

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 TUESDAY, 14th MARCH 2017 - DAY 20

20

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INDEX

WITNESS	PAGE
QUESTIONS OF THE COURT	5
SUBMISSION BY MR. MURRAY	7
SUBMISSION BY MR. GALLAGHER	34
SUBMISSION BY MR. MURRAY	40

1 THE HEARING RESUMED AS FOLLOWS ON TUESDAY, 14TH MARCH
2 2017

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

5 **REGISTRAR:** At hearing, Data Protection Commissioner 11:00
6 -v- Facebook Ireland Ltd. and another.

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

8 **MS. JUSTICE COSTELLO:** Mr. Murray, before you take up
9 where you were on the last day I have a series of
10 questions that I was going to sort put to you, you 11:00
11 don't have to answer them now, but if you might get a
12 chance to address them before you finish.

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

14 **MS. JUSTICE COSTELLO:** They are not necessarily in any
15 particular order. You were addressing the point that 11:00
16 the essence of the right to privacy involved the
17 possibility of notice, knowledge that there could be
18 some limitations if the requirements of national
19 security were still ongoing, but that you said that the
20 possibility at least of notice at some stage was at the 11:01
21 essence of it.

22
23 The US government and all its agencies and laws employ
24 a "*neither confirm nor deny*" approach for the reasons
25 they have outlined and the justification they have in 11:01
26 relation to that, the hostile actor, all that sort of
27 stuff; so I am just wondering is it possible then ever
28 to transfer data from the EU to the US, is there an
29 irreconcilable conflict between the principles?

1 Then another question was, does the, and it's not a
2 criticism, it's sort of non-loaded question, it may be
3 the implication: Does the DPC's case involve applying
4 a standard to the protection of data in a third country
5 that is higher than that which it enjoys within the 11:02
6 European Union because in the European Union you have
7 the exemptions for financial security.

8
9 Then what relevance does the data petitioner attach to
10 the scope of the issues canvassed by the Commission in 11:02
11 the Privacy Shield when considering US law. You will
12 have seen that, I think it's paragraphs, recital 65 to
13 124, deal with all of the various oversight and all
14 sorts of matters. While I understand your point that
15 the Privacy Shield is a limited decision, what exactly 11:02
16 would be the status of recital 90 in particular where
17 there seems to be something approaching a conclusion
18 there. And, if it is not binding, is it in some way
19 sort of persuasive in the way that common law courts
20 might understand that term. 11:03

21
22 And then, sort of a second matter, different matter,
23 when are the limitations or the principles, or what are
24 the principles applicable when a data protection
25 authority is exercising powers under Article 28(3) or 11:03
26 are there any principles in relation to that as such or
27 is it wider Charter points?

28
29 I am just wondering, I was trying to tease things out:

1 When does the Data Protection Commissioner say that the
2 data protections for EU citizens' data is either
3 breached or potentially breached? Because obviously we
4 were focussing on the act of transfer to the US,
5 there's reference to the fact that the data is 11:04
6 *accessible* to being surveilled and then a lot of the US
7 evidence has been directed towards protections once it
8 has been surveilled, minimising collection, minimising
9 analysts' approach, minimising dissemination and all
10 that sort of thing and is that relevant to the 11:04
11 assessment.

12
13 (Short pause) I think that's probably sufficient to be
14 going on with.

15 11:04
16 **SUBMISSION BY MR. MURRAY:**

17
18 **MR. MURRAY:** Judge, I'm going to answer all of those
19 now except for question 4, which is the one relating to
20 Article 28, which I think is perhaps best addressed in 11:05
21 the context of Article 4 of the SCC decisions because
22 there's an obvious overlap between the two.

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

24 **MR. MURRAY:** In relation to the others, I think I can
25 deal with them relatively briefly but in the course of 11:05
26 the today as I come through each of these issues
27 I think I'll be able to elaborate upon them, but can
28 I just give you a headline response now.

1 You referred, Judge, to the provision of notice in the
2 context of the essence of the right to privacy. And,
3 while that is not incorrect, it is actually the essence
4 of the right to a judicial remedy under Article 47
5 which is the one that is engaged by the provision as to 11:05
6 notice. Now, that is not just a semantic distinction,
7 because it does go to the focus of the Commissioner's
8 decision.

9
10 And insofar as you say 'well in the US they don't give 11:06
11 notice, they neither confirm nor deny', does that mean
12 that there has been a breach of the right, and the
13 answer to that lies in what I have just said. If you
14 frame it in terms of Article 47, I believe the answer
15 is *not necessarily*. Because if you have a standing 11:06
16 rule which accommodates the person who does not know,
17 then that mitigates the absence of notice. But what
18 is, in our respectful submission, absolutely and
19 clearly contrary to the scheme envisaged by the Charter
20 is what the US has which is a rule of *never* notifying. 11:06
21

22 You will recall that even Prof. Swire in his 2004 paper
23 at page 98 recommended a reconsideration of the
24 absolute rule of non-notification; in other words, what
25 the court in Watson said was that you've a right to be 11:07
26 notified at the point where the investigation is no
27 longer prejudiced by notification.

28 **MS. JUSTICE COSTELLO:** Hmm.

29 **MR. MURRAY:** The formulation of that is significant

1 because it is actually, it's not a test that's subject
2 to proportionality, it is a test that has
3 proportionality built into it, but in the US there's an
4 absolute blanket rule. And that is, in our respectful
5 submission, inconsistent with the requirements of the 11:07
6 Charter.

7
8 So it can be mitigated in one of two ways: Either not
9 the absolute rule, and it is an absolute rule, or a
10 relaxation of the standards such as standing. And can 11:08
11 I just make one point because this picks up on
12 something that was suggested but not, I think,
13 developed by Ms. Barrington which was that there was
14 some constitutional preclusion under Article 3 of the
15 federal constitution, some constitutional rule that 11:08
16 would prevent Congress from broadening standing. And
17 I would just remind you that Prof. Vladeck in his
18 writings and in his evidence had explained why that, in
19 his opinion, is not correct.

20 11:08
21 Judge, the second issue which you raised was the
22 standard to apply to data in a third country in a
23 context where the domestic rules have a preclusion for
24 national security.

25 **MS. JUSTICE COSTELLO:** But what I meant was in here, 11:09
26 within the EU --

27 **MR. MURRAY:** Hmm.

28 **MS. JUSTICE COSTELLO:** -- obviously national security is
29 an exception to the Directive, so you can have national

1 security, it's supervised to an extent by the CJEU, but
2 you have that exception for national security.

3 **MR. MURRAY:** Yes. But in our respectful submission,
4 and this was the point in the two extracts at pages 10
5 and 11 from the FRA Report which I opened to you on 11:09
6 Friday, page 10 their own view by reference to the ZZ
7 decision and page 11 quoting Mr. Anderson in his
8 report, there is and there remains a review power,
9 deriving we would say from the Charter, for the use of
10 data in the context of national security within the 11:09
11 Union. Both of those statements were clear and
12 unequivocal.

13
14 So you can't produce the trump card, and you are
15 absolutely right when you refer to the derogation under 11:10
16 the Directive, Article 3(2), but you cannot produce the
17 trump card of national security and say 'sorry, this is
18 the end, we don't have to comply now with Article 47,
19 we don't have to comply with the basic principles
20 derived by the court from the Charter'. 11:10

21
22 And, in any event, that in our respectful submission,
23 and this is a theme that we develop somewhat in the
24 speaking note which I handed in at the conclusion of my
25 own opening; the fact of the matter is, if that is what 11:10
26 the position is, well that is what the position is.

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

28 **MR. MURRAY:** The Member States are members of the
29 Union, they are bound by the European Convention of

1 Human Rights, they have their own set of supervision
2 and controls and if the position is that the United
3 States is held in this context to a different standard
4 so be it, that appears to be the corollary of the case
5 law. But, for the reason I have just alluded to, 11:11
6 I don't believe that that is correct.

7 **MS. JUSTICE COSTELLO:** It's not as stark as might have
8 been posited?

9 **MR. MURRAY:** I don't know. Well, it is certainly not.
10 I mean Facebook rely upon the FRA Report for 11:11
11 *everything* --

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

13 **MR. MURRAY:** -- but it seems disagree with this
14 conclusion, the one on pages 10 and 11 which I opened
15 to you yesterday. They rely on Prof. Brown's report as 11:11
16 the standard in terms of its analysis of the law of the
17 Member States, but don't appear to rely upon his
18 conclusion that notification is a mandatory aspect of
19 the European Convention of Human Rights or his
20 conclusion, immediately after the sentence that you 11:11
21 would recall Prof. Swire quoted 12 times in his report,
22 that the US falls below the standard set by the
23 Convention.

24
25 You finally, I think, asked me, Judge, in reference to 11:11
26 the status of the Commission's observations in the
27 course of Privacy Shield regarding, I suppose,
28 extraneous matters, and you referred to paragraph 90.
29 And I am actually just going to come to Privacy Shield

1 now so it occurs to me that may be a useful point at
2 which to examine that and can I ask you to look, Judge,
3 at Tab 13.

4
5 Your question, I think, is in part answered by the 11:12
6 second of two aspects of Privacy Shield which I am
7 going to emphasise as I go through the decision. The
8 first, to which you alluded, Judge, a few moments ago
9 is of course: *"Privacy Shield is not a decision that*
10 *the US law is adequate, Privacy Shield is a decision* 11:12
11 *that Privacy Shield is adequate"*.

12
13 And the second, Judge, is that, I think when you look
14 and consider very carefully what the Commission said
15 about Privacy Shield, that it becomes apparent that US 11:13
16 law, and in particular the remedial deficiencies in US
17 law, were saved by the Ombudsman. And we will see this
18 in particular in that sequence of paragraphs in the
19 recital running from 115 to 124 where it, I think, is
20 obvious that the Commission identifies a number of 11:13
21 significant deficiencies in the remedial régime in the
22 United States, very similar as it happens to those
23 which feature in the Commissioner's report, Draft
24 Decision, and then proceeds to immediately address the
25 Ombudsman in a context which I think makes it clear 11:13
26 that the Ombudsman is being introduced to address those
27 deficiencies. And of course that's key because the
28 Ombudsman comes out, then it means that the finding of
29 adequacy, well it's not a finding of adequacy of US law

1 at all.

2
3 Just then, Judge, to go very quickly through it.
4 I referred you but I don't think opened the title --

5 **MS. JUSTICE COSTELLO:** Hmm.

11:14

6 **MR. MURRAY:** -- of the decision. But it is of course a
7 decision on the adequacy of the protection provided by
8 the Privacy Shield. Nothing else. And if you turn
9 then, Judge, to recital 12 where, and this is on page
10 L2073.

11:14

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

12 **MR. MURRAY:** *"In 2014 the Commission entered into talks*
13 *with the US authorities to discuss the strengthening of*
14 *the Safe Harbour scheme in line with the 13*
15 *recommendations contained in Communication 847. After*
16 *the judgment of the Court of Justice of the European*
17 *Union in the Schrems case, these talks were*
18 *intensified, with a view to a possible new adequacy*
19 *decision which would meet the requirements of*
20 *Article 25."*

11:14

11:15

21
22 But this is important: *"The documents which are*
23 *annexed to this decision and which will also be*
24 *published in the US Federal Register are the result of*
25 *these discussions. The privacy principles, together*
26 *with the official representations and the commitments*
27 *by various US authorities contained in the documents in*
28 *annexes I and III to VII constitute the Privacy*
29 *Shield."*

11:15

1 So that is what is being found to be adequate. And it
2 really is a source of some surprise, to put it mildly,
3 that such emphasis is placed on this and it is
4 presented to you as it has been as a decision of
5 adequacy of US law, but this is only adequate in a 11:15
6 finding of adequacy in relation to the shield and it
7 only applies to data which is transferred under the
8 shield.

9
10 we'll see this again when we look at the actual 11:15
11 decision where the decision makes it clear that there's
12 data that's transferred under the shield and data that
13 isn't and Facebook, as we know, transfers two
14 categories of data under the shield but for at least
15 some other purposes relies upon the SCCs. 11:16

16
17 If you look then, Judge, at recital 13:

18
19 *"The Commission carefully analysed US law and practice,*
20 *including these official representations. Based on the 11:16*
21 *finds developed in recitals 136 to 140, the Commission*
22 *concludes the US ensures an adequate level of*
23 *protection for personal data transferred under the*
24 *shield."*

25 11:16
26 So again you see that phrase. What the finding relates
27 to is information transferred under the shield *"from*
28 *the Union to self-certified organisations in the United*
29 *States"*. And, Judge, and we'll see this later, just

1 again to emphasise: When the bodies certify, they
2 certify the data which they are going to be
3 transferring under the shield. It is, as it were, data
4 specific.

5
6 If you look then, Judge, to recital 16: "*The*
7 *protection afforded to personal data by the Privacy*
8 *Shield applies to any EU data subject whose personal*
9 *data have been transferred from the Union to*
10 *organisations in the US that have [self] certified*
11 *their adherence to the principles with the Department*
12 *of Commerce.*"

13
14 And then from paragraphs 19, and I won't open them but
15 just to flag them, to 29, the principles are outlined.
16 You can see what they are and they are an inherent part
17 of the shield and, therefore, an inherent part of what
18 has been found to be adequate. Paragraphs 30 to 37
19 deal with oversight and can I just draw your attention
20 in passing, as it were, to recital 33, just to pick up
21 on a point that I'm going to be coming back to later,
22 it will save me opening it. There are three references
23 to the SCCs in the entirety of the Privacy Shield and
24 one of them is recital 33.

25
26 "*Organisations that have persistently failed to comply*
27 *with the principles will be removed from the shield and*
28 *must return or delete the personal data received under*
29 *the shield. In other cases of removal, such as*

1 *voluntary withdrawal from participation or failure to*
2 *recertify, the organisation may retain such data if it*
3 *affirms to the Department of Commerce on an annual*
4 *basis its commitment to continue to apply the*
5 *principles or provides adequate protection for the*
6 *personal data by another authorised means, (for example*
7 *by using a contract that fully reflects the requirement*
8 *of the relevant standard contractual clauses)."*
9

10 And I'm going to gather together the three references 11:18
11 when I look at this aspect of it later but just to
12 observe that's one of the three references to the SCCs.
13

14 Then, Judge, at paragraphs 38 - sorry, recitals 38 to
15 63, deal with redress and can I ask you to turn to 11:18
16 recital 64. I will just emphasise these three
17 paragraphs because they underscore an arresting
18 incongruity in Facebook's case. Because on the one
19 hand they tell you national security is off limits,
20 national security in Article 4(2) includes the national 11:19
21 security of the United States and, even if it doesn't,
22 there's no comparator and so forth. But of course, if
23 that were correct, what business has the Commission
24 involving itself in a consideration of US national
25 security at all, but it is absolutely clear from these 11:19
26 paragraphs that that is exactly what it is doing.
27

28 Paragraphs 64: *"As follows from Annex II, adherence to*
29 *the Principle is limited to the extent necessary to*

1 meet national security, public interest or law
2 enforcement requirements.

3
4 65. The Commission has assessed the limitations and
5 safeguards available in U.S. law as regards access and
6 use of personal data transferred under the EU-U.S.
7 Privacy Shield by U.S. public authorities for national
8 security, law enforcement and other public interest
9 purposes. In addition, the U.S. government, through
10 its ODNI has provided the Commission with detailed 11:20
11 representations and commitments contained in the
12 Appendix VI. By letter signed by the Secretary of
13 State, Annex III, the US government has committed to
14 create a new oversight mechanism for national security
15 interference, the Ombudsman, who is independent from 11:20
16 the intelligence community."

17
18 And then a representation from the Department of
19 Justice is contained in Annex VII. And at recital 66
20 it records: 11:20

21
22 "The findings of the Commission on the limitations on
23 access and use of personal data transferred from the EU
24 to the United States by US public authorities and the
25 existence of effective legal protection are further 11:20
26 elaborated below."

27
28 Then, Judge, in those following paragraphs there is a
29 consideration of various aspects of the substantive

1 law. And it proceeds at paragraph 90, and maybe
2 I should refer you to paragraph 88 first or recital 88,
3 it says:

4
5 *"On the basis of all of the above, the Commission* 11:21
6 *concludes that there are rules in place in the United*
7 *States designed to limit any interference for national*
8 *security purposes with the fundamental rights of*
9 *persons whose personal data are transferred from the*
10 *Union to the United States under the US EU Privacy* 11:21
11 *Shield."*

12
13 So this, as with all of these paragraphs, is not
14 proposing a general clean, well a general finding of
15 adequacy on US law, it is concerned with what US law 11:21
16 plus the various protections provided for under the
17 Privacy Shield achieve.

18
19 And that I think, Judge, is the context in which the
20 paragraph that you observed, which is paragraph 90, 11:21
21 falls to be seen. Because paragraph 89 says:

22
23 *"As the above analysis has shown, US law ensures*
24 *surveillance measures will only be employed to obtain*
25 *foreign intelligence information – which is a* 11:22
26 *legitimate policy objective – and be tailored as much*
27 *as possible. In particular, bulk collection will only*
28 *be authorised exceptionally where targeted collection*
29 *is not feasible, and will be accompanied by additional*

1 *safeguards."*

2

3 And then in 90: *"In the Commission's assessment this*
4 *confirms that the standard set out by the Court of*
5 *Justice in Schrems, according to which legislation* 11:22
6 *involving interference with the fundamental rights*
7 *guaranteed by Articles 7 and 8 of the Charter must*
8 *impose 'minimum safeguards' and 'is not limited to what*
9 *is strictly necessary where it authorises, on a*
10 *generalised basis, storage of all of the personal data* 11:22
11 *of all of the persons whose data has been transferred*
12 *from the EU to the US without differentiation,*
13 *limitation or exemption being made in the light of the*
14 *objective pursued and without an objective criterion*
15 *being laid down by which to determine the limits of the* 11:22
16 *access of the public authorities to the data, and of*
17 *its subsequent use, for purposes which are specific,*
18 *strictly restricted and capable of justifying the*
19 *interference with both access to that data and its use*
20 *entail'."* 11:22

21

22 And that's a reference to paragraph 93 in Schrems:

23

24 *"Neither will there be unlimited collection and storage*
25 *of data of all persons without any limitations, nor*
26 *unlimited access. Moreover, the representations*
27 *provided to the Commission, including the assurance*
28 *that U.S. signals intelligence activities touch only a*
29 *fraction of the communications traversing the internet,*

1 *exclude that there would be access 'on a generalised*
2 *basis' to the content of the electronic*
3 *communications."*

4
5 Then, Judge, and this in my respectful submission is 11:23
6 what is critical for the purposes of the findings by
7 the DPC, we have this build-up, as it were, through the
8 recitals and the consideration of US law and the
9 consideration of the representations made by the
10 government and the consideration of the privacy 11:23
11 principles. There is consideration of oversight in the
12 following paragraphs and then at paragraph 115 the
13 Commission turns to the *specific* issue with which the
14 court is concerned and the specific issue with which
15 the Commissioner was concerned, namely remedies. 11:24

16
17 You have seen its consideration of the substantive law
18 and the protections but now, and that is the context in
19 which paragraph 90 to which you referred falls to be
20 considered, but now you move to remedies. And what the 11:24
21 Commission says about that, in our respectful
22 submission, is significant, both as to the content of
23 its comments and how it believed they could be
24 resolved.

25 11:24
26 So there's reference made, Judge, up to paragraph 115
27 in the various pieces of legislation to which you have
28 seen reference already made, including the
29 Administrative Procedure Act. And then at paragraph

1 115 they say this:

2
3 *"while individuals, including EU data subjects,*
4 *therefore have a number of avenues of redress when they*
5 *have been subject of unlawful electronic surveillance* 11:24
6 *for national security purposes, it is equally clear*
7 *that at least some legal bases that US intelligence*
8 *authorities may use are not covered."*

9
10 This is the first problem and this is 12333: 11:25

11
12 *"Moreover, even where judicial redress possibilities in*
13 *principle do exist for non-US persons, such as for*
14 *surveillance under FISA, the available causes of action*
15 *are limited and claims brought by individuals* 11:25
16 *(including US persons) will be declared inadmissible*
17 *where they cannot show 'standing', which restricts*
18 *access to the ordinary courts."*

19
20 So if you just take that paragraph and I'm going to ask 11:25
21 you to look at the footnotes which are attached to it
22 because they identify what the Commission obviously
23 sees as significant limitations on the remedial scheme
24 provided for in US law.

25 11:25
26 And the footnotes then refer you, actually footnote 168
27 which is referable to the preceding paragraph is of
28 interest because it kind of records that:
29

1 *"The individual will normally only receive a standard*
2 *reply by which the agency declines to either confirm or*
3 *deny the existence of records."*

4
5 Referring to ACLU. Then in footnote 169, the ODNI 11:26
6 representations are recorded in appendix or Annex VI:
7 *"According to the explanations provided, the available*
8 *causes of action either require the existence of*
9 *damage."*

10
11 So this is one limitation, and this is derived from 11:26
12 what the US authorities have told them: *"Or a showing*
13 *that the government intends to use or disclose*
14 *information obtained or derived from electronic*
15 *surveillance of the person concerned against that* 11:26
16 *person in judicial or administrative proceedings in the*
17 *US."*

18
19 So essentially you either have to prove damage, and we
20 know from FAA -v- Cooper what that means, or you have 11:26
21 to be in a situation where this evidence is being
22 adduced against you. Now those complaints or concerns
23 will be familiar with you, Judge, from the evidence.

24
25 And the Commission goes further because it identifies 11:27
26 how that does *not* align with the protections provided
27 under EU law because it says:

28
29 *"As the Court of Justice has repeatedly stressed, to*

1 *establish the existence of an interference with the*
2 *fundamental right to privacy, it does not matter*
3 *whether the person concerned has suffered any adverse*
4 *consequences on account of that interference."*

11:27

6 And this is paragraph 89 of Schrems which of course has
7 been referred to you on many occasions.

9 So there is one significant remedial deficiency in EU
10 law identified - sorry, in US law when compared with EU
11 law identified by the Commission. And then, Judge,
12 they explain in paragraph 171 that the admissibility
13 criterion stems from the case or --

11:27

14 **MS. JUSTICE COSTELLO:** You mean footnote.

15 **MR. MURRAY:** I am sorry, footnote 170.

11:27

16 **MS. JUSTICE COSTELLO:** Yes.

17 **MR. MURRAY:** So the admissibility criterion, that is
18 standing, derives from Article III.

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

20 **MR. MURRAY:** Case or controversy and we have seen
21 Prof. Vladeck's view that Congress can expand that.
22 And then 171, Judge, is Clapper:

11:28

24 *"As regards the use of NSLs, the USA Freedom Act*
25 *provides that non-disclosure requirements must be*
26 *periodically reviewed, and that recipients of NSLs be*
27 *notified when the facts no longer support a*
28 *non-disclosure requirement. However, this does not*
29 *ensure that the EU data subject will be informed that*

11:28

1 *he or she has been the target of an investigation."*

2
3 So in this short paragraph the Commission identifies
4 many of the deficiencies which the Data Protection
5 Commissioner is concerned about and which prompt her to 11:28
6 bring this application which she identifies in her
7 decision and have been elaborated upon in particular by
8 Mr. Serwin.

9
10 Then you see how the Ombudsman comes in, and it is 11:29
11 obvious that the Ombudsman is introduced to address
12 those deficiencies; in other words, without the
13 Ombudsman those remedial deficiencies would stand. So
14 what it says at paragraph, footnote, recital 116: "*In*
15 *order to provide for an additional redress avenue*", and 11:29
16 sorry, we are out of the footnotes, Judge --

17 **MS. JUSTICE COSTELLO:** The recitals, yes.

18 **MR. MURRAY:** -- into the recitals: "*In order to*
19 *provide for an additional redress avenue accessible for*
20 *all EU data subjects, the US government has decided to* 11:29
21 *create a new Ombudsperson mechanism as set out in the*
22 *letter from the US Secretary of State to the Commission*
23 *contained in Annex III to this decision. This*
24 *mechanism builds on the designation under PD28 of a*
25 *senior coordinator (at the level of Under-Secretary) in* 11:29
26 *the State Department as a contact point for foreign*
27 *governments to raise concerns regarding U.S. signals*
28 *intelligence activities, but goes significantly beyond*
29 *this the original concept.*

1 117. In particular, according to the commitments from
2 the US government, the Ombudsperson mechanism will
3 ensure that individual complaints are properly
4 investigated and addressed."

5 11:30

6 And when you ask the question why is this Ombudsperson
7 being put in place, what is the reason for it and why
8 is the Commission elaborating upon it, in context it is
9 absolutely clear it is being put in place to identify
10 the constraints arising from the combination of the 11:30
11 standing rule and the rules regarding the necessity for
12 the proof of damage to sue.

13
14 "will ensure that individual complaints are properly
15 investigated and addressed, and that individuals 11:30
16 receive independent confirmation that US laws have been
17 complied with or, in the case of a violation of such
18 laws, the non-compliance has been remedied. The
19 mechanism includes the 'Privacy Shield Ombudsman', the
20 Under-Secretary and further staff as well as oversight 11:30
21 bodies competent to oversee the different elements of
22 the Intelligence Community on whose cooperation the
23 Privacy Shield Ombudsperson will rely in dealing with
24 complaints. In particular, where an individual's
25 request relates to the compatibility of surveillance
26 with U.S. law, the Privacy Shield Ombudsperson will be
27 able to rely on independent oversight bodies with
28 investigatory powers, (such as the Inspector-Generals
29 or the PCLOB). In each case the Secretary of State

1 ensures that the Ombudsperson will have the means to
2 ensure that its response to individual requests is
3 based on all the necessary information.
4

5 118. Through this 'composite structure', the 11:31
6 Ombudsperson Mechanism guarantees independent oversight
7 and individual redress."
8

9 So it is this individual redress provided by the
10 Ombudsman which addresses the concerns previously 11:31
11 identified by the Commission: "Moreover, the
12 cooperation with other oversight bodies ensures access
13 to the necessary expertise. Finally, by imposing an
14 obligation on the Privacy Shield Ombudsperson to
15 confirm compliance or remediation of any 11:31
16 non-compliance, the mechanism reflects a commitment
17 from the US government as a whole to address and
18 resolve complaints from EU individuals."
19

20 So it proceeds, Judge, to address aspects of the 11:31
21 Ombudsman, it records that he will be independent from
22 the intelligence community, and these have been opened
23 to me and I won't repeat them, but I do want to take
24 you to recital 122 --

25 **MS. JUSTICE COSTELLO:** Mm hmm. 11:32

26 **MR. MURRAY:** -- as the conclusion reached by the
27 Commission regarding the Ombudsperson:
28

29 "Overall this mechanism ensures that individual

1 *complaints will be thoroughly investigated and*
2 *resolved, and that at least in the field of*
3 *surveillance this will involve independent oversight*
4 *bodies with the necessary expertise and investigatory*
5 *powers and an Ombudsperson that will be able to carry* 11:32
6 *out its functions free from improper, in particular*
7 *political influence. Moreover, individuals will be*
8 *able to bring complaints without having to demonstrate,*
9 *or just to provide indications, that they have been the*
10 *object of surveillance."* 11:32

11
12 So just stop there. That sentence tells you exactly
13 what it is the Commission was concerned about, that the
14 problem that we have been discussing arising from US
15 standing rules and the combination of those and the 11:32
16 absence of any obligation to notify is now being, in
17 the commission's view, addressed: "*In the light of*
18 *those features, the Commission is satisfied there are*
19 *adequate and effective guarantees against abuse."*

20 11:33
21 And then the decision, Judge, recitals 123 and 124:

22
23 "*On the basis of all of the above - and that obviously*
24 *includes the Ombudsman - the Commission concludes the*
25 *US ensures effective legal protection against* 11:33
26 *interferences by its intelligence authorities with the*
27 *fundamental rights of the persons whose data are*
28 *transferred from the Union to the United States under*
29 *the shield.*

1 124. In this respect, the Commission takes note of the
2 Court of Justice's judgment in the Schrems case
3 according to which 'legislation not providing for any
4 possibility for an individual to pursue legal remedies
5 in order to have access to personal data relating to 11:33
6 him, or to obtain the rectification or erasure of such
7 data, does not respect the essence of the fundamental
8 right to effective judicial protection as enshrined in
9 Article 47'."

10
11 So the Commission now has identified the very point
12 which the DPC has been concerned about and its
13 conclusion is this: "The Commission's assessment has
14 confirmed that such legal remedies are provided for in
15 the US, including through the introduction of the 11:34
16 Ombudsperson mechanism. The Ombudsperson mechanism
17 provides for independent oversight with investigatory
18 powers. In the framework of the Commission's
19 continuous monitoring of the Privacy Shield, including
20 through the annual joint review which shall also 11:34
21 involve the Ombudsperson, the effectiveness of this
22 mechanism will be reassessed."

23
24 Now, Judge, what that means is the following: It means
25 that the Commission has made a finding that the Privacy 11:34
26 Shield is adequate and, if you are transferring your
27 information under the Privacy Shield, fine. It would
28 appear, and again I'm at pains to emphasise that my
29 client's position is that, although the matter is not

1 entirely clear, that the SCCs have the Ombudsperson
2 superimposed upon them and I will show in a moment
3 where that comes from.
4

5 So, what there is is a finding that the whole of the 11:35
6 Privacy Shield provides an adequate remedial basis,
7 only the Ombudsperson is transferred over to SCCs, but
8 if the Ombudsperson is *not* an adequate remedy, if the
9 Commission is wrong in concluding that it is an
10 Article 47 compliant remedy that meets the requirements 11:35
11 of Schrems, well then there is, and I would
12 respectfully submit the Commission decision supports
13 the proposition that there is, no adequate remedy for
14 the purpose of Article 47 in the United States.

15 11:36
16 And, for the reasons that I alluded to on Friday and to
17 which I will return later, there are legitimate
18 concerns and issues around the Ombudsperson.

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

20 **MR. MURRAY:** So, if anything, Judge, when one looks 11:36
21 closely and carefully at the analysis of the
22 Commission, insofar as the issues that we have brought
23 to the court are concerned, if anything they support
24 the concerns which we agitate, in my submission.

25 11:36
26 Judge, can I ask you to go to the decision itself
27 because, as has been pointed out, the decision gets
28 lost in the undergrowth of the recitals, it's at page
29 35, L207-35.

1 MS. JUSTICE COSTELLO: I have it, thank you.

2 MR. MURRAY: So this just emphasises this concept of
3 transferring data under the Privacy Shield. So do you
4 see Article 1: *"For the purpose of Article 25(2), the* 11:37
5 *United States ensures an adequate level of protection*
6 *of personal data transferred from the Union to*
7 *organisations in the United States under the EU Privacy*
8 *Shield."*

9
10 So there it is in the clearest terms in the decision 11:37
11 itself, the finding of adequacy is only to information
12 transferred under the shield.

13
14 2. The EU-US Privacy Shield is constituted by the
15 principles issued by the US Department of Commerce on 11:37
16 7th and the official representations and commitments
17 contained in the documents listed in Annexes I, III to
18 VII."

19
20 So that's what the shield is. 11:37

21 MS. JUSTICE COSTELLO: Mm hmm.

22 MR. MURRAY: And I'm going to just look at some
23 extracts of that in a moment and then, thirdly:

24
25 *"For the purposes of paragraph 1, personal data are* 11:37
26 *transferred under the shield where they are transferred*
27 *from the Union to organisations in the United States*
28 *that are included in the 'Privacy Shield list',*
29 *maintained and made publically available by the*

1 *Department of Commerce, in accordance with sections I*
2 *and III of the principles."*

3
4 And what that means is that, insofar as you have signed
5 up to the shield and self-certified for the purposes of 11:38
6 particular data, then the transfer of that data enjoys
7 the benefit of his Adequacy Decision. And just to show
8 you where you find that in terms of categories of
9 information, if you turn to page 41.

10 **MS. JUSTICE COSTELLO:** Yes. 11:38

11 **MR. MURRAY:** You'll see, and this is dealing with the
12 certification, page 41:

13
14 *"Verify self-certification requirements - prior to*
15 *finalising an organisation's self-certification (or 11:38*
16 *annual re-certification) and placing an organisation on*
17 *the Privacy Shield List, verify that the organisation*
18 *has: Provided required organisational contact*
19 *information; described the activities of the*
20 *organisation with respect to personal information; and 11:39*
21 *indicated what personal information is covered by its*
22 *self-certification."*

23
24 So you actually identify the categories of data so
25 certified. 11:39

26
27 And if you go forward to page 49, paragraph 6, you'll
28 see:
29

1 *"Organisations are obligated to apply the principles to*
2 *all personal data transferred in reliance on the*
3 *Privacy Shield after they enter the Privacy Shield. An*
4 *organisation that chooses to extend Privacy Shield*
5 *benefits to human resources personal information*
6 *transferred from the EU for use in the context of*
7 *employment relationship must indicate this when it*
8 *self-certifies."*

11:39

10 And, if you just go over the page, again you'll see it
11 is data specific at the top of the page, an
12 organisation has to inform individuals about and No.
13 iii: *"Its commitment to subject to the Principles all*
14 *personal data received from the EU in reliance on the*
15 *Privacy Shield."*

11:39

11:40

16
17 And if you go forward to page 56, again you see this
18 phrase an organisation in (f), I am terribly sorry.

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

20 **MR. MURRAY:** Page 56(f): *"An organisation must subject*
21 *to the Privacy Shield principles all personal data*
22 *received by the EU in reliance on the Privacy Shield.*
23 *The undertaking to adhere to the Privacy Shield*
24 *principles is not time limited in respect of personal*
25 *data received during the period in which the*
26 *organization enjoys the benefits of the Privacy Shield.*
27 *Its undertaking means that it will continue to apply*
28 *the Principles to such data for as long as the*
29 *organization stores, uses or discloses them, even if it*

11:40

1 *subsequently leaves the Privacy Shield for any reason.*
2 *An organization that withdraws from the Privacy Shield*
3 *but wants to retain such data must affirm to the*
4 *Department on an annual basis its commitment to*
5 *continue to apply the Principles or provide 'adequate'*
6 *protection for the information by another authorized*
7 *means (for example, using a contract that fully*
8 *reflects the requirements of the SCCs.)"*
9

10 And that's the second reference, Judge, to the SCCs. 11:41
11 And if you go forward to page 72, which is perhaps the
12 clearest reference to the SCCs, in the fourth paragraph
13 on that page.

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

15 **MR. MURRAY:** *"This memorandum describes a new mechanism* 11:41
16 *that the Senior Coordinator will follow to facilitate*
17 *the process of requests relating to national security*
18 *access to data transmitted from the EU to the US*
19 *pursuant to the Privacy Shield, standard contractual*
20 *clauses, binding corporate rules, derogations."* 11:41
21

22 And that is the legal basis, it would appear, and it
23 seems the sole legal basis on which the Ombudsman
24 applies to the SCCs. There isn't an amendment to the
25 SCC decision or indeed any express reference in the 11:42
26 Privacy Shield decision except in recital 33. So it's
27 a little bit unclear, but I think I have already
28 explained to you my client's position on it.
29

1 So what that means, Judge, is, if, I can respectfully
2 so submit, Privacy Shield applies only to Privacy
3 Shield, it applies only to data transferred in reliance
4 on Privacy Shield. The Adequacy Decision, therefore,
5 does not and cannot bind the court or anyone else in 11:42
6 relation to an assessment of the validity of the SCCs.
7 We do raise an issue, as we are entitled to for the
8 reasons I explained on Friday afternoon, as regards the
9 Ombudsperson. If we're right in that it may have
10 implications for the Privacy Shield decision, we're not 11:42
11 challenging the Privacy Shield decision.

