 has not been contravened, the*  
19          *Referee shall notify the applicant in writing to that*  
20          *effect.*

21  
22          *(8) A decision of the Referee under this section is*  
23          *final."*

24  
25          And the referee is given the power to access official 12:42  
26          documents or records. But I suppose what's important  
27          here is that a person can make a complaint and the  
28          referee then either will simply indicate to the  
29          applicant that there has not been a breach and no more,

1 and no requirement for reasons - that's under  
2 subsection 7 - or will indicate that there *has* been a  
3 breach - and that's under subsection 4 - and then, as a  
4 matter of discretion, may make a recommendation in  
5 relation to a sum of compensation and may direct 12:43  
6 destroying of the relevant data. But there's no  
7 requirement that the complainant be told about the  
8 destroying of the relevant data. And indeed there's  
9 simply a recommendation for the payment to the  
10 applicant of a sum by way of compensation; it's not 12:43  
11 clear -- I beg your pardon, I'm sorry, the following  
12 provision provides that the Minister shall implement  
13 any recommendation.

14  
15 But if one is a complainant one, I suppose, gets 12:43  
16 something very like what one gets as a result of  
17 Ombudsman's procedure; one either simply gets a  
18 statement saying simply 'No', or else one gets a  
19 statement saying 'Yes, this has been found', but with  
20 the additional feature here that there may be 12:43  
21 compensation provided. So I think similar in many  
22 ways.

23  
24 Judge, can I just move on then please to deal with the  
25 SCCs? And I know the court has looked at the SCCs on a 12:44  
26 number of occasions, but I simply want to ask the court  
27 just to consider one discrete issue.

28 **MS. JUSTICE COSTELLO:** where shall I find them again?

29 **MS. HYLAND:** So the SCCs are in book 13, I think.

1           **MS. JUSTICE COSTELLO:** Is that the US authorities --

2           **MR. GALLAGHER:** The EU authorities. The very first

3           book.

4           **MS. HYLAND:** Yes, exactly. So book 13, Judge. You

5           have a number of book 13s, but it should be in the 12:44

6           first --

7           **MS. JUSTICE COSTELLO:** well, except my was called "1".

8           **MS. HYLAND:** Oh, I see. I'm sorry, Judge.

9           **MS. JUSTICE COSTELLO:** I don't have a 13. Somebody's

10          superstitious. 12:44

11          **MS. HYLAND:** Oh, I see. I'm so sorry, I didn't realise

12          that. So I can give you the tab number then. Divide

13          10, Judge.

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

15          **MS. HYLAND:** Of the European materials. And what I 12:44

16          only wanted to ask the court to look at, Judge, was

17          just to think a little bit about the actual remedy

18          that's available through the SCCs. Because we know

19          what the Data Protection Directive says in relation to

20          SCCs and we know what the DPC says as well in relation 12:45

21          to the SCCs in her decision. And I suppose it's no

22          harm just to remind the court what exactly was said by

23          the DPC - I don't think I need to open it.

24

25          But essentially, at paragraph 61 she said that the 12:45

26          safeguards constituted by the SCCs did not answer the

27          CJEU's objections in Schrems; she said they did no more

28          than establish a right of contract to a remedy against

29          an importer or an exporter; they weren't binding on the

1 US Government; and there was no provision to access a  
2 remedy in the event that the data may be the subject of  
3 interference by a US public authority.  
4

5 And I suppose there's a number of points you could make 12:45  
6 to that. First of all, the way it's expressed sounds  
7 as if an objection is being made to the subject of  
8 interference by a US public authority per se; in other  
9 words, the very fact that a US public authority can  
10 access the data is a cause for concern. But that is 12:46  
11 not, of course, the basis of what she ultimately found.  
12 What she ultimately found was there wasn't sufficient  
13 *remedies* in US law. And in that context, in our  
14 submission, it was imperative that the first thing she  
15 ought to have done was not look to US law, but to look 12:46  
16 to the SCCs to see what precisely a person was entitled  
17 to obtain by way of a remedy under the SCC, i.e. the  
18 contractual remedy, which is the primary purpose of the  
19 SCCs. And she made an assumption that the remedy had  
20 to be in the US. But in fact there is no basis upon 12:46  
21 which she should have concluded that a US remedy is  
22 necessarily what a data subject requires. A  
23 contractual remedy in the EU may be sufficient  
24 depending on the nature of the breach.  
25

26 So if I could just ask the court to look to the annex  
27 to the SCCs, because that's where one sees these  
28 particular clauses that go into every single contract.  
29 And Ms. Cunnane has exhibited the contract in question

1 - and I won't open it, because it's the same, in the  
2 same format effectively as this document. But you do  
3 have that before you and that's the contract between  
4 the exporter and the importer, Facebook Ireland and  
5 Facebook US.

12:47

6  
7 But the core provisions, Judge, that the court should  
8 look at, in my respectful submission, is Clause 3, 4  
9 and 5 of the annex to the SCC decision, and that  
10 identifies the obligations of the data exporter and the  
11 data importer. And essentially it's a clever, if you  
12 like, device, because what it does is it wraps around  
13 the protections of the country where the data comes  
14 from and it allows those protections to travel to  
15 whatever country they go to. That's the best way of  
16 looking at it, as a wraparound protection. And if  
17 there's a breach of those protections that travel with  
18 the data then there's a remedy against the exporter.

12:47

12:48

19  
20 And what's important about this and what's easy, I  
21 think, to miss initially is that the protections are  
22 those which come from the country of the data exporter.  
23 So let's talk about Ireland in the particular case;  
24 when data is being transferred, with it go the *Irish*  
25 rules in respect of data protection. And if *those*  
26 rules are breached by the importer, there's a remedy.  
27 So it's not that when one moves the data to the US,  
28 immediately one leaves behind the protections of Irish  
29 law.

12:48

12:48



1  
2 And one see that from the wording of Clause 4 and 5.  
3 And if I could ask the court just to look at Clause 4,  
4 "Obligations of the Data Exporter":

5  
6 *"The data exporter agrees and warrants:*  
7 *(a) that the processing, including the transfer itself,*  
8 *of the personal data has been and will continue to be*  
9 *carried out in accordance with the relevant provisions*  
10 *of the applicable data protection law."*

11  
12 And when one goes to the body of the SCC decision, in  
13 the definitions section in Article 3, one sees the  
14 definition of "applicable data protection law". And  
15 what that means is:

12:49

16  
17 *"The legislation protecting the fundamental rights and*  
18 *freedoms of individuals and, in particular, their right*  
19 *to privacy with respect to the processing of personal*  
20 *data applicable to a data controller in the Member*  
21 *State in which the data exporter is established."*

22  
23 So that's the crucial part there. What legislation is  
24 being discussed there? It's legislation which is  
25 applicable to a data controller in the Member State in  
26 which the *exporter* is established. So what we're  
27 talking about here is *Irish*, in this particular case,  
28 *Irish* law, because the data exporter is established in  
29 Ireland. And whatever legislation in Ireland is

12:49

1 applicable to the privacy rights, that's the  
2 legislation that is protected, if you like, by the  
3 SCCs. And that's the legislation that's at issue  
4 whenever there's a breach. So one doesn't leave behind  
5 the Irish protections when the data is transferred.

12:50

6  
7 If one looks, going back then to the SCC, to the annex  
8 and in particular Clause 4, you'll see there that under  
9 (b):

10  
11 *"It has instructed and throughout the duration of the*  
12 *personal data-processing services will instruct the*  
13 *data importer to process the personal data transferred*  
14 *only on the data exporter's behalf and in accordance*  
15 *with the applicable data protection law and the*  
16 *Clauses."*

17  
18 So you've already seen, Judge, the definition of data,  
19 the applicable data protection law definition. And so  
20 what does the exporter do? The exporter is telling,  
21 instructing the importer to process that data in  
22 accordance with, in this case, Irish law. That's the  
23 obligation.

12:51

24  
25 Then you see a corresponding obligation at Clause 5 of  
26 the importer. The importer agrees: *"To process the*  
27 *personal data only on behalf of the data exporter and*  
28 *in compliance with its instructions... if it cannot*  
29 *provide such compliance"* it has to inform promptly the

12:51

1 data exporter of its inability and then the exporter  
2 can suspend or terminate the contract.

3  
4 Then more widely, I suppose - that's promising to  
5 comply with the instructions - but then in 5(b), more 12:51  
6 widely, the data importer is asked to consider the  
7 legislative context in which it operates. And it  
8 indicates that it has no reason to believe the  
9 legislation applicable to it prevents it from  
10 fulfilling the instructions received from the data 12:52  
11 exporter and its obligations under the contract and, if  
12 there's a change in the legislation which is likely to  
13 have a substantial adverse effect, it will notify the  
14 change to the data exporter.

15 12:52  
16 So the subject has the protection of knowing that when  
17 its data is transferred to another third country, the  
18 Irish protections will go with it. And if they are not  
19 observed and if there's a breach, whether it's because  
20 the exporter doesn't give the right instruction or 12:52  
21 whether it's because the importer doesn't abide by the  
22 instruction or sees another party not abiding by it and  
23 does nothing about it, doesn't tell the exporter, in  
24 that situation action may be brought under Clause 6.  
25 And Clause 6 identifies liability and sets out what the 12:52  
26 liability is. 6(1):

27  
28 *"The parties agree that any data subject, who has*  
29 *suffered damage as a result of any breach of the*

1           *obligations... is entitled to receive compensation from*  
2           *the data exporter for the damage suffered."*

3  
4           And it's worth noting that it's in the same, the  
5           wording is the same wording as in the Data Protection           12:53  
6           Directive, where there is a right to damages under, I  
7           think, Article 22.

8  
9           If one, I suppose, thinks of a couple of factual  
10          scenarios, one can see, in my submission, why the Data           12:53  
11          Protection Commissioner ought to have considered the  
12          types of situations she was worried about in relation  
13          to the US and considered how the SCCs would respond to  
14          those situations and what kind of a remedy would've  
15          been given to the data subject. And I suppose if one           12:53  
16          thinks of a number of different examples. First of  
17          all, one can think of a simple type example where let's  
18          say there is incorrect data and the data importer  
19          doesn't remediate the data, let's say there's a mistake  
20          about somebody's personal data - we saw that in many of           12:53  
21          the US cases, but let's say it happens, the data is  
22          exported to the US, the importer is told by the subject  
23          that the data being held is incorrect and the importer  
24          doesn't take any steps; that's, if you like, a plain  
25          private law scenario and in that case there will be a           12:54  
26          remedy against the data exporter. Why the exporter?  
27          Because I've already said it's the importer who is  
28          doing -- is failing to take action, failing to  
29          remediate. The reason is because the SCCs give the

1 right of action against the exporter. And that's  
2 because it's easier for a data subject to sue the  
3 exporter in the country in which they're based.  
4

5 So there's a remedy you have; you don't have to go to 12:54  
6 the US to sue, you don't have to worry about US law,  
7 you're simply allowed to identify the fact that there  
8 has been a breach of *Irish* data legislation. It's  
9 happened in the US, the importer is the person who has  
10 breached it, the importer has *not* carried out the 12:54  
11 instructions that were given by the exporter and  
12 there's a cause of action and a right of action for the  
13 subject in Ireland against the exporter, because the  
14 exporter steps into the shoes of the importer.

15 12:55  
16 what then of a situation which is, I suppose, involving  
17 in some way a public body? For example, let us say  
18 there is a request to the importer in the US for  
19 material, let's say the US Government requires personal  
20 data to be provided and let's say there is no lawful 12:55  
21 authority, let's say the Directive under FISA is not  
22 properly executed or there is no Directive or something  
23 of that sort and the data importer doesn't check; in  
24 that case, what is the position in relation to a  
25 remedy? Because that's obviously a core issue in this 12:55  
26 case. well, first of all what one must look to is the  
27 *Irish* law. Because as we know, the relevant law is the  
28 applicable data protection law as identified in  
29 Article 3 of the Directive. what does the applicable

1 data protection law say? One looks to Ireland to see  
2 what would be the position if, let's say in an Irish  
3 context, data had been given by Facebook to the law  
4 enforcement, to the guards without any authorisation  
5 being produced by the guards. And in my submission, 12:56  
6 because of the national security exemption, there's  
7 nothing *in* the Data Protection Directive about that  
8 type of situation. Because as I've already identified,  
9 under Section 1(4) of the Data Protection Act, national  
10 security is exempted. 12:56

11  
12 So in fact there would not be a response from the  
13 national legislation in that, the applicable data  
14 protection law in an Irish context. And in those  
15 circumstances, there would equally not be a response in 12:56  
16 the US context. But not because of the transfer;  
17 because of the fact that the wraparound Irish  
18 provisions that go with the data transfer simply don't  
19 contain provisions designed to deal with national  
20 security measures. 12:57

21 **MS. JUSTICE COSTELLO:** But the Irish situation would  
22 apply to Irish national security.

23 **MS. HYLAND:** Yes.

24 **MS. JUSTICE COSTELLO:** So An Garda Síochána, for  
25 example. 12:57

26 **MS. HYLAND:** Yes.

27 **MS. JUSTICE COSTELLO:** But let's say it's the NSA.

28 **MS. HYLAND:** Yes.

29 **MS. JUSTICE COSTELLO:** Quite clearly, the NSA isn't

1 part of --

2 **MS. HYLAND:** Absolutely.

3 **MS. JUSTICE COSTELLO:** -- the exemptions under Irish

4 law.

5 **MS. HYLAND:** Yes. 12:57

6 **MS. JUSTICE COSTELLO:** So can you tease that one out

7 for me?

8 **MS. HYLAND:** well, I think one still has to find --

9 **MS. JUSTICE COSTELLO:** Because it is an exemption. And

10 don't exemptions have to be construed narrowly? 12:57

11 **MS. HYLAND:** Yes, that's true, Judge. But if one

12 thinks that what one --

13 **MS. JUSTICE COSTELLO:** From derogation, whatever.

14 **MS. HYLAND:** Yes, that's absolutely right, Judge. But

15 if one thinks that what one is being promised by the 12:57

16 SCCs is for your *Irish* law rights to go with you to the

17 US and to give you a cause of action back in Ireland

18 for whatever happens in the US, it's difficult to

19 conceive why, if there *is* no Irish law right for that

20 particular type of wrongdoing, why there should be any 12:57

21 redress in that situation against an act of a US body

22 where a similar act by an Irish security service would

23 not give rise to any cause of action in the Irish

24 context.

25 **MS. JUSTICE COSTELLO:** So what you're saying, just to 12:58

26 take it out of this particular factual situation, if

27 the data was surveilled, for example, by North Korea,

28 that you wouldn't be able to sue here in Ireland? You

29 know what I mean?

1 MS. HYLAND: Yes.

2 MS. JUSTICE COSTELLO: What I'm saying is our exception  
3 is obviously based on *our* rule.

4 MS. HYLAND: Yes.

5 MS. JUSTICE COSTELLO: In relation to *our* national 12:58  
6 security.

7 MS. HYLAND: Yes.

8 MS. JUSTICE COSTELLO: It doesn't even, as far as I can  
9 see, apply to the UK. For example, the UK were quite  
10 happily surveying half of Europe, if Mr. Anderson's 12:58  
11 report is to be believed, and that apparently was  
12 legitimate and lawful.

13 MS. HYLAND: Yes.

14 MS. JUSTICE COSTELLO: So I don't get your -- I know  
15 this is an important point. 12:58

16 MS. HYLAND: Absolutely, yes.

17 MS. JUSTICE COSTELLO: And maybe you might want to  
18 address it to me after lunch. But it is this analogy  
19 point...

20 MS. HYLAND: Yes. 12:58

21 MS. JUSTICE COSTELLO: ... which I do need some help  
22 with.

23 MS. HYLAND: Yes, of course. Judge, can I just ask,  
24 just in relation to the North Korean example, is the  
25 example whereby there is surveillance being carried on 12:59  
26 *in Ireland*, if you like, by North Korea or elsewhere?

27 MS. JUSTICE COSTELLO: No. No, the data has been  
28 transferred and it's been accessed by your North  
29 Koreans' security. One might not take a sanguine view



1 of that.