12
13 And in my submission when you look closely at those
14 paragraphs, 115 and following of the recitals, the
15 analysis conducted by the Commission actually supports 11:43
16 the analysis which the Commissioner, which my client
17 has reached to the extent that it is quite clear that
18 the Ombudsman is introduced to plug the very
19 significant gaps which we have identified.

20 11:43
21 So, that is what I have to say, Judge, about the
22 Privacy Shield.

23 **MR. GALLAGHER:** Judge, I am very loathe to interrupt
24 but there is a point I want to make. It does appear as
25 if the DPC is raising a new issue now that was never 11:43
26 canvassed in opening and it's this: Mr. Murray lays a
27 lot of emphasis on the fact that the Commission
28 decision refers to the Privacy Shield and adequacy in
29 that context, implying that the findings with regard to

1 national security law and the redress provisions,
2 including the Ombudsman person, are not findings as to
3 adequacy in relation to that sphere and that the
4 Adequacy Decision is solely conditioned on the signing
5 up to the Privacy Shield. 11:44

6
7 Now, that was never made as part of their case. If
8 I have misunderstood the case he is now making I will
9 sit down, but that is of some importance, Judge.
10 Because you will remember the Privacy Shield documents 11:44
11 and assessments are divided in two. The first relates
12 to what I call the private sphere where you sign up to
13 the principles and the second, beginning on page 13,
14 relates to the public sphere. Both are assessed
15 separately. No issue has ever been made by the DPC 11:44
16 about the adequacy of the SCC clauses in relation to
17 the private sphere.

18
19 So the only part of the Privacy Shield decision that is
20 relevant to the issue before you is that that relates 11:45
21 to the public sphere, the finding of strictly
22 necessary, and the finding of adequacy of remedies,
23 including the Ombudsperson. And if the DPC is now
24 contending, which I said was never contended in the
25 submissions, never contended in Mr. Collins' opening, 11:45
26 that the Privacy Shield adequacy finding is only
27 binding on this court and is only relevant to this
28 court where somebody is transferring under the Privacy
29 Shield, they are not entitled to make that case now.

1 That is a conflation of two different strands of the
2 Privacy Shield and that is very important.

3 **MR. MURRAY:** well, Judge --

4 **MS. JUSTICE COSTELLO:** Just a moment, just before
5 Mr. Murray. As I understood it, and I haven't looked 11:45
6 at the pleadings for what seems like a long while at
7 this stage.

8 **MR. GALLAGHER:** Yes.

9 **MS. JUSTICE COSTELLO:** The Privacy Shield wasn't
10 initially part of the Plaintiff's case at all for 11:45
11 obvious reasons.

12 **MR. GALLAGHER:** Yes.

13 **MS. JUSTICE COSTELLO:** It emerged by way of defence.

14 **MR. GALLAGHER:** Yes.

15 **MS. JUSTICE COSTELLO:** And then it was responded to in 11:46
16 reply, we rely on it for its full force, meaning and
17 effect.

18 **MR. GALLAGHER:** Exactly.

19 **MS. JUSTICE COSTELLO:** So it is not really the case
20 that it's your defence and they are responding to it 11:46
21 rather than her case. Now maybe I have misunderstood
22 this.

23 **MR. GALLAGHER:** well, except they said they would rely
24 on it for its full meaning and effect. Mr. Collins
25 referred to it in the opening, he could have left it to 11:46
26 the defence.

27 **MS. JUSTICE COSTELLO:** well, I think to be fair to him
28 in his opening he did say that he was also going to
29 open the positions advanced by the other parties, if

1 I can to put it that way as well.

2 **MR. GALLAGHER:** Yes. Oh, I make no criticism of him,
3 but it is part, they said they would rely on it for
4 full force and effect. If they are now contending that
5 the Privacy Shield isn't relevant or doesn't constitute 11:46
6 a finding as to adequacy because Facebook has not
7 signed up to the Privacy Shield.

8 **MR. MURRAY:** I didn't say that.

9 **MR. GALLAGHER:** Well, sorry, excuse me.

10 **MS. JUSTICE COSTELLO:** No, what he said was that it's a 11:47
11 finding of adequacy in a limited scope.

12 **MR. GALLAGHER:** Yes.

13 **MS. JUSTICE COSTELLO:** Just as, for example, you were
14 arguing that the Schrems decision is limited because it
15 doesn't define that US law is inadequate, it only finds 11:47
16 that the decision of the Commission failed to address
17 those issues and therefore it was invalid. So he has
18 said that it's a narrow decision and therefore it's
19 not, because I had asked was it binding upon the court.

20 **MR. GALLAGHER:** Yes. 11:47

21 **MS. JUSTICE COSTELLO:** And...

22 **MR. GALLAGHER:** And he seems to be saying now, that's
23 why I said at the very beginning if I have
24 misunderstood the position I will happily sit down, but
25 he does seem to be saying that the finding of adequacy, 11:47
26 and he drew your attention to the Articles of the
27 decision, is in the context of signing up to the
28 Privacy Shield, but that ignores the fact that the
29 Commission's analysis examines two strands. It

1 examines what I have called the private transfer where
2 you must sign up to the principles.

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

4 **MR. GALLAGHER:** And, separately from page 13 on, the
5 transfer in the context of the national security
6 sphere. 11:47

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

8 **MR. GALLAGHER:** In respect of both it finds adequacy.
9 There has never been any suggestion that the
10 protections in the private sphere that are provided by 11:48
11 the SCCs are in any way inadequate. That has never
12 been suggested, they were never even looked at and
13 therefore the only part of the Privacy Shield decision
14 that is relevant to the court's examination of the
15 issue in this case, national surveillance, is the 11:48
16 analysis that relates to that issue and, separately, in
17 relation to that issue, the Commission finds that the
18 protections, including the redress which does involve
19 the Ombudsperson, is adequate and that is the effect
20 of -- 11:48

21 **MS. JUSTICE COSTELLO:** well, just a moment, can you
22 show me where that is? I know this is somewhat
23 interfering with your reply.

24 **MR. MURRAY:** well it is, Judge, and I think it is very
25 unfair. Nobody interrupted Mr. Gallagher or Ms. Hyland 11:48
26 when they were addressing the court making their
27 submissions and I think it is very, very wrong for
28 Mr. Gallagher to have stood up and interrupted my
29 reply. If he wants to make a point at the conclusion

1 he can do so, but this is an attempt by him to make
2 submissions in the middle of my reply and I have to
3 say, Judge, it should be deprecated.

4 **MS. JUSTICE COSTELLO:** well, Mr. Gallagher, I will park
5 that argument in relation to it. 11:49

6 **MR. GALLAGHER:** Yes.

7 **MS. JUSTICE COSTELLO:** But I mean it did see that, and
8 I know because I have got your marks on it as well as
9 Mr. Collins' marks, that my attention was drawn to the
10 actual decision itself which on its face says that "*the* 11:49
11 *personal data transferred from the Union to*
12 *organisations in the United States under the Privacy*
13 *Shield*", so it has to be under the whole lot, you can't
14 go under a half a leg.

15 **MR. GALLAGHER:** Yes. That is true, Judge. Sorry, 11:49
16 I don't, I can understand Mr. Murray objecting, I don't
17 agree with his criticisms and I deliberately didn't
18 want to interrupt his presentation and that's why
19 I allowed him finish that particular point.

20 11:49
21 But, Judge, the examination involves the two strands.
22 There has never been any suggestion in the DPC's
23 decision that in the private sphere the SCCs are
24 inadequate; therefore, the aspect of the Privacy Shield
25 that is relevant is its analysis of adequacy in the 11:50
26 context of the public sphere.

27 **MS. JUSTICE COSTELLO:** well, I will consider your
28 point, but I'm not too sure that it is well raised, but
29 I will consider it because I do think that they did

1 reserve their case to say full force meaning and
2 effect. But I will look back at the pleadings and
3 stuff because it was a case that it was part of your
4 case that they were responding to, not the case as
5 originally brought. But I will look at it and I will 11:50
6 re-read the opening carefully with that comment in
7 mind.

8 **MR. GALLAGHER:** Thank you.

9 **MS. JUSTICE COSTELLO:** That observation in mind.

10 **MR. MURRAY:** And you will recall that I interrupted 11:50
11 Mr. Gallagher while he raised this issue in his opening
12 observing that there were questions around what was in
13 his submissions and pleadings. No issue arises in
14 relation to whether things are pleaded or not or in
15 submissions, we're not making that point. It's in that 11:50
16 context that I now analyse it, and the decision, Judge,
17 speaks for itself.

18
19 Now, I want to move on, Judge, to the fourth item on
20 the list I handed you on Friday which is US law and 11:51
21 what findings you should make in relation to that.
22 Just perhaps to begin by making some comments about the
23 evidence you have heard.

24
25 Obviously, Judge, it will be a matter for the court to 11:51
26 reach the conclusions it reaches regarding the expert
27 witnesses, and I don't want to say too much about any
28 particular witness or the factors the court may bring
29 to bear on its assessment of their credibility, but

1 I will say this about Prof. Swire. In my respectful
2 submission Prof. Swire was not in a position to assist
3 the court on the critical issues with which it was
4 concerned. His report contained a *fundamental* error in
5 his explanation of US constitutional law insofar as it 11:52
6 applied to non-US persons, which of course is what we
7 were about, it was at the heart of the case. He was
8 not, in my respectful submission, in a position to
9 provide any explanation as to how he had made that
10 error. He cited a case as authority for the 11:52
11 proposition which it simply did not sustain, and
12 I understood him to accept that, eventually, in his
13 evidence.

14
15 He adhered on oath doggedly to an interpretation of the 11:52
16 Supreme Court decision in Clapper, which anybody who
17 had been in the court for the preceding ten days would
18 have known was untenable and which he retracted only
19 when asked to read out the wording of the Supreme Court
20 judgment itself. 11:52

21
22 He didn't read the Spokeo case because it was in his
23 inbox, even though it was an Article III case concerned
24 with standing in data protection cases. His report was
25 146,500 words long, 310 pages, produced in a very short 11:53
26 period of time with the assistance of a large number of
27 other people, a fact which was not disclosed in the
28 report itself.
29

1 I would urge you to look at the corrections that the
2 US government helpfully made to Prof. Swire rescuing
3 him from further cross-examination in the course of the
4 his evidence as regards errors that he had made in his
5 report. In my respectful submission I would ask you to 11:53
6 bear those comments in mind as you consider
7 Prof. Swire's evidence.

8
9 Prof. Vladeck's report was, perhaps somewhat unusually,
10 not one where he was asked to express his opinion per 11:54
11 se on the issues, but effectively, as I understood his
12 evidence, to do a critique of the DPC decision, and
13 that may be why he didn't state in his report what his
14 views actually were as recorded elsewhere regarding the
15 efficacy of the House Intelligence Committee. We also 11:54
16 know, as with all but one of the other Facebook
17 witnesses, that Prof. Vladeck's report was also the
18 subject of comment by the US government, although we do
19 not know what that comment was.

20 11:54
21 There is a criticism made of Mr. Serwin insofar as it
22 is said he wasn't a national security expert. He was,
23 Judge, an expert in cyber security and privacy
24 litigation and enforcement. He's the author of a work
25 on information security and privacy, he was well placed 11:54
26 to give evidence regarding the actual issue, namely the
27 remedial scheme in place in the United States.

28
29 And just one point of detail, Judge, well actually two

1 points of detail, none of which are of any significance
2 but just to observe them so the court isn't - they are
3 not corrected. It was put to Mr. Serwin on a number of
4 occasions that he was the only US law witness or person
5 consulted by the Commissioner and that's correct, and 11:55
6 he confirmed that that was correct. But it should be
7 noted, Judge, that, when you look at the DPC decision,
8 the Commissioner records the fact that she had regard
9 to a number of documents, including the European
10 Commission November 2013 Working Group Report, the 11:55
11 Commission Report on the Functioning of the Safe
12 Harbour, the communication from the Commission to the
13 Parliament and Council of February 2016 and of course
14 she is also a member of the Article 29 working Group
15 which has obviously been concerned in this issue for 11:55
16 some time. And those documents variously make
17 references to US law.

18 **MS. JUSTICE COSTELLO:** They are recited in the Draft
19 Decision.

20 **MR. MURRAY:** They are in the decision, just to observe 11:56
21 that.

22
23 And the other point again of detail which I think is
24 inconsequential is just to say, it was said on a number
25 of occasions that Prof. Richards had prepared his 11:56
26 report with the benefit of assistance. He didn't. He
27 never said he did. He was asked a question by
28 Mr. Gallagher, a sort of rolled-up question which
29 referred to his assistance. He answered the question,

1 he didn't say 'I don't have assistance', but he
2 certainly didn't ever say that he did. That again is a
3 point of detail.
4

5 All of that said, Judge, and putting the assessment of 11:56
6 the witnesses to one side, which is of course a matter
7 for the court, I think, and I think this is in
8 particular the case when you look at the second day of
9 Prof. Vladeck's evidence, I think that there perhaps
10 isn't a huge amount between the parties in terms of 11:56
11 what US law says or doesn't say. You'll see on Day 13
12 page 43 that Prof. Vladeck's disagreement - sorry, the
13 comments Prof. Vladeck had to make on Mr. Serwin's
14 report and the DPC decision were this: He had eight
15 points in his report. 11:57
16

17 Two of them were on matters on which he and the DPC
18 agreed, 12333 and the limitations on the JRA and
19 Privacy Act; two of them related to matters that were
20 not remedies that were generally available to non-EU 11:57
21 persons or indeed EU persons, criminal, exclusionary
22 remedy, possibility of criminal prosecutions; of the
23 remaining four, one was standing, which he accepted
24 was, in his own words, a *substantial* obstacle; and the
25 other was the APA which I think he also accepted, and 11:58
26 I'll come back to this shortly, was a remedy with some
27 limitations.
28

29 There were two then final issues, Rule 11 and its

1 relevance, and you have heard what you have heard about
2 that and I don't want propose to say any more about it
3 and then issues around the immunity and sovereign
4 immunity and recoverability of damages. I don't
5 believe that they are key.

11:58

6
7 But, subject to that, in my respectful submission, the
8 DPC analysis of US law and Mr. Serwin's analysis in his
9 report is not questioned by Prof. Vladeck.

10
11 Insofar as I can ascertain I think the principal
12 difference between Prof. Richards and Prof. Vladeck,
13 subject to just this issue of standing, of Clapper
14 standing if I can use that phrase which I will come
15 back to, was differences to the effect of the decision
16 in Spokeo and that difference was undoubtedly there.

11:58

11:59

17
18 So, Judge, in the light of that could I respectfully
19 submit that the court should draw eight conclusions in
20 relation to US law. The first and simplest is there is
21 no provision in US law for the giving of notice after
22 the fact that surveillance has taken place and there is
23 no dispute about that.

11:59

24
25 You'll recall Ms. Gorski's evidence which was that most
26 people in the US who have been surveilled will never
27 know of that fact. She advocated, as you will recall,
28 the prospect of delayed notification. I do think it's
29 of some significance that even Prof. Swire writing in

11:59

1 2004 had called for reconsideration of that position.
2 As I said that's page 98 of his report. That's the
3 first issue, it's clear-cut, no dispute.
4

5 The second issue then, Judge, relates to the findings 12:00
6 that should be made in relation to the Clapper
7 standing, if I can so phrase it. Again I don't
8 believe - well, sorry, there is no room for dispute as
9 to what the test articulated by the United States
10 Supreme Court was. It is not an objectively reasonable 12:00
11 likelihood that communications will be intercepted. It
12 is a requirement of certainty and of imminence. The
13 threatened injury must be certainly impending. That's
14 page, sorry, 1147 of the Clapper judgment, it's been
15 opened to you many times. I'll just let the 12:00
16 stenographer change.
17

18 Even if one takes the evidence provided by Facebook at
19 its height in the form of Prof. Vladeck's evidence on
20 standing, his formula was that you would have to show 12:01
21 that you *had been* the subject of surveillance or *would*
22 *shortly* be the subject of surveillance. His phrase was
23 "has *collected or* will shortly *collect*" - day 12, page
24 153. But that, of course, even that formula has to be
25 refracted through the prism, as it were, of certainly 12:02
26 impending - "will shortly" was the language used by
27 Prof. Vladeck.
28

29 And I think, Judge, what is arresting about the

1 evidence given by Prof. Vladeck on standing is how
2 readily and, let me say, properly, he accepted what a
3 significant obstacle this was to litigants. On five
4 occasions in his evidence he referred to it as a
5 *substantial* obstacle. He also referred to it as an 12:02
6 *extremely* high bar and an exceptionally high bar.
7 Ms. Gorski described it as an extraordinarily difficult
8 obstacle. And Prof. Richards described it as
9 presenting a substantial obstacle. Indeed, it's
10 difficult not to observe the similarity of the language 12:03
11 to which all of the experts resorted in describing the
12 effect of the Clapper case.

13
14 Prof. Swire - day 11, page 75 to 76 - agreed that
15 people would not know of surveillance and that people 12:03
16 who did not know they were being surveilled would have
17 difficulty establishing standing. And this is the
18 position - and these were his words - "*under most*
19 *scenarios we can think of.*"

20 12:03
21 And, Judge, I would again remind you of Prof. Vladeck's
22 articles, suggesting that Congress would broaden this
23 standing out, it's not immutably fixed by Article 3 of
24 the Constitution, in his opinion; it could be *aligned*
25 with the test which, as he advocated it should be, it 12:04
26 could be aligned with the test fixed by the United
27 States Court of Appeals for the Second Circuit in
28 Clapper, the case that -- not ACLU -v- Clapper --
29 MS. JUSTICE COSTELLO: No, no, Amnesty.

1 **MR. MURRAY:** -- the decision prior to the Supreme Court
2 decision. But just to stop there. I mean,
3 Mr. Gallagher's analysis, 'well, you've got to have
4 proportionality and strict necessity'; I mean, it is
5 striking that the United States Court of Appeals for
6 the Second Circuit saw *little* difficulty in formulating
7 a test of standing based upon objectively reasonable,
8 an objectively reasonable likelihood. It was
9 sufficient for *them*.

12:04

10
11 So I would just ask you to bear that in mind and we'll
12 come back to that when we look at these issues around
13 proportionality and how critically important it is for
14 national security law that you have these constraints
15 which are imposed by the US federal system.

12:04

12:05

16
17 So I'm going to come back very shortly and, when I've
18 finished my points on American law, just try to match
19 them up against what we know about the law of the EU.
20 It is *absolutely* clear that the Clapper test has *no*
21 analogue in EU law. And in fact, when you look at the
22 decisions of the Court of Human Rights that were opened
23 by Ms. Hyland, you'll see, I suppose, an interesting
24 calculus posited by the court that you have to look at
25 a range of considerations when you decide how easy it
26 should be to *bring* challenges to national
27 surveillance -- sorry, national security surveillance.
28 And in the absence of notification and in the absence
29 of remedies in the individual contracting states, the

12:05

12:05

1 European Court of Human Rights applies a very weak
2 test, far weaker than even the Second Circuit in
3 Clapper, to deciding when there will be an entitlement
4 to proceed in that court.

5 **MS. JUSTICE COSTELLO:** When you say "Second Circuit", 12:06
6 you mean the Court of Appeal decision that was
7 overturned by the Supreme --

8 **MR. MURRAY:** I do.

9 **MS. JUSTICE COSTELLO:** -- Court? Yes.

10 **MR. MURRAY:** I do, yes. Sorry. 12:06

11 **MS. JUSTICE COSTELLO:** Because we were all referring to
12 the Second Circuit as ACLU.

13 **MR. MURRAY:** I know. Because that was also -- yes.
14 Yes, indeed. And on a number of occasions colleagues
15 said 'well, you have *some* remedies under US law' - this 12:06
16 was a regularly recurring theme - 'You have *some*
17 remedies under US law', so the fact it's not exactly
18 the same as in Europe, that can hardly be the ground
19 for complaint'. But without standing, you have *no*
20 remedy. And at the end of the day, the analysis of US 12:07
21 law can be expressed in a sentence: There's no
22 obligation to tell you and if you don't know, it's very
23 difficult to sue. And in our respectful submission,
24 that is a state of affairs which is *patently*
25 inconsistent with Article 47. 12:07

26
27 So I think it was Ms. Barrington who referred to a
28 remedy with limitations being provided by US law. And
29 it's wrong -- that's an incorrect description, with

1 respect. This is a situation in which there is, in
2 that circumstance, in truth, no remedy.

3 **MS. JUSTICE COSTELLO:** well, what do you say to the
4 Data Commissioner's, I think it's paragraph 44 of her
5 draft decision, saying that there are *some* remedies? 12:07

6 **MR. MURRAY:** Oh, yeah, there *are* some remedies. But
7 you can't invoke *any* of them unless you've standing.

8 **MS. JUSTICE COSTELLO:** So you're saying effectively
9 they're almost illusionary, is that what you --

10 **MR. MURRAY:** There is no remedy you can invoke without 12:08
11 Article 3 standing, *none*.

12
13 So, Judge, that's notice and it's standing. And a
14 third issue - and this, I suppose, leads on to what
15 you've just observed - even if you can establish 12:08
16 standing, you can't obtain damages for the bare
17 violation of your privacy right - FAA -v- Cooper and
18 Doe -v- Chao; you cannot obtain declaratory relief for
19 *some* aspects of FISA, because the APA is precluded; and
20 even if you can - and this, I think, is an important 12:08
21 detail, Judge, which may have got a little lost because
22 we perhaps all assume that a declaration is a
23 declaration, you get them in the same way you might get
24 them in this jurisdiction in respect of an historic
25 event - it was made absolutely clear by Prof. Vladeck 12:09
26 at day 12, page 176 that to obtain declaratory relief
27 you have to establish that the harm is still occurring
28 *or* that it's likely to occur again in the future.
29

1 So what that means is that even if you surmount Article
2 3 standing, you will not be able to obtain relief for a
3 breach that has already occurred in the past unless you
4 can prove loss to get damages or unless you can prove a
5 likelihood of recurrence to obtain declaratory or 12:10
6 injunctive relief. Your information may have been
7 unlawfully disclosed and there is *no* remedy for that
8 historic fact. And this *must* be why the Commission, in
9 the paragraphs in the Privacy Shield Decision which I
10 opened to you, emphasised that aspect of US law in its 12:10
11 footnote. That's the third point.

12
13 Fourth, a finding we would urge you to make is that
14 even if you establish standing and even if you
15 establish pecuniary loss such as to entitle you to 12:10
16 damages, *that's* not enough; you have to prove
17 willfulness. That's the standard in Section 2712 and
18 it governs actions under 1806(a), 1825 and 1845. The
19 government agent must've acted with the conscious
20 objective of committing a violation. 12:11

21
22 This is brushed aside in the submissions. I can't
23 remember who, one counsel said 'Ah, sure look, that's
24 just like the decision in Glencar, that's the law
25 here'. It is emphatically *not*. Glencar is a decision 12:11
26 about the exceptional tort of misfeasance in public
27 office, the knowing abuse of powers, for which,
28 unsurprisingly, you have to prove not just an abuse,
29 but that it was knowing. *This* is about a violation of

1 protective privacy rights. And the position in US law
2 is that you cannot *obtain* damages under these various
3 sections where that violation occurs other than
4 willfully.

5
6 Fifth, another point on which again I hope that the
7 various points I've made are *not* the subject of
8 dispute, I tried to take them as much as I can from
9 Prof. Vladeck's evidence, the fifth point, again *not* in
10 dispute, as non-US citizens you have no entitlement to 12:11
11 implead or rely upon the provisions of the
12 Constitution. So you've no Fourth Amendment rights,
13 you can't sue for damages for violation of the Fourth
14 Amendment rights and you have *absolutely* no entitlement
15 to challenge a state of affairs whereby, pursuant to 12:12
16 legislation, your information gets seized and accessed
17 without any prior independent review, warrant, judicial
18 or otherwise, where you become part of a retrospective
19 annual review conducted by the FISA court. You cannot
20 raise any issue as to that state of affairs. 12:13

21
22 Now, sixth - and here there *was* a dispute - Spokeo,
23 there were differences perhaps in some respects of
24 emphasis. But there's a number of aspects of that
25 decision which are clear: Injuries have to be concrete 12:13
26 before they meet Article 3 standing requirements; a
27 mere violation of a statute will not alone meet that
28 test; it is clear that the test has been applied by
29 lower courts to preclude claims under certain statutes

1 for bare violation of privacy interests - now, I have
2 to emphasise, Judge, in fairness, Prof. Vladeck says
3 these were all cases involving private actors and that
4 in his opinion, the position would be different against
5 a government actor in the context of national
6 surveillance. But there is *no* law which has so
7 determined since Spokeo.

12:14

8
9 Prof. Vladeck agreed that the doctrine could have
10 application to cases of unlawful retention of
11 information in a national security context. In that
12 regard he thought that there was an issue as to whether
13 the concreteness test would be met. And I think it's
14 fair to say that there's a division between the experts
15 as to whether the doctrine could function to preclude
16 claims for unlawful disclosure of information or
17 unlawful *obtaining* of information where there was no
18 damage established. But I do think it important to
19 emphasise, Judge, that Prof. Vladeck did say that in
20 his view, the situation could be different in the
21 context of national security issues. I'm not sure if
22 that was ever put to Prof. Richards - certainly he
23 never expressed a position that agreed with that. His
24 view was that Spokeo had added another significant
25 complication to data privacy cases. And you've seen
26 the decisions of the lower courts holding bare privacy
27 violations, albeit in the private context, as not
28 entitling a claim for damages.

12:14

12:14

12:15

12:15

1 Then, Judge - I said I'd eight points, but I've only
2 seven - the seventh and final one is that EU citizens,
3 as with US nationals, are subject to significant
4 constraints: The NSA excluded from the Redress Act;
5 Privacy Act is subject to so many exceptions. And 12:15
6 indeed Prof. Vladeck himself, in his evidence, said he
7 didn't believe the Act was of much significance. And
8 also, Judge, you've seen how Prof. Vladeck, in his
9 writings, had criticised the rules in relation to state
10 secrecy, calling for those to be abrogated and replaced 12:16
11 with more tailored provisions.

12
13 So that's the framework of US law without ignoring what
14 I said at the very start, which is that, save for his
15 eight points, it's our understanding that the Data 12:16
16 Protection Commissioner's analysis of US law and
17 Mr. Serwin's are accepted, save for those eight points.

18
19 So where does that then leave us in terms of a
20 comparison between those various points and the 12:16
21 position under EU law? I think that some aspects of
22 this can be dealt with relatively quickly and I'll
23 address them in the order that I've just outlined them
24 as applying to the US system.

25 12:17
26 So to deal first with notice. And that is, that, as
27 you know, is addressed, Judge, at tab 37 in Watson and,
28 Judge, going to perhaps overlap with the national
29 security issue just as I open this case to you and I

1 want to draw some parts of it to your attention and
2 I'll elaborate upon them again when I look at national
3 security later this afternoon. If you look first of
4 all at the laws that were in issue in Watson. The
5 Swedish law is summarised at paragraph 16 of the
6 decision.

12:18

7 **MS. JUSTICE COSTELLO:** Sorry, just a moment. There's
8 numbers in brackets and then I just have to find what
9 page it's on.

10 **MR. MURRAY:** Yes. Judge, it's page eight.

12:18

11 **MS. JUSTICE COSTELLO:** Thank you. Paragraph 16. Thank
12 you.

13 **MR. MURRAY:** Yes. So this was the Swedish law with
14 which the court was concerned: Access to data is
15 regulated by the lagen -- well, I shouldn't have begun
16 that, because there's no way I'm going to be able to
17 finish it. We'll pass from that. The law "*on*
18 *gathering of data relating to electronic communications*
19 *as part of intelligence gathering by law enforcement*
20 *authorities.*" So it was the Swedish law concerned
21 generally with intelligence gathering. Then if you go
22 to paragraph 33 you'll see - at page 12.

12:18

12:19

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

24 **MR. MURRAY:** The UK law. And here -- and of course,
25 Watson was a case about retention. The RIPA, Section
26 22 provides:

12:19

27
28 "*This section applies where a person designated for the*
29 *purposes of this Chapter believes that it is necessary*

1 *on grounds falling within subsection (2) to obtain any*
2 *communications data.*

3
4 *(2) It is necessary on grounds falling within this*
5 *subsection to obtain communications data if it is*
6 *necessary:*

7 *(a) in the interests of national security;*

8 *(b) for the purpose of preventing or detecting crime or*
9 *of preventing disorder;*

10 *(c) in the interests of the economic well-being...*

11 *(d) ... of public safety;*

12 *(e) ... public health."*

13
14 And so forth. Now, at paragraph 103, on page 24 the
15 court made it clear that it was not just dealing with
16 ordinary crime when it considered the issue of
17 mandatory retention, which was the position both in the
18 UK *and* in Sweden.

19
20 "*... while the effectiveness of the fight against*
21 *serious crime"* - and it's interesting to note that
22 within the context of "serious crime" the court felt
23 fell "*in particular organised crime and terrorism, may*
24 *depend to a great extent on the use of modern*
25 *investigation techniques, such an objective of general*
26 *interest, however fundamental it may be, cannot in*
27 *itself justify that national legislation providing for*
28 *the general and indiscriminate retention of all traffic*
29 *and location data should be considered to be necessary*

1 *for the purposes of that fight."*

2
3 So I do, Judge, with respect, suggest to you that my
4 Friends are in error when they suggest that in some
5 sense national security was being hived out by the 12:21
6 Court of Justice from its analysis. That had never
7 happened in any -- the other cases, Digital Rights or
8 Schrems and there's nothing in the language of the
9 decision that suggests that it was in fact observations
10 like that one, of which there are a number, suggest 12:21
11 otherwise.

12
13 Indeed if you turn to paragraph 111, on page 25:

14
15 *"As regard the setting of limits on such a measure with 12:21*
16 *respect to the public and the situations that may*
17 *potentially be affected, the national legislation" -*
18 and this is the legislation which the Court of Justice
19 feels has to be there to allow retention - *"must be*
20 *based on objective evidence which makes it possible to*
21 *identify a public whose data is likely to reveal a*
22 *link, at least an indirect one, with serious criminal*
23 *offences, and to contribute in one way or another to*
24 *fighting serious crime or to preventing a serious risk*
25 *to public security" -* and they are again all bunched 12:22
26 together as part of the same justification - *"Such*
27 *limits may be set by using a geographical criterion*
28 *where the competent national authorities consider, on*
29 *the basis of objective evidence, that there exists, in*

1 *one or more geographical areas, a high risk of*
2 *preparation for or commission of such offences."*

3
4 Then if you turn to paragraph 119, what is said is, at
5 the bottom of page 26:

12:22

6
7 *"Accordingly, and since general access to all retained*
8 *data, regardless of whether there is any link, at least*
9 *indirect, with the intended purpose, cannot be regarded*
10 *as limited to what is strictly necessary, the national*
11 *legislation concerned must be based on objective*
12 *criteria in order to define the circumstances and*
13 *conditions under which the competent national*
14 *authorities are to be granted access to the data of*
15 *subscribers or registered users. In that regard,*
16 *access can, as a general rule, be granted, in relation*
17 *to the objective of fighting crime, only to the data of*
18 *individuals suspected of planning, committing or having*
19 *committed a serious crime or of being implicated in one*
20 *way or another in such a crime... However, in*
21 *particular situations, where for example vital national*
22 *security, defence or public security interests are*
23 *threatened by terrorist activities, access to the data*
24 *of other persons might also be granted where there is*
25 *objective evidence from which it can be deduced that*
26 *that data might, in a specific case, make an effective*
27 *contribution to combating such activities."*

28
29 Again, the court does not see national security as

1 being *outside* the parameter of its analysis at 11. On
2 the contrary, it's specifically distinguishing between
3 the requirements that might apply for access to be
4 obtained to retained data in the situations to which it
5 arises there and the particular situation of a *vital* 12:23
6 national security interest which is threatened by
7 terrorist activities -- sorry, if national security,
8 defence or public security is threatened by terrorist
9 activities, access might be granted where there's
10 objective evidence. 12:24

11
12 And that's the context in which the court then moves,
13 in paragraph 120, to say:

14
15 *"... to ensure, in practice, that those conditions are*
16 *fully respected, it is essential that access of the*
17 *competent national authorities to retained data should,*
18 *as a general rule, except in cases of validly*
19 *established urgency, be subject to a prior review... by*
20 *a court or by an independent administrative body, and*
21 *that the decision of that court or body should be made*
22 *following a reasoned request by those authorities*
23 *submitted... within the framework of procedures for the*
24 *prevention, detection or prosecution of crime."*

25
26 Now, it takes a great deal of strain to conclude that
27 at paragraph 119 the court is talking about national
28 security, because it obviously feels it's legitimately
29 within its realms of consideration, but suddenly has

1 now forgotten about that entirely and is just talking
2 about crime *excluding* national security.

3 **MS. JUSTICE COSTELLO:** Is there -- there was a point
4 being made that, it might have been in one of the
5 documents rather than in a submission, where you're 12:25
6 dealing with crime, it's usually not so much
7 preventative as looking back and solving it, whereas
8 national security is much more focused on preventative
9 and looking forward. I mean, that's a very crude
10 characterisation of the argument. But is there any 12:25
11 distinction there?

12 **MR. MURRAY:** No, well, in fact it's interesting, Judge,
13 that you say that, because my recollection - I'd better
14 check it before I say it - yes, the court talks about
15 *fighting* crime. 12:25

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

17 **MR. MURRAY:** "*Combating*" is a phrase used. Not
18 detection and prosecution of past events. In fact the
19 very formulation in the court's answer to the questions
20 on page 29 supports the proposition that whether that 12:25
21 distinction is a valid one or not, what the court was
22 dealing with here was something far broader.

23 **MS. JUSTICE COSTELLO:** Yes, because obviously with
24 terrorism, they really would be focusing on trying to
25 prevent it rather than -- 12:26

26 **MR. MURRAY:** Yeah. Yeah.

27 **MR. GALLAGHER:** Judge, it's page 19 of the adequacy
28 decision. The last footnote - I can't read what it is
29 - is what draws that distinction you're referring to.

1 MS. JUSTICE COSTELLO: Thank you.

2 MR. GALLAGHER: Page 19 of the adequacy decision.

3 MS. JUSTICE COSTELLO: That's the Privacy Shield?

4 MR. GALLAGHER: Yes.

5 MR. MURRAY: Yeah. It's quoted in Mr. Gallagher's note 12:26
6 on national security which was furnished to us, Judge,
7 the other day.

8
9 So the -- and indeed you'll see there in paragraph 120
10 that the court is concerned with the framework for the 12:26
11 prevention, which again feeds into Mr. Gallagher's own
12 analysis of the distinction between national security
13 and crime.

14
15 So then if you turn to paragraph 121 in *that* context: 12:26

16
17 "... *the competent national authorities to whom access*
18 *to the retained data has been granted must notify the*
19 *persons affected, under the applicable national*
20 *procedures, as soon as that notification is no longer*
21 *liable to jeopardise the investigations being*
22 *undertaken by those authorities. That... legal remedy,*
23 *expressly provided for in Article 15(2) of [the*
24 *Directive], read together with Article 22... where*
25 *their rights have been infringed.*"

26
27 So what you see there is a principle that is *not*
28 subject to proportionality, because it has
29 proportionality built into it. It's not a freestanding

1 obligation to notify *everybody* immediately or at a
2 fixed point in time, but it *is* an obligation to notify,
3 as long as the notification is no longer liable to
4 jeopardise the investigations. And *that* is something
5 which, of course, is missing and absent from the United 12:27
6 States regime. But aside from being missing, it means
7 that these ideas that have been suggested to you -
8 'well, sure look, that can be just cancelled out by
9 considerations of proportionality' - is wrong. Because
10 as I've said, proportionality is built into the formula 12:28
11 of the obligation.

12
13 So in my respectful submission - and I will, of course,
14 come back to this later this afternoon - the
15 proposition that the court, in the *context* of 12:28
16 legislation which *expressly* encompassed national
17 security within it, giving rise to the reference, was,
18 without ever saying so and actually referring to
19 national security throughout the decision, was in some
20 sense excluding it from the formulation of its 12:28
21 principle and obligation is *impossible* to accept and
22 involves turning logic upside down by saying, well,
23 national security is excluded and, therefore, we have
24 to assume that they were excluding it, even though they
25 never so said, when in fact the proper analysis is that 12:28
26 they considered national security, *it must follow* that
27 they were devising a rule which applied across the
28 board. And that reflects precisely the approach taken
29 in Schrems, which, if Mr. Gallagher is right, has to

1 have proceeded from a fundamentally mistaken basis.

2
3 So that's notice, Judge. The -- well, yes, indeed
4 Ms. Hyland, I just note, had said on day 18 that this
5 was not concerned with national security, because it 12:29
6 could not be the case that the Court of Justice
7 unilaterally would have imposed an obligation on all
8 intelligence services to notify without *any* caveat or
9 possibility for that notification to be restricted
10 where the national security demands that to be the 12:29
11 case. But that's in the formula. That is in the
12 formula itself.

13
14 So in our respectful submission, on the first of the
15 points I looked at in US law, there is a sharp 12:29
16 dichotomy, a clear principle of EU law which is not
17 observed in the US. And of course, as the decision in
18 Schrems acknowledges, you're going to have that; you
19 can't expect one legal system to be the carbon copy of
20 another. But there are certain fundamental 12:30
21 entitlements which go to the very essence of the right.
22 And as you will have seen from the analysis at
23 paragraph 120, the right to notice is an aspect of the
24 entitlement to invoke a remedy, because without notice
25 your ability to do so is constrained. 12:30
26

27 In relation to standing, Judge - and I *am* conscious
28 that these decisions have been opened to you, but I'm
29 afraid I *am* going to ask you to go back and look at

1 them very quickly - Hogan J's judgment in Schrems in
2 fact provides an authoritative consideration of the
3 standing requirements. It's at tab 20. And if I can
4 ask you to go to paragraph 41. And there - I think
5 this was opened to you, I don't recall it, but just to 12:31
6 emphasise it in any event - at paragraph 41 you'll see
7 the Commissioner had advanced the proposition that
8 Mr. Schrems' case was hypothetical because he couldn't
9 prove that his information had ever -- that there was
10 no evidence that there was an imminent risk of grave 12:32
11 harm to him or any of his data was, had been or was
12 likely to be accessed. And --

13 **MS. JUSTICE COSTELLO:** That's effectively a sort of a
14 US-type argument.

15 **MR. MURRAY:** It is, yes. And in fact some of the 12:32
16 language is exactly the same as Clapper. And Hogan J.
17 says:

18
19 *"42. For my part, I do not think that this objection is*
20 *well founded. The Snowden revelations demonstrate -*
21 *almost beyond peradventure - that the US security*
22 *services can routinely access the personal data of*
23 *European citizens which has been so transferred to the*
24 *United States and, in these circumstances, one may*
25 *fairly question whether US law and practice in relation*
26 *to data protection and State security provides for*
27 *meaningful or effective judicial or legal control. It*
28 *is true that Mr. Schrems cannot show any evidence that*
29 *his data has been accessed in this fashion, but this is*

1 *not really the gist of the objection.*

2
3 *43. The essence of the right to data privacy is that,*
4 *so far as national law is concerned and by analogy with*
5 *the protection afforded by Article 40.5 of the*
6 *Constitution, that privacy should remain inviolate and*
7 *not be interfered with save in the manner provided for*
8 *by law."*

9
10 And he gives examples of that.

12:33

11
12 *"44. This is also clearly the position", Hogan J. felt,*
13 *"under EU law as well, a point recently confirmed by*
14 *the Court of Justice in... Digital Rights Ireland in a*
15 *case where the Data Retention Directive... was held to*
16 *be invalid by reason of the absence of sufficient*
17 *safeguards in respect of the accessing of such data."*

18
19 And there he reads paragraph 32. That's been opened to
20 you before:

12:33

21
22 *"By requiring the retention of the data listed in*
23 *Article 5... [it] ...derogates from the system of*
24 *protection of the right to privacy established by [the*
25 *Directives]."*

26
27 Then paragraph 33:

28
29 *"To establish the existence of an interference with the*

1 *fundamental right to privacy, it does not matter*
2 *whether the information on the private lives concerned*
3 *is sensitive or whether the persons concerned have been*
4 *inconvenienced in any way."*

5
6 It's of some note that Hogan J. thought that statement
7 was relevant to the question of standing.

8
9 *"As a result, the obligation imposed by Articles 3 and*
10 *6 of [the Directive] on providers of publicly available*
11 *electronic communications services or of public*
12 *communications networks to retain, for a certain*
13 *period, data relating to a person's private life and to*
14 *his communications, such as those referred to in*
15 *Article 5... constitutes in itself an interference with*
16 *the rights guaranteed by Article 7."*

17
18 Then he talks about the access of national authorities,
19 or the court, to the data constitutes a further
20 interference with that right. And then Hogan J., at
21 paragraph 45, said:

12:34

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

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

4
5 *46. It is manifestly obvious that the present case*
6 *raises issues of both national and EU law, although in*
7 *the event the issue is largely governed by EU law given*
8 *the central importance of the Commission decision."*

9
10 So there is, in my respectful submission, an
11 authoritative consideration by Hogan J. of what the
12 standing requirements imposed by EU law are in *exactly*
13 this situation, and they are diametrically opposed to
14 those enabled under the law of the United States.

12:35

15
16 Ms. Barrington, I think it was, posed the rhetorical
17 question: well, how would Mr. Schrems do if he sought
18 standing in Ireland in the light of the various, the
19 information that's been disclosed to the court? And the
20 answer is: Pretty well, on the basis of the decision.
21 The case makes it absolutely clear, in my respectful
22 submission, that facts which in United States law would
23 not be sufficient to establish standing and could not
24 do so are sufficient under the law of the European
25 Union.

12:35

12:35

12:36

26
27 Judge, can I just remind you of one aspect of this? If
28 I could ask you to go forward to paragraph 49? There,
29 Hogan J. says:

1
2 *"The mere fact that these rights are thus engaged does*
3 *not necessarily mean that the interception of*
4 *communications by State authorities is necessarily or*
5 *always unlawful"* - and he refers to the preamble to the 12:36
6 Constitution - *"Provided appropriate safeguards are in*
7 *place, it would have to be acknowledged that in a*
8 *modern society electronic surveillance and interception*
9 *of communications is indispensable to the preservation*
10 *of State security."*

11
12 Now, again, on Facebook's argument, Hogan J. has
13 completely misunderstood and forgotten about these key
14 limitations on Union competence.

15
16 *"It is accordingly plain that legislation of this*
17 *general kind serves important - indeed, vital and*
18 *indispensable - State goals and interests."*

19
20 Then if you go forward, Judge, to paragraph 62, he 12:37
21 again emphasises his understanding of the legal
22 structures around surveillance regulation in the United
23 States, the operation of the FISA court and is clearly
24 in *no* doubt and under no misapprehension that what he
25 is asking the Court of Justice to do is to embark upon 12:37
26 a consideration of the implication of transfer to the
27 United States *because* the national security authorities
28 in that jurisdiction have accessed information in the
29 manner in which they did.

1
2 In that book, Judge - and this was opened by
3 Ms. Barrington to you - but if I can ask you to go back
4 to tab 19, where you'll see Digital Rights. And here
5 the State raised the argument that the applicants, 12:38
6 whose standing was based solely upon their ownership of
7 a mobile telephone, that they could not establish
8 standing. And if you go to page 275, McKechnie J., at
9 paragraph 44, quotes from the Verholen case, where he
10 says -- where the court said: 12:38

11
12 *"while it is, in principle, for national law to*
13 *determine an individual's standing and legal interest*
14 *in bringing proceedings, Community law nevertheless*
15 *requires that the national legislation does not*
16 *undermine the right to effective judicial protection...*
17 *and the application of national legislation cannot*
18 *render virtually impossible the exercise of the rights*
19 *[guaranteed]."*

20
21 And it is very hard to see how it can be credibly said
22 in the light of the evidence of Facebook's own US
23 expert witnesses that that is not *exactly* the effect of
24 the combination of there being no obligation to give
25 notice and of the standing rules as articulated by the 12:39
26 Supreme Court in Clapper. It is virtually impossible -
27 indeed on the basis of Ms. Gorski's evidence, *actually*
28 impossible for the vast majority of people who have
29 been surveilled to proceed to seek a legal remedy.

1
2 If you turn over the page, the quotation from the
3 Unibet case, 275 - this was opened to you. But if you
4 go to page 276.

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

12:39

6 **MR. MURRAY:** Again you see another useful formulation
7 at paragraphs 42 and 43; you can't undermine the right
8 to effective judicial protection. 43:

9
10 *"The detailed procedural rules governing actions for*
11 *safeguarding an individual's rights under Community law*
12 *must be no less favourable than those governing similar*
13 *domestic actions... and must not render practically*
14 *impossible or excessively difficult."*

15
16 Again I would pose the question: Can it be *seriously*
17 said that US law does not have the effect in the
18 circumstances that we are considering of rendering it
19 excessively difficult or practically impossible to
20 exercise rights? Indeed, the very descriptions recorded
21 in Prof. Vladeck's evidence, leaving aside the
22 descriptions accorded by other witnesses, would fit
23 almost exactly with that language.

12:40

24
25 There was some time spent on EU law dealing with direct
26 action and an attempt to suggest that this in some way
27 meant it would be *okay* in domestic legal systems to
28 create a practical impossibility for the agitation of
29 Article 47 rights. And that would be all right if

12:40

1 there was what was described by reference to one of the
2 cases as an *indirect* remedy. And that, to use language
3 which has in fact been used by counsel in another
4 context, is actually to compare apples and oranges.

5 The rules around direct action are there really as part 12:41
6 of the *structure* of EU administrative law and are there
7 *because* of the ability of the national courts applying
8 *precisely* these standing rules to refer, as you are
9 being asked to do, to the Court of Justice. So it is,
10 with respect, a completely *inapposite* analogy. 12:41

11
12 So, Judge, I have already outlined - and it's, I think,
13 paragraph 89 of Schrems, as quoted by the European
14 Commission in Safe Harbour - how the requirement to
15 prove some type of financial loss or pecuniary loss is 12:42
16 *not* consistent with the essence of the privacy right.
17 And the critical issues, that being the case, as you
18 match those various provisions of US law against EU law
19 come down to, I think, three propositions, which are
20 recorded on the list of questions that I handed up to 12:42
21 you on Friday: One, is proportionality analysis always
22 necessary, or is it sufficient to look and see if the
23 *essence* of the right is protected in the third country?
24 Two, if it *is* sufficient to look at the essence of the
25 right, is the essence of the Article 47 right impaired 12:42
26 by US law? And three, insofar as Article 47 is
27 concerned with judicial remedies, is it possible or
28 permissible to look at non-judicial remedies? And each
29 of those, in our respectful submission, can be answered

1 really quite briefly.

2
3 The Charter itself, in Article 52 - and this is book
4 one, tab one...

5 **MS. JUSTICE COSTELLO:** Can I put aside Digital Rights
6 for now?

12:43

7 **MR. MURRAY:** well, I -- yes. Yes, Judge.

8 **MS. JUSTICE COSTELLO:** Yes, I have it.

9 **MR. MURRAY:** So if you turn to Article 52, the function
10 of the court in considering limitations on the exercise
11 of rights and freedoms is described:

12:43

12
13 *"Any limitation on the exercise of the rights and*
14 *freedoms recognised by this Charter must be provided*
15 *for by law and respect the essence of those rights and*
16 *freedoms. Subject to the principle of proportionality,*
17 *limitations may be made only if they are necessary and*
18 *genuinely meet objectives of general interest."*

19
20 Just while we're on that, Judge - it'll save me coming
21 back to it - can I ask you to note no. 3 in Article 52:

12:44

22
23 *"In so far as this Charter contains rights which*
24 *correspond to rights guaranteed by the Convention" -*
25 *ECHR - "the meaning and scope of those rights shall be*
26 *the same as those laid down by the said Convention.*
27 *[But this] shall not prevent Union law providing more*
28 *extensive protection."*

1 And I think Mr. McCullough referred to that provision
2 the other day. So you start off from a regime whereby
3 the first issue, as defined by the article itself, is:
4 Has the essence of the right been impaired? So that,
5 just to give you the reference rather than to ask you 12:45
6 to open it again, that is reflected in the very
7 analysis adopted by the -- that is reflected in the
8 very analysis adopted by the Advocate General at
9 paragraph 132 of Watson; is the essence of the right
10 respected? 12:45

11
12 And we are criticised, the Commissioner is criticised
13 trenchantly for not conducting some wide ranging
14 proportionality analysis - not looking at national
15 security and identifying what the exigencies of it were 12:45
16 and deciding whether restrictions on the exercise of
17 rights enabled by US law were required to achieve that
18 objective and went no further than necessary to do so.
19 This criticism is repeated again and again. And she's
20 also criticised for not looking at the substantive 12:46
21 content of the rules relating to national security.

22
23 But in truth, *none* of that was necessary. Because much
24 indeed, as with the analysis of the Commission in the
25 Privacy Shield Decision, the concern of the 12:46
26 Commissioner was with remedies. And her conclusion,
27 which I would respectfully submit, for the reasons I've
28 just outlined, is *amply* supported by the evidence
29 you've now heard, was that the *essence*, the essential

1 requirements of the remedies under Article 47 had been
2 impaired in the United States system. So the question
3 of proportionality *doesn't arise*. The issue is: was
4 the essence of the rights interfered with? And it was,
5 for the very reason that I have outlined probably at
6 excessive length already. 12:47

7
8 I think, Judge, that when the court looks at the core
9 paragraph in Schrems, paragraph 95, there is no
10 proportionality analysis *there* and none required. The 12:47
11 question is a binary one: Was there or was there not
12 the provision or facility for a remedy under Article
13 47, that being the essence of the right in issue?

14
15 Going back to the second of the third questions that 12:48
16 I've just identified, that formulation answers that
17 question, because the essence of that right *is*
18 impaired. And it also answers the third part of the
19 question, because it is a right to a determination by a
20 tribunal as provided for in Article 47, which means a 12:48
21 tribunal which is independent and established by law.
22 And that is something of which EU citizens are deprived
23 in *each* of the respects which I've outlined, but in
24 particular in relation to standing, in relation to
25 notice and in relation to their inability to deploy 12:48
26 constitutional entitlements.

27
28 So in my respectful submission - and this, I suppose,
29 goes back to one of the three core points that I

1 outlined to you on Friday - in our respectful
2 submission, the issues around - and a huge amount of
3 the evidence is directed, as you know, to this argument
4 as to proportionality - the evidence is not relevant to
5 the issue before you and it *wasn't* relevant to the 12:49
6 Commissioner.

7
8 But even if it *was*, what *exactly* is the justification
9 by reference to *any* principle of proportionality for
10 *not* providing notice after the investigation is no 12:49
11 longer compromised by providing notice? What *is* the
12 justification for that and where is it to be found? And
13 what is the justification for having a rule of standing
14 which prevents persons who apprehend on reasonable
15 grounds that their privacy is going to be violated by 12:50
16 state surveillance, what is the rule of public policy
17 or national security which says 'No, you can't sue'?
18 And why did the originally -- well, I can't remember,
19 the majority of the judges in the Second Circuit in the
20 first Clapper case and in fact, unless I'm mistaken, 12:50
21 that case was re-heard by 12 judges, who divided
22 equally six/six, resulting in the original decision
23 standing; how come they didn't understand that they
24 were opening the doors to some national security
25 disaster? It really, with respect, makes *no* sense. 12:50
26

27 And when one comes back and looks at what the European
28 Court of Human Rights has said about the entitlement to
29 claim the position of victim under the Convention in

1 exactly this situation, it is obvious that there is and
2 *can be* no justification for either of those two
3 elements. But that is very much a side consideration
4 and a secondary argument, because the Commissioner's
5 decision, in our respectful submission, stands and 12:51
6 stands correctly in its own terms.

7
8 Now, we've had a lot of interesting discussion - I'm
9 going to move on to the next headline issue, Judge,
10 which is the SCCs - a lot of interesting discussion 12:51
11 about what's adequate and what's sufficient and what's
12 the Polish for "adequate" or the French for
13 "sufficient" and where does that all get us? And that
14 certainly led to an engaging couple of hours. And then
15 we have had a very helpful discussion of what's in the 12:51
16 SCCs and increasingly barbed criticism of the
17 Commissioner for not engaging in some greater analysis
18 of the SCCs. But one of the striking - a word which
19 has perhaps been overused by everybody in submissions
20 in this case - one of the noticeable aspects of what 12:52
21 you've heard about the SCCs from my Friends is this:
22 The argument has been advanced to you almost entirely -
23 the argument that they do in fact provide an
24 adequate/sufficient/Article 26(2) compliant level of
25 protection - it has been presented almost entirely in 12:52
26 the abstract.

27
28 I would've thought that had it been said, or if it were
29 to be said to you that actually the SCCs *do* provide a

1 proper remedy - we'll just use that word for the
2 moment, a proper remedy for the purposes of Article
3 26(2) - I would've expected that somebody would've said
4 'Right, let's take the Commissioner's objections and
5 *pretend* they're correct, her conclusions on US law are 12:52
6 correct, and let's now look at each of them and we will
7 show you how the SCCs provide a remedy in that
8 situation. And if there are some where it doesn't
9 provide a remedy, we will now tell you *why* it is that
10 the SCCs were not actually required to do so'. That, 12:53
11 one would've thought, is the analysis you'd expect to
12 have heard were the case -- sorry, having regard to the
13 essential argument that's being made.

14
15 But who went through that analysis with you? Ms. Hyland 12:53
16 certainly, in fairness, went through in some detail the
17 SCCs. Mr. Collins went through the SCCs in some,
18 albeit somewhat louder, detail. But where did you
19 actually, where were you actually told which were the
20 provisions in the SCCs that remedied the deficiencies 12:53
21 which the Commissioner rightly or wrongly, or the gaps
22 which the Commissioner had rightly or wrongly found in
23 US law and where were you told that, given the fact
24 that the SCCs did not provide a remedy in circumstances
25 A to D, actually that was fine? 12:54

26 **MS. JUSTICE COSTELLO:** well, Mr. Cush had a different
27 analysis - and I'm summarising it very crudely; his
28 analysis was of course contracts don't remedy state
29 laws, but you've got an alternative effectively, he

1 called it compensation if I'm remembering it correctly.

2 **MR. MURRAY:** Yes.

3 **MS. JUSTICE COSTELLO:** So he was sort of saying 'You're
4 not going to get your apple, you're going to get your
5 orange'.

12:54

6 **MR. MURRAY:** Yes.

7 **MS. JUSTICE COSTELLO:** 'And that's good enough'.

8 **MR. MURRAY:** well, what does --

9 **MS. JUSTICE COSTELLO:** Now, that's very, very crude.

10 **MR. MURRAY:** Yeah. No, but that is exactly the example

12:54

11 I was thinking of. What does the man who doesn't know
12 he's under surveillance get? What does the man or woman
13 who believes they're under surveillance in a
14 reasonable -- with reasonable likelihood and wants to
15 litigate that fact get? What does the person whose
16 information is unlawfully disclosed by the NSA, in
17 circumstances where, as a matter of EU law, it may be
18 said they ought not to have had the information at all,
19 what do *they* get? What's the provision in the SCCs that
20 gives them *anything*?

12:55

21
22 In fact, if one wishes to stay with the apples and
23 oranges and move them into a Christmas analogy, you get
24 the stocking with the block of coal in it. You don't
25 get *anything*. And it is particularly significant, as
26 Mr. McCullough emphasised on Friday, that Clause 4(a)
27 in the SCC articles is the one for which there is *no*
28 contractual responsibility.

12:55

1 So where that takes you is to the following
2 proposition, which is in truth and in terms what the
3 Commissioner said in her decision: That there are going
4 to be certain circumstances in which there is a
5 deficiency in a legal system which has not been and in 12:56
6 some circumstances *cannot be* remedied by an SCC. And
7 that *must* be the case.

8
9 If the difficulty is with Article 47 and if the
10 deficiency is the absence of an Article 47 compliant 12:56
11 remedy or any ability to obtain one, that is not and
12 cannot be resolved by the SCCs. It is, if I can
13 respectfully say so, as simple as that. Which is why
14 the Commissioner's decision, correctly, does not engage
15 in pages of analysis to reach it. It is that simple. 12:56

16
17 And if it is *not* that simple then it means that under
18 Article 26 SCCs can be produced and can be incorporated
19 into the law and applicable to particular states, but
20 data transferred under those SCCs to a jurisdiction 12:57
21 where there is no equivalent to *the most basic*
22 requirement imposed by EU law at the remedial level.
23 And maybe that *is* the case. But in our view, it's not
24 the case. And at the very least that is a question
25 which the Court of Justice, never having elaborated 12:57
26 upon it, must conclude.

27
28 And can I -- again I'm, I suppose, hesitant to re-open
29 cases and paragraphs that have been opened to you on

1 too many times already, but can I just remind you, I
2 think it was Mr. McCullough who drew this to your
3 attention, and we entirely agree with it, that in, in
4 particular, the Advocate General's ruling in Schrems -
5 and I'll have the paragraph numbers for you after lunch 12:58
6 - there's an analysis of the meaning of the word
7 "adequate". It's a memorable paragraph, because it
8 also quotes the equivalent word in the French version,
9 "adéquat" and, well, does adequate mean appropriate or
10 does it mean something else? 12:58

11
12 And this, if I can respectfully submit, is the solution
13 to the word games dilemma arising from some of the
14 submissions that you have heard: Really -- there are,
15 of course, different terms used in different language 12:58
16 texts, but ultimately the question as to what the
17 meaning of the clauses is is to be determined in the
18 light of their purpose and context, and in particular
19 the purpose and context of a regime of data protection
20 which, as is stated in all of the cases, envisages a 12:59
21 "high level of protection".

22
23 That's ultimately the test. And no one says, nor could
24 they say that there has to be some equivalence between
25 the legal systems applicable to data protection, no one 12:59
26 says there has to be a carbon copy of the Data
27 Protection Directive in all Member States to which
28 information, or to all states to which information is
29 transferred. *But* there are certain *minimum*

1 requirements that *must* be addressed. And in our
2 respectful submission, for the reasons that I've
3 outlined, in the case of the United States, there are
4 not and the SCCs do not and cannot remedy them.

5
6 So, Judge, subject to the court, I can pick that up --
7 **MS. JUSTICE COSTELLO:** Yes, I'll take that up at two.
8 Thank you.

9
10
11 (LUNCHEON ADJOURNMENT)
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29

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

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

5 **REGISTRAR:** In the matter of Data Protection 14:04
6 Commissioner -v- Facebook Ireland Ltd. and another.

7 **MS. JUSTICE COSTELLO:** Mr. Murray, I know you have come
8 on to the SCCs and one of the questions I didn't ask
9 you this morning, I sort of held back for when you got
10 on to the SCCs was, when you are analysing and 14:04
11 responding to the arguments can you address the issue
12 as to what is the purpose of Article 26(2). Because
13 it's predicated on the lack of adequacy in the national
14 laws of the third country and how were the SCCs meant
15 to deal with that inadequacy in your submission in a 14:05
16 way that's workable. I am assuming that there has to
17 be some sort of workability here or else it can be an
18 avoidance mechanism which would drive a coach and four
19 through the Article 25 requirement.

20 **MR. MURRAY:** Yes. 14:05

21 **MS. JUSTICE COSTELLO:** It's in relation to the balance.

22 **MR. MURRAY:** And maybe, Judge, just in dealing with
23 that question before I look at the text of the SCCs,
24 can I ask you to look at the Advocate General's
25 judgment -- 14:05

26 **MS. JUSTICE COSTELLO:** In?

27 **MR. MURRAY:** -- in Schrems.

28 **MS. JUSTICE COSTELLO:** Schrems. what tab is it again?

29 **MR. MURRAY:** Now, I am sorry, Judge, it's Tab 36B.

1 MS. JUSTICE COSTELLO: Yes. And you were mentioning
2 paragraph?

3 MR. MURRAY: Yes, I just wanted to open the four or
4 five paragraphs in which this appears. Again I do
5 apologise for opening paragraphs that have already been 14:06
6 opened to you, but it's really I suppose with a view to
7 putting them into --

8 MS. JUSTICE COSTELLO: Sorry. My highlighter was
9 hiding, that's all.

10 MR. MURRAY: So, Judge, sorry, Tab 36B. 14:06

11 MS. JUSTICE COSTELLO: Yes.

12 MR. MURRAY: And I'm going to ask you to go to
13 paragraph 139.

14 MS. JUSTICE COSTELLO: Yes.

15 MR. MURRAY: So you start off with, the Advocate 14:06
16 General explains:

17
18 *"Article 25 is based entirely on the principle that the*
19 *transfer of personal data to a third country cannot*
20 *take place unless that third country guarantees an 14:07*
21 *adequate level of protection. The objective of the*
22 *article is thus to ensure the continuity of the*
23 *protection afforded by the directive where personal*
24 *data is transferred to a third country."*

25
26 And that word "continuity" I think is important:
27

28 *"It is appropriate, in that regard, to bear in mind*
29 *that the directive affords a high level of protection*

1 of citizens of the Union with regard to the processing
2 of their personal data.

3
4 140. In view of the important role played by the
5 protection of personal data with regard to the 14:07
6 fundamental right to privacy, this kind of high level
7 of protection must, therefore, be guaranteed, including
8 where the data is transferred to a third country.

9
10 141. It is for that reason that I consider the 14:07
11 Commission can find, on the basis of Article 25, that a
12 third country ensures an adequate level of protection
13 only where, following a global assessment of the law
14 and practice, it is able to establish that that third
15 country offers a level of protection that is 14:08
16 essentially equivalent to that afforded by the
17 directive, even though the manner in which that
18 protection is implemented may differ from that
19 generally encountered within the Union."

20 14:08
21 Now again, Judge, obviously he's dealing with
22 Article 25 rather than Article 26, but it clearly
23 defines the context. And the key, I suppose, concepts
24 there are that of continuity of the high level of
25 protection achieved through essential equivalence, 14:08
26 although the manner in which protection is implemented
27 may differ.

28
29 And then over the page:

1 *"142. Although the English word 'adequate' may be*
2 *understood, from a linguistic viewpoint, as designating*
3 *a level of protection that is just satisfactory or*
4 *sufficient, and thus as having a different semantic*
5 *scope from the French word, the only criterion that*
6 *must guide the interpretation of that word is the*
7 *objective of attaining a high level of protection of*
8 *fundamental rights as required by the directive.*

14:08

10 *143. Examination of the level of protection afforded*
11 *by a third country must focus on two fundamental*
12 *elements, the content of the applicable rules and the*
13 *means of ensuring compliance with those rules.*

14:09

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

14:09

14:09

25
26 *145. In that regard, I would observe at the outset*
27 *that within the European Union the prevailing notion is*
28 *that an external control mechanism in the form of an*
29 *independent authority is a necessary component of any*

14:09

1 *system designed to ensure compliance with the rules on*
2 *the protection of personal data."*

3
4 Just to stop there. I mean there's a lot in that and a
5 lot which is directly relevant, including the last 14:09
6 paragraph which ties in clearly to the Ombudsman who is
7 not independent of the Executive, although it is
8 consistently said he is independent of the security
9 services, something which comes from the Strasbourg
10 jurisprudence which I will come back to. 14:10

11
12 That is the context in which the court looks at
13 Article 26, bearing in mind that Article 26 has to be
14 interpreted in the light of those principles and
15 objectives as described by the Advocate General. And 14:10
16 you then turn, Judge, to Article 26 itself, you will
17 recall it's in Tab No. 4 page --

18 **MS. JUSTICE COSTELLO:** I have it, thanks.

19 **MR. MURRAY:** -- 46 and paragraph 2 then:

20 14:11
21 *"A Member State may authorise a transfer or set of*
22 *transfers of personal data to a third country which*
23 *does not ensure an adequate level of protection where*
24 *the controller adduces adequate safeguards - and you*
25 *will recall it was with the word 'adequate' that some* 14:11
26 *issue was taken by Mr. Cush - with respect to the*
27 *protection of the privacy of fundamental rights and*
28 *freedom of individuals and as regards the exercise of*
29 *the corresponding rights. Such safeguards may in*

1 *particular result from appropriate contractual*
2 *clauses."*

3
4 Now the objective is to ensure, in this case through
5 the mechanism of the standard contractual clauses, that 14:11
6 the protections which are identified by the Advocate
7 General, and which follow in any event from Article 25,
8 are provided. So, and if you want to use Mr. Cush's
9 language, the clauses can compensate for what would
10 otherwise be an inadequacy in the third country, third 14:12
11 party state when compared with EU law. And the way
12 they can do that, obviously I'm sure a myriad of
13 different ways, depending on how the third party state
14 is found to be inadequate in its legal system to begin
15 with or its protections. 14:12

16
17 It may be that an inadequacy is something which can
18 readily be addressed through a contractual clause. For
19 example, if you have a third party state that has a
20 completely, if I can use the word, adequate system of 14:13
21 remedies within its own judicial system but an aspect
22 thereof, let's take one just isolated example: A
23 preclusion on recovering compensation except where
24 there is financial damage proven. Let's say that is
25 not adequate protection. Well, the standard 14:13
26 contractual clauses could - if you take this example,
27 but otherwise an adequate system with courts that you
28 can access without the substantial obstacle of
29 standing, you can establish your entitlement to a

1 remedy but you have that cap, just take that example.
2 You can't obtain compensation for what in European law
3 is required in order to have a proper system of
4 protection.

5
6 well, in that situation you could have a system whereby
7 the standard contractual clauses allowed compensation
8 equivalent to that which is required in European law to
9 be made available under the clauses for the breach.

10 That would satisfy the breach. So you have your system
11 and if you want to go and get rectification or
12 destruction of information you go to Ruritania's courts
13 and they have the jurisdiction and power to give you
14 what you are seeking but they have this one aspect
15 which falls short of what is required in the European
16 system and that can be remedied through the standard
17 contractual clauses. And you could I'm sure conceive
18 and consider and examine many other similar examples of
19 those types of deficiencies where, in combination with
20 the third party legal system and the supplement
21 provided by the SCCs, you are brought back to the
22 position such that the essential entitlements that you
23 are guaranteed under European data protection law are
24 in one form or another remedied and protected.

25
26 To do that, and this again goes back, I suppose the
27 point I made in the opening, Mr. Collins made in the
28 opening, and the Commissioner did - and which the
29 Commissioner adopted in her decision - to find out if

1 that's working you've got to, your first question has
2 to be what is the inadequacy, what is the deficiency,
3 what is the respect in which the third party state is
4 not complying with the requirements identified by the
5 Court of Justice.

14:15

6
7 Then, having identified that, the second question in
8 fact logically is can that deficiency be remedied by an
9 SCC; and the third question is, well if it can, has the
10 SCC in place and in operation achieved that objective.

14:15

11 **MS. JUSTICE COSTELLO:** what's troubling me is that the
12 SCCs to an extent are universal and, to put it
13 colloquially, it is sort of one-size-fits-all. You
14 could have any number of ways in which different states
15 could have inadequacies, to use the language of the
16 Directive, and the SCCs are sort of there meant to be
17 addressing it; is the critical third element then meant
18 to be Article 4 of the SCCs, the individual suspension
19 in respect of individual?

14:16

20 **MR. MURRAY:** Yes, and you will see from my road map,
21 Article 4 I'm going to come back and deal with
22 separately.

14:16

23 **MS. JUSTICE COSTELLO:** Yes. The one thing that has
24 troubled me is how the extremes of either end of the
25 interpretations of 25 and 26 can each cancel out the
26 effect of 25 and 26?

14:16

27 **MR. MURRAY:** No, I fully understand. But in many
28 respects, Judge, the point you make that it's
29 one-size-fits-all is the very point. Because in other,

1 in systems other than the United States, the
2 fundamental difficulty that presents itself here -
3 I mean the SCCs are not intended to be a complete, well
4 it is not necessary that the SCCs be a complete
5 substitute for your entitlement to go to the third 14:17
6 party system, they are a third party judicial system.
7 It is just, and there may be jurisdictions where the
8 fundamental difficulty arising in this case viz
9 standing is not a problem. So the SCCs are very much a
10 fallback in that event. 14:17

11
12 The problem here is one which cannot be remedied by the
13 SCCs, just cannot be.

14 **MS. JUSTICE COSTELLO:** But even when the SCCs operate,
15 we go to Ruritania and there is no problems with 14:17
16 standing, the reliefs added to the picture by the SCCs
17 are these third party contractual rights; isn't that
18 right?

19 **MR. MURRAY:** Correct.

20 **MS. JUSTICE COSTELLO:** So what you are really doing is 14:18
21 providing an additional type of remedy.

22 **MR. MURRAY:** Exactly. Then in any given situation, and
23 this is why the submission that was made to you,
24 I think it was Mr. Maurice Collins, that in some sense
25 the idea of data flows to one jurisdiction being 14:18
26 prohibited, which of course is the relief which we have
27 sought, he suggested that this was inappropriate or
28 inapposite. Actually it's quite right because it
29 depends on how the SCCs intersect with each individual

1 system as to whether there has been an inadequacy.

2
3 And, Judge, if you take it back, and I know I am
4 repeating myself and please forgive me.

5 **MS. JUSTICE COSTELLO:** No, no.