2 **MS. HYLAND:** Yes, yes. Very good, Judge, I'll reflect  
3 on that after lunch. At the moment I think the  
4 relevant test in the SCCs is the applicable data  
5 protection law. So one has to look to that for  
6 protection -- 12:59

7 **MS. JUSTICE COSTELLO:** Yes, I know you're looking at  
8 the data protection law. But it's the next step.  
9 You're saying clearly in Ireland, if it was performed  
10 by An Garda Síochána, you wouldn't have a remedy. 12:59

11 **MS. HYLAND:** Yes.

12 **MS. JUSTICE COSTELLO:** It's your next step, that you're  
13 saying it therefore, it follows that because it's the  
14 analogous, the analogue, if you like, to An Garda  
15 Síochána, that therefore you still don't have a remedy? 12:59

16 **MS. HYLAND:** Yes.

17 **MS. JUSTICE COSTELLO:** That's the bit I need a bit of  
18 help with.

19 **MS. HYLAND:** Very good. We'll look at that over lunch.  
20 Thank you, Judge. It's just one o'clock I see. 12:59

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

22 **MS. HYLAND:** Thank you.

23  
24  
25 (LUNCHEON ADJOURNMENT) 13:00

1           **THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS**  
2           **FOLLOWS**

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

5           **REGISTRAR:** Hearing resumed.

14:04

6           **MS. JUSTICE COSTELLO:** Before we resume, I should say  
7           that I had a word with the President at lunch. He's  
8           going to see whether a judge might be able to take over  
9           my commitments on Tuesday, so if you might relay that  
10          to, well obviously Mr. Murray, but to Mr. Collins if he  
11          is dealing with it.

14:04

12          **MR. MURRAY:** Certainly, Judge.

13          **MS. JUSTICE COSTELLO:** And the rest of you for your  
14          diaries. Now I'll try to have, I won't have that  
15          confirmed, I don't think, until tomorrow.

14:04

16          **MR. GALLAGHER:** Thank you.

17          **MS. HYLAND:** Thank you, Judge. Judge, just before  
18          lunch you asked me about a situation, for example, if  
19          the data had been identified by a Member State, for  
20          example such as North Korea. Can I answer the  
21          question, if you like, in two parts. I identified, the  
22          court knows that we have always identified the national  
23          security exemption.

14:04

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

25          **MS. HYLAND:** But Mr. Gallagher yesterday clearly set  
26          out the fact that that primary position that we adopt  
27          was not adopted in Schrems and by the Commission in the  
28          Privacy Shield.

14:04

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

1 MS. HYLAND: And that when one adopts the Schrems and  
2 the Commission approach you do have regard and you must  
3 have regard to the fact that the processing is  
4 conducted in a national security context and that you  
5 have Charter rights in that context if the interference 14:05  
6 goes beyond what is strictly necessary.

7  
8 So, taking the Schrems approach, there is a remedy for  
9 a person whose data has been taken, let's say in North  
10 Korea, by the security services with the acquiescence 14:05  
11 of the importer. Because in that situation the  
12 interference has gone beyond what is strictly  
13 necessary, it's not justified. You are now into, if  
14 you like, the terrain where EU law *does* apply, there's  
15 been a breach of your Charter rights, and, if the 14:05  
16 importer has not taken steps in that regard, then there  
17 is liability back in Ireland on the exporter. Because  
18 the data, I think the phrase that I identified to the  
19 court is "*the applicable data protection law*".

20 MS. JUSTICE COSTELLO: And that's the Charter then 14:06  
21 applying Schrems.

22 MS. HYLAND: Exactly, it's the Charter, exactly. On  
23 that basis, Judge, that means that irrespective, if you  
24 like, where your data goes, the applicable data  
25 protection law travels, the Charter travels with it and 14:06  
26 the test then is whether or not it has gone beyond what  
27 is strictly necessary or not.

28 MS. JUSTICE COSTELLO: Mm hmm. And does that rubric  
29 apply whether it's lawful in the third country, and I'm

1 not taking about the US at the moment.

2 **MS. HYLAND:** Yes.

3 **MS. JUSTICE COSTELLO:** Because you could obviously have  
4 and I took the example on a previous occasion of Nazi  
5 Germany. 14:06

6 **MS. HYLAND:** Yes.

7 **MS. JUSTICE COSTELLO:** what might have been in  
8 accordance with law, such a régime, would not be  
9 regarded as compliant with the Charter.

10 **MS. HYLAND:** Yes. And that's what is so powerful, if 14:06  
11 you like, about the SCCs because they take the concept  
12 of the applicable data protection law.

13

14 Now, can I just identify 1.2, Judge, and that's at  
15 Clause 5, there's a footnote to Clause 5 and that goes 14:06  
16 to the very point that you have just asked me about;  
17 what is, if you like, the relevant margin in the State  
18 to which the data is being transferred.

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

20 **MS. HYLAND:** Clause 5, as you know, is in relation to 14:07  
21 the data importer and the data importer of course is in  
22 the third country.

23

24 And you'll see there that, after the heading  
25 "*obligations of the data importer*", 1, there's a 14:07  
26 footnote and that footnote says:

27

28 "*Mandatory requirements of the national legislation*  
29 *applicable to the data importer which do not go beyond*

1       *what is necessary in a democratic society on the basis*  
2       *of one of the interests."*

3  
4       And I'll just skip on just so the sentence makes sense.

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

14:07

6       **MS. HYLAND:** *"Are not in contradiction with the*  
7       *standard contract clauses."*

8  
9       So there what we see is the SCCs identifying that  
10       certain legislation in third countries will be  
11       acceptable provided they are still within the bounds of  
12       Article 13(1) - and they are the various different  
13       necessary measures to safeguard national security,  
14       defence, and so on - but, once one falls out of that,  
15       then that legislation is not considered to be protected  
16       by Article 13(1). So that gives, if you like, some  
17       guidance to the national importer in respect of the  
18       legislation which is and is not acceptable.

14:07

14:08

19       **MS. JUSTICE COSTELLO:** And the flip side of that is if  
20       they do go beyond what is necessary.

14:08

21       **MS. HYLAND:** Yes.

22       **MS. JUSTICE COSTELLO:** Then you are in trouble.

23       **MS. HYLAND:** Exactly. And in fact if you look and see  
24       5(b) in fact puts an obligation on the importer to look  
25       around it, as it were, at the legislation because it  
26       has to agree and warrant that:

14:08

27  
28       *"It has no reason to believe the legislation applicable*  
29       *to it prevents it from fulfilling the instructions*

1           *received.*"

2  
3           And its obligations under the contract. And if there's  
4           a change that's going to have a substantial adverse  
5           effect it has to notify the change to the exporter and 14:08  
6           the exporter is entitled to suspend or terminate.

7  
8           So there is inbuilt protections which is if the  
9           importer decides that I'm now in a régime that is  
10          making it impossible for me to comply with the 14:08  
11          instructions that I was given by the data exporter,  
12          I must tell the data exporter that and they can suspend  
13          or terminate.

14  
15          So the SCCs are cleverly balanced to consider the kind 14:09  
16          of situations and the kind of countries into which  
17          transfers will be made and to consider whether they do  
18          or they don't comply with the privacy rights and the  
19          steps that need to be taken and the remedies that are  
20          available depending on the situation. 14:09

21  
22          The SCCs are not blind to privacy issues.

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

24          **MS. HYLAND:** And I think that can be seen quite clearly  
25          actually by the definition of "*applicable data* 14:09  
26          *protection law*". Because, if we go back to that  
27          definition, you will see that the definition is:  
28          "*Legislation protecting the fundamental rights and*  
29          *freedom of individuals and, in particular, their right*

1           to privacy."

2  
3           So the SCC is absolutely focussed on the issues of  
4           privacy and fundamental rights, even though it's in a  
5           contractual context, that is to the forefront of the           14:09  
6           drafter's mind.

7  
8           So they are the protections, if you like, that are  
9           available vis-à-vis the exporter/importer and the  
10          individual data subject only has to sue in the Member           14:10  
11          State from which the data came. But then there is  
12          another very important protection and safeguard, and  
13          the court has already seen that, and that is  
14          Article 4(1) of the SCC itself, just below the  
15          definition of "*applicable data protection law*".           14:10

16  
17          And that is the provision that allows the national  
18          supervisory authority to stop the transfer where they  
19          are of the opinion that, according to the test under  
20          Article 4(1)(a) the law imposes obligations "*beyond the*           14:10  
21          *restrictions necessary in a democratic society*", again  
22          picking up the language.

23       **MS. JUSTICE COSTELLO:** That's going back to the  
24       footnote?

25       **MS. HYLAND:** Exactly, exactly. It's a perfect, as it           14:10  
26       were it is perfectly squared off. You have both the  
27       data importer looking at the law to which it is subject  
28       in the third country and then you have the ultimate  
29       protection which is the supervisor who can take action

1 if it is established that the law to which the data  
2 importer is subject goes beyond the necessary  
3 requirements.

4  
5 And, Judge, you'll be aware that the wording of that 14:11  
6 has changed, and I just have one point to make about  
7 that shortly. But I suppose the curiosity about all  
8 this from our point of view is that the Data Protection  
9 Commissioner better than anybody understands the  
10 obligations of 4(1)(a) and the entitlements of 4(1)(a), 14:11  
11 they are not just obligations, they are entitlements  
12 the office has, because they are incumbent upon the  
13 office here, as in every other Member State. And,  
14 given that that safeguard was there, it's difficult to  
15 understand why the DPC arrived at the conclusion at 14:11  
16 paragraph 61 that the SCCs were of no assistance given  
17 the concerns about US law.

18  
19 Because one would have thought that the necessary  
20 corollary of the expression of the concerns was that 14:11  
21 action ought to have been considered by her in respect  
22 of 4(1)(a) and/or she should have realised that the  
23 data importer and the data exporter had obligations  
24 under the SCCs. So the complete failure to engage in  
25 any way with the substance of the mechanisms set up by 14:12  
26 the SCCs, we say, is a signal failure on the part of  
27 the DPC.

28 **MS. JUSTICE COSTELLO:** Just teasing that out, and  
29 I know that this doesn't apply to the US but it applies



1 sort of in theory to all third countries. You took me  
2 through a whistle-stop tour in relation to EU laws, and  
3 I think we can probably - EU Member State laws.

4 **MS. HYLAND:** Yes.

5 **MS. JUSTICE COSTELLO:** We can probably assume that  
6 there would be a similar patchwork in *non*-EU countries.

14:12

7 **MS. HYLAND:** Yes.

8 **MS. JUSTICE COSTELLO:** And some of them would not have  
9 any legislation governing interception of data.

10 **MS. HYLAND:** Yes.

14:12

11 **MS. JUSTICE COSTELLO:** But this is dealing with  
12 legislation.

13 **MS. HYLAND:** Yes.

14 **MS. JUSTICE COSTELLO:** So is there a gap in a  
15 situation, let us say country A another, totalitaria,  
16 has no laws, just allows its security agencies to  
17 access data.

14:12

18 **MS. HYLAND:** Yes. Well, I think one way you could  
19 perhaps address that is by looking at the wording of  
20 4(1)(a), "*imposes upon him requirements to derogate*".

14:13

21 Now if you are being told that the data in your  
22 possession will be taken by the security services,  
23 let's say without any legal basis, but, for example, in  
24 Zakharov one of the things that was required was that a  
25 device had to be put on the bearers in order to permit  
26 interception, so that was a given.

14:13

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

28 **MS. HYLAND:** And it was known. And let us say the  
29 importer is in a similar situation where it knows that

1 a device is being put, placed by the security services  
2 on its network or its bearers; in that situation, in my  
3 submission, that would be a requirement there. It's  
4 not a requirement imposed by law because there is no  
5 law, but it is undoubtedly a requirement which is 14:14  
6 interfering. And in that situation, Judge, it seems to  
7 me that Clause 5(b) would oblige it to contact the  
8 exporter and notify the exporter of the requirements  
9 that are being imposed on it.

10  
11 Now it is certainly true that 5(b) does make reference  
12 to the legislation applicable to it from fulfilling the  
13 instruction received, but I think the core point here  
14 is the obligation to comply with the instructions.  
15 Because, if you look at 5(a), you must process the data 14:14  
16 *"in compliance with its instructions"* and, *"if it*  
17 *cannot provide such compliance for whatever reasons"*,  
18 it has to tell the exporter of its inability to comply,  
19 and that would arise in a situation where it is not  
20 being mandated by legislation but by practice. 14:14

21 **MS. JUSTICE COSTELLO:** I should re-emphasise, that is  
22 not what the evidence has adduced here, but it was just  
23 trying to help construe the document.

24 **MS. HYLAND:** Of course, absolutely, and it does help,  
25 I think, to identify theoretical examples. 14:15

26  
27 Judge, just the last point on the SCCs before I move  
28 off them is just a very net point but I think it's one  
29 worth making. Tab 14, I think you have been at Tab 10

1 of the SCC document.

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

3 **MS. HYLAND:** Then Tab 14 is this *new* decision of  
4 December 2016. It's just a small amendment to the SCC  
5 and what it does is it changes the wording of 4(1). 14:15  
6 And the reason it changes it is because you will  
7 remember in Schrems the court was concerned that the  
8 Safe Harbour Decision had sought to tell the  
9 supervisory authorities when they could and couldn't  
10 prevent data flows. The court in Schrems took the view 14:15  
11 that that wasn't something the Commission could do in  
12 an Adequacy Decision.

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

14 **MS. HYLAND:** And it took the view that because of that  
15 ruling in Schrems that 4(1)(a), which we have just 14:15  
16 looked at, which is very prescriptive about when a data  
17 supervisor can and can't suspend, was overprescriptive.  
18 And you will see now that the wording that has been  
19 substituted is a much broader wording and it gives the  
20 DPCs around the Member States a much greater level, 14:16  
21 I suppose, of autonomy in terms of deciding when they  
22 should and should not suspend or ban data flows. And  
23 the reason it's important here is because it shows that  
24 the Commission following Schrems had no concerns about  
25 the SCC decision apart from this one discrete concern; 14:16  
26 In other words, they have made the powers of the Data  
27 Protection Commissioners a little wider and less  
28 constrained. But, apart from that, Schrems did not  
29 give rise to concerns about the legality of the SCCs.

1 Because what you have here is the DPC telling the court  
2 that it thinks that SCCs are unlawful because of the  
3 way they operate in the US context.  
4

5 On the other hand, you have the Commission making an  
6 amendment to the SCC decision, a very minor amendment,  
7 and not in any way throwing into doubt any other aspect  
8 of the SCC decision.

14:17

9 **MS. JUSTICE COSTELLO:** And this is post Privacy Shield,  
10 isn't it?

14:17

11 **MS. HYLAND:** Exactly. It is just December, it just  
12 happened this December.

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

14 **MS. HYLAND:** So I suppose it's, we say it's an  
15 endorsement of the legality of the SCCs by the  
16 Commission and a demonstration that there is no aspect  
17 of Schrems, apart from that discrete area that I have  
18 identified, that raises any concern about the SCCs and  
19 in our submission it undermines the concerns of the DPC  
20 in that regard.

14:17

14:17

21  
22 And, Judge, can I just finish by going back to a point  
23 I made very briefly yesterday and that's just in  
24 relation to Article 47. Article 47 obviously is a very  
25 important part of the Charter and I think  
26 Ms. Barrington has already spent some time identifying  
27 for you how it plays out in the Member States and in  
28 particular how remedies are a matter for the Member  
29 States subject to the twin principles of effectiveness

14:17

1 and equivalence. So it's for the Member States to  
2 identify remedies in the case of a breach of EU law  
3 provided that those remedies are equivalent to the ones  
4 applicable for national law breaches and are effective.

14:18

5  
6 But I think it is probably worth looking in that  
7 context at one of the most recent decisions of the  
8 Court of Justice on Article 47 and in particular in a  
9 context that I mentioned to you yesterday which is the  
10 supreme irony of it being asserted that EU - I beg your  
11 pardon, that US standing rules are inadequate, so  
12 inadequate as to make the SCCs unlawful in a situation  
13 where one of the big, I suppose, issues in EU  
14 procedural law over many years has been the inability  
15 of individuals to take direct challenges to the Court  
16 of Justice, the General Court and/or the Court of  
17 Justice.

14:18

14:18

18  
19 You heard Mr. O'Dwyer talking about constitutional  
20 challenges and you heard him saying that one of the  
21 difficulties with US law was apparently that it wasn't  
22 possible for EU citizens to bring, if I may call them,  
23 constitutional challenges, i.e. challenges to the  
24 *legality* of surveillance legislation as opposed to  
25 their application. We say that's wrong anyway because  
26 of the APA, that was ignored completely. But even if  
27 one puts that aside for a moment, what is striking is  
28 that in the EU context an individual citizen  
29 effectively cannot challenge the legality of an EU

14:19

14:19

1 measure directly before the Court of Justice or the  
2 General Court. It has to be done in a way that's being  
3 sought to be done here whereby it comes to a national  
4 court and there is an application for a preliminary  
5 ruling. In fact that is obvious because otherwise 14:19  
6 presumably Mr. Schrems would not be here, he would be  
7 simply bringing his case directly in Luxembourg.

8  
9 And that is a very, very significant standing obstacle.  
10 There's been a great deal of lobbying about it over 14:19  
11 the years, a great deal of academic writing, a great  
12 deal of case law, a lot of people challenging it, so  
13 much so that in the Lisbon Treaty there was a small  
14 amendment made to respond to those concerns. But in  
15 fact, when one sees the substance of that amendment and 14:20  
16 sees this case Inuit, it was a very modest amendment  
17 indeed and it did not fundamentally change the  
18 conditions in relation to standing.

19  
20 So we say that in any analysis by the court of the 14:20  
21 adequacy of the standing rules in the US context the  
22 court cannot ignore the standing rules in the EU  
23 context for a similar type of challenge, i.e. a  
24 challenge to the legality of an instrument of EU law in  
25 this case or US law, a legislative type instrument. 14:20

26 **MS. JUSTICE COSTELLO:** But, like, Mr. Schrems  
27 effectively was able to challenge the Safe Harbour  
28 Decision.

29 **MS. HYLAND:** Again through the Irish courts.

1 MS. JUSTICE COSTELLO: Through the Irish courts.

2 MS. HYLAND: Yes, that's right.

3 MS. JUSTICE COSTELLO: And he got there. It may have  
4 been a convoluted route, is that not a legal structural  
5 point rather than a standing point? 14:21

6 MS. HYLAND: well, I think it isn't, Judge. Because  
7 you see the case law, there is a lot of cases where  
8 people do look directly for direct access and the court  
9 rejects their claims on the basis that they don't have  
10 standing. For example, in the challenges to the 14:21  
11 Privacy Shield, there is two challenges going on, both  
12 of those, we think, is likely that there will be  
13 standing challenges to, Digital Rights are one of the  
14 people who are challenging it. It's very like on the  
15 basis of the case law that there will be a challenge on 14:21  
16 the basis of their standing to directly challenge  
17 Privacy Shield, that is a direct action.

18  
19 And so the fact as to whether or not the preliminary  
20 reference procedure is an adequate way of dealing with 14:21  
21 the access to the Court of Justice, many commentators,  
22 including a number of Advocate Generals, have indicated  
23 that it is not because it's not a direct route  
24 effectively. And I wonder could I just ask the court  
25 in this respect just to look at a short extract from a 14:21  
26 textbook and a then case of Inuit and then I will  
27 finish on that, Judge.

28  
29 This is Paul Craig of Craig & de Búrca, the court will

1 probably be familiar with that book. And if I could  
2 just ask the court to look at page 305 "Access to  
3 *Judicial Review Standing*" and then, just turning over  
4 the page, "*locus standi - the background*":

14:22

5  
6 "*The complex case law on standing to contest the*  
7 *legality of EU norms is well known. A brief outline is*  
8 *given here to set the scene for the discussion of more*  
9 *recent jurisprudence.*

14:22

10  
11 *Article 230 provided for direct review of legality.*  
12 *Member States, the European Parliament, Council, and*  
13 *Commission were regarded as privileged applicants and*  
14 *therefore had standing to challenge the legality of any*  
15 *acts. The Court of Auditors and the ECB could bring*  
16 *actions to protect their prerogatives. Non-privileged*  
17 *applicants had to satisfy 234, which provided that."*

14:22

18  
19 And then there was, the test was whether it was of  
20 "*direct and individual concern to the former*".

14:22

21  
22 "*Direct challenge to the legality of EU norms by*  
23 *non-privileged applicants has proved extreme difficult.*  
24 *The Plaumann test has remained authoritative even since*  
25 *the early 1960s. Persons other than those to whom a*  
26 *decision was addressed could only claim to be*  
27 *individually concerned if that decision affects them by*  
28 *reason of certain attributes which are peculiar to them*  
29 *or by reason of circumstances in which they are*

14:22



1       *differentiated from all other persons, and by virtue of*  
2       *these factors distinguished them individually just as*  
3       *in the case of the person addressed. The applicant in*  
4       *the instant case failed because it practised a*  
5       *commercial activity that could be carried on by any* 14:23  
6       *person at any time. This made little sense*  
7       *pragmatically, since the existing range of firms is*  
8       *established by the ordinary principles of supply and*  
9       *demand: if there are two or three firms in the industry*  
10       *they can satisfy the current market demand. The number* 14:23  
11       *is unlikely to alter significantly, if at all. The*  
12       *ECJ's reasoning also rendered it impossible for an*  
13       *applicant to succeed except in a very limited category*  
14       *of retrospective cases. The applicant failed because*  
15       *the activity of clementine-importing could be carried* 14:23  
16       *out by anyone at any time. It was however always open*  
17       *to the Court to contend that others could enter the*  
18       *industry and hence to deny standing to existing firms.*

19  
20       *The difficulty of directly challenging EU norms in the* 14:23  
21       *form of regulations was equally marked. The Calpak*  
22       *test required the non-privileged applicant to show that*  
23       *the measure in question was not a real regulation, but*  
24       *that it was in reality a decision of individual concern*  
25       *to him. This was not easy, because of the abstract* 14:23  
26       *terminology test. The ECJ held that a real regulation*  
27       *was the measure that applied to objectively determined*  
28       *situations and produced level effects with regard to*  
29       *categories of persons described in a general and*

1        *abstract manner. The nature of the measure as a*  
2        *regulation was not called into question by the mere*  
3        *fact that it was possible to determine the number or*  
4        *even the identity of those affected. The Court*  
5        *recognised that the purpose of allowing such challenge* 14:24  
6        *was to prevent the Union institutions from immunising*  
7        *matters from attack by the form of their*  
8        *classification. If regulations were never open to*  
9        *challenge the institutions could classify matters in*  
10       *this way, secure that private individuals could never* 14:24  
11       *contest them. Article 230(4) sought to prevent this by*  
12       *permitting a challenge when the regulation was in*  
13       *reality a decision, which was of direct and individual*  
14       *concern to the applicant. This required, as*  
15       *acknowledged in Calpak, the Court to look behind the* 14:24  
16       *form of the measure in order to determine whether in*  
17       *substance there really was a regulation or not. The*  
18       *problem with the abstract terminology test was that,*  
19       *rather than looking behind form to substance, it came*  
20       *very close to looking behind form to form. This was* 14:24  
21       *because it was always possible to draft norms in the*  
22       *manner specified by the abstract terminology test and*  
23       *thus to immunise them from attack. This was especially*  
24       *so since the court made it clear that knowledge of the*  
25       *number or identity of those affected would not prevent* 14:25  
26       *the norm being regarded as a true regulation.*

27  
28       *The Codorniu case raised hopes that the standing rules*  
29       *for direct challenge were being liberalised, but the*

1 decision proved to have a limited impact. The ECJ  
2 affirmed the abstract terminology test as the criterion  
3 for whether a regulation was a real regulation, rather  
4 than a decision, but held that this did not prevent the  
5 regulation from being of individual concern to some 14:25  
6 applicants. The test for whether an applicant was  
7 individually concerned was laid down in Plaumann. It  
8 was for the applicant to show the contested provision  
9 affected him by reason of certain attributes which were  
10 peculiar to him, or by reason of circumstances in which 14:25  
11 he was differentiated from all other persons. The hope  
12 raised by Codorniu was dashed by the realisation that  
13 in most instances the Plaumann test would be  
14 interpreted in the same manner as in Plaumann itself.  
15 The fact that the applicant operated a trade, which 14:25  
16 could be engaged in by any other person served to deny  
17 individual concern. The fact that the applicant was  
18 the only firm affected by the contested measure did not  
19 suffice to afford standing. Nor were the EU courts  
20 willing to apply the more liberal case law from areas 14:25  
21 such as state aids, dumping, and competition to  
22 challenges outside those areas. If the Union courts  
23 felt an applicant should be regarded as individually  
24 concerned by a true regulation it required complex  
25 legal reasoning to square this with existing 14:26  
26 orthodoxy."

27  
28 Then, Judge, this is your point here, is the reference  
29 procedure a suitable substitute:

1 "Indirect challenge to contest the legality of EU norms  
2 was an imperfect substitute for more liberal standing  
3 rules for direct challenge. The narrow rules for  
4 standing in cases of direct challenge were often  
5 justified judicially by the existence of indirect 14:26  
6 challenge via Article 234 since the individual could  
7 get to the ECJ via the national courts. Advocate  
8 General Jacobs in Extramet pointed out however the  
9 limits of indirect challenge. He noted that Article  
10 230 contained no suggestion that the availability of 14:26  
11 annulment depended on the absence of an alternative  
12 means of redress in the national courts. Such a result  
13 would, in any event, have been far from satisfactory  
14 since the existence of any domestic remedy would depend  
15 on national law." 14:26

16  
17 And that's important there, remedies do come from  
18 national law.

19  
20 "Advocate General Jacobs held furthermore that the 14:26  
21 indirect method of challenge had serious disadvantages  
22 by comparison with the direct action under 230.  
23 National courts lacked expertise in the subject and did  
24 not have the benefit of participation of the Council  
25 and the Commission. The proceedings in national 14:27  
26 courts, combined with a reference, could involve  
27 substantial delays and extra costs. The national  
28 courts had no jurisdiction to declare EU regulations  
29 invalid and this made it likely that interim measures

1 would be necessary in some cases, even though the  
2 national courts might not be the appropriate forum for  
3 granting such measures. There are in addition  
4 procedural difficulties attendant upon indirect  
5 challenge. This was because a reference from a 14:27  
6 national court on the validity of regulation did not  
7 always give the court as full an opportunity to  
8 investigate the matter as would a direct action against  
9 the adopting institution. The ECJ's general strategy  
10 was, however, to ignore the applicants' difficulties in 14:27  
11 using indirect challenge. Thus in Asocarne the  
12 applicants argued that widespread structural delays in  
13 the Spanish judicial system should be taken into  
14 account when assessing standing for direct actions.  
15 The ECJ's response subsequently cited in many cases was 14:27  
16 unequivocal. Such circumstances could not alter the  
17 system of remedies provided by the Treaties, and could  
18 not justify direct action where the standing conditions  
19 were not satisfied."

20  
21 Then there's a reference to intervention and how  
22 intervention was also difficult.

23  
24 Judge, can I take that up then to look at how the court  
25 dealt with this plea. Because in this case of Inuit, 14:28  
26 which Ms. Barrington opened, we see a plea that this -  
27 sorry, Judge, this was handed in to you a few days ago  
28 but I can hand in --

29 **MS. JUSTICE COSTELLO:** I'm not sure where, I don't

1 think I have those back with me, or maybe I do. Have  
2 we any idea where it is in the folders? Have you any  
3 idea where it is in the index?

4 **MS. HYLAND:** I am so sorry, Judge, my solicitor will  
5 just hand in a copy. 14:28

6 **MS. JUSTICE COSTELLO:** Well, no, I have the copy here,  
7 but it's a question of where it is in the index.

8 **MS. HYLAND:** Oh, I am so sorry. It is where it is in  
9 the index, yes. It should be, I would have thought,  
10 probably in Book 3 maybe, I'm just guessing by when it 14:28  
11 was handed in. It was handed in...

12 **MR. GALLAGHER:** Tab 35, we think, Judge.

13 **MS. HYLAND:** Tab 35.

14 **MS. JUSTICE COSTELLO:** Yes, 45.

15 **MR. GALLAGHER:** Of the book. (Short pause) 14:28

16 **MS. JUSTICE COSTELLO:** Sorry, it's a blank.

17 **MS. HYLAND:** I'll hand in a copy.

18 **MR. GALLAGHER:** We're just getting it.

19 **MS. HYLAND:** Sorry, Judge, we're just going to hand in  
20 a copy there to the court. 14:29

21

22 Judge, this is a case about seal products and it had a  
23 very interesting group of applicants with all sorts of  
24 exotic names. But if I could just ask the court to  
25 take it up please at page 18. Because what the 14:30  
26 applicants were saying - in fact page 17 I think is  
27 where it starts - effectively they were saying that the  
28 restrictions on direct access and of --

29 **MR. GALLAGHER:** It is 45, Judge, I am terribly sorry to

1 interrupt.

2 **MS. JUSTICE COSTELLO:** No, I have it but mine is blank.  
3 I have Tab 45 but I have nothing in it.

4 **MR. GALLAGHER:** Oh, I am terribly sorry.

5 **MS. JUSTICE COSTELLO:** Best laid plans, yes.

14:30

6 **MR. GALLAGHER:** Sorry.

7 **MS. JUSTICE COSTELLO:** I don't know what happened  
8 there, but anyway.

9 **MS. HYLAND:** what they were saying, Judge, was that the  
10 direct action restriction was in *breach* of Article 47,  
11 so they were invoking the Charter, their right to a  
12 remedy to say that they ought to be allowed to bring  
13 these kind of direct actions, not a million miles in  
14 fact from what is being complained about in the US  
15 context, and it is interesting to see the short shrift  
16 the court gave to that argument.

14:30

14:30

17  
18 At paragraph 89 you will see the argument: "*The*  
19 *appellants claim that the interpretation adopted by the*  
20 *General Court of the fourth paragraph of Article 263*  
21 *TFEU - they are the standing requirements - is in*  
22 *breach of Article 47 of the Charter in that it enables*  
23 *natural and legal persons to bring actions for*  
24 *annulment of European Union legislative acts solely*  
25 *where those acts are of direct and individual concern*  
26 *to them, within the meaning of the fourth paragraph.*"

14:30

27  
28 And the court at paragraphs 90, 91 and 92, the court  
29 sets out its standard jurisprudence on the way in which

1 the system works.

2  
3 And then at paragraph 93: *"Accordingly, natural or*  
4 *legal persons who cannot by reason of the conditions of*  
5 *admissibility stated in the fourth paragraph of Article*  
6 *263 TFEU, challenge directly European Union acts of*  
7 *general application do have protection against the*  
8 *application to them of those acts. Where*  
9 *responsibility for the implementation of those acts*  
10 *lies with the European Union institutions, those*  
11 *persons are entitled to bring a direct action before*  
12 *the Courts of the European Union against the*  
13 *implementing measures. Where that implementation is a*  
14 *matter for the Member States, such persons may plead*  
15 *the invalidity of the European Union act at issue*  
16 *before the national courts and tribunals and cause the*  
17 *latter to request a preliminary ruling.*

18  
19 94. *It must be emphasised that in proceedings before*  
20 *national courts, individual parties have the right to*  
21 *challenge before the courts the legality of any*  
22 *decision."*

14:32

23  
24 So this is before the *national* court.

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

14:32

26 **MS. HYLAND:** And then, Judge, you will see paragraph 96  
27 there is a reference to the reference procedure:

28  
29 *"97. Having regard to the protection conferred by*



1       Article 47 of the Charter, it must be observed that  
2       that article is not intended to change the system of  
3       judicial review laid down by the Treaties - and this is  
4       the Article 47 part - and particularly the rules  
5       relating to the admissibility of direct actions brought 14:32  
6       before the Courts of the European Union, as is apparent  
7       also from the Explanation on Article 47 of the Charter,  
8       which must be taken into consideration for the  
9       interpretation of the Charter.

10  
11       98. Accordingly, the conditions of admissibility laid  
12       down in the fourth paragraph of 263 must be interpreted  
13       in the light of the fundamental right to effective  
14       judicial protection, but such an interpretation cannot  
15       have the effect of setting aside the conditions 14:32  
16       expressly laid down in that Treaty."

17  
18       And at paragraph 100: "It is for the Member States to  
19       establish a system of legal remedies and procedures  
20       which ensure respect for the fundamental right to 14:32  
21       effective judicial protection."