14:18

6 **MR. MURRAY:** But if you take it back to the core
7 problem here which is the, as Prof. Vladeck describes
8 it, substantial obstacle of standing, combined with the
9 fact that the person does not know whether they have
10 been the subject of surveillance, combined with the
11 fact that you cannot obtain damages absent proof of
12 loss, combined with the fact that you cannot obtain
13 relief absent by way of damages, absent proof of
14 wilfulness, combined with the fact that your
15 entitlement even to declaratory relief where the APA
16 functions is constrained by reference to the need to
17 prove either present or future likelihood of harm,
18 present harm or future likelihood, then you have your
19 list of inadequacies and the next step logically has to
20 be to do what I am now going to ask you to do which is
21 to look at the SCCs and ask 'well it's almost before
22 and after, here are the deficiencies in the third party
23 system, here is the SCC and after the SCC have those
24 deficiencies, if such they be, as we say they are, been
25 remedied'.

14:19

14:19

14:19

14:20

26
27 And I think, if I can respectfully say so, when one
28 approaches it that way, whether the word one uses is
29 adequate or sufficient or proper compensation really

1 slides behind the primacy of the objective which is as
2 identified in the Advocate General's opinion in our
3 submission.

4
5 So if I can ask you, Judge, because it's in the same 14:20
6 book, to turn to the SCC decision and to engage in that
7 very exercise. The relevant clause is on page 11 and
8 it's Tab No. 10.

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

10 **MR. MURRAY:** And it is Clause 3, so you can see the 14:20
11 core third party enforcement right given by Clause 3.

12 **MS. JUSTICE COSTELLO:** This is the Clause 3 in the
13 standard clauses rather than the article itself; is
14 that right?

15 **MR. MURRAY:** Well, it's... 14:21

16 **MS. JUSTICE COSTELLO:** I just want to make sure which 3
17 am I looking at.

18 **MR. MURRAY:** Yes, exactly, I am terribly sorry. It's
19 in the annex to the decision.

20 **MS. JUSTICE COSTELLO:** Yes. 14:21

21 **MR. MURRAY:** You see "*the data subject can enforce*
22 *against the data exporter*", so if you just stop there.
23 And one can see that there would be issues with third
24 party states where this provides, this fills the gap,
25 this provides a mechanism for getting something which 14:21
26 the third party state does not provide you with but
27 which, through the mechanism of contractual liability,
28 you can obtain:
29

1 *"The data subject can enforce against the data exporter*
2 *this clause, clause 4(b) to (i)."*

3
4 And you'll just note there, as Mr. McCullough
5 emphasised, that excludes (a) and (, judge,): *"Clause* 14:21
6 *5(a) to (e), and (g) to (, judge,), 6(1) and (2), 7,*
7 *8(2) and 9 to 12 as third-party beneficiary."*

8
9 So that contractual right is given and Ms. Hyland said
10 'well this shows you how' or the theory of this is 14:22
11 that, I can't remember the exact phrase that she used,
12 but it was to the effect that the domestic law
13 protection including the Charter we would say travels,
14 travels with the information.

15 14:22
16 But in truth it doesn't or does not in a fundamental
17 respect which is relevant to this case. Because, as
18 Mr. McCullough emphasised, the critical obligation in
19 Clause 4(a) does not trigger liability under the SCCs.
20 That is the one which says that the data exporter on 14:23
21 the one hand agrees and warrants:

22
23 *"That the processing, including the transfer itself, of*
24 *the personal data has been and will continue to be*
25 *carried out in accordance with the relevant provisions*
26 *of the applicable data protection law (and, where*
27 *applicable, has been notified to the relevant*
28 *authorities of the Member State where the data exporter*
29 *is established) and does not violate relevant*

1 *provisions of that State."* But that's excluded.

2
3 And if you turn over the page, (, judge,), which is the
4 undertaking to ensure compliance with clauses 4(a) to
5 (i), is excluded as well. So how does this clause, one 14:23
6 in truth, with respect, doesn't even get to adequate or
7 sufficient or compensatable or comparable, how do these
8 clauses provide *any* remedy in the context of and having
9 regard to the difficulties which I have identified.

10
11 And whether it's an unusual situation matters not, but
12 it is the situation that the clauses combine with a
13 legal system which operates because of its own rules to
14 prevent *any* remedial, we say any remedy being available
15 in a broad range of circumstances and that's the 14:24
16 problem in our respectful submission.

17 **MS. HYLAND:** Judge, I think there is something wrong
18 with what's being said, and I don't want to interrupt
19 Mr. Murray, but at the end I would like to come back.
20 I think there is a factual inaccuracy in what's being 14:24
21 said.

22 **MR. MURRAY:** well I think, Ms. Hyland can identify the
23 fact inaccuracy now, Judge.

24 **MS. HYLAND:** Yes, Judge, because if one goes to look at
25 Clause 3, one sees there that there's an entitlement to 14:24
26 enforce against the exporter clauses 5(a) to (e) and
27 5(a) is in relation to the agreement of the data
28 importer.

29 **MR. MURRAY:** well, I wonder does that really affect the

1 situation, Judge? I mean, if we look at 5(a), the data
2 importer: *"To process the personal data only on behalf*
3 *of the data exporter and compliance with its*
4 *instructions and with the Clauses; if it cannot provide*
5 *such compliance for whatever reasons, it agrees to* 14:25
6 *inform promptly the data exporter of its inability to*
7 *comply, in which case the data exporter is entitled to*
8 *suspend the transfer of data."*

9
10 How does that solve my problem if I have a reasonably 14:25
11 well grounded belief that the National Security Agency
12 has been listening to my telephone calls, reading my
13 e-mails or reviewing the internet, my internet traffic,
14 how does that give me anything? And that, if anything,
15 if I can respectfully say so, proves the point. 14:25

16
17 Judge, then the next issue is well does the Ombudsman
18 remedy this? Because you can go to the Ombudsman and
19 subject to the proviso, if such it be, that there is a
20 certain lack of clarity around the Ombudsman and the 14:26
21 SCCs, but if we take it that the SCCs function
22 vis-à-vis the data transferred under the standard
23 contractual clauses, does that resolve the problem?
24 Because you can go to the Ombudsman and you, Judge,
25 obvious from your question this morning, are familiar 14:26
26 with the process that that entails. The Ombudsman is
27 appointed, in fact perhaps it's worth looking at the
28 Privacy Shield decision Annex III A section 4(e) and
29 again that should be open before the court.

1 MS. JUSTICE COSTELLO: I have that.

2 MR. MURRAY: So if you go to page, it is page 74,
3 Judge.

4 MS. JUSTICE COSTELLO: Yes.

5 MR. MURRAY: *"Once a request has been completed and as 14:27*
6 *described in section 3, the Privacy Shield Ombudsman*
7 *provide in a timely manner an appropriate response to*
8 *the submitting EU individual complaint handling body,*
9 *subject to the continuing obligation to protect*
10 *information under applicable laws and policies. The 14:27*
11 *Privacy Shield Ombudsman will provide a response to the*
12 *submitting handling body confirming EU individual*
13 *complaint confirming (i) that the complaint has been*
14 *properly investigated, and (ii) that the U.S. law,*
15 *statutes, executives orders, presidential directives,*
16 *and agency policies, providing the limitations and*
17 *safeguards described in the ODNI letter, have been*
18 *complied with, or, in the event of non-compliance, such*
19 *non-compliance has been remedied. The Privacy Shield*
20 *Ombudsman will neither confirm nor deny whether the 14:28*
21 *individual has been the target of surveillance nor will*
22 *the Privacy Shield Ombudsman confirm the specific*
23 *remedy that was applied. As further explained in*
24 *Section 5, FOIA requests will be processed."*

25
26 So that's the core of the Ombudsman's functions. So
27 you can say or it might be said 'well this resolves
28 part of your difficulty because now you don't have to
29 establish Clapper standing, you can go to this third

1 party and you can get a remedy'. So that then begs the
2 question: well does that resolve the difficulty? And
3 in our respectful submission, and just to remind you,
4 Judge, that this was an issue that was specifically
5 addressed by Mr. Richards in his evidence and unless 14:28
6 I am very much mistaken, it may also be -- no, in fact
7 it may be an issue which Mr. Ferguson QC also
8 addressed.

9 **MS. JUSTICE COSTELLO:** I don't think I have come across
10 a Mr. Ferguson. I have come across a Mr. Robertson. 14:29

11 **MR. MURRAY:** Mr. Robertson, I am sorry.

12 **MS. JUSTICE COSTELLO:** But I haven't - unless that was
13 one of the ones I ruled out.

14 **MR. MURRAY:** No. I'm sorry, Judge, I don't know where
15 that came from. Mr. Robertson QC I think may refer to 14:29
16 it, but in any event is that an Article 47 compliant
17 remedy of the kind that we are concerned with?

18
19 In fairness, I think Ms. Hyland may have observed this,
20 you will see that there is, and in fact in some of the 14:29
21 footnotes in Privacy Shield decision there is sort of a
22 relationship identified between this and the ECHR case
23 of Kennedy.

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

25 **MR. MURRAY:** where I think it was Lord Justice Mummery 14:29
26 was in charge of a procedure under the RIPA of a kind
27 that had some of these features.

28
29 In our respectful submission there are well-founded

1 concerns about the efficacy of the Ombudsman and they
2 derive from the simple and obvious fact that the
3 Ombudsman is an appointee of the Executive under the
4 auspices of the Secretary of State.

5 **MS. JUSTICE COSTELLO:** well that obviously didn't
6 bother the Commission. 14:30

7 **MR. MURRAY:** Excuse me, Judge?

8 **MS. JUSTICE COSTELLO:** That obviously didn't bother the
9 Commission because they didn't take that point and
10 accept it. 14:30

11 **MR. MURRAY:** No, that is correct and that is why, that
12 is I suppose the issue that would travel to the Court
13 of Justice in the event that the court were to decide
14 to refer, and clearly the fact of the Commission
15 decision, we all agree, doesn't preclude the Court of
16 Justice from considering that very issue. 14:30

17
18 But just look back, Judge, at the Charter itself in...

19 **MS. JUSTICE COSTELLO:** Am I keeping this clause open or
20 am I finished with it? 14:31

21 **MR. MURRAY:** No, and the court - that was just
22 I suppose to outline the headline features of it.

23 **MS. JUSTICE COSTELLO:** Hmm.

24 **MR. MURRAY:** But if you turn, Judge, to Article 47.

25 **MS. JUSTICE COSTELLO:** Yes. 14:31

26 **MR. MURRAY:** And this is what the court in Schrems was
27 concerned with: *"Everyone whose rights and freedoms*
28 *guaranteed by the law of the Union are violated has the*
29 *right to an effective remedy before a tribunal in*

1 *compliance with the conditions laid down in this*
2 *Article." And: "Everyone is entitled to a fair and*
3 *public hearing within a reasonable time by an*
4 *independent and impartial tribunal."*

14:31

6 That notion of independence has, is and always has been
7 key to the Community concept of an independent tribunal
8 of the kind envisaged by Article 47. If you just take,
9 and I think that book the court can put to one side
10 until I come back and look at Article 4 which will be
11 the towards the end of the afternoon.

14:32

13 If you turn to Tab 25 you will see one of the many
14 cases addressing the analogous concept, and the
15 textbooks on the Charter I think all make clear that
16 the analogy is a good one, between court or tribunal
17 for the purposes of Article 234. So this is the case,
18 Judge, of Denuit, Tab 25, if I can ask you to go to
19 Tab 12?

14:32

20 **MS. JUSTICE COSTELLO:** Tab 12 or paragraph 25?.

14:32

21 **MR. MURRAY:** I am sorry, paragraph 12 Tab 25.

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

23 **MR. MURRAY:** So:

25 *"In order to determine whether a body making a*
26 *reference is a court or tribunal of the Member State,*
27 *the Court takes account of a number of factors, such as*
28 *whether the body is established by law, whether it is*
29 *permanent, whether its jurisdiction is compulsory,*

14:33

1 *whether its procedure is inter partes, whether it*
2 *applies rule of law and whether it is independent."*

3
4 And again the texts on Article 47 make it clear that
5 those, as one would expect, are critical indicia also 14:33
6 of the court under Article 47. So how is it and how
7 can it be that the body to whom you go in substitution,
8 as you will have seen, for a proper remedial system, as
9 you will have seen from the Privacy Shield decision,
10 and perhaps "*proper*" is an unfair description, but in 14:33
11 substitution for what the Charter would regard as an
12 adequate remedial system, as I think is evident from
13 the Commission's analysis of the issue, where it
14 identified the difficulties with standing and the
15 remedies available; how is it that someone serving 14:34
16 under the pleasure of the Secretary of State and part
17 of the Executive satisfies or could possibly satisfy
18 that criteria? And that is aside entirely from the
19 fact that it's not unusual in our systems of course to
20 have bodies that are part of the Executive making 14:34
21 decisions of one kind or another, but they are always
22 subject to review by the courts. That is not the case
23 here. There is no provision for review by a court, it
24 is not established by law, it is not permanent, it
25 doesn't give decisions or reasons, it doesn't grant 14:34
26 compensation. It does exactly what I have just shown
27 you.

28
29 And that, in our respectful submission, clearly

1 discloses a well founded basis for concern as to
2 whether the difficulties which are identified in the
3 Commissioner's decision, which of course to emphasise
4 predated the Privacy Shield decision, have been
5 addressed.

14:35

6
7 So, Judge, the next issue is one that I spoke to you
8 about on Friday afternoon which is whether the
9 comparator is EU law or the law of the Member States.
10 I said quite a bit about it then and I won't go back
11 over it again, save just to remind you that the notion
12 that you define your standard by reference to the laws
13 of individual Member States rather than by reference to
14 European law was not the approach adopted in Schrems,
15 nor was it the approach adopted by the Commission in
16 the Privacy Shield. In fact, insofar as we can see,
17 it's not the approach adopted by anyone ever anywhere.

14:35

14:36

18
19 It seems to us, and again I am repeating what I said on
20 Friday afternoon but just to sign off on this issue, it
21 seems to us to be very difficult to see how in theory
22 you could say that adequacy in the manner identified by
23 the Advocate General in Digital Rights is met by some
24 sort of a survey of Member State law in circumstances
25 where the cases themselves show that the law of the
26 Member States on occasion does lag behind what the
27 Court of Justice interprets the Charter as requiring,
28 and that has been a feature and a striking one of both
29 Digital Rights and Watson.

14:36

14:36

1
2 It's very difficult to see how you conduct that
3 exercise in comparison, whether it's the average
4 approach taken by the Member States or the approach
5 only taken by some Member States or some lowest common 14:37
6 denominator. Insofar as we can ascertain, Judge, no
7 authority of any kind in the Directive or in the
8 Charter or anywhere else has been identified as
9 grounding that proposition. So that, as it were, in
10 our respectful submission disposes of that. 14:37

11
12 And shall I just say this: If we are correct in what
13 I have said to you about proportionality, and if I am
14 correct in what I say to you about the laws of the
15 individual Member States, well then actually a huge 14:37
16 amount of the evidence which has been adduced before
17 you by Facebook actually falls to one side because it
18 is not in truth germane to any of the actual issues
19 with which the court is concerned.

20 14:38
21 The next question then is the Convention and the role
22 that it plays. I opened to you Article 52(3) --

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

24 **MR. MURRAY:** -- a little while ago and it sort of
25 explains the role of the Convention. I won't open 14:38
26 this, but I will just give you the reference. There is
27 a short discussion in the Watson judgment at paragraphs
28 126 to 131 of the status of the Convention in which it
29 emphasises, what I think has already been said to you,

1 that the Charter is not part of EU law and that.

2 **MS. JUSTICE COSTELLO:** Sorry, the Convention I presume
3 you mean?

4 **MR. MURRAY:** I am sorry, the Convention is not part of
5 EU law, and that the Charter envisaged the potential 14:39
6 for greater protection than the Convention, and indeed
7 that the *Convention* has no equivalent of Article 8, no
8 express protection for data privacy. So that's the
9 first, I suppose, general point to bear in mind, Judge,
10 as you look at the Convention cases. They are 14:39
11 undoubtedly of some assistance. It could not be said
12 that the Court of Justice would regard them as
13 irrelevant to its interpretation of the issues. It
14 refers to decisions of the Strasbourg court not
15 infrequently in this context, but they are certainly 14:39
16 not dispositive. That's the first thing.

17
18 The second thing, Judge, which is perhaps more
19 important as you look at the Convention law, is to
20 I suppose bear in mind the critical difference legally 14:39
21 between what the Strasbourg court is doing and what the
22 Court of Justice is doing. The European Convention on
23 Human Rights is an international treaty. The Court of
24 Human Rights superintends that treaty, but it does so
25 in a context where it does not expect or impose 14:40
26 uniformity on all of the legal systems which have
27 subscribed to it.

28
29 The starting point, therefore, when you look at the

1 Strasbourg case law is the fact that the European Court
2 of Human Rights is considering a large number of
3 different legal systems which it acknowledges are
4 entitled to regulate their affairs according to
5 different modalities and therefore, and it's for this 14:40
6 reason that the Court of Human Rights has the concept
7 of margin of appreciation which effectively gives the
8 state, the individual states the competence to decide
9 themselves how they will go about giving effect to the
10 Court of Human Rights decisions. 14:41

11
12 By contrast of course the Charter is an instrument
13 which has an entirely different and immediate effect in
14 all of the legal systems which must comply with it,
15 insofar as it operates. And, Judge, we would, insofar 14:41
16 as it is suggested in the submissions in Facebook and
17 their analysis of the Court of Human Rights cases,
18 insofar as it is suggested that the Strasbourg case law
19 shows that the US system would pass the test in the
20 Strasbourg court, we profoundly disagree with that. 14:42
21 And I think, Judge, when you look at the case law and
22 consider it in the light of the evidence you have heard
23 of US law, it does become apparent that the position is
24 quite different.

25 14:42
26 Can I ask you just to look at Prof. Brown's report.
27 I made a passing reference to this this morning, and
28 I actually put this to Prof. Swire, but this is at tab,
29 it's in book -- it's in the book of the US materials,

1 Judge.

2 **MS. JUSTICE COSTELLO:** I am just waiting to hear which
3 book it was or what tab it is?

4 **MR. MURRAY:** I am just waiting to...

5 **MS. JUSTICE COSTELLO:** Is it in the index? 14:42

6 **MR. MURRAY:** It's Book 5, Judge, Tab 66.

7 **MS. JUSTICE COSTELLO:** This is the US?

8 **MR. MURRAY:** This is, yes. And this is the report
9 which both Prof. Swire and...

10 **MS. JUSTICE COSTELLO:** Yes, I have it, thanks. I think 14:43
11 Mr. Robertson.

12 **MR. MURRAY:** Robertson, I am trying to get Ferguson out
13 of my mind, Mr. Robertson QC referred to. And if you
14 turn to page 16 you will see.

15 **MS. JUSTICE COSTELLO:** Sorry the numbers are very tiny, 14:43
16 just a moment. Yes, I have it, thank you.

17 **MR. MURRAY:** Yes. You will see a helpful enough list
18 under section 3.4:

19
20 *"Despite the relatively weak standards on foreign 14:43*
21 *intelligence collection by EU Member States, the*
22 *European Convention to which those states [are parties]*
23 *sets relatively high standards in terms of the*
24 *compliance of all surveillance régimes with the rule of*
25 *law."* 14:43

26
27 Then he refers to a commentator who has identified the
28 following minimum standards which should apply to all
29 surveillance practices by Council of Member States:

1
2 *"Powers must be set out in statute law, rather than in*
3 *subsidiary rules, orders or manuals. The rule must be*
4 *a form which is open to scrutiny and knowledge.*
5 *Secret, unpublished, rules are fundamentally contrary* 14:44
6 *to the rule of law;*

7
8 *offences and activities to which surveillance may be*
9 *order should be spelled out in a clear and precise*
10 *manner;* 14:44

11
12 *The law should clearly indicate which categories of*
13 *people may be subject to surveillance;*

14
15 *There must be strict limits on the duration of* 14:44
16 *surveillance; there must be strict procedures to be*
17 *followed for ordering the examination, use and storage*
18 *of data; there must be strong safeguards against abuse;*
19 *there must be strict rules on the destruction/erasure."*

20 14:44
21 And then: *"Persons who have been subjected to*
22 *surveillance should be informed of this as soon as it*
23 *is possible without endangering national security or*
24 *criminal investigations so that they can exercise their*
25 *right to an effective remedy at least ex post facto."* 14:44

26
27 And then finally again, perhaps of some significance
28 when you look at the Ombudsman: *"The bodies charged*
29 *with supervising the use of surveillance powers should*

1 *be independent and responsible to, and be appointed by*
2 *Parliament rather than the Executive."*

3
4 If you look then at page 3.

5 **MS. JUSTICE COSTELLO:** I thought we were on page -- oh, 14:45
6 we are going back.

7 **MR. MURRAY:** Back to page 3, sorry. There's this
8 comment at the bottom of the page:

9
10 *"In the absence of clear and specific rules in other 14:45*
11 *countries, ironically the US now serves as a baseline*
12 *for foreign surveillance standards - although the*
13 *European Convention on Human Rights, which requires*
14 *protection of the rights of all those within States*
15 *parties' jurisdiction, sets a higher general standard 14:45*
16 *than the US government's interpretation of its*
17 *international human rights law obligations as applying*
18 *only within its own territory."*

19
20 Now, Judge, when you look at the cases, and I'm not 14:45
21 going to open all of the cases opened by Ms. Hyland,
22 but I will just look at a handful of the more recent
23 ones. What I think emerges from those cases is that,
24 and I think all of these aspects of the approach taken
25 by the Court of Human Rights are products of the 14:46
26 phenomenon that I have identified earlier on, namely
27 the fact that they are dealing with myriad different
28 legal systems without any requirement of uniformity and
29 therefore subject to the margin of appreciation.

1
2 One of the first things they look at when they have
3 these cases is to see well is there an effective remedy
4 available under national law? And if there is
5 effective remedies available under national law, the 14:46
6 human rights court tends to step back from
7 investigating or examining the complaint.

8
9 If there is *no* possibility under national law of
10 challenging the surveillance measures, the court 14:47
11 applies greater scrutiny. Second, if there is no
12 effective remedy under national law the ECHR tends to
13 allow standing before it if persons can establish a
14 reasonable likelihood of surveillance, and you'll see
15 in fact in some of the more recent cases an even weaker 14:47
16 standard being applied.

17 **MS. JUSTICE COSTELLO:** What was that you said, if they
18 can establish, what's the word you used?

19 **MR. MURRAY:** If a person can establish a *reasonable*
20 likelihood of surveillance. 14:47

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

22 **MR. MURRAY:** And, thirdly, the ECHR in our submission
23 as one looks at the cases imposes an obligation to
24 notify as a general principle but that obligation is
25 qualified to the extent that it will not operate if the 14:47
26 investigation will be jeopardised by notification.

27
28 And also, in some of the cases, the court will not find
29 an obligation to notify if there is a sufficient legal

1 remedy in the national system. That's rather like the
2 point I made to you earlier on about the relationship
3 between notification and standing, if you have got
4 liberal standing rules then the need for notification
5 may be abated.

14:48

6
7 So, Judge, these cases are contained in Book 4, and
8 I think Ms. Hyland opened a number of earlier cases,
9 Klass, which dates from 1976, and Weber and the Silver
10 case. But I'm going to ask you to start with Kennedy
11 which is 2010. And just to explain, I'm going to open,
12 Judge, to you just three of these cases, Kennedy,
13 Zakharov and Szabo and the facts of each are important
14 in terms of understanding why the court reached the
15 conclusion that it did.

14:49

14:49

16
17 In Kennedy the court was concerned with the
18 compatibility of the UK Regulation of Investigatory
19 Powers Act with the Convention. This was a case
20 brought by an individual who had served time in prison
21 and who subsequently set up, well became an advocate
22 for those who had been involved I think in miscarriages
23 of justice. He claimed that his communications were
24 being monitored under the RIPA, the Regulation of
25 Investigatory Powers Act. That legislation established
26 what was called an Investigatory Powers Tribunal and it
27 was chaired by a Lord Justice of appeal, Lord Justice
28 Mummery, and, not unlike the Ombudsman, it had a
29 provision whereby you could make no determination or

14:49

14:50

1 advise that any illegality had been resolved and he
2 made no determination in favour of the applicant, and
3 that meant one of two things but they didn't tell you
4 which: Either that there had been no interception of
5 your communications or that such interception as had
6 taken place had been lawful.

14:50

7
8 So, in terms of the English legal system there was this
9 independent, and it was an independent body, to which
10 you could bring a complaint without proving that you
11 had in fact been the subject of surveillance or meeting
12 some very high threshold.

14:51

13
14 And if you look at paragraph 57, Judge, you will see
15 the court explains, this is on page 15: "*Section 57 of*
16 *the RIPA provides that the Prime Minister shall appoint*
17 *an Interception of Communications Commissioner. He*
18 *must be a person who holds or has held high judicial*
19 *office. The Commissioner is appointed for a*
20 *three-year, renewable term. To date, there have been*
21 *two Commissioners. Both are former judges of the Court*
22 *of Appeal.*"

14:51

14:51

23
24 So the court, if you move forward to page 36.

25 **MS. JUSTICE COSTELLO:** Page 36?

14:51

26 **MR. MURRAY:** Yes, Judge, paragraph 122, explains the
27 standing requirement that the court envisaged and it
28 summarises this after consideration of Klass. And they
29 say:

1
2 "Following Klass and Malone, the former Commission -
3 that's the European Commission on Human Rights - in a
4 number of cases against the United Kingdom in which the
5 applicants alleged actual interception of their 14:52
6 communications, emphasised that the test in Klass and
7 Others could not be interpreted so broadly as to
8 encompass every person in the UK who feared that the
9 security services may have conducted surveillance of
10 him. Accordingly, the Commission required applicants 14:52
11 to establish that there was a 'reasonable likelihood'
12 that the measures had been applied to them."

13
14 So that was the standard applied by the Commission:

15 14:53
16 "123. In cases concerning general complaints about
17 legislation and practice permitting secret surveillance
18 measures, the Court has reiterated the Klass approach
19 on a number of occasions."

20 14:53
21 And then it quotes Weber, which was also opened by
22 Ms. Hyland. And at the end of that citation it says
23 this:

24
25 "where actual interception was alleged, the Court has 14:53
26 held that in order for there to be an interference, it
27 has to be satisfied there was a reasonable likelihood
28 that surveillance measures were applied to the
29 applicant." And that's the test explained there.

1 MS. JUSTICE COSTELLO: So that might have been the sort
2 of situation where you had all the attorneys who were
3 dealing with --

4 MR. MURRAY: Exactly.

5 MS. JUSTICE COSTELLO: -- people in Guantanamo.

14:53

6 MR. MURRAY: Exactly.

7 MS. JUSTICE COSTELLO: Yes.

8 MR. MURRAY: And that becomes even clearer when we look
9 at some of the later cases:

10
11 *"The Court will make its assessment in light of all of*
12 *the circumstances of the case and will not limit its*
13 *review to the existence of direct proof that*
14 *surveillance has taken place given that such proof is*
15 *generally difficult or impossible to obtain."*

14:53

16
17 *"Sight", they say over the page: "Should not be lost*
18 *of the special reasons justifying the Court's*
19 *departure, in cases concerning secret measures, from*
20 *its general approach which denies individuals the right*
21 *to challenge a law in abstracto. The principal reason*
22 *was to ensure that the secrecy of such measures did not*
23 *result in the measures being effectively*
24 *unchallengeable and outside the supervision of the*
25 *national judicial authorities. In order to assess, in*
26 *a particular case, whether an individual can claim an*
27 *interference as a result of the mere existence of*
28 *legislation permitting secret surveillance measures,*
29 *the Court must have regard to the availability of any*

14:53

14:54

14:54

1 *remedies at the national level and the risk of secret*
2 *surveillance measures being applied to him. where*
3 *there is no possibility of challenging the alleged*
4 *application of secret surveillance measures at a*
5 *domestic level, widespread suspicion and concern among* 14:54
6 *the general public that secret surveillance powers are*
7 *being abused cannot be said to be unjustified. In such*
8 *cases, even whether the actual risk of surveillance is*
9 *low, there is a greater need for scrutiny by this*
10 *court."* 14:55

11
12 So you see, Judge, how the, I suppose, range of review
13 by the Strasbourg court is in inverse proportion to the
14 remedies that are available in the domestic states. If
15 the domestic states don't have any remedies at all, an 14:55
16 expansive view of the Strasbourg court's standing or
17 the standing of the victim to come to the Strasbourg
18 court is taken.

19 **MS. JUSTICE COSTELLO:** So the same factual situations
20 in different states could result in different decisions 14:55
21 on standing because of the different legal régimes?

22 **MR. MURRAY:** Exactly, exactly. But the key driver, to
23 use the phrase, is what the court explains there in
24 paragraph 124, what you cannot have is a situation
25 where secret surveillance is effectively 14:55
26 unchallengeable.

27
28 And then at 125: "*The Court observes that the present*
29 *applicant complained of an interference with his*

1 *communications both on the basis that, given the*
2 *circumstances of this particular case, he had*
3 *established a reasonable likelihood of interception and*
4 *on the basis of the very existence of measures*
5 *permitting secret surveillance."*

14:56

6
7 Now remember in the UK Mr. Kennedy could go to the RIPA
8 where he didn't have to prove any surveillance. And he
9 says:

10
11 *"126. The applicant has alleged that the fact that*
12 *calls were not put through to him and that he received*
13 *hoax calls demonstrates a reasonable likelihood that*
14 *his communications are being intercepted. The Court*
15 *disagrees that such allegations are sufficient to*
16 *support the applicant's contention that his*
17 *communications have been intercepted. Accordingly, it*
18 *concludes that the applicant has failed to demonstrate*
19 *a reasonable likelihood that there was actual*
20 *interception in his case.*

14:56

21
22 *127. Insofar as the applicant complains about the RIPA*
23 *régime itself, the Court observes, first, that the RIPA*
24 *provisions allow any individual who alleges*
25 *interception of his communications to lodge a complaint*
26 *with an independent tribunal - and again the*
27 *independence of the tribunal is emphasised - a*
28 *possibility which was taken up by the applicant. The*
29 *IPT concluded that no unlawful, within the meaning of*

14:56

1 *RIPA, interception had taken place.*

2 *128. As to whether a particular risk of surveillance*
3 *arises in the applicant's case, the Court notes that*
4 *under the provisions of RIPA on internal communications*
5 *any person within the UK may have his communications* 14:57
6 *intercepted if interception is deemed necessary or one*
7 *or more of the grounds listed in the section. The*
8 *applicant has alleged that he is at particular risk of*
9 *having his communications intercepted as a result of*
10 *his high-profile murder case in which he made* 14:57
11 *allegations of police impropriety."*

12
13 *And there is the type of analogy with the people who*
14 *are in contact with the men in Guantanamo Bay or who by*
15 *virtue of their occupations are likely to be talking to* 14:57
16 *targets of communications.*

17
18 *"The Court observes that neither of these reasons would*
19 *appear to fall within the grounds listed in section*
20 *5(3) RIPA. However, in light of the applicant's* 14:57
21 *allegations that any interception is taking place*
22 *without lawful basis in order to intimidate him, the*
23 *Court considers it cannot be excluded that secret*
24 *surveillance measures were applied to him or that he*
25 *was, at the material time, potentially at risk of being* 14:58
26 *subjected to such measures.*

27 *129. In those circumstances he was given the*
28 *entitlement to complain of an interference with*
29 *Article 8."*

1
2 Now, Judge, if you move forward then to - I'm sorry,
3 yes - paragraph 166 on page 51. Here the court
4 explains why ultimately it believes that the system in
5 place in the UK meets the standard having regard to the 14:59
6 margin of appreciation fixed by the Convention. And at
7 paragraph 166 the court says:

8
9 *"As regards the supervision of the RIPA régime, the*
10 *Court observes that apart from the periodic review of 14:59*
11 *interception warrants and materials by intercepting*
12 *agencies and, where appropriate, the Secretary of*
13 *State, the Interception of Communications Commissioner*
14 *established under RIPA is tasked with overseeing the*
15 *general functioning of the surveillance regime and the*
16 *authorisation of interception warrants. He has*
17 *described his role as one of protecting members of the*
18 *public from unlawful intrusion into their private*
19 *lives, of assisting the intercepting agencies in their*
20 *work, of ensuring that proper safeguards are in place*
21 *to protect the public and of advising the Government*
22 *and approving the safeguard documents. The Court notes*
23 *that the Commissioner is independent of the executive*
24 *and the legislature and is a person who holds or has*
25 *held high judicial office. He reports annually to the 14:59*
26 *Prime Minister and his report is a public document*
27 *(subject to the non-disclosure of confidential annexes)*
28 *which is laid before Parliament. In undertaking his*
29 *review of surveillance practices, he has access to all*

1 *relevant documents, including closed materials and all*
2 *those involved in interception activities have a duty*
3 *to disclose to him any material he requires. The*
4 *obligation on intercepting agencies to keep records*
5 *ensures that the Commissioner has effective access to* 15:00
6 *details of surveillance activities undertaken."*

7
8 And then: *"In practice, the Commissioner reviews,*
9 *provides advice on and approves the Section 15*
10 *arrangements. The Court considers that the* 15:00
11 *Commissioner's role in ensuring the provisions of RIPA*
12 *and the Code are observed and applied correctly is of*
13 *particular value and his biannual review of a random*
14 *selection of specific cases in which interception has*
15 *been authorised provides important control."* 15:00

16
17 I just see the stenographer is here, Judge.

18
19 But it's paragraph 167, Judge, I just want to draw your
20 attention to: 15:01

21
22 *"The Court recalls that it has previously indicated*
23 *that in a field where abuse is potentially so easy in*
24 *individual cases and could have such harmful*
25 *consequences for democratic society as a whole, it is*
26 *in principle desirable to entrust supervisory control*
27 *to a judge... In the present case, the Court*
28 *highlights the extensive jurisdiction of the IPT to*
29 *examine any complaint of unlawful interception. Unlike*

1 *in many other domestic systems... any person who*
2 *suspects that his communications have been or are being*
3 *intercepted may apply to the IPT... The jurisdiction*
4 *of the IPT does not, therefore, depend on notification*
5 *to the interception subject that there has been an*
6 *interception of his communications. The Court*
7 *emphasises that the IPT is an independent and impartial*
8 *body, which has adopted its own rules of procedure.*
9 *The members of the tribunal must hold or have held high*
10 *judicial office or be experienced lawyers... In*
11 *undertaking its examination of complaints... the IPT*
12 *has access to closed material and has the power to*
13 *require the Commissioner to provide it with any*
14 *assistance it thinks fit and the power to order*
15 *disclosure by those involved in the authorisation and*
16 *execution of a warrant... In the event that the IPT*
17 *finds in the applicant's favour, it can... quash any*
18 *interception order, require destruction of intercept*
19 *material and order compensation to be paid... The*
20 *publication of the IPT's legal rulings further enhances*
21 *the level of scrutiny."*

22
23 And whether or not that, Judge, is a system which would
24 ultimately pass muster with the European -- with the
25 CJEU under the Charter, it is *certainly* a system which
26 differs in a number of significant respects from that
27 in the United States.