22  
23       So again the remedies piece is put back in the Member  
24       State responsibility.

25  
26       And then, looking at paragraph 102, we see the twin  
27       principles of effectiveness and equivalence that  
28       I mentioned already. And at paragraph 103:  
29

1       *"As regards the remedies which Member States must*  
2       *provide, while the FEU Treaty has made it possible in a*  
3       *number of instances for natural and legal persons to*  
4       *bring a direct action, where appropriate, before the*  
5       *Courts of the European Union, neither the FEU Treaty*  
6       *nor Article 19 TEU intended to create new remedies*  
7       *before the national courts to ensure the observance of*  
8       *European Union law other than those already laid down*  
9       *by national law.*

10  
11       *104. The position would be otherwise only if the*  
12       *structure of the domestic legal system concerned were*  
13       *such that there was no remedy making it possible, even*  
14       *indirectly, to ensure respect for the rights which*  
15       *individuals derive from European Union law, or again if* 14:33  
16       *the sole means of access to a court was available to*  
17       *parties who were compelled to act unlawfully."*

18  
19       we say that's a really important paragraph. Because if  
20       you compare that with the conclusions of the DPC in 14:34  
21       respect of remedies in the US setting, she did not come  
22       to a conclusion that there was *no* remedy making it  
23       possible, even indirectly, to ensure respect for the  
24       rights. Indeed she identified that there were remedies  
25       and they had flaws and they were fragmented, but they 14:34  
26       existed, and she didn't address at all the indirect  
27       remedies. And you know, Judge, from our submissions  
28       that we say there are many different indirect ways of  
29       obtaining recognition of rights under the Charter,

1 oversight, through the review by FISC, and in  
2 particular through the companies who are the subject of  
3 the directives.

4  
5 So we say that that's the test in EU law. It's only in 14:34  
6 those circumstances where the court indicated that it  
7 would depart from the existing legal architecture and  
8 yet that was not the test imposed by the DPC.

9  
10 Then finally at paragraph 105: "As regards the 14:35  
11 appellants' argument that the interpretation adopted by  
12 the General Court of the concept of 'regulatory act',  
13 provided for in the fourth paragraph, creates a gap in  
14 judicial protection, and is incompatible with  
15 Article 47 in that its effect is that any legislative 14:35  
16 act is virtually immune the judicial review."

17  
18 Now this is the argument of the appellants and that's  
19 how it is characterised:

20 14:35  
21 "It must be stated that the protection conferred by  
22 Article 47 of the Charter does not require that an  
23 individual should have an unconditional entitlement to  
24 bring an action for annulment of European Union  
25 legislative acts directly before the courts of the 14:35  
26 European Union."

27  
28 And that's why I say they gave short shrift to the  
29 argument, despite the existence of Article 47, an

1 individual is not entitled to go directly to the courts  
2 of the European Union.

3  
4 Judge, there is just two points as I finish.

5 Mr. Gallagher reminds me correctly that of course in 14:36  
6 respect of constitutional type challenges, because of  
7 the Fourth Amendment individuals cannot bring, even  
8 with the help of the APA, and I said earlier on that  
9 they could and that was wrong. But of course the  
10 companies who are the subject of the directives can 14:36  
11 bring those challenges such as in ACLU -v- Clapper.

12  
13 And then there was two other points. The first, Judge,  
14 in relation to the notification. There is uncontested  
15 evidence by Mr. DeLong and Prof. Swire in relation to 14:36  
16 the hostile actors and why notification presents  
17 problems, that hasn't been contested. Judge, if the  
18 court, contrary to all of the submissions we have made  
19 considers that a reference ought to be made, and we  
20 would obviously welcome an opportunity to be heard on 14:36  
21 the questions, and similarly in that context it would  
22 be very important to have a comprehensive record of the  
23 facts relevant to the issue, but we would hope that  
24 that won't arise and if it does arise that those issues  
25 would be for another day. May it please the court. 14:36

26 **MS. JUSTICE COSTELLO:** Thank you. Mr. McCullough?

**SUBMISSION BY MR. McCULLOUGH:**

MR. MCCULLOUGH: We have prepared a speaking note, Judge, which I will ask Mr. Rudden to distribute. I hope it will be of assistance to the court in two ways: One in following the structure of what I am saying, Judge, but also it contains references in the footnotes to where the authorities are to be found and tries to quote from those authorities and from evidence where that will be helpful and that, I hope, will be of some assistance to the court and avoid it having to go back to the original sources. It may not be, Judge, but I hope it will.

**MS. JUSTICE COSTELLO:** Hmm.

**MR. MCCULLOUGH:** There are two basic points that I want to make, Judge, and the first is one that was the subject matter of what I said when I was opening our case, Judge. We contend, Judge, there's no basis for a reference. The matters that form the subject matter of Mr. Schrems' complaint haven't been investigated.

Article 4 in particular forms a safety valve that the DPC ought to make use of under the circumstances that have arisen here. That's the first broad point, Judge.

The second is this: That we agree with the DPC that US law doesn't provide adequate protection for the rights of EU citizens and we add that that's true, not just of remedies, but also of substantive US law. The DPC has

1 concentrated on the former, but we say that her overall  
2 conclusion is equally true of the latter.

3  
4 We say that all of that, Judge, should of course  
5 properly have led to the exercise of Article 4 powers 14:39  
6 under the SCC decisions itself, but that, if we are  
7 wrong about that, well then the SCC decisions are  
8 necessarily invalid.

9  
10 If I can turn to the note, Judge, it deals first with 14:39  
11 the reformulated complaint, and the court will find  
12 that at Core Book 1 Tab 14.

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

14 **MR. MCCULLOUGH:** And I hope not to go, not to have to  
15 go back over that, Judge, if the court can take what 14:39  
16 I say now in conjunction with what I said when I was  
17 opening the case.

18 **MS. JUSTICE COSTELLO:** No, no, I re-read yesterday.

19 **MR. MCCULLOUGH:** Thank you, Judge. So there are three  
20 substantive issues that were raised in the reformulated 14:39  
21 complaint.

22  
23 The first was the central issue which was a contention  
24 that Facebook's contract, described as the DTPA, simply  
25 doesn't comply with the relevant SCC decision, and 14:39  
26 I gave the court details of why that is so or why that  
27 was said by Mr. Schrems to be so. The court will  
28 recall that at the time that he made the complaint he  
29 had access only to a redacted version of the DTPA. The

1 court has subsequently had the opportunity to see an  
2 unredacted version. And his basic complaint was simply  
3 that the DTPA is not in compliance with the SCC  
4 decisions. It's a noteworthy feature of the complaint  
5 that it doesn't in fact impugn the validity of the SCC 14:40  
6 decisions themselves at all, it makes at its centre  
7 this basic starting point.

8  
9 The second issue raised in the reformulated complaint  
10 was the additional means, beyond the SCC decision, by 14:40  
11 which Facebook transfers data to the US. The court is  
12 familiar with the fact that Article 26(1) in particular  
13 provides for a range of other possibilities.  
14 Article 26(2) deals with standard contractual clauses,  
15 Article 26(1) deals with other derogations. 14:41

16 **MS. JUSTICE COSTELLO:** Hmm.

17 **MR. MCCULLOUGH:** And in particular there's consent,  
18 there's transfer for the performance of a contract.  
19 Mr. Schrems made it clear in his reformulated complaint  
20 that he was at an overall level complaining that his 14:41  
21 data was being transferred in breach of his rights  
22 under the Directive and the Charter. He made it clear  
23 that, as it happens, he knew that the SCC decisions  
24 were being relied upon, but it is perfectly clear from  
25 his complaint that he wasn't limiting his complaint to 14:41  
26 that, he was asking the DPC to investigate all of the  
27 means by which Facebook transfers data to the US.

28  
29 And then the third point that was raised, Judge, was

1 this: That if the DTPA was in conformity with the SCC  
2 decision, the DPC ought nevertheless to exercise her  
3 powers under Article 4 of the SCC decision and suspend  
4 transfer of data by Facebook Ireland to Facebook Inc.  
5 And that was said, Judge, because, I'll come in a 14:42  
6 little more detail to Article 4, but that was said in  
7 the reformulated complaint to arise precisely because  
8 Article 4 is inserted in the SCC decisions for that  
9 purpose, to allow the DPC to exercise powers to suspend  
10 data transfer under circumstances where it comes clear 14:42  
11 to her that data in the US is not being treated in  
12 accordance with the rights of EU citizens.

13  
14 So I just pause that and I'll come back to Article 4 in  
15 a moment. You see from the speaking note, Judge, the 14:42  
16 next issue we raise is the general one of when a  
17 reference can be made. And we refer there, Judge, to  
18 the TFEU itself and Article 267 and that provides, as  
19 the court can see in the footnote:

20 14:43  
21 *"where such a question is raised before any court or*  
22 *tribunal of a Member State, that court or tribunal may,*  
23 *if it considers that a decision on the question is*  
24 *necessary to enable it to give judgment, request the*  
25 *court to give a ruling thereon."* 14:43  
26

27 That's the fundamental rule, Judge, that a court will  
28 make a reference under circumstances where it is  
29 necessary to do so. So if the national court can



1 decide the question without reference to the issue of  
2 EU law that is said to arise in the case it will do so  
3 and it will only make a reference where it requires an  
4 answer to that question in order to enable it to answer  
5 the question.

14:43

6  
7 Another part of that, Judge, which was mentioned  
8 yesterday by Mr. Gallagher, I think, that's the  
9 Gasparini case, which again is also mentioned in  
10 footnote 5, Judge, which provides that the court won't  
11 deal with hypothetical questions. Again it's part of  
12 the same picture. The court will only deal with  
13 questions where it is necessary for it to answer the  
14 question and, equally, it won't deal with moot  
15 questions.

14:43

14:44

16 **MS. JUSTICE COSTELLO:** But obviously there is the issue  
17 in this case that the only question I have been asked  
18 to do is make a reference.

19 **MR. MCCULLOUGH:** Yes.

20 **MS. JUSTICE COSTELLO:** And you made the submission when  
21 you had your opening statement that they couldn't sort  
22 of narrowly craft the case that so you rule it out.

14:44

23 **MR. MCCULLOUGH:** Exactly.

24 **MS. JUSTICE COSTELLO:** So that's the only thing that  
25 could be dealt with. So what I am concerned about, and  
26 you can help me with, is, if you are correct and you  
27 say 'they can't just whittle it down in this way, they  
28 have to then look at Mr. Schrems' complaint'.

14:44

29 **MR. MCCULLOUGH:** Yes.

1           **MS. JUSTICE COSTELLO:** And I am looking at Mr. Schrems'  
2           complaint and what was required to deal with  
3           Mr. Schrems' complaint; the DPC, there's a huge  
4           emphasis on her independence and her independent role.

5           **MR. MCCULLOUGH:** Yes.

14:44

6           **MS. JUSTICE COSTELLO:** Where's the borderline between  
7           me overstepping that role and her conducting, if she  
8           says 'this is the way I am conducting my investigation  
9           and this is what I need'.

10          **MR. MCCULLOUGH:** Yes.

14:45

11          **MS. JUSTICE COSTELLO:** It may look to me as if I think  
12          you are barking up the wrong tree, for argument sake,  
13          but am I allowed to interfere with her independence by  
14          dealing with it?

15          **MR. MCCULLOUGH:** Yes, I think the court must be. The  
16          court will of course have due respect for the  
17          independence of the DPC, but ultimately the issue here  
18          is or the issues here are the questions that arise in  
19          Mr. Schrems' reformulated complaint. Those are the  
20          issues that require to be investigated. As I submitted  
21          to the court before, the DPC can't make a reference  
22          necessary simply by selecting a question, presenting to  
23          the court and saying 'hey presto it is now necessary to  
24          refer that question'. That's circular and  
25          self-probative, Judge. The question has to be this:  
26          Is it necessary for the DPC to refer this question to  
27          the Court of Justice in order to decide the  
28          reformulated complaint. And the court must look at  
29          that and I don't think the court can avoid doing so

14:45

14:45

14:45

1 simply by reference to its respect for the role of the  
2 DPC. So the court, I think, must look at the complaint  
3 and must form its own view as to whether in fact the  
4 DPC is correct in suggesting that a reference is  
5 necessary in order to enable her to complete her task. 14:46

6  
7 In some cases, Judge, that might be a difficult task,  
8 but in this case I respectfully suggest not. The three  
9 issues that I have said lie at the heart of the  
10 Mr. Schrems' complaint are actually just not addressed 14:46  
11 in the Draft Decision. So there is in fact no  
12 analysis, just no analysis of the question of whether  
13 the DTPA is in conformity with the SCCs. There is *no*  
14 analysis of other means of transfer. The only  
15 reference to that in the draft determination is a 14:46  
16 statement in the single paragraph in strand 1 where the  
17 DPC says that that is a means that Facebook uses, and  
18 there's no reference at all to Article 4 and no  
19 explanation of why Article 4 is isn't suitable.

20 14:46  
21 So in a sense it's an easy enough task in my respectful  
22 submission for the court here. Those issues that  
23 clearly do lie at the heart of Mr. Schrems' complaint  
24 are simply not addressed.

25 14:47  
26 It was also suggested, Judge, and we deal with this at  
27 paragraph 3 of the speaking note, that paragraph 65 of  
28 Schrems 1 conferred a right on the DPC to bring this  
29 matter before the court and then created an obligation

1 on the court to refer if it shared the doubts of the  
2 DPC.

3  
4 Paragraph 65, Judge, is set out in the footnote.

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

14:47

6 **MR. MCCULLOUGH:** And you will see, Judge, it is set out  
7 in the context of paragraph 63. Paragraph 63 provides:

8  
9 *"Having regard to the those considerations, where a*  
10 *person whose personal data has been or could be*  
11 *transferred to a third country, has been the subject of*  
12 *a Commission decision pursuant to Article 25(6) lodges*  
13 *with the DPC a claim concerning the protections of his*  
14 *rights and freedoms in contrast to the processing of*  
15 *that data and contests, in bringing the claim, as in*  
16 *the main proceedings, the compatibility of that*  
17 *decision with the protection of the privacy and of the*  
18 *fundamental rights and freedoms of individuals, it is*  
19 *incumbent upon the DPC to examine the claim with all*  
20 *due diligence."*

14:47

14:48

14:48

21  
22 So it is Mr. Schrems' complaint, the complainant's  
23 complaint that is examined by the DPC. Then paragraph  
24 65 provides in relevant part:

25  
26 *"where the DPC considers that the objections advanced*  
27 *by the person who has lodged with it a claim concerning*  
28 *the protection of his rights and freedoms in regard to*  
29 *the processing of his personal data are well founded,*

14:48

1           *the DPC must be able to engage in legal proceedings."*

2  
3           But what the DPC brings before the court, Judge, is  
4           not, if you like, something that is free standing and  
5           arises separately from the complaint, the DPC must 14:48  
6           consider whether the objections that are advanced by  
7           the person who makes the complaint are well founded.  
8           And Mr. Schrems' fundamental problem here, Judge, is  
9           that just hasn't been done.

10  
11           Paragraph 65, Judge, doesn't go beyond the general rule  
12           of Article 267 of the TFEU, doesn't give right to a  
13           freestanding obligation to refer. It simply clarifies  
14           the circumstances in which, in this particular context,  
15           the context of the DPC, a claim is brought from her to 14:49  
16           the court to the CJEU, but it doesn't, as I say, change  
17           the basic ground rules of necessity.

18  
19           Can I add this, Judge, to the three points that I made  
20           before, and I think I mentioned this in opening the 14:49  
21           case: That the making of a reference is also premature  
22           on a different ground, Judge, and that's on the basis  
23           that it is in draft form only and explicitly subject to  
24           further submissions. That statement, Judge, is to be  
25           found the various places of the Draft Decision, if the 14:49  
26           court could just turn to that for a moment. You'll  
27           find it, Judge, at Core Book 1 Tab 18.

28  
29           Just to bring the court to some examples of the wording

1 of the DPC on which she makes it clear that this is a  
2 preliminary view only and doesn't in fact represent her  
3 final conclusion on the facts. If the court looks at  
4 page 2 paragraph 1(b):

5  
6 *"while my investigation remains ongoing, I have formed*  
7 *the view, on a draft basis, and pending receipt of such*  
8 *further submissions as the complainant and/or FB-I may*  
9 *wish to submit, that a legal remedy compatible with*  
10 *Article 47 of the Charter is not available."*

14:50

14:50

11  
12 Down the bottom of that paragraph: *"Against that*  
13 *backdrop, I consider that the SCC Decisions (as defined*  
14 *below) are likely to offend against Article 47 of the*  
15 *Charter insofar as they purport to legitimise the*  
16 *transfer of the personal data of EU citizens to the US*  
17 *notwithstanding the absence of any possibility for any*  
18 *such citizen to pursue legal remedies effective in the*  
19 *US."*

14:51

20  
21 And then: *"I emphasise again that this view has been*  
22 *reached on a provisional basis and this view, when*  
23 *articulated herein, is to be regarded as subject to*  
24 *receipt of such further submissions as the complainant*  
25 *and/or FB-I may wish to make."*

14:51

26  
27 And that language, Judge, is to be found throughout the  
28 draft determination, if the court turns forward to page  
29 19.

1 MS. JUSTICE COSTELLO: Mm hmm.

2 MR. MCCULLOUGH: Paragraph 43, similar language. The  
3 DPC says that what appears to her to be the position on  
4 the current stage of her investigation and subject to  
5 such further submissions as may be made. 14:51

6  
7 You'll find it again, Judge, on page 29 paragraph 60:  
8 *"For all the reasons outlined above, therefore, I have*  
9 *formed the view, subject to consideration of such*  
10 *submissions as may be submitted in due course by the* 14:51  
11 *complainant and FB-I that, at least on the question of*  
12 *redress, the objections raised by the CJEU in its*  
13 *judgment in Schrems have not yet been answered."*

14  
15 So it is expressly, Judge, a determination that is 14:52  
16 reached on the basis of an incomplete analysis of the  
17 factual background. And it is hard to see, Judge, how  
18 a reference can be said to be necessary by the DPC  
19 under circumstances where she herself says 'well  
20 I don't think actually know the full state of the facts 14:52  
21 here'.

22  
23 So just to look, Judge, then, we address this at  
24 paragraph 6 of the speaking note, on the three issues  
25 that we raised. I think the fact is, Judge, that that 14:52  
26 issue simply hasn't been investigated. And we say,  
27 Judge, that a reference can't be said to be necessary  
28 unless and until it *has* been investigated.

1 Just to take the most obvious example, Judge, the most  
2 obvious possible outcome: The DPC investigates the  
3 basis of the complaint made by Mr. Schrems and  
4 determines that indeed, in accordance with what he  
5 says, the DTPA is not in accordance with the draft 14:53  
6 decisions, well then those data transfers are not  
7 permitted to continue. And there can be no basis under  
8 those circumstances for referring a question as to the  
9 validity of the decision under which they are  
10 transferred to the Court of Justice, it simply wouldn't 14:53  
11 arise as a necessary question. A far smaller more  
12 discrete more particular question would have been asked  
13 and answered which would relate to this particular  
14 company only.

15  
16 And the same applies, Judge, in relation to the second 14:53  
17 ground: Unless and until the DPC investigates all of  
18 the basis upon which transfers take place, it follows  
19 that others may be relied upon. And it follows,  
20 therefore, Judge, in the same way that a reference is 14:54  
21 premature and, in my respectful submission, unnecessary  
22 unless and until that matter is investigated.

23 **MS. JUSTICE COSTELLO:** The question I was probably very  
24 incoherently putting to Mr. Gallagher yesterday --

25 **MR. MCCULLOUGH:** Yes. 14:54

26 **MS. JUSTICE COSTELLO:** -- in the light of the Privacy  
27 Shield decision aren't they entitled to transfer data  
28 under Privacy Shield regardless of the SCC?

29 **MR. MCCULLOUGH:** well...



1 **MS. JUSTICE COSTELLO:** They may de facto say that they  
2 have been transferring it in accordance with their  
3 agreement which they say is pursuant to an SCC  
4 decision.

5 **MR. MCCULLOUGH:** Yes. I'm not sure that he actually 14:54  
6 has said, Judge, that Facebook's intention would be to  
7 transfer all of their data.

8 **MS. JUSTICE COSTELLO:** No, he didn't say it was  
9 intention, I just sort of said, asked him, spinning  
10 forward, were they authorised to do so if the SCCs 14:54  
11 ultimately were to be struck down.

12 **MR. MCCULLOUGH:** And skipping forward, Judge, the court  
13 will find this issue addressed at paragraph 53 onwards.

14 **MS. JUSTICE COSTELLO:** well, okay. I'll let you deal  
15 with it in your own way. 14:54

16 **MR. MCCULLOUGH:** No, but I'll address it now, Judge,  
17 because it arises now. The Privacy Shield, Judge, is a  
18 self-certifying process.

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

20 **MR. MCCULLOUGH:** You can take advantage of Privacy 14:55  
21 Shield only if and to the extent to which you are  
22 willing to sign up to its principles. There is no  
23 evidence on what actually - there is no evidence on  
24 either of two points, Judge: Either what Facebook does  
25 in relation to Privacy Shield, does it actually take 14:55  
26 advantage of Privacy Shield at this stage and, if so,  
27 to what extent, still less is there any evidence on its  
28 intentions for the future.  
29

1 So I don't think the court can simply assume that if  
2 the SCC decisions come before the Court of Justice, and  
3 the SCC decision is found to be invalid, that Facebook  
4 will say, will turn around and say 'well it doesn't  
5 matter in any event because we intend to use Privacy  
6 Shield', and the same applies to the exercise by the  
7 DPC of Article 4. I don't think the court can conclude  
8 that, if the DPC exercises her powers under Article 4  
9 of the SCC decisions and prevented data flow to the US  
10 on the basis of those powers --

14:55

14:56

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

12 **MR. MCCULLOUGH:** -- that Facebook again would turn  
13 around and say 'well it doesn't matter because we  
14 intend to use Privacy Shield anyway'. The Privacy  
15 Shield issue remains in this case largely unexplored  
16 save in this one respect only, that Facebook relies  
17 upon Privacy Shield Adequacy Decision, and I'll come to  
18 that point, Judge. In my respectful submission that  
19 decision is not actually helpful or of any particular  
20 guidance to the court in this context.

14:56

14:56

21  
22 So I don't think the court can make any conclusion as  
23 to what would happen.

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

25 **MR. MCCULLOUGH:** If the court's concern is that this  
26 might be, if you like, something of a waste of time if  
27 a reference was to be made, or if the matter was to be  
28 sent back to the DPC, as we contend, with a direction  
29 for her to consider the points that are raised by

14:56

1 Mr. Schrems, I don't think the court can conclude any  
2 of that would be a waste of time.

3  
4 It is certainly the case, Judge, that we know this from  
5 the draft determination: That Facebook transfers data 14:57  
6 to the US largely on the basis of the SCC decisions and  
7 that appears to be the position as we speak before the  
8 court at the moment. It was certainly the position as  
9 of the time of the DPC's investigation.

10 14:57  
11 Just turning back, Judge, to, I suppose, the  
12 consequences of the DPC's failure to investigate the  
13 Article 4 point. The same applies there, Judge. If  
14 the court comes to the conclusion that the proper  
15 interpretation of the SCC decision itself is that the 14:57  
16 DPC should exercise her Article 4 powers if she is of  
17 the state of mind that she is, well then it must follow  
18 that a reference to the court as to the validity of the  
19 SCC decisions is unnecessary; in other words, if the  
20 same result can be achieved, an order whereby 14:57  
21 Mr. Schrems' data is not transferred to the US by the  
22 use of Article 4, it doesn't require the Court of  
23 Justice to consider whether the SCC decisions  
24 themselves are invalid.

25 14:58  
26 So the whole Article 4 question, Judge, is one has to  
27 be determined, it's to be considered and determined by  
28 the DPC in advance of there being any question in my  
29 respectful submission of a reference being necessary.

1 Turning, Judge, to, this is the top of page 4, if  
2 I continue using the speaking note which I hope is  
3 helpful. We make the point, Judge, that the provisions  
4 of Article 4 reflect wider Union and Member State law  
5 of providing for rights of suspension. It might be 14:58  
6 helpful if I just remind the court of where you'll find  
7 that material.

8  
9 It's in the Directive, Judge, which you'll find at the  
10 book of EU authorities Tab 4 (short pause) in Article 14:58  
11 28 sub-Article 3. In dealing with the supervisory  
12 authority it is provided at sub-Article 3 that:

13  
14 *"Each authority shall be in particular be endowed*  
15 *with."* 14:59

16  
17 Then turning to the second indent: *"Effective powers*  
18 *of intervention, such as"* and then skipping a few of  
19 those: *"Ordering the blocking, erasure or destruction*  
20 *of data or imposing a temporary or definitive ban on* 14:59  
21 *processing."*

22  
23 So that's, if you like, the broader origin of the  
24 powers. That's reflected, Judge, in the Irish Act  
25 which you'll find in the EU book of authorities, the 15:00  
26 second book, at Tab 17. This is a consolidated version  
27 of the Act, Judge, but if you look at page 48 you see  
28 section 11.

29 **MS. JUSTICE COSTELLO:** Yes.

1           **MR. MCCULLOUGH:** And subsection 1. Section 11,  
2           subsection 1, Judge, at page 48 sets out the governing  
3           rule, the governing *national* rule for this case:

4  
5           *"The transfer of personal data to a country or*  
6           *territory outside the European Economic Area may not*  
7           *take place unless that country or territory ensures an*  
8           *adequate level of protection for the privacy and the*  
9           *fundamental rights and freedoms of data subjects in*  
10          *relation to the processing of personal data having*  
11          *regard to all the circumstances surrounding the*  
12          *transfer."*

13  
14          It sets out matters to be considered. But if you turn  
15          in particular to subsection 7 on page 50, that  
16          provides:

15:01

17  
18          *"The Commissioner may, subject to the provisions of*  
19          *this section, prohibit the transfer of personal data*  
20          *from the State to a place outside the State unless such*  
21          *transfer is required or authorised by or under any*  
22          *enactment or required by any convention or other*  
23          *instrument imposing an international obligation on the*  
24          *State."*

25  
26          And that's the national law reflection of Article 28.  
27          And in our respectful submission, Judge, when the DPC  
28          decided that the transfer breached Mr. Schrems' rights  
29          as an EU citizen, the proper response, as a matter of

1 EU law, was to invoke Article 4. Now, that, I think,  
2 follows from the structure of the draft decision  
3 itself, to which I'll turn in a moment. It's just,  
4 with respect, Judge, illogical to seek to invalidate a  
5 Commission decision on the grounds that it doesn't  
6 adequately protect the rights of EU citizens, under  
7 circumstances where it contains a clause specifically  
8 *entitling* the DPC to make an order which protects the  
9 very *same* rights that she says invalidate it.

15:02

10  
11 I think I gave the court an example before, Judge, of a  
12 statute that provided for the protection, say, of the  
13 rights of confidentiality and it contained a section  
14 within it providing for a judge to grant an injunction  
15 to restrain a breach of the rights of confidentiality.  
16 It would be an odd action, Judge, to seek to strike  
17 down that statute on some constitutional ground that it  
18 failed adequately to protect confidentiality when it  
19 contained within it a section giving the judge the  
20 power to make an order to enforce the very rights that  
21 were said in that action to make it unconstitutional.  
22 It's an illogicality, Judge, as I respectfully submit,  
23 and indeed as others have submitted. Article 4 is  
24 inserted in the decision *precisely* for the purpose of  
25 enabling the DPC to exercise it in a case of this  
26 nature.

15:03

15:03

15:03

15:04

27  
28 Can I turn then, Judge, to the decision itself? And the  
29 court will find that at book one of the EU material,

1 tab ten.

2 **MS. JUSTICE COSTELLO:** Oh, that decision? I thought you  
3 meant the DPC's decision.

4 **MR. MCCULLOUGH:** Oh, I'm sorry. My apologies, Judge, I  
5 mean the... 15:04

6 **MS. JUSTICE COSTELLO:** The SCC decision?

7 **MR. MCCULLOUGH:** The SCC decision.

8 **MS. JUSTICE COSTELLO:** Book one, isn't it?

9 **MR. MCCULLOUGH:** Yes, Judge.

10 **MR. GALLAGHER:** Divide ten, Judge. 15:04

11 **MR. MCCULLOUGH:** Divide ten, Judge. Thank you.

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

13 **MR. MCCULLOUGH:** I'll deal with Article 4 now, Judge,  
14 and while I have it open, I'll deal with the point that  
15 Ms. Hyland was discussing just before lunch with the 15:05  
16 court.

17

18 So this is the version of the SCC decision that was in  
19 place at the time that the complaint was made - and as  
20 the court's aware, it's subsequently been altered. And 15:05  
21 Article 4 provides that:

22

23 *"without prejudice to their powers to take action to*  
24 *ensure compliance with national provisions... the*  
25 *competent authorities in the Member States may exercise*  
26 *their existing powers to prohibit or suspend data flows*  
27 *to third countries in order to protect individuals with*  
28 *regard to the processing of their personal data in*  
29 *cases where:*

1           (a) it is established that the law to which the data  
2           importer or a sub-processor is subject imposes upon him  
3           requirements to derogate from the applicable data  
4           protection law which go beyond the restrictions  
5           necessary in a democratic society as provided for in  
6           Article 13... where those requirements are likely to  
7           have a substantial adverse effect on the guarantees  
8           provided by the applicable data protection law and the  
9           standard contractual clauses."

10  
11          And I'll come back to that, Judge, and I'll say why  
12          that was applicable in the circumstances. But it  
13          breaks down into two: First, it must be established  
14          that the data importer or sub-processor has  
15          requirements imposed upon him which derogate from the 15:06  
16          applicable data protection law - that's EU data  
17          protection law - which go beyond the restrictions  
18          necessary in a democratic society as provided for in  
19          Article 13; and secondly, those requirements are likely  
20          to have a substantial adverse effect on the guarantees 15:06  
21          provided by the data protection law and the clauses  
22          themselves.

23  
24          (b) is:

25  
26          "A competent authority has established that the data  
27          importer or a sub-processor has not respected the  
28          standard contractual clauses in the Annex; or  
29



1           (c) there is a substantial likelihood that the standard  
2           contractual clauses in the Annex are not being or will  
3           not be complied with and the continuing transfer would  
4           create an imminent risk of grave harm to the data  
5           subjects."

6  
7           And perhaps just keeping that open, Judge, for a  
8           moment, if I may turn to the DPC's draft decision and  
9           demonstrate why, in my respectful submission, Article  
10          4(1)(a) was engaged. The court will find the relevant 15:06  
11          extracts from the draft determination set out at  
12          footnote 11 of the speaking note, Judge, and perhaps  
13          it's just as useful to look at it there, Judge.

14       **MS. JUSTICE COSTELLO:** Very good, yes. Save on the  
15       folders. 15:07

16       **MR. MCCULLOUGH:** Yes. So particular reference is made  
17       to paragraph 43 and then paragraphs 60 to 62 of the  
18       draft determination. At paragraph 43 the DPC concluded  
19       that: "*It remains the case that, even now*" --

20       **MS. JUSTICE COSTELLO:** I'm sorry, what page on your 15:07  
21       speaking note are you?

22       **MR. MCCULLOUGH:** Sorry, Judge, footnote 11.

23       **MS. JUSTICE COSTELLO:** Oh, yes. Thank you.