15:02

28
29 Now, Judge, the next case is Zakharov. And this is a

1 2015 judgment. And this concerned a journalist in
2 Russia who claimed that his communications had been
3 intercepted by the FSB. And the court will find -- if
4 you go forward, Judge, to paragraph 163 on page 38,
5 where it says:

15:03

6
7 *"The Court observes that the applicant in the present*
8 *case claims that there has been an interference with*
9 *his rights as a result of the mere existence of*
10 *legislation permitting covert interception of mobile*
11 *telephone communications and a risk of being subjected*
12 *to interception measures, rather than as a result of*
13 *any specific interception measures applied to him."*

14
15 And at paragraph...

15:03

16 **MS. JUSTICE COSTELLO:** That would be a bit like what
17 they call the facial challenges in the United States.

18 **MR. MURRAY:** well, it would. It would be a bit like
19 what McKechnie J. actually allowed in Digital Rights,
20 where the possession of the mobile phone was sufficient
21 to allow you to challenge the fact of a mandatory
22 retention regime and the possibility that the State -
23 guards/revenue - could access that information.

15:04

24
25 At paragraph 164 the court summarises its case law. It
26 says:

15:04

27
28 *"The Court has consistently held in its case-law that*
29 *the Convention does not provide for the institution of*

1 *an actio popularis and that its task is not normally to*
2 *review the relevant law and practice in abstracto, but*
3 *to determine whether the manner in which they were*
4 *applied to, or affected, the applicant gave rise to a*
5 *violation of the Convention."*

6
7 There's a number of cases cited.

8
9 *"Accordingly, in order to be able to lodge an*
10 *application in accordance with Article 34, an*
11 *individual must be able to show that he or she was*
12 *'directly affected' by the measure complained of. This*
13 *is indispensable for putting the protection mechanism*
14 *of the Convention into motion, although this criterion*
15 *is not to be applied in a rigid, mechanical and*
16 *inflexible way...*

17
18 *165. Thus, the Court has permitted general challenges*
19 *to the relevant legislative regime in the sphere of*
20 *secret surveillance in recognition of the particular*
21 *features of secret surveillance measures and the*
22 *importance of ensuring effective control and*
23 *supervision of them. In the case of Klass... the Court*
24 *held that an individual might, under certain*
25 *conditions, claim to be the victim of a violation*
26 *occasioned by the mere existence of secret measures or*
27 *of legislation permitting secret measures, without*
28 *having to allege that such measures had been in fact*
29 *applied to him. The relevant conditions were to be*

1 *determined in each case according to the Convention*
2 *right or rights alleged to have been infringed, the*
3 *secret character of the measures... and the connection*
4 *between the applicant and those measures."*

15:05

5
6 Then, Judge, down the page at 167, having quoted from
7 Klass, they said:

8
9 *"In several cases the Commission and the Court held*
10 *that the test in Klass and Others could not be*
11 *interpreted so broadly as to encompass every person in*
12 *the respondent State who feared that the security*
13 *services might have compiled information about him or*
14 *her. An applicant could not, however, be reasonably*
15 *expected to prove that information concerning his or*
16 *her private life had been compiled and retained. It*
17 *was sufficient, in the area of secret measures, that*
18 *the existence of practices permitting secret*
19 *surveillance be established and that there was a*
20 *reasonable likelihood that the security services had*
21 *compiled and retained information concerning his or her*
22 *private life."*

23
24 And again that's redolent of the Second Circuit in
25 Clapper in the one that went to the Supreme Court.
26 Then if you turn over the page then to paragraph 169.
27 After they've observed the various chilling effects on
28 different rights that such regimes can have:

15:06

1 *"Finally, in its most recent case on the subject,*
2 *Kennedy... the Court held that sight should not be lost*
3 *of the special reasons justifying the Court's*
4 *departure, in cases concerning secret measures, from*
5 *its general approach which denies individuals the right*
6 *to challenge a law in abstracto. The principal reason*
7 *was to ensure that the secrecy of such measures did not*
8 *result in the measures being effectively*
9 *unchallengeable and outside the supervision of the*
10 *national judicial authorities and the Court. In order*
11 *to assess, in a particular case, whether an individual*
12 *can claim an interference as a result of the mere*
13 *existence of legislation permitting secret surveillance*
14 *measures, the Court must have regard to the*
15 *availability of any remedies at the national level and*
16 *the risk of secret surveillance measures being applied*
17 *to him or her. Where there is no possibility of*
18 *challenging the alleged application of secret*
19 *surveillance measures at domestic level, widespread*
20 *suspicion and concern among the general public that*
21 *secret surveillance powers are being abused cannot be*
22 *said to be unjustified. In such cases, even where the*
23 *actual risk of surveillance is low, there is a greater*
24 *need for scrutiny by this Court."*

25
26 So what they then do, Judge, over the page, is try to
27 put together a synthesis of the court's jurisprudence
28 in relation to the entitlement to bring challenges to
29 these types of secret surveillance measures, having

1 regard to the law as it's developed. And that
2 consideration starts at paragraph 171:

3
4 *"In the Court's view the Kennedy approach is best*
5 *tailored to the need to ensure that the secrecy of*
6 *surveillance measures does not result in the measures*
7 *being effectively unchallengeable and outside the*
8 *supervision of the national judicial authorities...*
9 *Accordingly, the Court accepts that an applicant can*
10 *claim to be the victim of a violation occasioned by the*
11 *mere existence of secret surveillance measures, or*
12 *legislation permitting secret surveillance measures, if*
13 *the following conditions are satisfied. Firstly, the*
14 *Court will take into account the scope of the*
15 *legislation permitting secret surveillance measures by*
16 *examining whether the applicant can possibly be*
17 *affected by it, either because he or she belongs to a*
18 *group of persons targeted by the contested legislation*
19 *or because the legislation directly affects all users*
20 *of communication services by instituting a system where*
21 *any person can have his or her communications*
22 *intercepted. Secondly, the Court will take into*
23 *account the availability of remedies at the national*
24 *level and will adjust the degree of scrutiny depending*
25 *on the effectiveness of such remedies. As the Court*
26 *underlined in Kennedy, where the domestic system does*
27 *not afford an effective remedy to the person who*
28 *suspects that he or she was subjected to secret*
29 *surveillance, widespread suspicion and concern among*

1 *the general public that secret surveillance powers are*
2 *being abused cannot be said to be unjustified... In*
3 *such circumstances the menace of surveillance can be*
4 *claimed in itself to restrict free communication*
5 *through the postal and telecommunication services,*
6 *thereby constituting for all users or potential users a*
7 *direct interference with the right guaranteed by*
8 *Article 8. There is therefore a greater need for*
9 *scrutiny by the Court and an exception to the rule,*
10 *which denies individuals the right to challenge a law*
11 *in abstracto, is justified. In such cases the*
12 *individual does not need to demonstrate the existence*
13 *of any risk that secret surveillance measures were*
14 *applied to him. By contrast, if the national system*
15 *provides for effective remedies, a widespread suspicion*
16 *of abuse is more difficult to justify. In such cases,*
17 *the individual may claim to be a victim of a violation*
18 *occasioned by the mere existence of secret measures or*
19 *of legislation permitting secret measures only if he is*
20 *able to show that, due to his personal situation, he is*
21 *[personally] at risk."*

22
23 NOW --

24 **MS. JUSTICE COSTELLO:** *"Potentially".*

25 **MR. MURRAY:** Sorry, *"he is potentially at risk"*, excuse 15:10
26 me. So that's the twofold test: If there's *no* remedies
27 in the national system, they will *actually* let someone
28 bring an abstract challenge, saying 'My
29 communications -- my communication is chilled by the

1 knowledge of this secret surveillance'; if there's a
2 more generous system of remedies then the standing rule
3 is tightened. But look to what it's tightened to -
4 you're potentially at risk.

5
6 And, Judge, can I respectfully submit that I don't know
7 of any case in which -- sorry, the Court of Justice has
8 made it clear that it is entitled to apply a *higher*
9 standard than the Strasbourg court. But it *cannot* be
10 said that it's going to apply a *lower* one.

11 **MS. JUSTICE COSTELLO:** That's your Article 52(3)?

12 **MR. MURRAY:** Correct. And insofar as the court
13 decides, wishes to try and, I suppose, develop or
14 analyse further, then in our submission - it's already
15 clearly articulated in Schrems what the requirements
16 for access to the judicial remedies are - then that
17 formulation is useful, in our submission, and it makes
18 it very difficult, in our respectful submission, to see
19 how it could be said that the US system meets it.

20
21 Now, the same judgment deals with the issue of
22 notification. And this is picked up at paragraph 287
23 on page 73. And again I think in this judgment -- and
24 I'm going to, I'm afraid, open a number of pages of
25 this, because it just saves going back over the earlier
26 cases and it's a synthesis of legal position. So at
27 paragraph 286 they explain that they're now turning to
28 the issue of notification. And they observe in that
29 paragraph, as we've seen ourselves, that it is

1 inextricably linked to the effectiveness of remedies.
2 And they say:

3
4 *"It may not be feasible in practice to require*
5 *subsequent notification in all cases. The activity or*
6 *danger against which a particular series of*
7 *surveillance measures is directed may continue for*
8 *years, even decades, after the suspension of those*
9 *measures. Subsequent notification to each individual*
10 *affected by a suspended measure might well jeopardise*
11 *the long-term purpose that originally prompted the*
12 *surveillance. Furthermore, such notification might*
13 *serve to reveal the working methods and fields of*
14 *operation of the intelligence services and even*
15 *possibly to identify their agents. Therefore, the fact*
16 *that persons concerned by secret surveillance measures*
17 *are not subsequently notified once surveillance has*
18 *ceased cannot by itself warrant the conclusion that the*
19 *interference was not 'necessary...', as it is the very*
20 *absence of knowledge of surveillance which ensures the*
21 *efficacy of the interference. As soon as notification*
22 *can be carried out without jeopardising the purpose of*
23 *the restriction after the termination of the*
24 *surveillance measure, information should, however, be*
25 *provided to the persons concerned."*

26
27 And that again is a formulation which is uncannily
28 similar to that ultimately adopted by the Court of
29 Justice in Watson.

1
2 *"The Court also takes note of the Recommendation of the*
3 *Committee of Ministers regulating the use of personal*
4 *data in the police sector, which provides that where*
5 *data concerning an individual have been collected and*
6 *stored without his or her knowledge, and unless the*
7 *data are deleted, he or she should be informed, where*
8 *practicable, that information is held... as soon as the*
9 *object of the police activities is no longer likely to*
10 *be prejudiced."*

11
12 Then he turns to Klass:

13
14 *"In... Klass... and Weber... the Court examined German*
15 *legislation which provided for notification of*
16 *surveillance as soon as that could be done after its*
17 *termination without jeopardising its purpose. The*
18 *Court took into account that it was an independent*
19 *authority, the G10 Commission, which had the power to*
20 *decide whether an individual being monitored was to be*
21 *notified of a surveillance measure. The Court found*
22 *that the provision in question ensured an effective*
23 *notification mechanism which contributed to keeping the*
24 *interference with the secrecy of telecommunications*
25 *within the limits of what was necessary to achieve the*
26 *legitimate aims."*

27
28 Then they quote those cases and say:
29

1 *"In... Association for European Integration and Human*
2 *Rights... the Court found that the absence of a*
3 *requirement to notify the subject of interception at*
4 *any point was incompatible with the Convention, in that*
5 *it deprived the interception subject of an opportunity*
6 *to seek redress for unlawful interferences with his or*
7 *her Article 8 rights and rendered the remedies*
8 *available under the national law theoretical and*
9 *illusory rather than practical and effective. The*
10 *national law thus eschewed an important safeguard*
11 *against the improper use of special means of*
12 *surveillance... By contrast, in the case of Kennedy*
13 *the absence of a requirement to notify the subject of*
14 *interception at any point in time was compatible with*
15 *the Convention, because in the United Kingdom any*
16 *person who suspected that his communications were being*
17 *or had been intercepted could apply to the*
18 *Investigatory Powers Tribunal, whose jurisdiction did*
19 *not depend on notification."*

20
21 So you can see there, Judge, again how within the
22 margin of appreciation different solutions are enabled
23 by the Strasbourg court; you don't *have* to notify if
24 you have a system where you can apply to an independent
25 tribunal for an adjudication without proving that you
26 were under surveillance. If you're *not* in that
27 situation, the obligation to notify is triggered.

28
29 *"289. Turning now to the circumstances of the present*

1 case, the Court observes that in Russia persons whose
2 communications have been intercepted are not notified
3 of this fact at any point or under any circumstances.
4 It follows that, unless criminal proceedings have been
5 opened against the interception subject and the
6 intercepted data have been used in evidence, or unless
7 there has been a leak, the person concerned is unlikely
8 ever to find out if his or her communications have been
9 intercepted."

10
11 And that's precisely the position in the United States.

12
13 "290. The Court takes note of the fact that a person
14 who has somehow learned that his or her communications
15 have been intercepted may request information about
16 the... data... It is worth noting in this connection
17 that in order to be entitled to lodge such a request
18 the person must be in possession of the facts of the
19 operational-search measures to which he or she was
20 subjected. It follows that the access to information
21 is conditional on the person's ability to prove that
22 his or her communications were intercepted.

23 Furthermore, the interception subject is not entitled
24 to obtain access to documents relating to interception
25 of his or her communications; he or she is at best
26 entitled to receive 'information' about the collected
27 data. Such information is provided only in very
28 limited circumstances, namely if the person's guilt has
29 not been proved in accordance with the procedure

1 *prescribed by law, that is, he or she has not been*
2 *charged or the charges have been dropped on the ground*
3 *that the alleged offence was not committed."*

4
5 And he continues then. Then paragraph 291 says:

15:17

6
7 *"The Court will bear the above factors - the absence of*
8 *notification and the lack of an effective possibility*
9 *to request and obtain information about interceptions*
10 *from the authorities - in mind when assessing the*
11 *effectiveness of remedies available under Russian law.*

12
13 292. *Russian law provides that a person claiming that*
14 *his or her rights have been... violated... may complain*
15 *to the official's superior [or] a prosecutor... The*
16 *Court reiterates that a hierarchical appeal to a direct*
17 *supervisor of the authority... does not meet the*
18 *requisite standards of independence."*

19
20 And it says a prosecutor also lacks independence.
21 Then, Judge, if you go forward to paragraph 296:

15:17

22
23 *"As regards the judicial review complaint under the*
24 *Judicial Review Act... the burden of proof is on the*
25 *claimant to show that the interception has taken place*
26 *and that his or her rights were thereby breached... In*
27 *the absence of notification or some form of access to*
28 *official documents... such a burden of proof is*
29 *virtually impossible to satisfy. Indeed, the*

1 *applicant's judicial complaint was rejected by the*
2 *domestic courts on the ground that he had failed to*
3 *prove that his telephone communications had been*
4 *intercepted... The Court notes that the Government*
5 *submitted several judicial decisions taken under*
6 *Chapter 25 of the Code of Civil Procedure or Article*
7 *1069 of the Civil Code... However, all of those*
8 *decisions, with one exception, concern searches or*
9 *seizures of documents or objects, that is,*
10 *operational-search measures carried out with the*
11 *knowledge of the person concerned. Only one judicial*
12 *decision concerns interception of communications. In*
13 *that case the intercept subject was able to discharge*
14 *the burden... because she had learned about the*
15 *interception... in the course of criminal*
16 *proceedings...*

17
18 *297... the Court takes note of the Government's*
19 *argument that Russian law provides for criminal*
20 *remedies for abuse of power, unauthorised collection or*
21 *dissemination of information about a person's private*
22 *and family life and breach of citizens' right to*
23 *privacy... For the reasons set out in the preceding*
24 *paragraphs these remedies are also available only to*
25 *persons who are capable of submitting to the*
26 *prosecuting authorities at least some factual*
27 *information about the interception of their*
28 *communications...*

1 298. The Court concludes from the above that the
2 remedies referred to by the Government are available
3 only to persons who are in possession of information
4 about the interception of their communications. Their
5 effectiveness is... undermined by the absence of a
6 requirement to notify... or an adequate possibility to
7 request and obtain information... Accordingly, the
8 Court finds that Russian law does not provide for an
9 effective judicial remedy."

10
11 And it was on that basis that the court found that the
12 Russian system was defective. But obviously the
13 Russian system is whatever it is and I'm sure one can
14 say, viewing the system as a whole, it had deficiencies
15 of a different kind than those in the United States and 15:19
16 none of these systems are the same. But the essential
17 theory, as it were, of that decision, in our respectful
18 submission, sets out the parameters of the requirement
19 to give notice when it doesn't apply, what happens when
20 it doesn't apply and what *must* be provided in terms of 15:19
21 remedy to -- or access to an independent tribunal for a
22 remedy.

23
24 And I think it's important, Judge, to observe that
25 these decisions are arrived at in the very context for 15:20
26 which Mr. Gallagher contends, Mr. Gallagher and
27 Ms. Hyland contend in this case, namely a
28 proportionality analysis that takes account of the
29 nature of national security surveillance and of the

1 particular characteristics of it and considerations
2 that have to be brought to bear on it. And even *with*
3 that, they reach the conclusions which I've outlined in
4 terms of standing and in terms of the obligation to
5 notify.

15:20

6
7 Then finally, Judge, paragraph -- sorry, tab 46 is
8 Szabó. And, yes, these concern members of an NGO which
9 voiced frequent criticism of the government and they
10 challenged the validity of the Hungarian state's
11 national security surveillance powers. And I just want
12 to open, Judge, to you page 28, because they go through
13 a lengthy analysis of the cases up to and including the
14 Zakharov case.

15:20

15
16 You'll see here in addressing the entitlement of the
17 applicants to claim victim status, paragraph 38, they
18 say that:

15:21

19
20 *"Affiliation with a civil-society organisation does not*
21 *fall within the grounds listed in section 7/E (1) point*
22 *(a) sub-point and point (e) of the Police Act" - that*
23 *was the source of the surveillance power - "which*
24 *concern in essence terrorist threats and rescue*
25 *operations to the benefit of Hungarian citizens in*
26 *dangerous situations abroad. Nevertheless, it appears*
27 *that under these provisions any person within Hungary*
28 *may have his communications intercepted if interception*
29 *is deemed necessary on one of the grounds enumerated in*

1 *the law... The Court considers that it cannot be*
2 *excluded that the applicants are at risk of being*
3 *subjected to such measures should the authorities*
4 *perceive that to do so might be of use to pre-empt or*
5 *avert a threat foreseen by the legislation especially*
6 *since the law contains the notion of 'persons concerned*
7 *identified ... as a range of persons' which might*
8 *include indeed any person."*

9
10 *And that test, which is a highly diluted one, was*
11 *sufficient in the circumstances of that case to give*
12 *standing. And if you go to page 43, paragraph 86, they*
13 *turn to notice.*

15:22

14 **MS. JUSTICE COSTELLO:** Page 43?

15 **MR. MURRAY:** Page 43, paragraph 86.

15:22

16
17 *"Moreover, the Court has held that the question of*
18 *subsequent notification of surveillance measures is*
19 *inextricably linked to the effectiveness of remedies*
20 *and hence to the existence of effective safeguards*
21 *against the abuse of monitoring powers, since there is*
22 *in principle little scope for any recourse by the*
23 *individual concerned unless the latter is advised of*
24 *the measures taken without his or her knowledge and*
25 *thus able to challenge their justification... As soon*
26 *as notification can be carried out without jeopardising*
27 *the purpose of the restriction after the termination of*
28 *the surveillance measure, information should be*
29 *provided to the persons concerned."*

1
2 And I think the, again, unequivocal nature of that
3 statement and its similarity to that in Watson is
4 notable.

5
6 *"In Hungarian law... no notification, of any kind, of*
7 *the measures is foreseen. This fact, coupled with the*
8 *absence of any formal remedies in case of abuse,*
9 *indicates that the legislation falls short of securing*
10 *adequate safeguards.*

11
12 *87. It should be added that although the Constitutional*
13 *Court held that various provisions in the domestic law*
14 *read in conjunction secured sufficient safeguards for*
15 *data storage, processing and deletion, special*
16 *reference was made to the importance of individual*
17 *complaints made in this context... For the Court, the*
18 *latter procedure is hardly conceivable, since once more*
19 *it transpires from the legislation that the persons*
20 *concerned will not be notified of the application of*
21 *secret surveillance to them."*

22
23 And in the last part of paragraph 89 they say:

24
25 *"Given that the scope of the measures could include*
26 *virtually anyone, that the ordering is taking place*
27 *entirely within the realm of the executive and without*
28 *an assessment of strict necessity, that new*
29 *technologies enable the Government to intercept masses*

1 *of data easily concerning even persons outside the*
2 *original range of operation, and given the absence of*
3 *any effective remedial measures, let alone judicial*
4 *ones, the Court concludes that there has been a*
5 *violation."*

6
7 And I suppose, in fairness, it has to be said that all
8 of these cases tend to roll up a whole range of
9 considerations, of which the remedies are but one, in
10 reaching the ultimate conclusions that they do. But I 15:24
11 think and would submit, Judge, that the conclusions on
12 the core issues of notification and standing are clear.

13
14 Now, Judge, I just want to turn now to the national
15 security issue. And once again this is an issue which 15:25
16 I referred to on Friday. And I think it's very
17 important, Judge, to try and understand the *precise*
18 argument which is being advanced by my Friends. It is
19 an argument which has evolved from the point when the
20 written submissions were delivered. It was certainly 15:25
21 our understanding that the case that was made was that
22 the references, Article 4(2), the references -- sorry,
23 Article 4(2) TEU and Article 3(2) of the Directive to
24 national security were to everyone's national security
25 and that effectively, therefore, any issue touching on 15:26
26 national security processing in the United States was
27 effectively, for that reason, off limits. That was our
28 understanding of the case that's made, and you'll see
29 it in the written submissions - I don't think it was an

1 unreasonable one.

2
3 So that has now evolved, as I've said, and it's -- and
4 I think first presented in Mr. Gallagher's opening
5 that, well, no, it's not just that, although that case 15:26
6 is still being made as we understand it, it's that
7 within the Member States - and this is the point,
8 Judge, to which you adverted at the start of this
9 morning - within the individual Member States there
10 would be no application of the Charter or of the 15:26
11 principles to processing for the purpose of national
12 security and, therefore, if we understand the argument
13 correctly, there is no comparator. And although this
14 isn't said, I think the point of conclusion of the
15 argument has to be that effectively the individual 15:27
16 Member States in Europe can do as they please when it
17 comes to processing of data for the purpose of national
18 security and that, therefore, the United States system
19 cannot be subjected to any of the scrutiny with which
20 we're concerned, because there's nothing to compare it 15:27
21 against.

22
23 That certainly, as we understand it, is the terminus of
24 that argument. Because you'll see in particular in the
25 most recent speaking note -- or sorry, it's not a 15:27
26 speaking note, it's, well, the paper produced in
27 response to our speaking note, that there's constant
28 reference to the absence of a comparator.

1 The evolution of the argument is not without
2 significance -- oh, I'm sorry, there's one third point
3 which I should advert to, which is now, as presented by
4 Mr. Gallagher, the centrepiece of the national security
5 argument is a case called The European Parliament -V-
6 The Commission, which didn't feature in Facebook's
7 submissions to the court at all; in fact we included it
8 in our speaking note and they have availed of it to say
9 that it actually proves everything that you need to
10 know about national security processing.

15:28

15:28

11
12 Judge, we don't understand how it can be said plausibly
13 that Article 4(2), when it refers to national security,
14 is referring to the national security of states other
15 than the Member States. We just don't understand how
16 that can possibly be the case. I don't think it's
17 unfair to say that no authority has been cited in
18 support of that proposition. And insofar as the second
19 argument is concerned, the one in relation to
20 comparator, in our respectful submission, as I outlined
21 to you on Friday, it means that everybody was wrong
22 when they looked at these issues in, in particular in
23 Schrems. But also, going back to the passages in
24 Watson which I opened to you this morning, the fact
25 that the court in that case/the Advocate General
26 proceeded with the analysis that he, it and he did
27 makes it very difficult to see how this argument could
28 possibly be well founded. Everybody has overlooked it.
29

15:28

15:29

15:29

1 And I do just, in that connection, want to start off by
2 just reminding the court as to just how many references
3 there are made in the course of, in particular the
4 Schrems case, to the national security issue. So if
5 you can turn to tab 36(b) in the first instance. And 15:30
6 I've already opened to you this morning Hogan J's
7 judgment - he overlooked this fundamental issue of
8 competence. And if you look at 36(b) you'll see the
9 Advocate General's -- sorry, Judge. You start off at
10 paragraph 25. This, Judge, is page five. Paragraph 15:31
11 25:
12

13 *"Mr. Schrems lodged a complaint with the Commissioner"*
14 *- that's my client - "claiming, in essence, that the*
15 *law and practices of the United States offer no real*
16 *protection of the data kept in the United States*
17 *against State surveillance. That was said to follow*
18 *from the revelations made by... Snowden from May 2013*
19 *concerning the activities of the United States*
20 *intelligence services, in particular those of the*
21 *National Security Agency."*
22

23 And really, if Mr. Gallagher is correct in either
24 version of his argument, the Advocate General really
25 should've been saying 'well, that's the end of that so. 15:31
26 This is nothing to do with us, we've no interest in how
27 the United States proceeds to process information for
28 the purposes of national security'. And, Judge, I do
29 think it is of some significance that at -- I'm subject

1 to correction, but I do not believe that at *any* point
2 in Mr. Gallagher's submissions was an explanation given
3 as to *how* these cases could have been determined as
4 they were had that national security argument been
5 addressed, except for the reference which may have been 15:32
6 made on one or two occasions that nobody raised it.
7 But with respect, this is at the very centre of the
8 decision of the court in this case. And the argument
9 that's advanced, taken to its conclusion, is that
10 really they just should've said from the start 'This is 15:32
11 nothing to do with us', instead of striking down the
12 Safe Harbour decision in that and *only* in that context.
13 It makes, with respect, little sense.

14
15 Paragraph 34 over the page: 15:33

16
17 *"Mr. Schrems brought proceedings before the High Court*
18 *for judicial review of the Commissioner's decision*
19 *rejecting his complaint. After examining the evidence*
20 *adduced in the main proceedings, the High Court found*
21 *that the electronic surveillance and interception of*
22 *personal data serve necessary and indispensable*
23 *objectives in the public interest, namely the*
24 *preservation of national security and the prevention of*
25 *serious crime."*

26
27 Then if you move on to paragraph 53:

28
29 *"As Mr. Schrems states in his observations, for the*

1 *purposes of the complaint at issue in the main*
2 *proceedings the key issue is that of the transfer of*
3 *personal data from Facebook... to Facebook... in the*
4 *light of the generalised access which the NSA and other*
5 *United States security agencies have under the powers*
6 *conferred on them by [the legislation]."*

7
8 Paragraph 199 on page 28:

9
10 *"Indeed, the access of the United States intelligence*
11 *services to the data transferred covers, in a*
12 *comprehensive manner, all persons using electronic*
13 *communications services, without any requirement that*
14 *the persons concerned represent a threat to national*
15 *security."*

16
17 And if you turn over the page, Judge, to paragraph two
18 -- sorry, if you just look at paragraph 206 at the
19 bottom of that page:

20
21 *"Citizens of the Union whose data has been transferred*
22 *may approach specialist dispute resolution bodies*
23 *established in the United States... to request*
24 *information as to whether the undertaking holding their*
25 *personal data is infringing the conditions of the*
26 *self-certification regime. The private dispute*
27 *resolution carried out by [such bodies] cannot deal*
28 *with breaches of the right to protection of personal*
29 *data by bodies or authorities other than self-certified*

15:34

1 *undertakings. Those dispute resolution bodies have no*
2 *power to rule on the lawfulness of the activities of*
3 *the United States security agencies."*

4
5 But nor, on this construct, do the European courts. 15:35
6 Then if you turn over the page, you'll see at 210 - and
7 I just emphasise this when we look at the Ombudsman:

8
9 *"The intervention of independent supervisory*
10 *authorities is in fact at the heart of the European*
11 *system of personal data protection. It is therefore*
12 *natural that the existence of such authorities was*
13 *considered from the outset to be one of the conditions*
14 *necessary for a finding that the level of protection*
15 *afforded by third countries was adequate; and it is a*
16 *condition that must be satisfied in order for data*
17 *flows from the territory of the Member States to the*
18 *territory of third countries... As noted in the*
19 *working document adopted by the Working Party*
20 *established by Article 29... in Europe there is broad*
21 *agreement that 'a system of "external supervision" in*
22 *the form of an independent authority is a necessary*
23 *feature of a data protection compliance system'.*

24
25 *211. I observe, moreover, that the FISC does not offer*
26 *an effective judicial remedy to citizens of the Union*
27 *whose personal data is transferred to the United*
28 *States. The protection against surveillance by*
29 *government services provided for in section 702...*

1 *applies only to United States citizens and to foreign*
2 *citizens legally resident on a permanent basis in the*
3 *United States. As the Commission itself has observed,*
4 *the oversight of United States intelligence collection*
5 *programmes would be improved by strengthening the role*
6 *of the FISC and by introducing remedies for*
7 *individuals. Those mechanisms could reduce the*
8 *processing of personal data of citizens of the Union*
9 *that is not relevant for national security purposes."*

10
11 I probably have already over-laboured the point, I
12 won't do it any further by going through the equivalent
13 paragraphs in the judgment, but just to identify
14 paragraph 28 and 82 to 87, where again --

15 **MS. JUSTICE COSTELLO:** Sorry, what were those numbers? 15:36

16 **MR. MURRAY:** Sorry, 28 and 82 to 87. where again the
17 fact that the court was concerned with US national
18 security data processing and data processing in that
19 context and the legal controls and remedies constructed
20 around that was *central* to the recitation of the facts 15:37
21 and the outcome. There was *no* and could have been no
22 issue about it.

23
24 So how did this happen? How did it come about that the
25 court embarked upon this errand when actually it 15:37
26 should've been simply pulling the shutters down? And of
27 course, needless to say, not only does it not advert to
28 the competence, if Mr. Gallagher is right that national
29 security means national security *everywhere*, but

1 actually -- but furthermore, does not engage in any
2 consideration of the law of the individual Member
3 States or any suggestion, well, there's no comparator
4 because in some sense the individual states' national
5 security processing is also off limits.

15:37

6
7 So that, I suppose, is the point that I emphasised last
8 Friday and it's the point which, in our respectful
9 submission, means that insofar as the court adopts the
10 view that this argument has any substance at all, it is 15:38
11 an issue that *has* to be referred. Because for the
12 court to say, as you are being invited to do, 'well,
13 national security is off limits' could only be to reach
14 a conclusion which is at loggerheads, as I think I said
15 on Friday, with the analysis adopted by the European 15:38
16 Court. And the extracts from the FRA at pages 10 and
17 11, which I opened to you on Friday, similarly make
18 that absolutely clear.

19
20 The fact of the matter, in our respectful submission, 15:39
21 is this, and if I can ask you to go back to book one,
22 the Charter -- sorry, the TEU, in Article 16 - and
23 you'll find this in tab two - confers the right to
24 protection of personal data. And it's conferred in
25 terms which are clear and unqualified:

15:39

26
27 *"1. Everyone has the right to the protection of*
28 *personal data concerning them."*
29

1 The Union is conferred with competence by that
2 paragraph. You should note that the following
3 paragraph is qualified:

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

14
15 So you start off from the proposition that the Union 15:40
16 has competence arising from the first paragraph of
17 Article 16. And how national security relates to that
18 is evident in one case which I think is referred to in
19 my Friends' submissions, which is footnoted in the
20 extract from the FRA report which I opened on the last 15:41
21 occasion and it's the ZZ -v- Secretary of State for the
22 Home Department (Same Handed).

23
24 In this case the issue before the court related to and
25 arose in the context of a refusal of leave to enter the 15:41
26 UK by an individual who had had permanent resident
27 status and who was subsequently deprived of that status
28 having gone, I think, to Afghanistan and he brought
29 proceedings before the Special Tribunal in the UK

1 arising from that and he raised contentions before
2 ultimately, I think, the Court of Appeal, which
3 referred to the Court of Justice, as to whether the
4 procedure operated by the Special Tribunal had been
5 fair and in compliance with his Article 47 Charter 15:42
6 rights in circumstances where it had not given a full
7 decision, it hadn't disclosed all of the information on
8 the basis of which ZZ was being refused access to the
9 UK.

10
11 So a similar, not a data protection case, but a case 15:42
12 presenting some of the similar issues of national
13 security that arise in the context of national
14 surveillance; you don't want to be -- or, sorry,
15 national security surveillance; you don't want to be 15:42
16 telling people who are under surveillance too much
17 about the information you've gathered. And similarly,
18 in ZZ they did not wish to provide information in an
19 unadulterated form to him, although it I think it was
20 given to a special advocate who had appeared on his 15:42
21 behalf.

22
23 So if you turn to paragraph three you will see, Judge,
24 that:

25
26 *"Chapter VI of [the relevant Directive] contains*
27 *provisions relating to restriction by the Member States*
28 *of the right of entry and the right of residence of*
29 *citizens of the European Union on grounds of public*

1 *policy, public security or public health."*

2
3 And if you go forward then to paragraph 22 on page
4 eight, the essential facts are outlined:

5
6 *"ZZ has dual French and Algerian nationality...
7 married to a British national since 1990 and the couple
8 had... children... ZZ resided lawfully in the United
9 Kingdom [and he was given] a right of... residence."*

10
11 I said he'd gone to Afghanistan; he went to Algeria, it
12 says in the next paragraph, in August 2005.

13
14 *"The Secretary of State decided to cancel his right of
15 residence and to exclude him from the United Kingdom on
16 the ground that his presence was not conducive to the
17 public good. SIAC" - that's the special court -
18 "stated in its judgment that ZZ had no right of appeal
19 against that decision cancelling his right of
20 residence.*

21
22 *24... ZZ travelled to the United Kingdom, where a
23 decision refusing him admission was taken by the
24 Secretary of State... Following that decision, ZZ was
25 removed to Algeria. On the date when the present
26 request for a preliminary ruling was lodged he was
27 residing in France.*

28
29 *25. ZZ lodged an appeal... which was dismissed by SIAC*

1 on the basis that that decision was justified by
2 imperative grounds of public security. Before SIAC, ZZ
3 was represented by a solicitor and a barrister of his
4 own choosing...

5
6 26. In those appeal proceedings, the Secretary of State
7 objected to the disclosure to ZZ of material upon which
8 he relied in opposition to ZZ's appeal. In accordance
9 with the rules of procedure applicable before SIAC, two
10 special advocates were appointed to represent ZZ's
11 interests. These special advocates had consultations
12 with ZZ based upon the 'open evidence'.
13

14 27. Subsequently, the information not disclosed to ZZ
15 upon which the decision refusing entry at issue in the
16 main proceedings was based was disclosed to those
17 special advocates, who were from then on precluded from
18 seeking further instructions from, or providing
19 information to, ZZ or his personal advisers without the
20 permission of SIAC."
21

22 Then the special advocates proceeded. So then you'll
23 see over the page at paragraph 30:

24
25 "SIAC dismissed ZZ's appeal, and gave an 'open'
26 judgment and a 'closed' judgment, the latter being
27 provided only to the Secretary of State and ZZ's
28 special advocates. In its open judgment, SIAC held, in
29 particular, that 'little of the case against' ZZ had

1 *been disclosed to him and that that which had been*
2 *disclosed did not concern 'the critical issues'."*

3
4 If you go down to paragraph 34, the matter having come
5 before the Court of Appeal, they referred the question: 15:45

6
7 *"Does the principle of effective judicial protection,*
8 *set out in [the Directive]... require that a judicial*
9 *body considering an appeal from a decision to exclude a*
10 *European Union citizen from a Member State on grounds*
11 *of public policy and public security... ensure that the*
12 *European Union citizen... is informed of the essence of*
13 *the grounds against him, notwithstanding the fact that*
14 *the authorities of the Member State and the relevant*
15 *domestic court, after consideration of the totality of*
16 *the evidence against the European Union citizen relied*
17 *upon by the authorities of the Member State, conclude*
18 *that the disclosure of the essence of the grounds*
19 *against him would be contrary to the interests of State*
20 *security?"*

21
22 Now, there you can see, Judge, an immediate analogue
23 with the argument that's advanced here insofar as it's
24 said you can't apply the Charter to the German
25 surveillance regime. Here there is a clear national 15:46
26 security issue in play, it relates directly to the
27 proceedings in which ZZ is involved, and that is raised
28 as the basis on which the national authorities seek to
29 say that the principal effect of judicial protection

1 doesn't require the disclosure of certain information.

2
3 But if you turn over the page, Judge, to the top of the
4 page, they're recording the government's submission.

5 Just the first full paragraph on that page says:

15:46

6
7 *"It is clear from Article 4(2) TEU and Article*
8 *346(1)(a) TFEU that State security remains the*
9 *responsibility of solely the Member States. The*
10 *question... thus relates to an area governed by*
11 *national law and, for that reason, does not fall within*
12 *European Union competence."*

13
14 So again, in our respectful submission, the analogy is
15 clear; on Mr. Gallagher's case, if someone were to seek
16 to agitate the Charter against the German national
17 security surveillance regime, they would be entitled to
18 say 'Sorry, this is a matter which is outside the
19 competence of the Union. Our data processing for
20 national security process is off limits' -- 'purposes',
21 sorry, 'is off limits and to that extent, the Charter
22 doesn't apply, Article 47 doesn't apply'. There is no
23 comparator Mr. Gallagher would say.

15:47

15:47

24
25 But that's wrong. And the reason it's wrong is because
26 in *this* case the court was concerned with a matter,
27 namely the right of entry of someone who had been a
28 former, a permanent resident, which *is* within European
29 Union competence. And you can't play the trump card of

15:47

1 national security and say 'well, you simply can't look
2 at this now, none of the rules that would otherwise
3 apply apply'.
4

5 And if you see at paragraph 38 -- in fact, maybe I
6 should open all of it. Paragraph 36 says:

15:48

7
8 *"... the Court's settled case-law should be recalled*
9 *according to which, in proceedings under Article 267...*
10 *which are based on a clear separation of functions*
11 *between the national courts and the Court of Justice,*
12 *the national court alone has jurisdiction to find and*
13 *assess the facts in the case before it and to interpret*
14 *and apply national law. Similarly, it is solely for*
15 *the national court, before which the dispute has been*
16 *brought and which must assume responsibility for the*
17 *judicial decision to be made, to determine, in the*
18 *light of the particular circumstances of the case, both*
19 *the need for and the relevance of the questions that it*
20 *submits to the Court. Consequently, where the*
21 *questions submitted concern the interpretation of*
22 *European Union law, the Court is in principle bound to*
23 *give a ruling...*

24
25 *37. The Court may refuse to rule on a question referred*
26 *by a national court only where it is quite obvious that*
27 *the interpretation of European Union law that is sought*
28 *bears no relation to the actual facts of the main*
29 *action or its purpose, where the problem is*

1 hypothetical, or where the Court does not have before
2 it the factual or legal material necessary to give a
3 useful answer...

4
5 38. That is not the case here. First, the question
6 referred relates to the interpretation of Article 30(2)
7 of [the Directive], read in the light, in particular,
8 of Article 47 of the Charter. Second, that question
9 arises in the context of a genuine dispute relating to
10 the legality of a decision refusing entry taken,
11 pursuant to the directive, by the secretary of State
12 against ZZ. Furthermore, although it is for Member
13 States to take the appropriate measures to ensure their
14 internal and external security, the mere fact that a
15 decision concerns State security cannot result in
16 European Union law being inapplicable."

17
18 Now, if you turn over the page, Judge, to page 11, at
19 paragraph 49:

20
21 "It is only", they say, "by way of derogation that
22 Article 30(2) of Directive 2004/38 permits the Member
23 States to limit the information sent to the person
24 concerned in the interests of State security. As a
25 derogation from the rule set out in the preceding
26 paragraph of the present judgment, this provision must
27 be interpreted strictly, but without depriving it of
28 its effectiveness.

1 50. *It is in that context that it must be determined*
2 *whether and to what extent Articles 30(2) and 31 of*
3 *[the Directive], the provisions of which must be*
4 *interpreted in a manner which complies with the*
5 *requirements flowing from Article 47... permit the*
6 *grounds of a decision taken under Article 27 of the*
7 *directive not to be disclosed precisely and in full."*

8
9 They then say:

10
11 *"It is to be borne in mind that interpretation in*
12 *compliance with those requirements must take account of*
13 *the significance, as resulting from the system applied*
14 *by the Charter as a whole, of the fundamental right*
15 *guaranteed by Article 47... In particular, it should*
16 *be taken into account that, whilst Article 52(1)...*
17 *admittedly allows limitations on the exercise of the*
18 *rights enshrined by the Charter, it nevertheless lays*
19 *down that any limitation must in particular respect the*
20 *essence of the fundamental right in question and*
21 *requires, in addition, that, subject to the principle*
22 *of proportionality, the limitation must be necessary*
23 *and genuinely meet objectives of general interest*
24 *recognised by [European Union law]."*

25
26 And that, I suppose, takes us back to a theme of before
27 lunch where *precisely* the analysis which we have urged
28 upon you, Judge, in relation to proportionality is
29 applied; you start off by ensuring that the limitation

1 respects the essence of the fundamental right and
2 requires, in addition, that, subject to the principle
3 of proportionality, it must meet the relevant test.
4

5 *"52. Therefore, the interpretation of Articles 30(2)*
6 *and 31 of [the Directive], read in the light of Article*
7 *47... cannot have the effect of failing to meet the*
8 *level of protection that is guaranteed in the manner*
9 *described in the preceding paragraph of the present*
10 *judgment.*

15:51

11
12 *53. According to the Court's settled case-law, if the*
13 *judicial review guaranteed by Article 47... is to be*
14 *effective, the person concerned must be able to*
15 *ascertain the reasons upon which the decision taken in*
16 *relation to him is based, either by reading the*
17 *decision itself or by requesting and obtaining*
18 *notification of those reasons, without prejudice to the*
19 *power of the court with jurisdiction to require the*
20 *authority concerned to provide that information."*

21
22 Then he refers to cases, or they refer to cases there.
23

24 *"So as to make it possible for him to defend his rights*
25 *in the best possible conditions and to decide, with*
26 *full knowledge of the relevant facts, whether there is*
27 *any point in his applying to the court with*
28 *jurisdiction, and in order to put the latter fully in a*
29 *position in which it may carry out the review of the*

1 *lawfulness of the... decision...*

2
3 *54... it may prove necessary, both in administrative*
4 *proceedings and in judicial proceedings, not to*
5 *disclose certain information...*

6
7 *55. As regards judicial proceedings, the Court has*
8 *already held that, having regard to the adversarial*
9 *principle that forms part of the rights of the defence,*
10 *which are referred to in Article 47... the parties to a*
11 *case must have the right to examine all the*
12 *documents..."*

13
14 Then paragraph 56:

15
16 *"The fundamental right to an effective legal remedy*
17 *would be infringed if [the decision] were founded on*
18 *facts... which the parties [had not received].*

19
20 *57... in exceptional cases, [if the] national authority*
21 *opposes... full disclosure... of the grounds which*
22 *constitute the basis of a decision... by invoking*
23 *reasons of State security, the court with jurisdiction*
24 *in the Member State... must have at its disposal and*
25 *apply techniques and rules of procedural law which*
26 *accommodate, on the one hand, legitimate State security*
27 *considerations regarding the nature and sources of the*
28 *information taken into account in the adoption of such*
29 *a decision and, on the other hand, the need to ensure*

1 *sufficient compliance with the person's procedural*
2 *rights."*

3
4 Now, of course, if the argument advanced by my Friends
5 was right, actually that would be totally wrong, you 15:53
6 wouldn't engage in that exercise *at all*, you would say
7 'Oh, sorry, this is a situation which, on the grounds
8 of national security, we are *not* providing this
9 information and you have *no* jurisdiction to inquire
10 into whether that's compliant with Article 47 or not, 15:54
11 because as the English government argued in this case,
12 national security is off bounds, it's outside EU
13 competence, it is nothing to do with the court'. But
14 that's not the approach taken.

15 15:54
16 And there is, as I said, a direct, in our respectful
17 submission, analogue. Because in the case where the
18 German national security surveillance laws were to be
19 reviewed, they would be reviewed under Article 47,
20 *with, of course*, accommodation of the fact that it's a 15:54
21 national security case, as one takes accommodation of
22 *any* particular feature of any specific case which may
23 impact upon the operation of the Charter rights. But
24 you *must* protect the essence of the right. And the
25 court's inquiry is operative irrespective of the fact 15:54
26 that is it's a national security case. And if the
27 position were otherwise, this case could not have been
28 decided as it was. And if the position *is* as the case
29 would suggest then my Friends' submission in relation

1 to national security *must* be wrong.

2
3 Then they continue at paragraph 61:

4
5 *"... the competent national authority has the task of*
6 *proving, in accordance with the national procedural*
7 *rules, that state security would in fact be compromised*
8 *by precise and full disclosure."*
9

10 And the grounds on which the decision was reached. And 15:55
11 then it proceeds to observe the independent examination
12 which should be taken into account. And if you turn
13 over the page then, Judge, at paragraph 69:

14
15 *"In the light of the foregoing considerations, the*
16 *answer to the question referred is that Articles 30(2)*
17 *and 31 of [the Directive], read in the light of Article*
18 *47... must be interpreted as requiring the national*
19 *court with jurisdiction to ensure that failure by the*
20 *competent national authority to disclose to the person*
21 *concerned, precisely and in full, the grounds on which*
22 *a decision taken under Article 27 of that directive is*
23 *based and to disclose the related evidence to him is*
24 *limited to that which is strictly necessary, and that*
25 *he is informed, in any event, of the essence of those*
26 *grounds in a manner which takes due account of the*
27 *necessary confidentiality of the evidence."*
28

29 Judge, we therefore say that the application of the

1 same principles results in the conclusion stated in the
2 FRA report, which is, of course, that national security
3 data processing *remains* subject to the Charter, subject
4 to the requirements.

5
6 Now, what does that mean? Well, it means first of all,
7 in my respectful submission - I've dealt with this
8 briefly; I think I dealt with it when I opened the
9 case, and we referred to it in our speaking note -
10 there is simply *no* basis on which it can be said 15:56

11 national security refers to national security of third
12 party states. That is just, in our submission, a far
13 fetched submission unsupported by authority *or* by the
14 text. But insofar as the second argument is concerned,
15 it's wrong, because in fact the national security 15:57
16 surveillance of Member States falls within the Charter
17 and *must* respect the essence of the Charter rights, and
18 therefore, the United States system of national
19 security surveillance must do likewise.

20
21 Judge, I want to move on now to deal with the last
22 question on Facebook's case which is on my list and
23 then I need to deal with Mr --

24 **MS. JUSTICE COSTELLO:** well, I think maybe tomorrow
25 might make it more sensible. 15:57

26 **MR. MURRAY:** Certainly, Judge. Thank you.

27 **MS. JUSTICE COSTELLO:** So eleven o'clock then tomorrow.

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

1 THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 15TH
2 MARCH AT 11:00
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57 [2] - 110:14, 110:15 57.. [1] - 155:20					
6		A			
6 [2] - 31:27, 66:10 6(1 [1] - 93:6 61 [1] - 157:3 62 [1] - 68:20 63 [1] - 16:15 64 [2] - 16:16, 16:28 65 [2] - 6:12, 17:4 66 [2] - 17:19, 105:6 69 [1] - 157:13		A&L [1] - 3:3 abated [1] - 109:5 ability [4] - 63:25, 71:7, 79:11, 129:21 able [13] - 7:27, 25:27, 27:5, 27:8, 51:2, 55:16, 84:14, 120:9, 120:11, 124:20, 131:13, 134:25, 154:14 above-named [1] - 1:26 abroad [1] - 133:26 abrogated [1] - 54:10 absence [16] - 8:17, 27:16, 48:28, 65:16, 79:10, 107:10, 126:20, 128:2, 128:13, 130:7, 130:27, 132:5, 135:8, 136:2, 137:28 absent [4] - 62:5, 91:11, 91:13 absolute [4] - 8:24, 9:4, 9:9 absolutely [9] - 8:18, 10:15, 16:25, 25:9, 48:20, 50:25, 52:14, 67:21, 144:18 abstract [2] - 76:26, 124:28 abstracto [4] - 112:21, 120:2, 122:6, 124:11 abuse [9] - 27:19, 51:27, 51:28, 106:18, 117:23, 124:16, 131:20, 134:21, 135:8 abused [3] - 113:7, 122:21, 124:2 accept [3] - 41:12, 62:21, 98:10 accepted [4] - 44:23, 44:25, 47:2, 54:17 accepts [1] - 123:9 access [34] - 17:5, 17:23, 19:16, 19:19, 19:26, 20:1, 21:18, 26:12, 28:5, 33:18, 55:14, 58:7, 58:14, 58:16, 58:23, 59:3, 59:9, 59:16, 61:17, 64:22, 66:18, 87:28, 116:29, 117:5, 118:12, 119:23, 125:16, 129:20,	129:24, 130:27, 132:21, 141:4, 141:10, 146:8 accessed [6] - 52:16, 64:12, 64:29, 66:25, 66:26, 68:28 accessible [2] - 7:6, 24:19 accessing [1] - 65:17 accommodate [1] - 155:26 accommodates [1] - 8:16 accommodation [2] - 156:20, 156:21 accompanied [2] - 18:29, 85:20 accordance [7] - 31:1, 93:25, 120:10, 129:29, 145:6, 148:8, 157:6 accorded [1] - 70:22 According [1] - 154:12 according [7] - 19:5, 22:7, 25:1, 28:3, 104:4, 121:1, 151:9 accordingly [2] - 68:16, 111:10 Accordingly [5] - 58:7, 114:17, 120:9, 123:9, 132:7 account [11] - 23:4, 99:27, 123:14, 123:23, 127:18, 132:28, 153:12, 153:16, 155:28, 157:12, 157:26 achieve [3] - 18:17, 73:17, 127:25 achieved [2] - 84:25, 89:10 acknowledged [1] - 68:7 acknowledges [2] - 63:18, 104:3 ACLU [3] - 22:5, 47:28, 49:12 act [1] - 7:4 Act [9] - 20:29, 23:24, 44:19, 54:4, 54:5, 54:7, 109:19, 109:25, 133:22 Act.. [1] - 130:24 acted [1] - 51:19 acting [1] - 145:5 actio [1] - 120:1 action [6] - 1:27, 21:14, 22:8, 70:26,	71:5, 151:29 actions [2] - 51:18, 70:10 actions.. [1] - 70:13 activities [14] - 19:28, 24:28, 31:19, 58:23, 58:27, 59:7, 59:9, 106:8, 117:2, 117:6, 127:9, 139:19, 142:2, 145:11 activity [1] - 126:5 actor [2] - 5:26, 53:5 actors [1] - 53:3 actual [10] - 14:10, 39:10, 42:26, 102:18, 111:5, 111:25, 113:8, 114:19, 122:23, 151:28 added [3] - 53:24, 90:16, 135:12 addition [3] - 17:9, 153:21, 154:2 additional [4] - 18:29, 24:15, 24:19, 90:21 address [9] - 5:12, 12:24, 12:26, 24:11, 26:17, 26:20, 37:16, 54:23, 82:11 addressed [11] - 7:20, 25:4, 25:15, 27:17, 54:27, 81:1, 87:18, 97:5, 97:8, 101:5, 140:5 addresses [1] - 26:10 addressing [5] - 5:15, 38:26, 89:17, 99:14, 133:16 adduced [3] - 22:22, 102:16, 140:20 adduces [1] - 86:24 Adequacy [3] - 31:7, 34:4, 35:4 adequacy [22] - 12:29, 13:7, 13:18, 14:5, 14:6, 18:15, 30:11, 34:28, 35:3, 35:16, 35:22, 35:26, 37:6, 37:11, 37:25, 38:8, 39:25, 60:27, 61:2, 82:13, 101:22 adequate [30] - 12:10, 14:1, 14:5, 14:22, 15:18, 16:5, 27:19, 28:26, 29:6, 29:8, 29:13, 30:5, 38:19, 76:11, 76:12, 80:9, 83:21, 84:12, 85:20, 86:23, 86:24,	87:20, 87:25, 87:27, 91:29, 94:6, 100:12, 132:6, 135:10, 142:15 adequate [2] - 12:11, 80:7 adequate/sufficient /Article [1] - 76:24 adhere [1] - 32:23 adhered [1] - 41:15 adherence [2] - 15:11, 16:28 ADJOURNED [1] - 159:1 ADJOURNMENT [2] - 81:11, 82:1 adjudication [1] - 128:25 adjust [1] - 123:24 administrative [4] - 22:16, 59:20, 71:6, 155:3 Administrative [1] - 20:29 admissibility [2] - 23:12, 23:17 admission [1] - 147:23 admittedly [1] - 153:17 adopted [10] - 73:7, 73:8, 88:29, 101:14, 101:15, 101:17, 118:8, 126:28, 142:19, 144:15 adoption [1] - 155:28 adopts [1] - 144:9 advanced [7] - 36:29, 64:7, 76:22, 136:18, 140:9, 149:23, 156:4 adversarial [1] - 155:8 adverse [1] - 23:3 advert [2] - 138:3, 143:27 adverted [1] - 137:8 advice [1] - 117:9 ADVISE [1] - 3:9 advise [1] - 110:1 advised [1] - 134:23 advisers [1] - 148:19 advising [1] - 116:21 Advocate [11] - 73:8, 80:4, 82:24, 83:15, 86:15, 87:6, 92:2, 101:23, 138:25, 139:9, 139:24 advocate [2] - 109:21, 146:20 advocated [2] -
7					
7 [4] - 4:5, 19:7, 66:16, 93:6 7/8 [1] - 2:8 7/E [1] - 133:21 702.. [1] - 142:29 72 [1] - 33:11 73 [1] - 125:23 74 [1] - 96:2 75 [1] - 47:14 76 [1] - 47:14 7th [1] - 30:16					
8					
8 [5] - 19:7, 103:7, 115:29, 124:8, 128:7 8(2 [1] - 93:7 82 [2] - 143:14, 143:16 847 [1] - 13:15 86 [2] - 134:12, 134:15 87 [3] - 135:12, 143:14, 143:16 88 [2] - 18:2 89 [4] - 18:21, 23:6, 71:13, 135:23					
9					
9 [1] - 93:7 90 [6] - 6:16, 11:28, 18:1, 18:20, 19:3, 20:19 93 [1] - 19:22 95 [1] - 74:9 98 [2] - 8:23, 46:2					

45:27, 47:25
advocates [5] - 148:10, 148:11, 148:17, 148:22, 148:28
adéquat [1] - 80:9
affairs [5] - 49:24, 52:15, 52:20, 66:28, 104:4
affect [1] - 94:29
affected [5] - 57:17, 61:19, 120:4, 123:17, 126:10
affected' [1] - 120:12
affects [1] - 123:19
affiliation [1] - 133:20
affirm [1] - 33:3
affirms [1] - 16:3
afford [1] - 123:27
afforded [6] - 15:7, 65:5, 83:23, 84:16, 85:10, 142:15
affords [1] - 83:29
Afghanistan [2] - 145:28, 147:11
afraid [2] - 63:29, 125:24
AFTER [1] - 82:1
afternoon [7] - 34:8, 55:3, 62:14, 82:4, 99:11, 101:8, 101:20
against' [1] - 148:29
agencies [7] - 5:23, 116:12, 116:19, 117:4, 141:5, 142:3, 145:10
agency [2] - 22:2, 96:16
Agency [2] - 95:11, 139:21
agent [1] - 51:19
agents [1] - 126:15
agitate [2] - 29:24, 150:16
agitation [1] - 70:28
ago [2] - 12:8, 102:24
agree [3] - 39:17, 80:3, 98:15
agreed [4] - 44:18, 47:14, 53:9, 53:23
agreement [2] - 94:27, 142:21
agrees [2] - 93:21, 95:5
AHERN [1] - 2:18
aims [1] - 127:26
albeit [2] - 53:27, 77:18

Algeria [2] - 147:11, 147:25
Algerian [1] - 147:6
align [1] - 22:26
aligned [2] - 47:24, 47:26
allegations [3] - 114:15, 115:11, 115:21
allege [1] - 120:28
alleged [8] - 111:5, 111:25, 113:3, 114:11, 115:8, 121:2, 122:18, 130:3
alleges [1] - 114:24
Alliance [1] - 2:27
allow [4] - 57:19, 108:13, 114:24, 119:21
allowed [3] - 39:19, 88:7, 119:19
allows [1] - 153:17
alluded [3] - 11:5, 12:8, 29:16
almost [6] - 50:9, 64:21, 70:23, 76:22, 76:25, 91:21
alone [3] - 52:27, 136:3, 151:12
alternative [1] - 77:29
amendment [1] - 33:24
Amendment [2] - 52:12, 52:14
AMERICA [1] - 2:21
American [1] - 48:18
Amnesty [1] - 47:29
amount [3] - 44:10, 75:2, 102:16
amply [1] - 73:28
analogous [1] - 99:14
analogue [3] - 48:21, 149:22, 156:17
analogy [6] - 65:4, 71:10, 78:23, 99:16, 115:13, 150:14
analyse [2] - 40:16, 125:14
analysed [1] - 14:19
analysing [1] - 82:10
analysis [38] - 11:16, 18:23, 29:21, 34:15, 34:16, 37:29, 38:16, 39:25, 45:8, 48:3, 49:20, 54:16, 57:6, 59:1, 61:12, 62:25, 63:22, 71:21, 73:7, 73:8, 73:14, 73:24,

74:10, 76:17, 77:11, 77:15, 77:27, 77:28, 79:15, 80:6, 100:13, 104:17, 132:28, 133:13, 138:26, 144:15, 153:27
analysts' [1] - 7:9
AND [1] - 1:13
and.. [2] - 37:21, 105:9
Anderson [1] - 10:7
Annex [6] - 16:28, 17:13, 17:19, 22:6, 24:23, 95:28
annex [1] - 92:19
annexed [1] - 13:23
Annexes [1] - 30:17
annexes [2] - 13:28, 116:27
annual [5] - 16:3, 28:20, 31:16, 33:4, 52:19
annually [1] - 116:25
answer [7] - 5:11, 7:18, 8:13, 8:14, 60:19, 67:20, 157:16
answer.. [1] - 152:3
answered [3] - 12:5, 43:29, 71:29
answers [2] - 74:16, 74:18
APA [3] - 44:25, 50:19, 91:15
apart [1] - 116:10
apologise [1] - 83:5
apparent [2] - 12:15, 104:23
Appeal [4] - 49:6, 110:22, 146:2, 149:5
appeal [7] - 109:27, 130:16, 147:18, 148:6, 148:8, 148:25, 149:9
appeal.. [1] - 147:29
Appeals [2] - 47:27, 48:5
appear [5] - 11:17, 28:28, 33:22, 34:24, 115:19
APPEARANCES [1] - 2:3
appeared [1] - 146:20
appellant [1] - 3:24
Appendix [1] - 17:12
appendix [1] - 22:6
apple [1] - 78:4
apples [2] - 71:4, 78:22
applicable [9] - 6:24,

61:19, 79:19, 80:25, 85:12, 93:26, 93:27, 96:10, 148:9
applicant [14] - 110:2, 111:29, 113:29, 114:11, 114:18, 114:22, 114:28, 115:8, 119:7, 120:4, 121:4, 121:14, 123:9, 123:16
applicant's [5] - 114:16, 115:3, 115:20, 118:17, 131:1
applicants [5] - 69:5, 111:5, 111:10, 133:17, 134:2
application [9] - 24:6, 53:10, 69:17, 113:4, 120:10, 122:18, 135:20, 137:10, 157:29
applied [19] - 41:6, 52:28, 62:27, 96:23, 108:16, 111:12, 111:14, 111:28, 113:2, 115:24, 117:12, 119:13, 120:4, 120:15, 120:29, 122:16, 124:14, 153:13, 153:29
applies [11] - 14:7, 15:8, 33:24, 34:2, 34:3, 49:1, 55:28, 66:23, 100:2, 108:11, 143:1
apply [19] - 9:22, 16:4, 32:1, 32:27, 33:5, 59:3, 105:28, 118:3, 125:8, 125:10, 128:17, 128:24, 132:19, 132:20, 149:24, 150:22, 151:3, 151:14, 155:25
apply' [2] - 150:22, 151:3
applying [5] - 6:3, 54:24, 71:7, 107:17, 154:27
appoint [1] - 110:16
appointed [4] - 95:27, 107:1, 110:19, 148:10
appointee [1] - 98:3
appreciation [4] - 104:7, 107:29, 116:6, 128:22
apprehend [1] - 75:14
approach [15] - 5:24,

7:9, 62:28, 101:14, 101:15, 101:17, 102:4, 107:24, 111:18, 112:20, 122:5, 123:4, 141:22, 156:14
approaches [1] - 91:28
approaching [1] - 6:17
appropriate [7] - 68:6, 80:9, 83:28, 87:1, 96:7, 116:12, 152:13
approves [1] - 117:9
approving [1] - 116:22
area [2] - 121:17, 150:10
areas [1] - 58:1
argued [1] - 156:11
arguing [1] - 37:14
argument [27] - 39:5, 60:10, 64:14, 68:12, 69:5, 75:3, 76:4, 76:22, 76:23, 77:13, 131:19, 136:18, 136:19, 137:12, 137:15, 137:24, 138:1, 138:5, 138:19, 138:27, 139:24, 140:4, 140:8, 144:10, 149:23, 156:4, 158:14
arguments [1] - 82:11
arise [2] - 74:3, 146:13
arises [4] - 40:13, 59:5, 115:3, 152:9
arising [6] - 25:10, 27:14, 80:13, 90:8, 145:16, 146:1
arose [1] - 145:25
arrangements [1] - 117:10
arresting [2] - 16:17, 46:29
arrived [1] - 132:25
Article [96] - 6:25, 7:20, 7:21, 8:4, 8:14, 9:14, 10:16, 10:18, 13:20, 16:20, 23:18, 28:9, 29:10, 29:14, 30:4, 41:23, 43:14, 47:23, 49:25, 50:11, 51:1, 52:26, 61:23, 61:24, 65:5, 65:23, 66:15, 66:16, 70:29, 71:25, 71:26, 72:3, 72:9, 72:21, 74:1,

74:12, 74:20, 77:2,
79:9, 79:10, 79:18,
82:12, 82:19, 83:18,
84:11, 84:22, 86:13,
86:16, 87:7, 89:18,
89:21, 97:16, 98:24,
99:2, 99:8, 99:10,
99:17, 100:4, 100:6,
102:22, 103:7,
115:29, 120:10,
124:8, 125:11, 128:7,
131:6, 136:22,
136:23, 138:13,
142:20, 144:22,
145:17, 146:5, 150:7,
150:22, 151:9, 152:6,
152:8, 152:22, 153:5,
153:6, 153:15,
153:16, 154:6,
154:13, 155:10,
156:10, 156:19,
157:17, 157:22
article [3] - 73:3,
83:22, 92:13
Articles [6] - 19:7,
37:26, 66:9, 153:2,
154:5, 157:16
articles [2] - 47:22,
78:27
articulated [3] - 46:9,
69:25, 125:15
AS [2] - 5:1, 82:1
ascertain [3] - 45:11,
102:6, 154:15
aside [5] - 51:22,
62:6, 70:21, 72:5,
100:18
aspect [8] - 11:18,
16:11, 39:24, 51:10,
63:23, 67:27, 87:21,
88:14
aspects [8] - 12:6,
17:29, 26:20, 50:19,
52:24, 54:21, 76:20,
107:24
assess [3] - 112:25,
122:11, 151:13
assessed [2] - 17:4,
35:14
assessing [1] -
130:10
assessment [10] -
7:11, 19:3, 28:13,
34:6, 40:29, 44:5,
84:13, 85:18, 112:11,
135:28
assessments [1] -
35:11
assist [1] - 41:2
assistance [5] -

41:26, 43:26, 43:29,
103:11, 118:14
assistance [1] -
44:1
assisting [1] -
116:19
Association [1] -
128:1
assume [3] - 50:22,
62:24, 151:16
assuming [1] - 82:16
assurance [1] -
19:27
AT [1] - 159:2
attach [1] - 6:9
attached [1] - 21:21
attain [1] - 85:15
attaining [1] - 85:7
attempt [2] - 39:1,
70:26
attention [6] - 15:19,
37:26, 39:9, 55:1,
80:3, 117:20
attorneys [1] - 112:2
August [1] - 147:12
auspices [1] - 98:4
author [1] - 42:24
authorisation [2] -
116:16, 118:15
authorise [1] - 86:21
authorised [3] -
16:6, 18:28, 117:15
authorises [1] - 19:9
authoritative [2] -
64:2, 67:11
authorities [32] -
13:13, 13:27, 17:7,
17:24, 19:16, 21:8,
22:12, 27:26, 55:20,
57:28, 58:14, 59:17,
59:22, 61:17, 61:22,
66:18, 66:26, 67:3,
68:4, 68:27, 93:28,
112:25, 122:10,
130:10, 131:26,
134:3, 141:29,
142:10, 142:12,
149:14, 149:17,
149:28
authorities.. [1] -
123:8
authority [12] - 6:25,
41:10, 85:29, 102:7,
127:19, 138:17,
142:22, 154:20,
155:20, 157:5,
157:20, 158:13
authority.. [1] -
130:17
authorized [1] - 33:6

availability [3] -
112:29, 122:15,
123:23
available [16] - 17:5,
21:14, 22:7, 30:29,
44:20, 66:10, 88:9,
94:14, 100:15, 108:4,
108:5, 113:14, 128:8,
130:11, 131:24, 132:2
availed [1] - 138:8
avenue [2] - 24:15,
24:19
avenues [1] - 21:4
average [1] - 102:3
avert [1] - 134:5
avoidance [1] -
82:18

B

balance [1] - 82:21
BANK [1] - 2:13
bar [2] - 47:6
barbed [1] - 76:16
bare [3] - 50:16,
53:1, 53:26
Barrington [4] -
9:13, 49:27, 67:16,
69:3
BARRINGTON [1] -
2:21
barrister [1] - 148:3
BARROW [1] - 2:14
based [13] - 14:20,
26:3, 48:7, 57:20,
58:11, 69:6, 83:18,
85:17, 148:12,
148:16, 151:10,
154:16, 157:23
baseline [1] - 107:11
bases [1] - 21:7
basic [2] - 10:19,
79:21
basis [24] - 16:4,
18:5, 19:10, 27:23,
29:6, 33:4, 33:22,
33:23, 57:29, 63:1,
67:20, 69:27, 84:11,
101:1, 114:1, 114:4,
115:22, 132:11,
143:2, 146:8, 148:1,
149:28, 155:22,
158:10
basis' [1] - 20:2
Bay [1] - 115:14
bear [8] - 40:29,
42:6, 48:11, 83:28,
103:9, 103:20, 130:7,
133:2

bearing [1] - 86:13
bears [1] - 151:28
became [1] - 109:21
become [2] - 52:18,
104:23
becomes [2] - 12:15,
112:8
been.. [1] - 130:14
BEFORE [1] - 1:17
begin [2] - 40:22,
87:14
beginning [2] -
35:13, 37:23
begs [1] - 97:1
begun [1] - 55:15
behalf [2] - 95:2,
146:21
behind [2] - 92:1,
101:26
being.. [1] - 56:10
belief [1] - 95:11
believes [3] - 55:29,
78:13, 116:4
belongs [1] - 123:17
below [2] - 11:22,
17:26
beneficiary [1] - 93:7
benefit [3] - 31:7,
43:26, 133:25
benefits [2] - 32:5,
32:26
best [4] - 7:20,
123:4, 129:25, 154:25
better [1] - 60:13
between [15] - 5:29,
7:22, 44:10, 45:12,
53:14, 54:20, 59:2,
61:12, 80:24, 97:22,
99:16, 103:21, 109:3,
121:4, 151:11
beyond [2] - 24:28,
64:21
biannual [1] - 117:13
binary [1] - 74:11
bind [1] - 34:5
binding [4] - 6:18,
33:20, 35:27, 37:19
bit [4] - 33:27,
101:10, 119:16,
119:18
BL [7] - 2:6, 2:11,
2:17, 2:22, 2:27, 3:2,
3:8
blanket [1] - 9:4
block [1] - 78:24
board [1] - 62:28
bodies [12] - 15:1,
25:21, 25:27, 26:12,
27:4, 100:20, 106:28,
141:22, 141:27,

141:29, 142:1, 145:9
body [10] - 59:20,
59:21, 96:8, 96:12,
99:25, 99:28, 100:7,
110:9, 118:8, 149:9
book [8] - 69:2, 72:3,
92:6, 99:9, 104:29,
105:3, 144:21
Book [2] - 105:6,
109:7
borne [1] - 153:11
bother [2] - 98:6,
98:8
bottom [3] - 58:5,
107:8, 141:19
bound [2] - 10:29,
151:22
bounds [1] - 156:12
brackets [1] - 55:8
breach [5] - 8:12,
51:3, 88:9, 88:10,
131:22
breached [2] - 7:3
breached.. [1] -
130:26
breaches [1] -
141:28
BRIAN [1] - 2:5
briefly [3] - 7:25,
72:1, 158:8
bring [7] - 24:6, 27:8,
40:28, 48:26, 110:10,
122:28, 124:28
bringing [1] - 69:14
British [1] - 147:7
broad [2] - 94:15,
142:20
broaden [1] - 47:22
broadening [1] -
9:16
broader [1] - 60:22
broadly [2] - 111:7,
121:11
brought [9] - 21:15,
29:22, 40:5, 88:21,
109:20, 133:2,
140:17, 145:28,
151:16
Brown's [2] - 11:15,
104:26
brushed [1] - 51:22
BSA [1] - 2:27
build [1] - 20:7
build-up [1] - 20:7
builds [1] - 24:24
built [3] - 9:3, 61:29,
62:10
bulk [1] - 18:27
bunched [1] - 57:25
burden [2] - 130:24,

130:28
burden.. [1] - 131:14
business [1] - 16:23
BY [5] - 1:17, 4:5,
 4:6, 4:7, 7:16
by.. [1] - 139:18