24       **MR. MCCULLOUGH:** which sets out relevant extracts from  
25       the draft determination. Paragraph 43 of the DPC's 15:07  
26       draft determination says:

27  
28       "*It remains the case that, even now, a legal remedy*  
29       *compatible with Article 47 of the Charter is not*

1       *available in the US to EU citizens whose data is*  
2       *transferred to the US where it may be at risk of being*  
3       *accessed and processed by US State agencies for*  
4       *national security purposes in a manner incompatible*  
5       *with Articles 7 and 8 of the Charter."*

6  
7       Then paragraphs 60 to 62, Judge, are perhaps the most  
8       importance ones, these are her conclusions. She says:

9  
10       *"60. For all of the reasons outlined above, therefore,*  
11       *I have formed the view, subject to consideration of*  
12       *such submissions as may be submitted in due course by*  
13       *the Complainant and FB-I that, at least on the question*  
14       *of redress, the objections raised by the CJEU in its*  
15       *judgment in Schrems have not yet been answered.*

16  
17       *61. It is also my view that the safeguards*  
18       *purportedly... set out in the Annexes to the SCC*  
19       *Decisions do not address the CJEU's objections*  
20       *concerning the absence of an effective remedy*  
21       *compatible with the requirements of Article 47 of the*  
22       *Charter, as outlined in Schrems. Nor could they... So*  
23       *far as the question of access to an effective remedy is*  
24       *concerned, it is my view that they cannot be said to*  
25       *ensure adequate safeguards for the protection of the*  
26       *privacy and fundamental rights and freedoms of EU*  
27       *citizens whose data is transferred to the US.*

28  
29       *62. Accordingly, I consider that the SCC Decisions are*

1       likely to offend against Article 47 of the Charter  
2       insofar as they purport to legitimise the transfer of  
3       the personal data of EU citizens to the US in the  
4       absence in many cases of any possibility for any such  
5       citizen to pursue effective legal remedies in the US in  
6       the event of any contravention by a US public authority  
7       of their rights under Articles 7 and/or 8 of the  
8       Charter."  
9

10       And just bearing those findings in mind, Judge, if you 15:09  
11       glance back at Article 4(1)(a). So the first question  
12       to be answered under 4(1)(a) is: Does the US law impose  
13       requirements which go beyond the restrictions necessary  
14       in a democratic society? And that's in fact *precisely*  
15       what the DPC finds when she says that the SCC decisions 15:09  
16       are likely to offend against Article 47 of the Charter.

17       **MS. JUSTICE COSTELLO:** well, isn't that dealing with  
18       remedies rather than substantive law?

19       **MR. MCCULLOUGH:** It is, Judge. Because that's what the  
20       DPC concentrated on. 15:10

21       **MS. JUSTICE COSTELLO:** Yes, exactly, she concentrated  
22       -- but I'm just wondering, looking at Article 4, is  
23       that dealing with substantive law or remedies or both?

24       **MR. MCCULLOUGH:** Oh, both, Judge. I think, yeah, it's  
25       dealing with the provisions of EU law. 15:10

26       **MS. JUSTICE COSTELLO:** I'm just looking at it, just  
27       parsing it. "*It is established that the law to which*  
28       *the data importer or sub-processor is subject imposes*  
29       *on him*" - I presume that means the data importer or

1 sub-processor?  
2 **MR. MCCULLOUGH:** Yes, Judge. Or sub-processor.  
3 **MS. JUSTICE COSTELLO:** "*Requirements to derogate.*" So  
4 that would be they would have to release data or make  
5 data available to one of the intelligence agencies in 15:10  
6 the US.  
7 **MR. MCCULLOUGH:** Yes.  
8 **MS. JUSTICE COSTELLO:** Now, they're not concerned with  
9 remedies as such, the controllers.  
10 **MR. MCCULLOUGH:** No. But what the Directive governs, 15:10  
11 Judge, is the transfer of data. And it governs the  
12 circumstances under which data may be transferred.  
13 **MS. JUSTICE COSTELLO:** Mm hmm.  
14 **MR. MCCULLOUGH:** So it's the transfer and then the  
15 release of data under circumstances in which there is 15:10  
16 not an adequate remedy for breaches of the rights of EU  
17 citizens. So --  
18 **MS. JUSTICE COSTELLO:** Yes, what I'm trying to focus  
19 on, I guess, is trying to work out (A) whether it's the  
20 *substantive* law, or whether it's breaches of the 15:11  
21 substantive law and whether it's a control on the US  
22 Government. I'm just trying to work it all into this,  
23 this Article 4. Because I understand obviously the  
24 objection - SCCs are only being relied on in  
25 circumstances where the domestic law of the third 15:11  
26 country, or "the problem".  
27 **MR. MCCULLOUGH:** Yes.  
28 **MS. JUSTICE COSTELLO:** But what we're looking at here  
29 is "*It is established that the law*" - that's the

1 domestic law of the third country.

2 **MR. MCCULLOUGH:** Yes

3 **MS. JUSTICE COSTELLO:** *"To which the data importer or*  
4 *sub-processor is subject imposes upon the data importer*  
5 *or sub-processor a requirement to derogate from the* 15:11  
6 *applicable data protection law"* - and that's either  
7 Irish law or Irish law and/or EU law, we'll...

8 **MR. MCCULLOUGH:** Yes. well --

9 **MS. JUSTICE COSTELLO:** Depending on various  
10 submissions. Some people have said Irish law, you've 15:11  
11 said EU law.

12 **MR. MCCULLOUGH:** well, it *is* Irish law, Judge. But  
13 Irish law must comply with EU law.

14 **MS. JUSTICE COSTELLO:** Yes, includes in the -- and with  
15 Charter and all that. 15:12

16 **MR. MCCULLOUGH:** So I don't, if I may say  
17 parenthetically, I don't accept at all Facebook's  
18 submission that we can look at national law and say  
19 'well, as it happens, it doesn't meet EU standards'.  
20 The standards to which EU citizens are *entitled* are 15:12  
21 those for which the Directive and the Charter provides.

22 **MS. JUSTICE COSTELLO:** Establishes, yes. But it's  
23 derogating from the restrictions, which go beyond  
24 restrictions necessary in a democratic society. So is  
25 the first part of that dealing with, if you like, the 15:12  
26 taking, the processing, as opposed to the remedies?

27 **MR. MCCULLOUGH:** well, I don't think so, Judge. I  
28 think when we look at -- I suppose, Judge, looking at  
29 it on an overall basis, the purpose of the Directive,

1 or the relevant part of the Directive I should say,  
2 Article 25 and Article 26 -- perhaps if we just turn to  
3 them, Judge, it's useful to see it in context as well.  
4 And you'll find those, Judge, at --

5 **MS. JUSTICE COSTELLO:** I have them marked, thanks. 15:13

6 **MR. MCCULLOUGH:** Thank you, Judge. So the purpose of,  
7 the overall purpose, Judge, under transfer of personal  
8 data to third countries. The Member States shall  
9 ensure - this is Article 25:

10  
11 *"That the transfer to a third country of personal data*  
12 *which are undergoing processing or are intended for*  
13 *processing after transfer may take place only if,*  
14 *without prejudice to compliance with the national*  
15 *provisions adopted pursuant to the other provisions of*  
16 *this Directive, the third country in question ensures*  
17 *an adequate level of protection."*

18  
19 So that's the point here of the relevant part of the  
20 Directive, is to ensure that there is, if you like, a 15:13  
21 safe space, it has to stay within the EU. You can send  
22 it to a third country, but only *if* in that third  
23 country you have adequate levels of protection, which,  
24 in my submission, means the same level of protection as  
25 that to which you'd be entitled in the EU. And I'll 15:13  
26 come to why I say that in due course.

27  
28 Then if we go back, Judge, then to 4(1)(a). So the  
29 question is whether it's established that US law, in

1 this case, imposes upon the importer or sub-processor  
2 requirements to derogate from the applicable data  
3 protection law. So that's requirements to derogate  
4 from EU law, which, if you like, result in an  
5 inadequate level of protection.

15:14

6 **MS. JUSTICE COSTELLO:** But by definition they aren't  
7 going to be providing remedies in courts, they're  
8 obviously going to be providing -- well, I suppose they  
9 could be sued, if you're talking about under the  
10 clauses under this...

15:14

11 **MR. MCCULLOUGH:** They could undoubtedly be sued, Judge.  
12 But the point, I think, here is that when data is  
13 transferred, it must be transferred only in  
14 circumstances in which there is the same level of  
15 protection for that data as obtains under EU law.

15:14

16 **MS. JUSTICE COSTELLO:** Hmm.

17 **MR. MCCULLOUGH:** So what Article 4(1)(a) means; that if  
18 requirements are imposed by derogate from that, in  
19 other words which require the release of data --

20 **MS. JUSTICE COSTELLO:** No, I understand that, that they  
21 have to -- I understand your overall point, that it has  
22 to have the same sort of bubble of protection.

15:15

23 **MR. MCCULLOUGH:** Yes.

24 **MS. JUSTICE COSTELLO:** I think somebody used that image  
25 before. But I'm asking you really is that referring to  
26 the overall substantive law, domestic law?

15:15

27 **MR. MCCULLOUGH:** It's referring to both, I think,  
28 Judge. Just to bring it in the context of remedies,  
29 the transfer of data is permitted only if US law

1 ensures that it can't be released unless released under  
2 conditions that are effectively equivalent to EU law.  
3 And that includes both substance and remedies.  
4

5 So a requirement to derogate, in the US context, is a 15:15  
6 requirement to release or a requirement to allow  
7 surveillance under circumstances where there is not an  
8 adequate remedy for those whose data is surveilled.  
9 And that's the requirement, Judge, and that's a  
10 requirement that goes beyond a restriction that is 15:16  
11 necessary in a democratic society.  
12

13 The restriction is the restriction on the ordinary  
14 rights of data subjects. If you want to compare EU law  
15 to US law, there's no restriction similar to the 15:16  
16 standing difficulties that apply in the US. There are  
17 those restrictions in the US. And that means that the  
18 release is then subject to restrictions which go beyond  
19 those that would apply in EU law. So in my respectful  
20 submission, Judge, it must apply both to Articles 7 and 15:16  
21 8, but also to Article 47, which is the remedies part  
22 of the Charter.  
23

24 I was dealing, Judge, with the second part of Article  
25 4(1)(a). 15:17

26 **MS. JUSTICE COSTELLO:** Yes.

27 **MR. MCCULLOUGH:** So in my respectful submission, what  
28 the DPC found, Judge, amounts to a finding that the  
29 requirements of US law imposed upon -- sorry, that US



1 law imposed upon the data processors, the data  
2 importers and processors requirements to derogate from  
3 the applicable data protection law which go beyond the  
4 requirements necessary. And are those requirements  
5 likely to have a substantial adverse effect on the 15:17  
6 guarantees provided by the appropriate data law and the  
7 Standard Contractual Clauses? we'll just look at the  
8 findings of the DPC, Judge.

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

10 **MR. MCCULLOUGH:** In which she says that the SCC 15:17  
11 decisions are likely to offend against Article 47 of  
12 the Charter, or that the safeguards appropriately set  
13 out in the annex do not address CJEU's objections  
14 concerning the absence of an effective remedy  
15 compatible with the requirements of Article 47 of the 15:18  
16 Charter.

17  
18 It's evident, Judge, that she's formed the view, as  
19 required in the second part of 4(1)(a), that the effect  
20 of US law is to impose requirements which have a 15:18  
21 substantially adverse effect on the guarantees provided  
22 by the applicable data protection law, that's Irish and  
23 the U law. In other words, is there a breach of the  
24 rights of EU citizens here to a substantial degree  
25 involved? The answer to that must, on the DPC's own 15:18  
26 logic, be yes, because she says that there's a breach  
27 of Charter rights.

28  
29 So in my respectful submission, Judge, that properly

1 brought 4(1)(a) into effect, in accordance with the  
2 findings made by the DPC. And that meant, Judge, that  
3 the proper response of the DPC, instead of bringing  
4 this application before the court, would have been to  
5 make an appropriate order pursuant to Article 4.

15:18

6  
7 If a full investigation had been carried out, Judge, I  
8 should add that it may well be that 4(1)(c) and 4(1)(c)  
9 would also have come into play. So if the DPC had  
10 concluded following a full investigation that the  
11 manner in which Facebook treated data wasn't in  
12 accordance with the Directive and the Charter, well,  
13 then it would've followed also that the data importer  
14 and sub-processor hadn't respected the Standard  
15 Contractual Clauses in the annex.

15:19

16  
17 If I just turn, Judge, to those particular provisions  
18 now, if I may. If you look at the back, Judge, of the  
19 SCC decision which we were looking at before. I'll  
20 just deal with this point, but also the point that you  
21 are discussing with Ms. Hyland. So you see, Judge,  
22 clause 1 contains a definition of applicable data  
23 protection law - it's the same definition as in the  
24 decision itself - clause 1(e).

15:19

25  
26 Clause 3, subclause 1 provides for the data subject to  
27 enforce... I'm looking, Judge, at the 2010 decision.  
28 **MS. JUSTICE COSTELLO:** Yes, I have that. That's the  
29 one behind tab ten, is it?

15:20

1 MR. MCCULLOUGH: Yes.

2 MS. JUSTICE COSTELLO: Thank you.

3 MR. MCCULLOUGH: So clause 3 provides:

4  
5 *"The data subject can enforce against the data exporter*  
6 *this clause, clause 4(b) to (i), clause 5(a) to (e),*  
7 *and (g) to (j), clause 6(1) and (2), clause 7, clause*  
8 *8(2), and clauses 9 to 12 as third-party beneficiary."*  
9

10 Then it provides for the obligations of the data  
11 exporter. And I suppose (a), Judge, is perhaps the  
12 most important one:

15:21

13  
14 *"The data exporter agrees and warrants:*  
15 *(a) that the processing, including the transfer itself,*  
16 *of the personal data has been and will continue to be*  
17 *carried out in accordance with the relevant provisions*  
18 *of the applicable data protection law (and, where*  
19 *applicable, has been notified to the relevant*  
20 *authorities of the Member State where the data exporter*  
21 *is established) and does not violate the relevant*  
22 *provisions of that state."*  
23

24 Then various other obligations of the data excessively  
25 difficult follow. Clause 5 then provides for  
26 obligations of the data importer. 5(a):

15:21

27  
28 *"The data importer agrees and warrants:*  
29 *(a) to process the personal data only on behalf of the*

1       *data exporter and in compliance with its instructions*  
2       *and the clauses."*

3  
4       *clause 5(b):*

5  
6       *"That it has no reason to believe that the legislation*  
7       *applicable to it prevents it from fulfilling the*  
8       *instructions received from the data exporter and its*  
9       *obligations under the contract and that in the event of*  
10       *a change in this legislation which is likely to have a*  
11       *substantial adverse effect on the warranties and*  
12       *obligations provided by the clauses, it will promptly*  
13       *notify the change to the data exporter as soon as it is*  
14       *aware."*

15  
16       And the court will recall the discussion you had with  
17       Ms. Hyland about the extent to which you have a remedy  
18       in damages here and the extent to which that is  
19       satisfactory.

20       **MS. JUSTICE COSTELLO:** well, I suppose Mr. Schrems has 15:22  
21       the authority -- could have sued both Facebook Ireland  
22       and Facebook Inc. on the basis of this clause, assuming  
23       he accepted that they had been transferred under an  
24       equivalent, a contract that complied with the SCCs.

25       **MR. MCCULLOUGH:** well, yes, Judge. I think it's not 15:22  
26       entirely clear, Judge --

27       **MS. JUSTICE COSTELLO:** I mean, that's who it's designed  
28       to protect, isn't it? I'm not saying he's *obliged* to,  
29       but I'm just saying --

1 MR. MCCULLOUGH: It is. No, it's designed to give you  
2 a damages remedy, Judge, as you can see from Clause 6:

3  
4 *"The parties agree that any data subject, who has*  
5 *suffered damage as a result of any breach of the*  
6 *obligations referred to in Clause 3 or in Clause 11 by*  
7 *any party or sub-processor is entitled to receive*  
8 *compensation from the data exporter for the damage*  
9 *suffered."*

10  
11 Now, Ms. Hyland's original position, I think, Judge,  
12 was 'well, it doesn't really. It looks as if it does.  
13 But in fact if material was taken by the US security  
14 services, you would then come back and ask whether you  
15 had a cause of action here'. And according to 15:23  
16 Facebook's sort of *base analysis*, you don't. But I  
17 think after lunch, Judge, the position was the one that  
18 was set out by Mr. Gallagher yesterday in which  
19 Facebook says 'well, that may be our base position, but  
20 we acknowledge that the cases demonstrate that one 15:23  
21 doesn't get a free pass simply by playing the national  
22 security card; restrictions imposed that are said to be  
23 in the interests of national security must meet the  
24 standards of strict necessity'. And so it is said in  
25 those circumstances you might get a cause of action if 15:23  
26 what occurred in the US was no worse than what could  
27 occur in Ireland.

28  
29 I just make two points about that, Judge. First,

1 actually, it may not be a very good damages remedy  
2 *anyway*. And that is for one quite technical reason.  
3 Because if you look at Clause 3, the third party  
4 beneficiary clause,

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

15:24

6 **MR. MCCULLOUGH:** You can enforce against the data  
7 excessively difficult this clause, clauses 4(b) to (i).  
8 You *can't* actually enforce clause 4(a), by way of a  
9 damages remedy in any event.