C

CAHILL [1] - 3:2
calculus [1] - 48:24
can.. [1] - 118:17
CANAL [1] - 2:29
cancel [2] - 89:25,
 147:14
cancelled [1] - 62:8
cancelling [1] -
 147:19
cannot [32] - 10:16,
 21:17, 34:5, 50:18,
 52:2, 52:19, 56:26,
 58:9, 64:28, 66:24,
 69:17, 79:6, 79:12,
 81:4, 83:19, 90:12,
 90:13, 91:11, 91:12,
 95:4, 113:7, 113:24,
 115:23, 122:21,
 124:2, 125:9, 126:18,
 134:1, 137:19,
 141:27, 152:15, 154:7
canvassed [2] -
 6:10, 34:26
cap [1] - 88:1
capable [2] - 19:18,
 131:25
carbon [2] - 63:19,
 80:26
card [3] - 10:14,
 10:17, 150:29
carefully [4] - 12:14,
 14:19, 29:21, 40:6
carried [5] - 93:25,
 126:22, 131:10,
 134:26, 141:27
carry [2] - 27:5,
 154:29
carrying [1] - 145:10
Case [1] - 1:5
case [111] - 6:3, 11:4,
 13:17, 16:18, 23:13,
 23:20, 25:17, 25:29,
 28:2, 35:7, 35:8,
 35:29, 36:10, 36:19,
 36:21, 38:15, 40:1,
 40:3, 40:4, 41:7,
 41:10, 41:22, 41:23,
 44:8, 47:12, 47:28,
 54:29, 55:25, 58:26,
 63:6, 63:11, 64:8,

65:15, 67:5, 67:21,
 69:9, 70:3, 71:17,
 75:20, 75:21, 76:20,
 77:12, 79:7, 79:23,
 79:24, 81:3, 87:4,
 90:8, 93:17, 95:7,
 97:22, 99:17, 100:22,
 104:1, 104:18,
 104:21, 109:10,
 109:19, 112:12,
 112:26, 114:2,
 114:20, 115:3,
 115:10, 117:27,
 118:29, 119:8,
 119:25, 119:28,
 120:23, 121:1, 122:1,
 122:11, 125:7,
 128:12, 129:1,
 131:13, 132:27,
 133:14, 134:11,
 135:8, 136:21,
 136:28, 137:5, 138:5,
 138:16, 139:4, 140:8,
 145:18, 145:24,
 146:11, 148:29,
 150:15, 150:26,
 151:8, 151:13,
 151:18, 152:5,
 154:12, 155:11,
 156:11, 156:17,
 156:21, 156:22,
 156:26, 156:27,
 156:28, 158:9, 158:22
case-law [3] -
 119:28, 151:8, 154:12
case/the [1] - 138:25
cases [46] - 15:29,
 41:24, 53:3, 53:10,
 53:25, 57:7, 59:18,
 71:2, 79:29, 80:20,
 99:14, 101:25,
 103:10, 104:17,
 107:20, 107:21,
 107:23, 108:3,
 108:15, 108:23,
 108:28, 109:7, 109:8,
 109:12, 111:4,
 111:16, 112:9,
 112:19, 113:8,
 117:14, 117:24,
 120:7, 121:9, 122:4,
 122:22, 124:11,
 124:16, 125:26,
 126:5, 127:28,
 133:13, 136:8, 140:3,
 154:22, 155:20
categories [4] -
 14:14, 31:8, 31:24,
 106:12
causes [2] - 21:14,

22:8
caveat [1] - 63:8
ceased [1] - 126:18
CENTER [1] - 3:8
central [2] - 67:8,
 143:20
centre [1] - 140:7
CENTRE [1] - 3:9
centrepiece [1] -
 138:4
certain [9] - 52:29,
 63:20, 66:12, 79:4,
 80:29, 95:20, 120:24,
 150:1, 155:5
certainly [14] - 5:13,
 11:9, 44:2, 46:13,
 46:25, 53:22, 66:27,
 76:14, 77:16, 103:15,
 118:25, 136:20,
 137:23, 158:26
certainty [1] - 46:12
certification [7] -
 31:12, 31:14, 31:15,
 31:16, 31:22, 85:18,
 141:26
certified [5] - 14:28,
 15:10, 31:5, 31:25,
 141:29
certifies [1] - 32:8
certify [3] - 1:22,
 15:1, 15:2
chaired [1] - 109:27
challenge [7] -
 52:15, 112:21,
 119:21, 122:6,
 124:10, 124:28,
 134:25
challenged [1] -
 133:10
challenges [4] -
 48:26, 119:17,
 120:18, 122:28
challenging [4] -
 34:11, 108:10, 113:3,
 122:18
chance [1] - 5:12
change [1] - 46:16
Chao [1] - 50:18
Chapter [3] - 55:29,
 131:6, 146:26
character [1] - 121:3
characterisation [1]
 - 60:10
characteristics [1] -
 133:1
charge [1] - 97:26
charged [2] - 106:28,
 130:2
charges [1] - 130:2
Charter [31] - 6:27,

8:19, 9:6, 10:9, 19:7,
 72:3, 72:14, 72:23,
 93:13, 98:18, 99:15,
 100:11, 101:27,
 102:8, 103:1, 103:5,
 104:12, 118:25,
 137:10, 144:22,
 146:5, 149:24,
 150:16, 150:21,
 152:8, 153:14,
 153:18, 156:23,
 158:3, 158:16, 158:17
Charter' [1] - 10:20
check [1] - 60:14
children.. [1] - 147:8
chilled [1] - 124:29
chilling [1] - 121:27
chooses [1] - 32:4
choosing.. [1] -
 148:4
Christmas [1] -
 78:23
Circuit [7] - 47:27,
 48:6, 49:2, 49:5,
 49:12, 75:19, 121:24
circumstance [1] -
 50:2
circumstances [19] -
 58:12, 64:24, 70:18,
 77:24, 78:17, 79:4,
 79:6, 94:15, 101:24,
 112:12, 114:2,
 115:27, 124:3,
 128:29, 129:3,
 129:28, 134:11,
 146:6, 151:18
citation [1] - 111:22
cited [3] - 41:10,
 120:7, 138:17
citizen [2] - 149:10,
 149:16
citizen.. [1] - 149:12
Citizens [1] - 141:21
citizens [11] - 52:10,
 54:2, 64:23, 74:22,
 84:1, 133:25, 142:26,
 143:1, 143:2, 143:8,
 146:29
citizens' [2] - 7:2,
 131:22
Civil [2] - 131:6,
 131:7
civil [1] - 133:20
civil-society [1] -
 133:20
CJEU [2] - 10:1,
 118:25
claim [8] - 53:28,
 75:29, 112:26,
 120:25, 122:12,

123:10, 124:17,
 133:17
claimant [1] - 130:25
claimed [3] - 109:23,
 119:2, 124:4
claiming [2] -
 130:13, 139:14
claims [4] - 21:15,
 52:29, 53:16, 119:8
Clapper [15] - 23:22,
 41:16, 45:13, 46:6,
 46:14, 47:12, 47:28,
 48:20, 49:3, 64:16,
 69:26, 75:20, 96:29,
 121:25
CLARE [1] - 2:19
clarity [1] - 95:20
clause [4] - 87:18,
 92:7, 94:5, 98:19
Clause [9] - 78:26,
 92:10, 92:11, 92:12,
 93:2, 93:5, 93:19,
 94:25
clauses [16] - 33:20,
 35:16, 80:17, 87:2,
 87:5, 87:9, 87:26,
 88:7, 88:9, 88:17,
 92:13, 94:4, 94:8,
 94:12, 94:26, 95:23
Clauses [1] - 95:4
clauses) [1] - 16:8
clean [1] - 18:14
clear [28] - 10:11,
 12:25, 14:11, 16:25,
 21:6, 25:9, 29:1,
 34:17, 46:3, 48:20,
 50:25, 52:25, 52:28,
 56:15, 63:16, 67:21,
 99:15, 100:4, 106:9,
 107:10, 125:8,
 136:12, 144:18,
 144:25, 149:25,
 150:7, 150:15, 151:10
clear-cut [1] - 46:3
clearer [1] - 112:8
clearest [2] - 30:10,
 33:12
clearly [9] - 8:19,
 65:12, 68:23, 84:22,
 86:6, 98:14, 100:29,
 106:12, 125:15
client [2] - 34:16,
 139:14
client's [2] - 28:29,
 33:28
closed [2] - 117:1,
 118:12
closely [2] - 29:21,
 34:13
coach [1] - 82:18

coal ^[1] - 78:24
Code ^[2] - 117:12, 131:6
Code.. ^[1] - 131:7
colleagues ^[1] - 49:14
collect ^[1] - 46:23
collected ^[3] - 46:23, 127:5, 129:26
collection ^[7] - 7:8, 18:27, 18:28, 19:24, 105:21, 131:20, 143:4
Collins ^[4] - 36:24, 77:17, 88:27, 90:24
COLLINS ^[2] - 2:5, 2:27
Collins' ^[2] - 35:25, 39:9
colloquially ^[1] - 89:13
COLM ^[1] - 3:8
combating ^[2] - 58:27, 60:17
combination ^[4] - 25:10, 27:15, 69:24, 88:19
combine ^[1] - 94:12
combined ^[4] - 91:8, 91:10, 91:12, 91:14
coming ^[2] - 15:21, 72:20
comment ^[4] - 40:6, 42:18, 42:19, 107:8
commentator ^[1] - 105:27
comments ^[4] - 20:23, 40:22, 42:6, 44:13
Commerce ^[4] - 15:12, 16:3, 30:15, 31:1
COMMERCIAL ^[1] - 1:3
commission ^[1] - 58:2
Commission ^[55] - 6:10, 12:14, 12:20, 13:12, 14:19, 14:21, 16:23, 17:4, 17:10, 17:22, 18:5, 19:27, 20:13, 20:21, 21:22, 22:25, 23:11, 24:3, 24:22, 25:8, 26:11, 26:27, 27:13, 27:18, 27:24, 28:1, 28:11, 28:25, 29:9, 29:12, 29:22, 34:15, 34:27, 37:16, 38:17, 43:10, 43:11, 43:12, 51:8, 67:8, 71:14, 73:24, 84:11, 98:6, 98:9, 98:14, 101:15, 111:2, 111:3, 111:10, 111:14, 121:9, 127:19, 138:6, 143:3
commission's ^[1] - 27:17
Commission's ^[6] - 11:26, 19:3, 28:13, 28:18, 37:29, 100:13
Commissioner ^[26] - 5:5, 7:1, 20:15, 24:5, 34:16, 43:5, 43:8, 64:7, 73:12, 73:26, 75:6, 76:17, 77:21, 77:22, 79:3, 82:6, 88:28, 88:29, 110:17, 110:19, 116:13, 116:23, 117:5, 117:8, 118:13, 139:13
COMMISSIONER ^[1] - 1:7
Commissioner's ^[10] - 8:7, 12:23, 50:4, 54:16, 76:4, 77:4, 79:14, 101:3, 117:11, 140:18
Commissioners ^[1] - 110:21
commitment ^[4] - 16:4, 26:16, 32:13, 33:4
commitments ^[4] - 13:26, 17:11, 25:1, 30:16
committed ^[3] - 17:13, 58:19, 130:3
Committee ^[2] - 42:15, 127:3
committing ^[2] - 51:20, 58:18
common ^[2] - 6:19, 102:5
communication ^[4] - 43:12, 123:20, 124:4, 124:29
Communication ^[1] - 13:15
communications ^[39] - 19:29, 20:3, 46:11, 55:18, 56:2, 56:5, 66:11, 66:12, 66:14, 68:4, 68:9, 109:23, 110:5, 111:6, 114:1, 114:14, 114:17, 114:25, 115:4, 115:5, 115:9, 115:16, 118:2, 118:6, 119:2, 119:11, 123:21, 124:29, 128:16, 129:2, 129:8, 129:14, 129:22, 129:25, 131:3, 131:12, 132:4, 133:28, 141:13
Communications ^[2] - 110:17, 116:13
communications.. ^[1] - 131:28
Community ^[4] - 25:22, 69:14, 70:11, 99:7
community ^[2] - 17:16, 26:22
comparable ^[1] - 94:7
comparator ^[7] - 16:22, 101:9, 137:13, 137:28, 138:20, 144:3, 150:23
compare ^[2] - 71:4, 137:20
compared ^[2] - 23:10, 87:11
comparison ^[2] - 54:20, 102:3
compatibility ^[2] - 25:25, 109:18
compatible ^[1] - 128:14
compensatable ^[1] - 94:7
compensate ^[1] - 87:9
compensation ^[7] - 78:1, 87:23, 88:2, 88:7, 91:29, 100:26, 118:19
competence ^[10] - 68:14, 104:8, 139:8, 143:28, 145:1, 145:16, 150:12, 150:19, 150:29, 156:13
competent ^[7] - 25:21, 57:28, 58:13, 59:17, 61:17, 157:5, 157:20
compiled ^[3] - 121:13, 121:16, 121:21
complain ^[2] - 115:28, 130:14
complained ^[2] - 113:29, 120:12
complains ^[1] - 114:22
complaint ^[12] - 96:8, 96:13, 108:7, 110:10, 114:25, 117:29, 130:23, 131:1, 139:13, 140:19, 141:1
complaint' ^[1] - 49:19
complaints ^[9] - 22:22, 25:3, 25:14, 25:24, 26:18, 27:1, 27:8, 111:16, 135:17
complaints.. ^[1] - 118:11
complete ^[2] - 90:3, 90:4
completed ^[1] - 96:5
completely ^[3] - 68:13, 71:10, 87:20
compliance ^[16] - 25:18, 26:15, 26:16, 85:13, 86:1, 94:4, 95:3, 95:5, 96:18, 96:19, 99:1, 105:24, 142:23, 146:5, 153:12, 156:1
compliant ^[5] - 29:10, 76:24, 79:10, 97:16, 156:10
complication ^[1] - 53:25
complied ^[2] - 25:17, 96:18
complies ^[1] - 153:4
comply ^[5] - 10:18, 10:19, 15:26, 95:7, 104:14
complying ^[1] - 89:4
component ^[1] - 85:29
comprehensive ^[1] - 141:12
compromised ^[2] - 75:11, 157:7
compulsory ^[1] - 99:29
conceivable ^[1] - 135:18
conceive ^[1] - 88:17
concept ^[5] - 24:29, 30:2, 99:7, 99:14, 104:6
concepts ^[1] - 84:23
concern ^[10] - 73:25, 101:1, 113:5, 122:20, 123:29, 131:8, 133:8, 133:24, 149:2, 151:21
concerned ^[44] - 18:15, 20:14, 20:15, 22:15, 23:3, 24:5, 27:13, 28:12, 29:23, 41:4, 41:23, 43:15, 55:14, 55:20, 58:11, 61:10, 63:5, 65:4, 66:2, 66:3, 71:27, 97:17, 98:27, 102:19, 109:17, 119:1, 126:16, 126:25, 129:7, 131:11, 134:6, 134:23, 134:29, 135:20, 137:20, 138:19, 141:14, 143:17, 150:26, 152:24, 154:14, 154:20, 157:21, 158:14
concerning ^[9] - 111:16, 112:19, 121:15, 121:21, 122:4, 127:5, 136:1, 139:19, 144:28
concerns ^[8] - 22:22, 24:27, 26:10, 29:18, 29:24, 98:1, 131:12, 152:15
conclude ^[3] - 59:26, 79:26, 149:17
concluded ^[1] - 114:29
concludes ^[6] - 14:22, 18:6, 27:24, 114:18, 132:1, 136:4
concluding ^[1] - 29:9
conclusion ^[15] - 6:17, 10:24, 11:14, 11:18, 11:20, 26:26, 28:13, 38:29, 73:26, 109:15, 126:18, 137:14, 140:9, 144:14, 158:1
conclusions ^[6] - 40:26, 45:19, 77:5, 133:3, 136:10, 136:11
concrete ^[1] - 52:25
concreteness ^[1] - 53:13
condition ^[1] - 142:16
conditional ^[1] - 129:21
conditioned ^[1] - 35:4
conditions ^[9] - 58:13, 59:15, 99:1, 120:25, 120:29, 123:13, 141:25, 142:13, 154:25
conductive ^[1] - 147:16
conduct ^[1] - 102:2
conducted ^[3] - 34:15, 52:19, 111:9
conducting ^[1] -

73:13
conferred [3] -
141:6, 144:24, 145:1
confers [1] - 144:23
confidential [1] -
116:27
confidentiality [1] -
157:27
confirm [6] - 5:24,
8:11, 22:2, 26:15,
96:20, 96:22
confirmation [1] -
25:16
confirmed [3] -
28:14, 43:6, 65:13
confirming [2] -
96:12, 96:13
confirms [1] - 19:4
conflation [1] - 36:1
conflict [1] - 5:29
Congress [3] - 9:16,
23:21, 47:22
conjunction [1] -
135:14
connection [3] -
121:3, 129:16, 139:1
conscious [2] -
51:19, 63:27
consequences [2] -
23:4, 117:25
Consequently [1] -
151:20
consider [8] - 12:14,
39:27, 39:29, 42:6,
57:28, 84:10, 88:18,
104:22
consideration [16] -
16:24, 17:29, 20:8,
20:9, 20:10, 20:11,
20:17, 59:29, 64:2,
67:11, 68:26, 76:3,
110:28, 123:2, 144:2,
149:15
considerations [6] -
48:25, 62:9, 133:1,
136:9, 155:27, 157:15
considered [6] -
20:20, 56:16, 56:29,
62:26, 66:27, 142:13
considering [6] -
6:11, 70:18, 72:10,
98:16, 104:2, 149:9
considers [3] -
115:23, 117:10, 134:1
consistent [1] -
71:16
consistently [2] -
86:8, 119:28
constant [1] - 137:27
constitute [3] -
13:28, 37:5, 155:22
constituted [1] -
30:14
constitutes [2] -
66:15, 66:19
constituting [1] -
124:6
Constitution [4] -
47:24, 52:12, 65:6,
68:6
constitution [1] -
9:15
Constitutional [1] -
135:12
constitutional [4] -
9:14, 9:15, 41:5,
74:26
constrained [2] -
63:25, 91:16
constraints [3] -
25:10, 48:14, 54:4
construct [1] - 142:5
constructed [1] -
143:19
consultations [1] -
148:11
consulted [1] - 43:5
contact [3] - 24:26,
31:18, 115:14
contained [8] -
13:15, 13:27, 17:11,
17:19, 24:23, 30:17,
41:4, 109:7
contains [3] - 72:23,
134:6, 146:26
contend [1] - 132:27
contended [2] -
35:24, 35:25
contending [2] -
35:24, 37:4
contends [1] -
132:26
content [4] - 20:2,
20:22, 73:21, 85:12
contention [1] -
114:16
contentions [1] -
146:1
contested [1] -
123:18
context [38] - 7:21,
8:2, 9:23, 10:10, 11:3,
12:25, 18:19, 20:18,
25:8, 32:6, 34:29,
37:27, 38:5, 39:26,
40:16, 53:5, 53:11,
53:21, 53:27, 56:22,
59:12, 61:15, 62:15,
71:4, 80:18, 80:19,
84:23, 86:12, 94:8,
103:15, 103:25,
132:25, 140:12,
143:19, 145:25,
146:13, 152:9, 153:1
context.. [1] - 135:17
continue [6] - 16:4,
32:27, 33:5, 93:24,
126:7, 157:3
continues [1] - 130:5
continuing [1] - 96:9
continuity [3] -
83:22, 83:26, 84:24
continuous [1] -
28:19
contract [2] - 16:7,
33:7
contracting [1] -
48:29
contracts [1] - 77:28
contractual [13] -
16:8, 33:19, 78:28,
87:1, 87:5, 87:18,
87:26, 88:7, 88:17,
90:17, 92:27, 93:9,
95:23
contrary [4] - 8:19,
59:2, 106:5, 149:19
contrast [3] - 104:12,
124:14, 128:12
contribute [1] -
57:23
contributed [1] -
127:23
contribution [1] -
58:27
control [6] - 64:27,
85:21, 85:28, 117:15,
117:26, 120:22
controller [1] - 86:24
controls [2] - 11:2,
143:19
controversy [1] -
23:20
Convention [26] -
10:29, 11:19, 11:23,
72:24, 72:26, 75:29,
102:21, 102:25,
102:28, 103:2, 103:4,
103:6, 103:7, 103:10,
103:19, 103:22,
105:22, 107:13,
109:19, 116:6,
119:29, 120:5,
120:14, 121:1, 128:4,
128:15
Cooper [2] - 22:20,
50:17
cooperation [2] -
25:22, 26:12
Coordinator [1] -
33:16
coordinator [1] -
24:25
copy [2] - 63:19,
80:26
COPYRIGHT [1] -
3:23
core [6] - 74:8,
74:29, 91:6, 92:11,
96:26, 136:12
corollary [1] - 11:4
corporate [1] - 33:20
correct [13] - 9:19,
11:6, 16:23, 43:5,
43:6, 77:5, 77:6,
90:19, 98:11, 102:12,
102:14, 125:12,
139:23
corrected [1] - 43:3
correction [1] -
140:1
corrections [1] -
42:1
correctly [5] - 76:6,
78:1, 79:14, 117:12,
137:13
correspond [1] -
72:24
corresponding [1] -
86:29
COSTELLO [117] -
1:17, 5:4, 5:8, 5:14,
7:23, 8:28, 9:25, 9:28,
10:27, 11:7, 11:12,
13:5, 13:11, 23:14,
23:16, 23:19, 24:17,
26:25, 29:19, 30:1,
30:21, 31:10, 32:19,
33:14, 36:4, 36:9,
36:13, 36:15, 36:19,
36:27, 37:10, 37:13,
37:21, 38:3, 38:7,
38:21, 39:4, 39:7,
39:27, 40:9, 43:18,
47:29, 49:5, 49:9,
49:11, 50:3, 50:8,
55:7, 55:11, 55:23,
60:3, 60:16, 60:23,
61:1, 61:3, 64:13,
70:5, 72:5, 72:8,
77:26, 78:3, 78:7,
78:9, 81:7, 82:4, 82:7,
82:21, 82:26, 82:28,
83:1, 83:8, 83:11,
83:14, 86:18, 89:11,
89:23, 90:14, 90:20,
91:5, 92:9, 92:12,
92:16, 92:20, 96:1,
96:4, 97:9, 97:12,
97:24, 98:5, 98:8,
98:19, 98:23, 98:25,
99:20, 99:22, 102:23,
103:2, 105:2, 105:5,
105:7, 105:10,
105:15, 107:5,
108:17, 108:21,
110:25, 112:1, 112:5,
112:7, 113:19,
119:16, 124:24,
125:11, 134:14,
143:15, 158:24,
158:27
Council [3] - 43:13,
105:29, 145:5
counsel [2] - 51:23,
71:3
countries [3] - 85:22,
107:11, 142:15
countries.. [1] -
142:18
country [13] - 6:4,
9:22, 71:23, 82:14,
83:19, 83:20, 83:24,
84:8, 84:12, 84:15,
85:11, 86:22, 87:10
couple [2] - 76:14,
147:7
coupled [1] - 135:7
course [28] - 7:25,
11:27, 12:9, 12:27,
13:6, 16:22, 23:6,
41:6, 42:3, 43:13,
44:6, 46:24, 55:24,
62:5, 62:13, 63:17,
77:28, 80:15, 90:26,
100:19, 101:3,
104:12, 131:15,
139:3, 143:27, 156:4,
156:20, 158:2
court [93] - 5:7, 8:25,
10:20, 20:14, 29:23,
34:5, 35:27, 35:28,
37:19, 38:26, 40:25,
40:28, 41:3, 41:17,
43:2, 44:7, 45:19,
48:24, 49:4, 52:19,
55:14, 56:15, 56:22,
58:29, 59:12, 59:20,
59:21, 59:27, 60:14,
60:21, 61:10, 62:15,
66:19, 67:19, 68:23,
69:10, 72:10, 74:8,
81:6, 86:12, 95:29,
98:13, 98:21, 98:26,
99:9, 99:16, 99:26,
100:6, 100:23,
102:19, 103:14,
103:21, 104:20,
108:6, 108:10,
108:28, 109:14,

109:17, 110:15,
110:24, 110:27,
113:10, 113:13,
113:18, 113:23,
116:3, 116:7, 119:3,
119:25, 125:9,
125:12, 128:23,
132:11, 138:7,
138:25, 139:2, 140:8,
143:17, 143:25,
144:9, 144:12,
145:24, 147:17,
149:15, 150:26,
151:12, 151:15,
151:26, 154:19,
154:27, 155:23,
157:19, 158:28
COURT [3] - 1:2, 4:4
Court [100] - 13:16,
19:4, 22:29, 28:2,
41:16, 41:19, 46:10,
47:27, 48:1, 48:5,
48:22, 49:1, 49:6,
49:9, 57:6, 57:18,
63:6, 65:14, 68:25,
69:26, 71:9, 75:28,
79:25, 89:5, 98:12,
98:15, 99:27, 101:27,
103:12, 103:22,
103:23, 104:1, 104:6,
104:10, 104:17,
107:25, 110:21,
111:18, 111:25,
112:11, 112:29,
113:28, 114:14,
114:23, 115:3,
115:18, 115:23,
116:10, 116:22,
117:10, 117:22,
117:27, 118:6, 119:7,
119:28, 120:18,
120:23, 121:9,
121:25, 122:2,
122:10, 122:14,
122:24, 123:9,
123:14, 123:22,
123:25, 124:9, 125:7,
126:28, 127:2,
127:14, 127:18,
127:21, 128:2, 129:1,
129:13, 130:7,
130:16, 131:4,
131:18, 132:1, 132:8,
134:1, 134:17,
135:13, 135:17,
136:4, 140:17,
140:20, 144:16,
146:2, 146:3, 149:5,
151:11, 151:20,
151:22, 151:25,
152:1, 155:7

court' [1] - 156:13
Court's [5] - 112:18,
122:3, 123:4, 151:8,
154:12
court's [5] - 38:14,
60:19, 113:16,
122:27, 156:25
courts [11] - 6:19,
21:18, 52:29, 53:26,
71:7, 87:27, 88:12,
100:22, 131:2, 142:5,
151:11
covered [2] - 21:8,
31:21
covers [1] - 141:11
covert [1] - 119:10
create [3] - 17:14,
24:21, 70:28
credibility [1] - 40:29
credibly [1] - 69:21
crime [14] - 56:8,
56:16, 56:21, 56:22,
56:23, 57:24, 58:17,
58:19, 59:24, 60:2,
60:6, 60:15, 61:13,
140:25
crime.. [1] - 58:20
criminal [7] - 44:21,
44:22, 57:22, 106:24,
129:4, 131:15, 131:19
criteria [2] - 58:12,
100:18
criterion [6] - 19:14,
23:13, 23:17, 57:27,
85:5, 120:14
critical [8] - 20:6,
41:3, 71:17, 89:17,
93:18, 100:5, 103:20,
149:2
critically [1] - 48:13
criticise [1] - 73:20
criticised [3] - 54:9,
73:12
criticism [6] - 6:2,
37:2, 42:21, 73:19,
76:16, 133:9
criticisms [1] - 39:17
critique [1] - 42:12
cross [1] - 42:3
cross-examination
[1] - 42:3
crude [2] - 60:9, 78:9
crudely [1] - 77:27
CURRAN [1] - 2:13
CUSH [1] - 3:2
Cush [2] - 77:26,
86:26
Cush's [1] - 87:8
cut [1] - 46:3
cyber [1] - 42:23

D

damage [5] - 22:9,
22:19, 25:12, 53:18,
87:24
damages [9] - 45:4,
50:16, 51:4, 51:16,
52:2, 52:13, 53:28,
91:11, 91:13
DAMIEN [1] - 2:7
danger [1] - 126:6
dangerous [1] -
133:26
Data [8] - 5:5, 7:1,
24:4, 50:4, 54:15,
65:15, 80:26, 82:5
data [140] - 5:28, 6:4,
6:9, 6:24, 7:2, 7:5,
9:22, 10:10, 14:7,
14:12, 14:14, 14:23,
15:2, 15:3, 15:7, 15:8,
15:9, 15:28, 16:2,
16:6, 17:6, 17:23,
18:9, 19:10, 19:11,
19:16, 19:19, 19:25,
21:3, 23:29, 24:20,
27:27, 28:5, 28:7,
30:3, 30:6, 30:25,
31:6, 31:24, 32:2,
32:11, 32:14, 32:21,
32:25, 32:28, 33:3,
33:18, 34:3, 39:11,
41:24, 53:25, 55:14,
55:18, 56:2, 56:5,
56:29, 57:21, 58:8,
58:14, 58:17, 58:23,
58:26, 59:4, 59:17,
61:18, 64:11, 64:22,
64:26, 64:29, 65:3,
65:17, 65:22, 66:13,
66:19, 66:24, 66:28,
67:3, 79:20, 80:19,
80:25, 83:19, 83:24,
84:2, 84:5, 84:8,
85:22, 86:2, 86:22,
88:23, 90:25, 92:21,
92:22, 93:1, 93:20,
93:24, 93:26, 93:28,
94:27, 95:1, 95:2,
95:3, 95:6, 95:7, 95:8,
95:22, 103:8, 106:18,
127:4, 127:5, 127:7,
129:6, 129:27,
135:15, 136:1,
137:17, 139:16,
140:22, 141:3,
141:11, 141:21,
141:25, 141:29,
142:11, 142:16,
142:23, 142:27,

143:8, 143:18,
144:24, 144:28,
145:9, 145:13,
146:11, 150:19, 158:3
DATA [1] - 1:7
data.. [1] - 129:16
date [2] - 110:20,
147:25
dates [1] - 109:9
DAY [1] - 1:18
days [1] - 41:17
deal [11] - 6:13, 7:25,
15:19, 16:15, 54:26,
59:26, 82:15, 89:21,
141:27, 158:21,
158:23
dealing [10] - 25:23,
31:11, 56:15, 60:6,
60:22, 70:25, 82:22,
84:21, 107:27, 112:3
deals [1] - 125:21
dealt [3] - 54:22,
158:7, 158:8
decades [1] - 126:8
decide [5] - 48:25,
98:13, 104:8, 127:20,
154:25
decided [3] - 24:20,
147:14, 156:28
decides [1] - 125:13
deciding [2] - 49:3,
73:16
decision [91] - 6:15,
8:8, 10:7, 12:7, 12:9,
12:10, 13:6, 13:7,
13:19, 13:23, 14:4,
14:11, 24:7, 24:23,
27:21, 29:12, 29:26,
29:27, 30:10, 33:25,
33:26, 34:10, 34:11,
34:28, 35:19, 37:14,
37:16, 37:18, 37:27,
38:13, 39:10, 39:23,
40:16, 41:16, 42:12,
43:7, 43:20, 44:14,
45:15, 48:1, 48:2,
49:6, 50:5, 51:24,
51:25, 52:25, 55:6,
57:9, 59:21, 60:28,
61:2, 62:19, 63:17,
67:8, 67:20, 75:22,
76:5, 79:3, 79:14,
88:29, 92:6, 92:19,
95:28, 97:21, 98:15,
100:9, 101:3, 101:4,
131:12, 132:17,
140:8, 140:12,
140:18, 146:7,
147:19, 147:23,
147:24, 148:1,

148:15, 149:9,
151:17, 152:10,
152:15, 153:6,
154:15, 154:17,
155:17, 155:29,
157:10, 157:22
Decision [7] - 12:24,
31:7, 34:4, 35:4,
43:19, 51:9, 73:25
decision.. [2] -
155:1, 155:22
decisions [12] - 7:21,
48:22, 53:26, 63:28,
100:21, 100:25,
103:14, 104:10,
113:20, 131:5, 131:8,
132:25
declaration [2] -
50:22, 50:23
declaratory [4] -
50:18, 50:26, 51:5,
91:15
declared [1] - 21:16
declines [1] - 22:2
deduced [1] - 58:25
deemed [2] - 115:6,
133:29
defective [1] -
132:12
defence [6] - 36:13,
36:20, 36:26, 58:22,
59:8, 155:9
defend [1] - 154:24
DEFENDANT [2] -
2:10, 2:16
DEFENDANTS [1] -
1:13
deficiencies [11] -
12:16, 12:21, 12:27,
24:4, 24:12, 24:13,
77:20, 88:19, 91:22,
91:24, 132:14
deficiency [5] - 23:9,
79:5, 79:10, 89:2,
89:8
define [3] - 37:15,
58:12, 101:12
defined [1] - 73:3
defines [1] - 84:23
degree [1] - 123:24
delayed [1] - 45:28
delete [1] - 15:28
deleted [1] - 127:7
deletion [1] - 135:15
deliberately [1] -
39:17
delivered [1] -
136:20
demands [1] - 63:10
democratic [1] -

117:25
demonstrate [4] -
 27:8, 64:20, 114:18,
 124:12
demonstrates [1] -
 114:13
denies [3] - 112:20,
 122:5, 124:10
denominator [1] -
 102:6
Denuit [1] - 99:18
deny [3] - 5:24, 22:3,
 96:20
deny' [1] - 8:11
Department [8] -
 15:11, 16:3, 17:18,
 24:26, 30:15, 31:1,
 33:4, 145:22
departure [2] -
 112:19, 122:4
deploy [1] - 74:25
deprecated [1] - 39:3
deprived [3] - 74:22,
 128:5, 145:27
depriving [1] -
 152:27
derive [1] - 98:2
derived [3] - 10:20,
 22:11, 22:14
derives [1] - 23:18
deriving [1] - 10:9
derogates [1] - 65:23
derogation [3] -
 10:15, 152:21, 152:25
derogations [1] -
 33:20
described [10] -
 31:19, 47:7, 47:8,
 71:1, 72:11, 86:15,
 96:6, 96:17, 116:17,
 154:9
describes [2] -
 33:15, 91:7
describing [1] -
 47:11
description [2] -
 49:29, 100:10
descriptions [2] -
 70:20, 70:22
designated [1] -
 55:28
designating [1] -
 85:2
designation [1] -
 24:24
designed [2] - 18:7,
 86:1
desirable [1] -
 117:26
despite [1] - 105:20

destruction [2] -
 88:12, 118:18
destruction/
erasure [1] - 106:19
detail [7] - 42:29,
 43:1, 43:23, 44:3,
 50:21, 77:16, 77:18
detailed [2] - 17:10,
 70:10
details [1] - 117:6
detecting [1] - 56:8
detection [2] - 59:24,
 60:18
determination [3] -
 74:19, 109:29, 110:2
determine [5] -
 19:15, 69:13, 99:25,
 120:3, 151:17
determined [5] -
 53:7, 80:17, 121:1,
 140:3, 153:1
develop [2] - 10:23,
 125:13
developed [3] - 9:13,
 14:21, 123:1
devising [1] - 62:27
diametrically [1] -
 67:13
dichotomy [1] -
 63:16
differ [2] - 84:18,
 84:27
difference [3] -
 45:12, 45:16, 103:20
differences [2] -
 45:15, 52:23
different [23] - 6:22,
 11:3, 25:21, 36:1,
 53:4, 53:20, 77:26,
 80:15, 85:4, 87:13,
 89:14, 104:3, 104:5,
 104:13, 104:24,
 107:27, 113:20,
 113:21, 121:28,
 128:22, 132:15
differentiation [1] -
 19:12
differs [1] - 118:26
difficult [11] - 47:7,
 47:10, 49:23, 70:14,
 70:19, 101:21, 102:2,
 112:15, 124:16,
 125:18, 138:27
difficulties [3] - 94:9,
 100:14, 101:2
difficulty [7] - 47:17,
 48:6, 79:9, 90:2, 90:8,
 96:28, 97:2
Digital [7] - 57:7,
 65:14, 69:4, 72:5,