10 **MS. JUSTICE COSTELLO:** Yes, it's there.

15:24

11 **MR. MCCULLOUGH:** And clause 4(a) is the one whereby the  
12 data exporter agrees and warrants that the processing  
13 itself, including the transfer, has been and will  
14 continue to be carried out in accordance with the  
15 relevant provisions of EU data protection law.

15:24

16  
17 So that guarantee, although it's given, doesn't give  
18 rise when breached to a cause of action in damages.  
19 You *can* sue in respect of the other parts of Clause 4.  
20 But if you look at Clause 4(b), that, for instance, is  
21 an agreement and warranty that the data exporter has  
22 instructed and throughout the duration the personal  
23 data processing server *will* instruct the data importer.  
24 So you can have a breach, you can have a cause of  
25 action in damages in the event of a breach of that.  
26 But not, it appears, a cause of action in damages in  
27 respect of a breach of clause 4(a). But perhaps more  
28 importantly in any event, Judge --

15:25

15:25

29 **MS. JUSTICE COSTELLO:** And 4(a) would capture the

1 national surveillance, the security surveillance in the  
2 United States.

3 **MR. MCCULLOUGH:** Hmm.

4 **MS. JUSTICE COSTELLO:** But possibly not (b), I don't  
5 know whether (b) would. 15:25

6 **MR. MCCULLOUGH:** But not (b), Judge, no. The  
7 difference between them, Judge, is 4(a) says it'll  
8 happen anyway. 4(b) says 'I'll instruct it to happen'.  
9 So you can sue for a breach of somebody not giving the  
10 right instruction, you can't sue under 4(a), or you 15:26  
11 can't sue for damages under 4(a) when it just happens  
12 that there is a breach of your data protection rights  
13 in the US, or whatever country it is to which your data  
14 is transferred.

15 15:26  
16 So there is a gap in the damages remedy. And one can  
17 understand why there is, because that might be hard on  
18 the data exporter to allow a cause of action against  
19 him in damages for a matter over which he has little  
20 control. 15:26

21  
22 But whatever about all that, Judge, more importantly,  
23 it's only a cause of action in damages. And this is a  
24 case, Judge, in which Mr. Schrems seeks, and is  
25 entitled to seek, an order preventing the material from 15:26  
26 going to the US in the first place. That's what lies,  
27 I suppose, at the heart of Article 25 and Article 26;  
28 the data shouldn't go in the first place unless the  
29 relevant protections are in place. A cause of action

1 in damages is all very well - perhaps not very useful  
2 under the circumstances the court has heard very well  
3 described; it's going to be hard ever *actually* to  
4 ascertain that the US security services have *in fact*  
5 had access to this data. 15:27

6  
7 But in any event, Judge, Article 25 and Article 26  
8 provide the data shouldn't go in the first place unless  
9 US laws are effectively equivalent to EU laws and are  
10 in accordance with the Charter. And that's what 15:27  
11 Article 4 provides for as well. They all hang  
12 together, Article 25/26 of the Directive, Article 4 of  
13 the decisions all hang together.

14  
15 So with respect, Judge, the contention that a damages 15:27  
16 remedy is enough I don't think *meets* the case that  
17 arises before the court here. Certainly Mr. Schrems'  
18 contention, Judge, is that the material shouldn't go in  
19 the first place.

20 **MS. JUSTICE COSTELLO:** Now, if you're saying a damages 15:28  
21 remedy doesn't meet the case, just taking it at the  
22 highest level, Article 25 provides that you have an  
23 adequate decision in relation to the third country and  
24 that's fine, you can transfer data pursuant to Article  
25 25. If you're going under 26, the article expressly 15:28  
26 refers to SCCs.

27 **MR. MCCULLOUGH:** Yes, Judge. Article 26(2).

28 **MS. JUSTICE COSTELLO:** Yes. And are you saying that in  
29 order to, at some very high level, to meet the



1 requirement of the Directive in relation to the  
2 protection of EU citizens' data, a damages remedy is  
3 insufficient?

4 **MR. MCCULLOUGH:** Oh, yes, Judge.

5 **MS. JUSTICE COSTELLO:** How does that then play with the 15:29  
6 Directive saying that you can transfer, transmit data  
7 pursuant to an SCC?

8 **MR. MCCULLOUGH:** Oh, but it doesn't, Judge. You start  
9 off with Article 25 -- you can transfer material  
10 pursuant to an SCC unless and until doing so leaves you 15:29  
11 in a position in which your rights are breached. The  
12 structure of the Directive starts off with Article 25,  
13 which provides that:

14  
15 *"The Member States shall provide that the transfer to a*  
16 *third country of personal data which are undergoing*  
17 *processing or are intended for processing after*  
18 *transfer may take place only if, without prejudice to*  
19 *compliance... the third country in question ensures an*  
20 *adequate level of protection."*

21  
22 So that's the starting point. It can't be transferred  
23 at all unless there's an adequate level of protection.  
24 And then there's Article 26, in which derogations are  
25 set out. Article 26(1) provides for derogations which 15:30  
26 really have to do with consent and waiver. Article  
27 26(2):

28  
29 *"... a Member State may authorise a transfer or a set*

1 of transfers of personal data to a third country which  
2 does not ensure an adequate level of protection within  
3 the meaning of Article 25(2), where the controller  
4 adduces adequate safeguards with respect to the  
5 protection of the privacy and fundamental rights and  
6 freedoms of individuals and as regards the exercise of  
7 the corresponding rights."

8  
9 So I'll come to this in a moment, Judge, but the point  
10 of Article 26(2) is as follows; if you can set up a set 15:30  
11 of contractual clauses which ensure you the *same*  
12 protection as you would have got under Article 25 then  
13 you may transfer. But the decisions themselves and the  
14 structure of the Directive make it clear that in if *in*  
15 *fact* the Standard Contractual Clauses *don't* provide 15:31  
16 that for you, well, then the transfer can't take place.  
17 That's what Article 4 of the decision is all about. It  
18 says you may *have* an SCC in place, Article 4(1)(a) says  
19 you may even be *complying* with it, but the foreign law  
20 imposes requirements on you which involve, if you like, 15:31  
21 a derogation from EU standards and so it must stop.

22 **MS. JUSTICE COSTELLO:** So, like, the SCC are global in  
23 their application and then Article 4 is country  
24 specific, if a Data Protection Commissioner decides to  
25 suspend? 15:31

26 **MR. MCCULLOUGH:** Oh, I think that's right, Judge, yes.  
27 Indeed I think it's perhaps even more specific, or  
28 *could* be more specific than that. It will apply to *any*  
29 transfer. So if, for instance, the DPC was able to

1       ascertain that particular requirements of, say in this  
2       case, US law applied only to one particular data  
3       importer, well, then the DPC could suspend the transfer  
4       of data to that particular data importer, or to a group  
5       of data importers if the particular requirements of US 15:32  
6       law applied to a group of them, or to the entire of a  
7       country if the requirements of the laws of that country  
8       applied to the entire.

9  
10       And that's important, Judge, because I suggested 15:32  
11       earlier, and I think wrongly, that if the DPC was  
12       making an order under Article 4 she'd have to make it  
13       in relation to the US entirely. But I don't think  
14       that's correct in fact, Judge. When you look more  
15       closely at it, she could make an order under Article 4 15:32  
16       that related to whatever exporter and importer or  
17       whatever group of exporters and importers were  
18       particularly affected by the relevant provisions of US  
19       law. And that, in turn, is important, because of  
20       course, we've heard a lot in this case about the risks 15:32  
21       to small and medium enterprise companies. But those  
22       companies, of course, don't seem to be subject to  
23       Section 702. So in fact the relevant order that could  
24       and should be made by the DPC under Article 4 would be  
25       a much more confined one than shutting down the flow of 15:33  
26       data to the US.

27  
28       Can I just continue, Judge, to deal --

29       **MS. JUSTICE COSTELLO:** Oh, certainly. I'm sorry, I'm

1 interrupting you.

2 **MR. MCCULLOUGH:** No, no. And it's helpful, I think,  
3 when you do, Judge, because it means I can answer the  
4 court's queries.

5  
6 Making the point, Judge, at paragraph 11 of the  
7 speaking note that as the court's aware, there has been  
8 a new version of Article 4 put in place. The court  
9 will find that at book one, tab 14. And it replaces  
10 Article 4 in both of the decisions, Judge, but I 15:33  
11 suppose we should look at, it's really the second one  
12 of them that's relevant, because it's the 2010 decision  
13 we've been talking about.

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

15 **MR. MCCULLOUGH:** So it's Article 2 of this 2016 15:34  
16 amending decision. It doesn't amend only Article  
17 4(1)(a), Judge, it replaces the entire of Article 4 as  
18 I read it. So now Article 4 simply reads as follows:

19  
20 *"Whenever the competent authorities in Member States*  
21 *exercise their powers pursuant to Article 28(3) of [the*  
22 *Directive] leading to the suspension or definitive ban*  
23 *of data flows to third countries in order to protect*  
24 *individuals... the Member State concerned shall,*  
25 *without delay, inform the Commission which will forward*  
26 *the information to the other Member States."*

27 **MS. JUSTICE COSTELLO:** And that's the applicable law  
28 that I have to consider when I'm considering the  
29 matter, even though the previous version was the

1 version that was in place when the...

2 **MR. MCCULLOUGH:** well, exactly.

3 **MS. JUSTICE COSTELLO:** ... DPC was writing her  
4 decision?

5 **MR. MCCULLOUGH:** The DPC, in fairness, of course, could 15:35  
6 only have considered the version of Article 4 before  
7 her at the time. But if the matter -- but the court,  
8 in reality, has to consider this version of Article 4.  
9 Because if the DPC considers the matter anew, the DPC  
10 will and can exercise only this power, exactly. 15:35

11  
12 That decision then removes the restrictions on Article  
13 4 that were previously present. It did so because in  
14 Schrems 1 the court had decided that the analogous  
15 article of the Safe Harbour decision contained an 15:36  
16 excessive level of restriction on the powers of the DPC  
17 to suspend data flows. Now, it was in fact in  
18 significantly more restrictive terms than Article 4 of  
19 the SCC decisions. But the court can see from the  
20 recitals to this implementing decision that it's that 15:36  
21 part of Schrems, of the Schrems decision.

22 **MS. JUSTICE COSTELLO:** So does that mean in considering  
23 the SCCs, I don't have to consider the nuances of  
24 4(1)(a)?

25 **MR. MCCULLOUGH:** I think ultimately probably not, 15:36  
26 Judge. Certainly if the court is considering what  
27 should now be done, the court should look at the  
28 present day...

29 **MS. JUSTICE COSTELLO:** Or more, if whether or not a

1 reference is necessary?

2 **MR. MCCULLOUGH:** well, exactly, Judge. I suppose  
3 that's really the way to look at it.

4 **MS. JUSTICE COSTELLO:** I look at it in the context of  
5 the current regime? 15:37

6 **MR. MCCULLOUGH:** Yes. Yes, exactly, Judge. That, I  
7 think, is the best way to look at it: Is a reference  
8 necessary? And for that purpose, the court looks at the  
9 present state of the law.

10 15:37

11 I'll just briefly look, Judge, at why the DPC says in  
12 her submissions that we're wrong about this Article 4  
13 point. And I will get the reference for those for the  
14 court. They're at core book 12, Judge.

15 **MS. JUSTICE COSTELLO:** Oh, I thought you meant her 15:37  
16 submissions, not her decision?

17 **MR. MCCULLOUGH:** No, her submissions, Judge, her  
18 submissions to this court.

19 **MS. JUSTICE COSTELLO:** Yes, I have those. I think  
20 they're tab three, is that right? 15:37

21 **MR. MCCULLOUGH:** They should be at book 12, Judge,  
22 tab...

23 **MS. JUSTICE COSTELLO:** Seven is it? Or three?

24 **MR. MCCULLOUGH:** Tab three, Judge, yes. And it's very  
25 briefly addressed, Judge, at paragraph 128 -- 127, I 15:38  
26 should say, and the following paragraphs. I think it's  
27 fair to say three points are made, Judge.

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

29 **MR. MCCULLOUGH:** At paragraph 128 it's submitted that

1 it's not open to Mr. Schrems to pursue the objections,  
2 in circumstances in which they don't arise from the  
3 draft decision and in which Mr. Schrems already  
4 canvassed his objections to the court and  
5 notwithstanding McGovern J. made directions for the  
6 proceedings to continue.

15:38

7  
8 So I suppose the basic point, Judge, is that it's said  
9 that, well, I can't canvass these points because they  
10 simply don't arise from the draft decision. And with  
11 respect, Judge, that brings me back to a point I made  
12 earlier; that's an entirely circular point.

15:38

13 Mr. Schrems' complaint isn't limited by the parts of it  
14 that the DPC chose to examine or to refer to the court.  
15 The Article 4 issue is squarely raised by Mr. Schrems  
16 in his complaint. The court can see the parts of the  
17 complaint in which he *does* refer to it. And indeed,  
18 whether or not it was raised by Mr. Schrems - although  
19 it was - it *had* to be considered by the DPC. If the  
20 court just thinks of the job of the DPC, looking at the  
21 SCC decisions and considering whether to refer the  
22 question of their validity to the Court of Justice,  
23 *obviously* the DPC had to consider Article 4, or at  
24 least *should* have considered Article 4.

15:39

15:39

25  
26 Then another point is made, Judge, at paragraph 131.

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

28 **MR. MCCULLOUGH:** *"The version of Article 4(1) then in*  
29 *place was not engaged, given that the Commissioners*

1        *concerns did not relate to 'requirements' imposed on*  
2        *data importers or sub-processors which had an adverse*  
3        *effect on the applicable data protection law or the*  
4        *SCCs."*

5  
6        And perhaps we've already addressed that, Judge.

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

8        **MR. MCCULLOUGH:**    In my submission, the requirements in  
9        question are the requirements of US law. And in fact  
10       the very point that is being made by the DPC in her  
11       draft decision is that the requirements of EU law are  
12       such as to lead to a breach of the data protection  
13       rights of EU citizens when their data is exported from  
14       the EU to the US. And so in my respectful submission,  
15       Judge, that part of Article 4(1) is met.

15:40

15:40

16  
17       Then at article 131, subarticle 2 the DPC deals with a  
18       point to do with equal treatment and proportionality  
19       and she says it would be in breach of *those* principles  
20       to forbid transfers by Facebook Ireland to be suspended  
21       while other transfers were ongoing. And with respect,  
22       Judge, that, again I don't think could be right. I  
23       think the proper reading of Article 4 is that it  
24       entitles the DPC to make orders relating to one  
25       country, one entity, a group of entities. The DPC  
26       seems to *accept* that, because that's the premise of  
27       what she says, but she says that that would be wrong  
28       and a breach of the principles of equal treatment.

15:41

15:41



1 But in fact, Judge, when you consider the alternative  
2 that the DPC puts before the court, the proposal the  
3 DPC makes is that the court should refer to the Court  
4 of Justice the question of whether the *entire* of the  
5 SCC falls. Now, I know Mr. Murray has said that he is 15:42  
6 asking the court to refer only the question of the  
7 legality of the SCC insofar as it relates to the US,  
8 but that, I think, is structurally hard to see. Can  
9 you have -- the structure of the SCC decisions under  
10 Article 26(2) *seems* to suggest a single worldwide 15:42  
11 decision, as opposed to a set of decisions, one for  
12 each country. And while --

13 **MS. JUSTICE COSTELLO:** And so you couldn't get a  
14 decision of the Court of Justice saying the SCC  
15 decisions are valid save and insofar as they're used 15:42  
16 for transfer of data to the US?

17 **MR. MCCULLOUGH:** Yes. Or to say that they're okay for  
18 India, Pakistan and somewhere else but not okay for  
19 other countries. That doesn't seem to be the structure  
20 of Article 26(2). 15:43  
21

22 So if you look at what the DPC -- that's a matter for  
23 the Court of Justice ultimately, Judge, of course. But  
24 that does seem to be the structure of it. And so it  
25 does seem wrong, Judge, that it should be advanced to 15:43  
26 the court that it would be better to run the risk of  
27 striking down the SCCs in their *entirety* as against  
28 forbidding data flows on a more specific basis. Even  
29 *if* the SCC can be struck down by the Court of Justice

1 for one country only, that still creates a far wider  
2 effect than an Article 4 order restricted to those by  
3 whom the relevant parts of EU law are affected.  
4

5 So, Judge, with respect, while it may be picking out 15:43  
6 one person to make an order under Article 4, that  
7 certainly seems better, and more in accordance in any  
8 event, with the SCC decisions themselves than to refer  
9 a question as to whether the entire edifice should come  
10 tumbling down. 15:44

11 **MS. JUSTICE COSTELLO:** So even though it could be  
12 almost a matter of happenstance as to whether somebody  
13 chose to sue - and I'm just taking them, for example,  
14 as, you know, Yahoo or Apple, or I don't know who else  
15 is transferring - does Twitter come as a -- I don't 15:44  
16 know, whatever it could be, as opposed to, in this case  
17 Facebook. So presumably, for example, Apple or Yahoo  
18 are subject to the same laws in the US as Facebook.  
19 But data flows to Facebook, on your argument, would be  
20 suspended, but the others would happily continue? 15:44

21 **MR. MCCULLOUGH:** No, I can see how there might be a  
22 variety of different orders, Judge. I can see how one  
23 might suspend them for a single entity or for a group  
24 of entities. There are a limited number of entities  
25 that it appears from the documents the court has seen 15:45  
26 are subject to the existing 702 programmes.

27 **MS. JUSTICE COSTELLO:** But I'm just asking -- you see,  
28 Mr. Schrems has only complained about Facebook.

29 **MR. MCCULLOUGH:** It *is* only about Facebook.

1 MS. JUSTICE COSTELLO: Would the Data Protection  
2 Commissioner be entitled to go outside the scope of the  
3 four walls of his complaint? Let's say you were right  
4 and she should exercise her powers under Article 4 of  
5 the SCCs; that would apply to a suspension of data -- 15:45

6 MR. MCCULLOUGH: To Facebook only.

7 MS. JUSTICE COSTELLO: To Facebook only?

8 MR. MCCULLOUGH: On the face of it, Judge, yes.

9 MS. JUSTICE COSTELLO: And how would that leave us? Is  
10 there any issue there, or is it just happenstance and 15:45  
11 that's the way it falls?

12 MR. MCCULLOUGH: I suppose it happens now, Judge. And  
13 perhaps not unknown in litigation that a circumstance  
14 that in fact affects many people, as it turns out  
15 affects one person only because that's the one person 15:45  
16 that sued. I suppose once an order under Article 4 had  
17 been made against Facebook, it would, of necessity, be  
18 relatively easy, it would, of necessity, be relatively  
19 obvious that similar complaints would lead to similar  
20 results against other entities subject to the same 15:45  
21 programmes.

22  
23 But the major point I want to make, Judge, is that it  
24 is preferable and more in accordance with Article 4 and  
25 the SCC decisions in general that *focused* orders should 15:46  
26 be made, as opposed to orders striking down the entire  
27 of the decision or invalidating the entire of the  
28 decision.  
29

1 And it's pointed out to me, Judge, that the Article  
2 28(3) power is, of course, wider than the Article 4  
3 power. So it is, I suppose, in principle open to the  
4 DPC to make an order under Article 28(3) or to initiate  
5 her own investigation.

15:46

6  
7 So just to conclude on Article 4, Judge. It was said  
8 to you in the last couple of days a few times by  
9 Mr. Gallagher, I think, that a striking feature of this  
10 case is that Mr. Schrems doesn't contend for the  
11 invalidity of the SCCs. And that's true in this  
12 strictly limited sense; Mr. Schrems says and we say  
13 that if Article 4 means what it appears to mean, well,  
14 then the SCCs aren't invalid, precisely because they  
15 allow for a form of safety valve in which the DPC can  
16 make orders adequate to protect the rights of EU  
17 citizens who are affected by or potentially affected by  
18 the transfer of data from the EU to the US.

15:47

15:47

19  
20 So there's a structure in the SCCs themselves that  
21 allows for Charter rights and Directive rights to be  
22 protected. And to that extent and in that way, I don't  
23 argue for the invalidity of the SCCs. But if I'm wrong  
24 about that and if the court takes the view that no,  
25 Article 4, for whatever reason, doesn't apply, well,  
26 then of course I *do* say that the SCCs are invalid and  
27 must be struck down. Because the consequence of that  
28 would be, I suppose, reasonably obviously, that the  
29 SCCs would not provide for the adequate protection of

15:47

15:48

1 the rights of EU citizens. And I think that must  
2 follow, Judge, from the first point that I make.

3  
4 So can I move on, Judge, to the second part I want to  
5 say, of what I want to say? And we address this at the 15:48  
6 foot of page six and the following pages. So we make  
7 the point, Judge, that without prejudice to the point  
8 I've made that it didn't form part of the reformulated  
9 complaint and only insofar as is determined that the  
10 exercise of the Article 4 powers isn't permissible or 15:48  
11 required, well, then we agree that the SCC decisions  
12 don't allow for adequate protection of EU citizen data  
13 rights and that those decisions ought to be declared  
14 invalid.

15 15:49  
16 I just want to pause now, Judge, under the next heading  
17 to deal with two points that seemed to be central to  
18 Facebook's case on these issues and that's, first,  
19 their argument in relation to national security, in  
20 which they said that the actions of which the court has 15:49  
21 heard in the US are simply not subject to data  
22 protection law at all. And they said that, Judge, as I  
23 understand it, because of the provisions of the TFEU  
24 excluding national security from the purview of the  
25 Treaty and the provision of the Directive, following on 15:49  
26 from that, providing that it applies only to issues  
27 covered by the Treaty.

28  
29 And then they made a related but different argument,

1 Judge, in which they said that the proper comparator  
2 here, if you come to *make* a comparison, is not between  
3 EU law on the one hand and US law on the other hand,  
4 rather it's between the laws of the Member States on  
5 the one hand and US law on the other hand. And I  
6 respectfully submit they're wrong on both those points.

15:50

7  
8 The national security issue, Judge, perhaps need not  
9 greatly detain the court, because although it's taken  
10 up a great deal of discussion before the court, I think  
11 we've actually all arrived at a position in which we  
12 agree, or at least agree for the purpose of the court's  
13 consideration of the matter. I'll just break it down  
14 into stages as to what I say about it.

15:50

15  
16 The first point I make is this, Judge, that the  
17 exclusion of national security from the purview of the  
18 Treaty I suppose self-evidently is an exclusion of EU  
19 Member States' national security. The EU *never*  
20 purported to legislate for the national security of *any*  
21 area other than that covered by its Member States.  
22 Well, perhaps only a statement of the obvious, Judge,  
23 but the national security *exclusion* mentioned in the  
24 TFEU I think is self-evidently an exclusion relating to  
25 the national security of Member States. But that  
26 doesn't follow, for reasons that I'll explain in a  
27 moment, Judge, that the national security concerns of  
28 the US are exempt from scrutiny. They are, but for a  
29 different reason.

15:50

15:50

15:51

1  
2 So the next point is this, Judge - and on this I think  
3 we probably ultimately agree, or at least agree for the  
4 purpose of these proceedings - that although the EU  
5 doesn't have competence in the area of national 15:51  
6 security, it doesn't follow from that that the laws of  
7 Member States are not subject to scrutiny when they  
8 ostensibly -- sorry, they're not subject to scrutiny,  
9 my apologies, when they ostensibly relate to national  
10 security. 15:51

11  
12 So it's not a sort of a trump card, it's not a joker;  
13 Member States can't simply say 'This law is passed in  
14 the interests of national security, this measure is  
15 taken in the interests of national security, it is now 15:52  
16 exempt from examination'. It's clear, Judge, from the  
17 cases that you've seen that at least as far as the CJEU  
18 in its decisions to date is concerned, restrictions on  
19 Charter rights on the grounds of national security are  
20 permitted only to the extent that they're strictly 15:52  
21 necessary and proportionate.

22  
23 And, Judge, we set out in footnote 19 in particular  
24 references to some of the material that the court has  
25 seen which we say makes that clear. So we refer to the 15:52  
26 Charter itself and then to Watson, the Tele2 decision,  
27 which the court said at paragraph 96:

28  
29 *"Due regard to the principle of proportionality also*

1 *derives from the Court's settled case-law to the effect*  
2 *that the protection of the fundamental right to respect*  
3 *for private life at EU level requires that derogations*  
4 *from and limitations on the protection of personal data*  
5 *should apply only in so far as is strictly necessary".* 15:53

6 **MS. JUSTICE COSTELLO:** Mr. Gallagher said that that was  
7 fine, because it clearly fell within the scope of EU  
8 because it was in a criminal sphere which had been  
9 brought into the scope of the EU purview, as opposed to  
10 the national security area which remained outside the 15:53  
11 purview of the EU.

12 **MR. MCCULLOUGH:** well --

13 **MS. JUSTICE COSTELLO:** If I've summarised him  
14 correctly. And I doubt I have, but anyway.

15 **MR. MCCULLOUGH:** well, Judge, I don't think it alters 15:53  
16 what is said. It certainly is said in Schrems, Judge,  
17 but also in Watson, so perhaps one can just rely on  
18 Schrems ultimately, Judge. I think it's clear, Judge,  
19 that there is a strictly -- there's a proportionality  
20 requirement and, therefore, a strictly necessary 15:54  
21 requirement which follows on from the proportionality  
22 requirement. And I don't think there's any dispute  
23 between us, Judge, that at least *this* case can be  
24 determined on that basis, that restrictions on Charter  
25 rights and, in due course, Directive rights can be 15:54  
26 justified only insofar as they are proportionate and,  
27 therefore, strictly necessary.

28  
29 Now, Mr. Gallagher says, Judge, that ultimately if he



1 ever arrives in the CJEU, he'll take a different point  
2 of view. And that's fine, Judge, of course he's  
3 entitled do to do that. His contention there will be  
4 that the entire area of national security is exempt  
5 from scrutiny. So he'll have a more difficult time 15:54  
6 answering his North Korea question there than he did  
7 here, because I don't actually *think* he has an answer  
8 for it. But nevertheless, Judge, he can deal with it  
9 there. For the moment, Judge, you heard clearly from  
10 Ms. Hyland's answer to the question posed by the court 15:54  
11 just before lunch that it *is* accepted for the purpose  
12 of these proceedings that there is a requirement of  
13 strict necessity.

14  
15 And that's perhaps particularly so, Judge, in this 15:55  
16 case, where, not actually dealing with processing --  
17 and we're not primarily dealing with processing by  
18 Member States themselves, we're dealing with processing  
19 by data processors and a stream of actions by data  
20 processors, that's to say the export from Ireland to 15:55  
21 the US, the making available in the US, the passing of  
22 material, of data from Facebook Ireland to Facebook,  
23 they're all acts of data processing. And the real  
24 question here, Judge, is whether the US law that  
25 imposes, if you like, limitations on the rights of data 15:55  
26 subjects in respect of that processing is or is not  
27 valid in accordance with EU law.

28  
29 So certainly, Judge - we address this at paragraph 20 -

1 the Directive itself, the Privacy Shield Decision, the  
2 Schrems decision, indirectly Watson all make it clear  
3 that EU law provides that national laws governing the  
4 activities of providers can be legitimised within the  
5 EU on the basis of national surveillance solely to the 15:56  
6 extent such restrictions are strictly necessary.

7  
8 If the court just pauses for a moment, Judge, to think  
9 of this; I mean, what can the Commission and the US  
10 Government have been doing when they were talking about 15:56  
11 the Privacy Shield and the long passages in it which  
12 talk about US national security unless they accepted at  
13 least that premise? And it follows also, Judge, from  
14 Schrems - and we've set out at footnote 22, I suppose,  
15 a citation that is perhaps more directly relevant, 15:57  
16 because Schrems is a decision in precisely the same  
17 space, in which the court said at paragraph 92:

18  
19 *"Furthermore and above all, protection of the*  
20 *fundamental right to respect for private life at EU*  
21 *level requires derogations and limitations in relation*  
22 *to the protection of personal data to apply only in so*  
23 *far as is strictly necessary."*

24  
25 And that's what -- if you like, Judge, that's the 15:57  
26 position *in* the EU; you can derogate from privacy  
27 rights, so Article 7 and Article 8 rights under the  
28 Charter of Fundamental Rights, only insofar as strictly  
29 necessary, whether national security is your reason or

1 another aim of the State is your reason, they must all  
2 be proportionate and strictly necessary.

3  
4 And in this case, Judge, it follows from that that the  
5 transfer of data to other countries whose laws impose 15:57  
6 restrictions on the rights of data subjects is  
7 permitted only if and to the extent that the protection  
8 in those countries is effectively equivalent to that in  
9 the EU and that it doesn't breach the Charter rights of  
10 EU citizens. And that's really what lies at the heart 15:58  
11 of Schrems 1, Judge, and that's what this case is  
12 about.

13  
14 Perhaps again it seems obvious, but it has taken us, I  
15 think, a long time, Judge; I think the undisputed 15:58  
16 question here is -- well, there's no doubt that this is  
17 a statement, Judge, I think, with which the parties  
18 agree, that you can transfer data to the US only if and  
19 insofar as US law gives you protection that is  
20 effectively equivalent - I'll come back to the meaning 15:58  
21 of that in a moment - to that available under EU law  
22 and that doesn't breach EU citizens' Charter rights.

23  
24 In other words, Judge, a restriction in this case, a  
25 restriction that the court has heard a lot about, any 15:59  
26 of these restrictions, is permissible if and only if  
27 and to the extent and only to the extent that a similar  
28 restriction would be acceptable if it was imposed by a  
29 Member State in the EU. That's the comparison the

1 court is making - are all these restrictions in the US  
2 restrictions of a sort that would be acceptable in the  
3 EU and do they breach EU citizens' Charter rights?

4 **MS. JUSTICE COSTELLO:** And in assessing that question,  
5 is the jurisprudence opened by Ms. Hyland from the  
6 Court of Human Rights, European Court of Human Rights  
7 the appropriate test?

15:59

8 **MR. MCCULLOUGH:** Well, it's not -- I suppose the  
9 jurisprudence of the Court of Human Rights informs any  
10 analysis of Charter rights, Judge. But they're not in  
11 precisely the same terms. I mean, there isn't in fact  
12 an equivalent of both Article 7 and 8 in the...

16:00

13 **MS. JUSTICE COSTELLO:** No, but you know the test, it  
14 was quite, in relation to national security law she was  
15 labouring -- emphasising the point that there was quite  
16 a, what was it, margin of...

16:00

17 **MR. MCCULLOUGH:** A margin of discretion, Judge, yeah.

18 **MS. JUSTICE COSTELLO:** Of discretion, yes.

19 **MR. MURRAY:** Appreciation.

20 **MS. JUSTICE COSTELLO:** Appreciation. I knew it was an  
21 unusual phrase.

16:00

22 **MR. MCCULLOUGH:** A margin of appreciation, my  
23 apologies. So that's a margin to the States, Judge. I  
24 suppose a margin of appreciation point may not apply  
25 quite as much in relation to the Charter as it does in  
26 relation to the Convention. But the basic principles  
27 of proportionality, Judge, as analysed in the Court of  
28 Human Rights - I should say the component *parts* of the  
29 test of proportionality - are, I think, the same as the

16:00

1 assessment of proportionality that the court will find  
2 conducted at Charter level.

3  
4 There are differences in the texts of the rights and  
5 there may be differences in the extent of the margin of 16:01  
6 appreciation, but the basic analysis of proportionality  
7 is going to be roughly the same, Judge.

8  
9 So it's just four o'clock, Judge.

10 **MS. JUSTICE COSTELLO:** Yes, thank you. 16:01

11 **MR. McCULLOUGH:** May it please the court.

12 **MS. JUSTICE COSTELLO:** I think the parties, if you  
13 wouldn't mind, should make plans for Tuesday and, by  
14 the look of it, Wednesday as well.

15 **MR. MURRAY:** Very good, Judge. 16:01

16 **MR. GALLAGHER:** Thanks, Judge.

17  
18 **THE HEARING WAS THEN ADJOURNED UNTIL FRIDAY, 10TH MARCH**  
19 **AT 11:00**

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