101:23, 101:29,
 119:19
DIGITAL [1] - 3:2
dilemma [1] - 80:13
diluted [1] - 134:10
direct [6] - 70:25,
 71:5, 112:13, 124:7,
 130:16, 156:16
directed [3] - 7:7,
 75:3, 126:7
Directive [14] - 9:29,
 10:16, 61:24, 66:10,
 80:27, 89:16, 102:7,
 136:23, 146:26,
 152:7, 152:22, 153:3,
 154:6, 157:17
directive [7] - 83:23,
 83:29, 84:17, 85:8,
 152:11, 153:7, 157:22
Directive.. [1] - 65:15
Directive].. [1] -
 149:8
directives [1] - 96:15
Directives] [1] -
 65:25
directly [3] - 86:5,
 123:19, 149:26
disagree [2] - 11:13,
 104:20
disagreement [1] -
 44:12
disagrees [1] -
 114:15
disaster [1] - 75:25
discharge [1] -
 131:13
disclose [5] - 22:13,
 117:3, 155:5, 157:20,
 157:23
disclosed [10] -
 41:27, 51:7, 67:19,
 78:16, 146:7, 148:14,
 148:16, 149:1, 149:2,
 153:7
discloses [2] -
 32:29, 101:1
disclosure [9] -
 23:25, 23:28, 53:16,
 116:27, 118:15,
 148:7, 149:18, 150:1,
 157:8
disclosure.. [1] -
 155:21
discuss [1] - 13:13
discussing [1] -
 27:14
discussion [4] -
 76:8, 76:10, 76:15,
 102:27
discussions [1] -

13:25
dismissed [2] -
 147:29, 148:25
disorder [1] - 56:9
disposal [1] - 155:24
disposes [1] -
 102:10
dispositive [1] -
 103:16
dispute [11] - 45:23,
 46:3, 46:8, 52:8,
 52:10, 52:22, 141:22,
 141:26, 142:1,
 151:15, 152:9
dissemination [2] -
 7:9, 131:21
distinction [5] - 8:6,
 60:11, 60:21, 60:29,
 61:12
distinguishing [1] -
 59:2
divided [2] - 35:11,
 75:21
division [1] - 53:14
doctrine [2] - 53:9,
 53:15
document [2] -
 116:26, 142:19
documents [11] -
 13:22, 13:27, 30:17,
 35:10, 43:9, 43:16,
 60:5, 116:22, 117:1,
 129:24, 131:9
documents.. [2] -
 130:28, 155:12
Doe [1] - 50:18
doggedly [1] - 41:15
DOHERTY [1] - 2:17
domestic [13] - 9:23,
 70:13, 70:27, 93:12,
 113:5, 113:14,
 113:15, 118:1,
 122:19, 123:26,
 131:2, 135:13, 149:15
done [1] - 127:16
DONNELLY [1] - 2:6
doors [1] - 75:24
DORSET [1] - 3:10
doubt [1] - 68:24
down [13] - 19:15,
 35:9, 37:24, 62:22,
 71:19, 72:26, 99:1,
 121:6, 140:11,
 143:26, 145:7, 149:4,
 153:19
DPC [10] - 20:7,
 28:12, 34:25, 35:15,
 35:23, 42:12, 43:7,
 44:14, 44:17, 45:8
DPC's [2] - 6:3,

39:22
draft [1] - 50:5
Draft [2] - 12:23,
 43:18
draw [4] - 15:19,
 45:19, 55:1, 117:19
drawn [1] - 39:9
draws [1] - 60:29
drew [2] - 37:26,
 80:2
drive [1] - 82:18
driver [1] - 113:22
dropped [1] - 130:2
dual [1] - 147:6
DUBLIN [7] - 2:8,
 2:14, 2:19, 2:25, 2:29,
 3:5, 3:10
due [2] - 124:20,
 157:26
duration [1] - 106:15
during [1] - 32:25
duty [1] - 117:2

E

e-mails [1] - 95:13
easily [1] - 136:1
easy [2] - 48:25,
 117:23
ECHR [4] - 72:25,
 97:22, 108:12, 108:22
economic [1] - 56:10
effect [15] - 36:17,
 36:24, 37:4, 38:19,
 40:2, 45:15, 47:12,
 69:23, 70:17, 89:26,
 93:12, 104:9, 104:13,
 149:29, 154:7
effective [27] - 17:25,
 27:19, 27:25, 28:8,
 58:26, 64:27, 69:16,
 70:8, 98:29, 106:25,
 108:3, 108:5, 108:12,
 117:5, 120:22,
 123:27, 124:15,
 127:22, 128:9, 130:8,
 132:9, 134:20, 136:3,
 142:26, 149:7,
 154:14, 155:16
effectively [12] -
 42:11, 50:8, 64:13,
 77:29, 104:7, 112:23,
 113:25, 122:8, 123:7,
 136:25, 136:27,
 137:15
effectiveness [8] -
 28:21, 56:20, 123:25,
 126:1, 130:11, 132:5,
 134:19, 152:28

effects ^[1] - 121:27
efficacy ^[3] - 42:15, 98:1, 126:21
eight ^[7] - 44:14, 45:19, 54:1, 54:15, 54:17, 55:10, 147:4
EILEEN ^[1] - 2:21
either ^[12] - 7:2, 9:8, 22:2, 22:8, 22:19, 76:2, 89:24, 91:17, 110:4, 123:17, 139:23, 154:16
elaborate ^[2] - 7:27, 55:2
elaborated ^[3] - 17:26, 24:7, 79:25
elaborating ^[1] - 25:8
electronic ^[8] - 20:2, 21:5, 22:14, 55:18, 66:11, 68:8, 140:21, 141:12
ELECTRONIC ^[1] - 3:7
element ^[1] - 89:17
elements ^[3] - 25:21, 76:3, 85:12
eleven ^[1] - 158:27
elsewhere ^[1] - 42:14
embark ^[1] - 68:25
embarked ^[1] - 143:25
emerged ^[1] - 36:13
emerges ^[1] - 107:23
emphasis ^[3] - 14:3, 34:27, 52:24
emphasise ^[9] - 12:7, 15:1, 16:16, 28:28, 53:2, 53:19, 64:6, 101:3, 142:7
emphasised ^[7] - 51:10, 78:26, 93:5, 93:18, 111:6, 114:27, 144:7
emphasises ^[4] - 30:2, 68:21, 102:29, 118:7
emphatically ^[1] - 51:25
employ ^[1] - 5:23
employed ^[1] - 18:24
employment ^[1] - 32:7
empt ^[1] - 134:4
enable ^[1] - 135:29
enabled ^[3] - 67:14, 73:17, 128:22
encompass ^[2] - 111:8, 121:11
encompassed ^[1] - 62:16
encountered ^[1] - 84:19
end ^[7] - 10:18, 49:20, 89:24, 94:19, 99:11, 111:22, 139:25
endangering ^[1] - 106:23
enforce ^[3] - 92:21, 93:1, 94:26
enforcement ^[5] - 17:2, 17:8, 42:24, 55:19, 92:11
engage ^[4] - 79:14, 92:6, 144:1, 156:6
engaged ^[2] - 8:5, 68:2
engaging ^[2] - 76:14, 76:17
English ^[3] - 85:1, 110:8, 156:11
enhances ^[1] - 118:20
enjoys ^[3] - 6:5, 31:6, 32:26
enough ^[1] - 78:7
enshrined ^[2] - 28:8, 153:18
ensure ^[17] - 23:29, 25:3, 25:14, 26:2, 59:15, 83:22, 86:1, 86:23, 87:4, 94:4, 112:22, 122:7, 123:5, 149:11, 152:13, 155:29, 157:19
ensured ^[1] - 127:22
ensures ^[10] - 14:22, 18:23, 26:1, 26:12, 26:29, 27:25, 30:5, 84:12, 117:5, 126:20
ensuring ^[5] - 85:13, 116:20, 117:11, 120:22, 153:29
entail ^[1] - 19:20
entails ^[1] - 95:26
enter ^[2] - 32:3, 145:25
entered ^[1] - 13:12
entirely ^[9] - 29:1, 60:1, 76:22, 76:25, 80:3, 83:18, 100:18, 104:13, 135:27
entirety ^[1] - 15:23
entitle ^[1] - 51:15
entitled ^[11] - 34:7, 35:29, 66:28, 95:7, 99:2, 104:4, 125:8, 129:17, 129:23, 129:26, 150:17
entitlement ^[12] - 49:3, 52:10, 52:14, 63:24, 75:28, 87:29, 90:5, 91:15, 94:25, 115:28, 122:28, 133:16
entitlements ^[3] - 63:21, 74:26, 88:22
entitling ^[1] - 53:28
entrust ^[1] - 117:26
entry ^[4] - 146:28, 148:15, 150:27, 152:10
enumerated ^[1] - 133:29
envisaged ^[4] - 8:19, 99:8, 103:5, 110:27
envisages ^[1] - 80:20
EOIN ^[1] - 2:16
equally ^[2] - 21:6, 75:22
equivalence ^[2] - 80:24, 84:25
equivalent ^[7] - 79:21, 80:8, 84:16, 85:16, 88:8, 103:7, 143:12
erasure ^[1] - 28:6
errand ^[1] - 143:25
error ^[3] - 41:4, 41:10, 57:4
errors ^[1] - 42:4
eschewed ^[1] - 128:10
especially ^[1] - 134:5
essence ^[27] - 5:16, 5:21, 8:2, 8:3, 28:7, 63:21, 65:3, 71:16, 71:23, 71:24, 71:25, 72:15, 73:4, 73:9, 73:29, 74:4, 74:13, 74:17, 133:24, 139:14, 149:12, 149:18, 153:20, 154:1, 156:24, 157:25, 158:17
essential ^[7] - 59:16, 73:29, 77:13, 84:25, 88:22, 132:16, 147:4
essentially ^[3] - 22:19, 84:16, 85:16
establish ^[15] - 23:1, 50:15, 50:27, 51:14, 51:15, 65:29, 67:23, 69:7, 84:14, 87:29, 96:29, 108:13, 108:18, 108:19, 111:11
established ^[13] - 53:18, 59:19, 65:24, 74:21, 93:29, 99:28, 100:24, 109:25, 114:3, 116:14, 121:19, 141:23, 142:20
establishing ^[1] - 47:17
EU ^[46] - 5:28, 7:2, 9:26, 15:8, 17:6, 17:23, 18:10, 19:12, 21:3, 22:27, 23:9, 23:10, 23:29, 24:20, 26:18, 30:7, 30:14, 32:6, 32:14, 32:22, 33:18, 44:20, 44:21, 48:19, 48:21, 54:2, 54:21, 63:16, 65:13, 67:6, 67:7, 67:12, 70:25, 71:6, 71:18, 74:22, 78:17, 79:22, 87:11, 96:8, 96:12, 101:9, 103:1, 103:5, 105:21, 156:12
EU-U.S ^[1] - 17:6
EU-US ^[1] - 30:14
Europe ^[3] - 49:18, 137:16, 142:20
EUROPE ^[1] - 3:2
European ^[40] - 6:6, 10:29, 11:19, 13:16, 43:9, 49:1, 64:23, 67:24, 71:13, 75:27, 85:24, 85:27, 88:2, 88:8, 88:15, 88:23, 101:14, 103:22, 104:1, 105:22, 107:13, 111:3, 118:24, 128:1, 138:5, 142:5, 142:10, 144:15, 145:5, 146:29, 149:10, 149:12, 149:16, 150:12, 150:28, 151:22, 151:27, 152:16, 153:24
event ^[11] - 10:22, 50:25, 64:6, 67:7, 87:7, 90:10, 96:18, 97:16, 98:13, 118:16, 157:25
events ^[1] - 60:18
eventually ^[1] - 41:12
everywhere ^[1] - 143:29
evidence ^[38] - 7:7, 9:18, 22:21, 22:23, 40:23, 41:13, 42:4, 42:7, 42:12, 42:26, 44:9, 45:25, 46:18, 46:19, 47:1, 47:4, 52:9, 54:6, 57:20, 57:29, 58:25, 59:10, 64:10, 64:28, 69:22, 69:27, 70:21, 73:28, 75:3, 75:4, 97:5, 102:16, 104:22, 129:6, 140:19, 149:16, 157:23, 157:27
evidence' ^[1] - 148:12
evident ^[2] - 100:12, 145:18
evolution ^[1] - 138:1
evolved ^[2] - 136:19, 137:3
ex ^[1] - 106:25
exact ^[1] - 93:11
exactly ^[19] - 6:15, 16:26, 27:12, 36:18, 49:17, 64:16, 67:12, 69:23, 70:23, 75:8, 76:1, 78:10, 90:22, 92:18, 100:26, 112:4, 112:6, 113:22
examination ^[7] - 38:14, 39:21, 42:3, 85:10, 106:17, 118:11, 157:11
examine ^[4] - 12:2, 88:18, 117:29, 155:11
examined ^[1] - 127:14
examines ^[2] - 37:29, 38:1
examining ^[3] - 108:7, 123:16, 140:19
example ^[9] - 16:6, 33:7, 37:13, 58:21, 78:10, 87:19, 87:22, 87:26, 88:1
examples ^[2] - 65:10, 88:18
except ^[6] - 7:19, 33:26, 36:23, 59:18, 87:23, 140:5
exception ^[4] - 9:29, 10:2, 124:9, 131:8
exceptional ^[2] - 51:26, 155:20
exceptionally ^[2] - 18:28, 47:6
exceptions ^[1] - 54:5
excessive ^[1] - 74:6
excessively ^[2] - 70:14, 70:19
exclude ^[3] - 20:1, 147:15, 149:9

excluded [6] - 54:4, 62:23, 94:1, 94:5, 115:23, 134:2
excludes [1] - 93:5
excluding [3] - 60:2, 62:20, 62:24
exclusionary [1] - 44:21
excuse [3] - 37:9, 98:7, 124:25
execution [1] - 118:16
executive [2] - 116:23, 135:27
Executive [5] - 86:7, 98:3, 100:17, 100:20, 107:2
executives [1] - 96:15
exemption [1] - 19:13
exemptions [1] - 6:7
exercise [11] - 69:18, 70:20, 72:10, 72:13, 73:16, 86:28, 92:7, 102:3, 106:24, 153:17, 156:6
exercising [1] - 6:25
exigencies [1] - 73:15
exist [1] - 21:13
existence [17] - 17:25, 22:3, 22:8, 23:1, 65:29, 112:13, 112:27, 114:4, 119:9, 120:26, 121:18, 122:13, 123:11, 124:12, 124:18, 134:20, 142:12
exists [1] - 57:29
expand [1] - 23:21
expansive [1] - 113:16
expect [4] - 63:19, 77:11, 100:5, 103:25
expected [2] - 77:3, 121:15
experienced [1] - 118:10
expert [4] - 40:26, 42:22, 42:23, 69:23
expertise [2] - 26:13, 27:4
experts [2] - 47:11, 53:14
explain [3] - 23:12, 109:11, 125:27
explained [5] - 9:18, 33:28, 34:8, 96:23, 111:29

explains [6] - 83:16, 102:25, 110:15, 110:26, 113:23, 116:4
explanation [3] - 41:5, 41:9, 140:2
explanations [1] - 22:7
exporter [8] - 92:22, 93:1, 93:20, 93:28, 94:26, 95:3, 95:6, 95:7
express [3] - 33:25, 42:10, 103:8
expressed [2] - 49:21, 53:23
expressly [2] - 61:23, 62:16
extend [1] - 32:4
extensive [2] - 72:28, 117:28
extent [8] - 10:1, 16:29, 34:17, 56:24, 89:12, 108:25, 150:21, 153:2
external [3] - 85:28, 142:21, 152:14
extract [1] - 145:20
extracts [3] - 10:4, 30:23, 144:16
extraneous [1] - 11:28
extraordinarily [1] - 47:7
extremely [1] - 47:6
extremes [1] - 89:24

F

FAA [2] - 22:20, 50:17
face [1] - 39:10
FACEBOOK [1] - 1:12
Facebook [9] - 5:6, 11:10, 14:13, 37:6, 42:16, 46:18, 82:6, 102:17, 104:16
Facebook's [5] - 16:18, 68:12, 69:22, 138:6, 158:22
Facebook.. [2] - 141:3
facial [1] - 119:17
facilitate [1] - 33:16
facility [1] - 74:12
fact [60] - 7:5, 10:25, 34:27, 37:28, 41:27, 43:8, 45:22, 45:27, 48:21, 49:17, 51:8, 57:9, 60:12, 60:18, 62:25, 64:2, 64:15, 68:2, 71:3, 75:20, 76:23, 77:23, 78:15, 78:22, 89:8, 91:9, 91:11, 91:12, 91:14, 94:23, 95:27, 97:6, 97:20, 98:2, 98:14, 100:19, 101:16, 104:1, 107:27, 108:15, 110:11, 114:11, 119:21, 120:28, 126:15, 129:3, 129:13, 135:7, 138:7, 138:24, 142:10, 143:17, 144:20, 149:13, 151:5, 152:14, 156:20, 156:25, 157:7, 158:15
facto [1] - 106:25
factors [3] - 40:28, 99:27, 130:7
facts [9] - 23:27, 67:22, 109:13, 129:18, 143:20, 147:4, 151:13, 151:28, 154:26
facts.. [1] - 155:18
factual [4] - 94:20, 113:19, 131:26, 152:2
failed [4] - 15:26, 37:16, 114:18, 131:2
failing [1] - 154:7
failure [2] - 16:1, 157:19
fair [4] - 36:27, 53:14, 99:2, 146:5
fairly [1] - 64:25
fairness [4] - 53:2, 77:16, 97:19, 136:7
fall [4] - 115:19, 133:21, 145:11, 150:11
fallback [1] - 90:10
falling [2] - 56:1, 56:4
falls [7] - 11:22, 18:21, 20:19, 88:15, 102:17, 135:9, 158:16
familiar [2] - 22:23, 95:25
family [1] - 131:22
far [5] - 49:2, 60:22, 65:4, 72:23, 158:12
fashion [1] - 64:29
favour [2] - 110:2, 118:17
favourable [1] - 70:12

feared [2] - 111:8, 121:12
feasible [2] - 18:29, 126:4
feature [5] - 12:23, 101:28, 138:6, 142:23, 156:22
features [4] - 27:18, 97:27, 98:22, 120:21
February [1] - 43:13
Federal [1] - 13:24
federal [2] - 9:15, 48:15
feeds [1] - 61:11
fell [1] - 56:23
felt [2] - 56:22, 65:12
Ferguson [3] - 97:7, 97:10, 105:12
fetched [1] - 158:13
few [1] - 12:8
field [2] - 27:2, 117:23
fields [1] - 126:13
fifth [2] - 52:6, 52:9
fight [2] - 56:20, 57:1
fighting [3] - 57:24, 58:17, 60:15
fills [1] - 92:24
final [2] - 44:29, 54:2
finalising [1] - 31:15
Finally [1] - 122:1
finally [4] - 11:25, 26:13, 106:27, 133:7
financial [3] - 6:7, 71:15, 87:24
findings [6] - 17:22, 20:6, 34:29, 35:2, 40:21, 46:5
fine [2] - 28:27, 77:25
finish [3] - 5:12, 39:19, 55:17
finished [2] - 48:18, 98:20
first [21] - 12:8, 18:2, 21:10, 35:11, 45:20, 46:3, 54:26, 55:3, 63:14, 73:3, 75:20, 89:1, 103:9, 103:16, 108:2, 114:23, 137:4, 139:5, 145:16, 150:5, 158:6
First [1] - 152:5
Firstly [1] - 123:13
FISA [4] - 21:14, 50:19, 52:19, 68:23
FISC [2] - 142:25, 143:6
fit [2] - 70:22, 118:14
fits [2] - 89:13, 89:29

FITZGERALD [1] - 2:23
five [3] - 47:3, 83:4, 139:10
fixed [4] - 47:23, 47:26, 62:2, 116:6
flag [1] - 15:15
flowing [1] - 153:5
flows [2] - 90:25, 142:17
focus [2] - 8:7, 85:11
focused [1] - 60:8
focusing [1] - 60:24
focussing [1] - 7:4
FOIA [1] - 96:24
follow [4] - 33:16, 62:26, 87:7, 139:17
following [1] - 106:17
following [12] - 1:23, 17:28, 20:12, 28:24, 34:14, 59:22, 79:1, 84:13, 105:28, 111:2, 123:13, 145:2
Following [1] - 147:24
follows [3] - 16:28, 129:4, 129:20
FOLLOWS [2] - 5:1, 82:2
footnote [7] - 21:26, 22:5, 23:14, 23:15, 24:14, 51:11, 60:28
footnoted [1] - 145:19
footnotes [4] - 21:21, 21:26, 24:16, 97:21
FOR [4] - 2:21, 2:27, 3:2, 3:7
force [4] - 36:16, 37:4, 40:1, 85:16
foregoing [1] - 157:15
foreign [5] - 18:25, 24:26, 105:20, 107:12, 143:1
foreseen [2] - 134:5, 135:7
forgive [1] - 91:4
forgotten [2] - 60:1, 68:13
form [7] - 46:19, 85:28, 88:24, 106:4, 130:27, 142:22, 146:19
formal [1] - 135:8
former [3] - 110:21, 111:2, 150:28
forms [1] - 155:9
formula [5] - 46:20,

46:24, 62:10, 63:11, 63:12
formulating [1] - 48:6
formulation [7] - 8:29, 60:19, 62:20, 70:6, 74:16, 125:17, 126:27
forth [2] - 16:22, 56:14
forward [11] - 31:27, 32:17, 33:11, 60:9, 67:28, 68:20, 110:24, 116:2, 119:4, 130:21, 147:3
founded [5] - 64:20, 97:29, 101:1, 138:28, 155:17
four [3] - 44:23, 82:18, 83:3
Fourth [2] - 52:12, 52:13
fourth [3] - 33:12, 40:19, 51:13
FRA [5] - 10:5, 11:10, 144:16, 145:20, 158:2
fraction [1] - 19:29
frame [1] - 8:14
framework [4] - 28:18, 54:13, 59:23, 61:10
France [1] - 147:27
FRANCIS [1] - 2:11
free [3] - 27:6, 124:4, 145:12
FREE [1] - 3:9
Freedom [1] - 23:24
freedom [1] - 86:28
freedoms [4] - 72:11, 72:14, 72:16, 98:27
freestanding [1] - 61:29
French [4] - 76:12, 80:8, 85:5, 147:6
frequent [1] - 133:9
Friday [14] - 10:6, 29:16, 34:8, 40:20, 71:21, 75:1, 78:26, 101:8, 101:20, 136:16, 138:21, 144:8, 144:15, 144:17
Friends [4] - 57:4, 76:21, 136:18, 156:4
Friends' [2] - 145:19, 156:29
FRY [1] - 2:28
FSB [1] - 119:3
full [11] - 36:16, 36:24, 37:4, 40:1, 146:6, 150:5, 153:7,

154:26, 155:21, 157:8, 157:21
fully [5] - 16:7, 33:7, 59:16, 89:27, 154:28
function [3] - 53:15, 72:9, 95:21
functioning [1] - 116:15
Functioning [1] - 43:11
functions [4] - 27:6, 91:16, 96:26, 151:10
fundamental [21] - 18:8, 19:6, 23:2, 27:27, 28:7, 41:4, 56:26, 63:20, 66:1, 84:6, 85:8, 85:11, 86:27, 90:2, 90:8, 93:16, 139:7, 153:14, 153:20, 154:1, 155:16
fundamentally [2] - 63:1, 106:5
furnished [1] - 61:6
furthermore [1] - 144:1
Furthermore [3] - 126:12, 129:23, 152:12
future [3] - 50:28, 91:17, 91:18

G

G10 [1] - 127:19
GALLAGHER [21] - 2:10, 4:6, 34:23, 36:8, 36:12, 36:14, 36:18, 36:23, 37:2, 37:9, 37:12, 37:20, 37:22, 38:4, 38:8, 39:6, 39:15, 40:8, 60:27, 61:2, 61:4
Gallagher [12] - 38:25, 38:28, 39:4, 40:11, 43:28, 62:29, 132:26, 138:4, 139:23, 143:28, 150:23
Gallagher's [6] - 48:3, 61:5, 61:11, 137:4, 140:2, 150:15
games [1] - 80:13
gap [1] - 92:24
gaps [2] - 34:19, 77:21
gather [1] - 16:10
gathered [1] - 146:17
gathering [3] - 55:18, 55:19, 55:21

General [7] - 73:8, 83:16, 86:15, 87:7, 101:23, 138:25, 139:24
general [21] - 18:14, 56:25, 56:28, 58:7, 58:16, 59:18, 68:17, 72:18, 103:9, 107:15, 108:24, 111:16, 112:20, 113:6, 116:15, 120:18, 122:5, 122:20, 124:1, 153:23
General's [4] - 80:4, 82:24, 92:2, 139:9
generalised [3] - 19:10, 20:1, 141:4
generally [4] - 44:20, 55:21, 84:19, 112:15
Generals [1] - 25:28
generous [1] - 125:2
genuine [1] - 152:9
genuinely [2] - 72:18, 153:23
geographical [2] - 57:27, 58:1
German [4] - 127:14, 149:24, 150:16, 156:18
germane [1] - 102:18
GILMORE [1] - 3:8
gist [1] - 65:1
Given [1] - 135:25
given [15] - 47:1, 67:7, 77:23, 85:22, 90:22, 92:11, 93:9, 112:14, 114:1, 115:27, 136:2, 140:2, 146:6, 146:20, 147:9
Glencar [2] - 51:24, 51:25
global [1] - 84:13
goals [1] - 68:18
GOODBODY [1] - 3:3
Gorski [1] - 47:7
Gorski's [2] - 45:25, 69:27
governed [2] - 67:7, 150:10
governing [2] - 70:10, 70:12
government [15] - 5:23, 17:9, 17:13, 20:10, 22:13, 24:20, 25:2, 26:17, 42:2, 42:18, 51:19, 53:5, 133:9, 142:29, 156:11
Government [4] - 116:21, 131:4, 132:2,

135:29
government's [2] - 107:16, 150:4
Government's [1] - 131:18
governments [1] - 24:27
governs [1] - 51:18
GRAINNE [1] - 3:8
GRAND [1] - 2:29
grant [1] - 100:25
granted [5] - 58:14, 58:16, 58:24, 59:9, 61:18
grave [1] - 64:10
great [2] - 56:24, 59:26
greater [6] - 76:17, 103:6, 108:11, 113:9, 122:23, 124:8
ground [4] - 49:18, 130:2, 131:2, 147:16
grounded [1] - 95:11
grounding [1] - 102:9
grounds [18] - 56:1, 56:4, 75:15, 115:7, 115:19, 133:21, 133:29, 146:29, 148:2, 149:10, 149:13, 149:18, 153:6, 155:21, 156:7, 157:10, 157:21, 157:26
Group [2] - 43:10, 43:14
group [1] - 123:18
Guantanamo [2] - 112:5, 115:14
guaranteed [10] - 19:7, 66:16, 72:24, 84:7, 88:23, 98:28, 124:7, 153:15, 154:8, 154:13
guaranteed [1] - 69:19
guarantees [4] - 26:6, 27:19, 83:20, 85:20
guards/revenue [1] - 119:23
guide [1] - 85:6
guilt [1] - 129:28

H

had.. [1] - 147:8
half [1] - 39:14
hand [4] - 16:19,

93:21, 155:26, 155:29
handed [3] - 10:24, 40:20, 71:20
Handed [1] - 145:22
handful [1] - 107:22
handling [2] - 96:8, 96:12
happily [1] - 37:24
harbour [1] - 85:17
Harbour [4] - 13:14, 43:12, 71:14, 140:12
hard [1] - 69:21
hardly [2] - 49:18, 135:18
harm [4] - 50:27, 64:11, 91:17, 91:18
harmful [1] - 117:24
HAYES [1] - 2:13
headline [3] - 7:28, 76:9, 98:22
health [2] - 56:12, 147:1
hear [1] - 105:2
HEARD [1] - 1:17
heard [9] - 40:23, 45:1, 73:29, 75:21, 76:21, 77:12, 80:14, 104:22
hearing [2] - 5:5, 99:3
HEARING [4] - 1:17, 5:1, 82:1, 159:1
heart [2] - 41:7, 142:10
height [1] - 46:19
held [15] - 11:3, 65:15, 82:9, 110:18, 111:26, 116:25, 118:9, 119:28, 120:24, 121:9, 122:2, 134:17, 135:13, 148:28, 155:8
held.. [1] - 127:8
helpful [2] - 76:15, 105:17
helpfully [1] - 42:2
hence [1] - 134:20
here' [1] - 51:25
hesitant [1] - 79:28
hiding [1] - 83:9
hierarchical [1] - 130:16
high [14] - 47:6, 58:1, 80:21, 83:29, 84:6, 84:24, 85:7, 105:23, 110:12, 110:18, 115:10, 116:25, 118:9
High [2] - 140:17, 140:20
HIGH [1] - 1:2

high-profile ^[1] - 115:10
higher ^[3] - 6:5, 107:15, 125:8
highlighter ^[1] - 83:8
highlights ^[1] - 117:28
highly ^[1] - 134:10
himself ^[1] - 54:6
historic ^[2] - 50:24, 51:8
hived ^[1] - 57:5
hmm ^[15] - 8:28, 9:27, 10:27, 11:12, 13:5, 13:11, 26:25, 29:19, 30:21, 32:19, 38:3, 38:7, 60:16, 97:24, 98:23
hoax ^[1] - 114:13
Hogan ^[9] - 64:1, 64:16, 65:12, 66:6, 66:20, 67:11, 67:29, 68:12, 139:6
hold ^[1] - 118:9
holding ^[2] - 53:26, 141:24
holds ^[2] - 110:18, 116:24
Home ^[1] - 145:22
hope ^[1] - 52:6
hostile ^[1] - 5:26
hours ^[1] - 76:14
HOUSE ^[1] - 2:13
House ^[1] - 42:15
how' ^[1] - 93:10
huge ^[3] - 44:10, 75:2, 102:15
Human ^[15] - 11:1, 11:19, 48:22, 49:1, 75:28, 103:23, 103:24, 104:2, 104:6, 104:10, 104:17, 107:13, 107:25, 111:3, 128:1
human ^[3] - 32:5, 107:17, 108:6
Hungarian ^[3] - 133:10, 133:25, 135:6
Hungary ^[1] - 133:27
Hyland ^[11] - 38:25, 48:23, 63:4, 77:15, 93:9, 94:22, 97:19, 107:21, 109:8, 111:22, 132:27
HYLAND ^[3] - 2:11, 94:17, 94:24
hypothetical ^[2] - 64:8, 152:1

I
i) ^[1] - 93:2
idea ^[1] - 90:25
ideas ^[1] - 62:7
identified ^[19] - 23:10, 23:11, 26:11, 28:11, 34:19, 74:16, 87:6, 89:4, 89:7, 92:2, 94:9, 97:22, 100:14, 101:2, 101:22, 102:8, 105:27, 107:26, 134:7
identifies ^[4] - 12:20, 22:25, 24:3, 24:6
identify ^[7] - 21:22, 25:9, 31:24, 57:21, 94:22, 126:15, 143:13
identifying ^[1] - 73:15
ignores ^[1] - 37:28
ignoring ^[1] - 54:13
ii ^[1] - 96:14
II ^[1] - 16:28
III ^[8] - 13:28, 17:13, 23:18, 24:23, 30:17, 31:2, 41:23, 95:28
iii ^[1] - 32:13
illegality ^[1] - 110:1
illusionary ^[1] - 50:9
illusory ^[1] - 128:9
immediate ^[2] - 104:13, 149:22
immediately ^[3] - 11:20, 12:24, 62:1
imminence ^[1] - 46:12
imminent ^[1] - 64:10
immunity ^[2] - 45:3, 45:4
immutably ^[1] - 47:23
impact ^[1] - 156:23
impaired ^[4] - 71:25, 73:4, 74:2, 74:18
impartial ^[2] - 99:4, 118:7
impending ^[2] - 46:13, 46:26
imperative ^[1] - 148:2
implead ^[1] - 52:11
implemented ^[2] - 84:18, 84:26
implicated ^[1] - 58:19
implication ^[2] - 6:3, 68:26
implications ^[1] - 34:10

implying ^[1] - 34:29
importance ^[4] - 35:9, 67:8, 120:22, 135:16
important ^[14] - 13:22, 36:2, 48:13, 50:20, 53:18, 68:17, 83:26, 84:4, 103:19, 109:13, 117:15, 128:10, 132:24, 136:17
importer ^[2] - 94:28, 95:2
impose ^[2] - 19:8, 103:25
imposed ^[5] - 48:15, 63:7, 66:9, 67:12, 79:22
imposes ^[1] - 108:23
imposing ^[1] - 26:13
impossibility ^[1] - 70:28
impossible ^[8] - 62:21, 69:18, 69:26, 69:28, 70:14, 70:19, 112:15, 130:29
improper ^[2] - 27:6, 128:11
impropriety ^[1] - 115:11
improved ^[1] - 143:5
In.. ^[2] - 127:14, 128:1
in.. ^[2] - 65:14, 98:18
inability ^[2] - 74:25, 95:6
inaccuracy ^[2] - 94:20, 94:23
inadequacies ^[2] - 89:15, 91:19
inadequacy ^[5] - 82:15, 87:10, 87:17, 89:2, 91:1
inadequate ^[4] - 37:15, 38:11, 39:24, 87:14
inadmissible ^[1] - 21:16
inapplicable ^[1] - 152:16
inapposite ^[2] - 71:10, 90:28
inappropriate ^[1] - 90:27
inbox ^[1] - 41:23
include ^[2] - 134:8, 135:25
included ^[2] - 30:28, 138:7
includes ^[3] - 16:20,

25:19, 27:24
including ^[17] - 14:20, 19:27, 20:28, 21:3, 21:16, 28:15, 28:19, 35:2, 35:23, 38:18, 43:9, 84:7, 86:5, 93:13, 93:23, 117:1, 133:13
incompatible ^[1] - 128:4
incongruity ^[1] - 16:18
inconsequential ^[1] - 43:24
inconsistent ^[2] - 9:5, 49:25
inconvenienced ^[1] - 66:4
incorporated ^[1] - 79:18
incorrect ^[2] - 8:3, 49:29
increasingly ^[1] - 76:16
Indeed ^[2] - 130:29, 141:10
indeed ^[14] - 33:25, 44:21, 47:9, 49:14, 54:6, 57:13, 61:9, 63:3, 68:17, 69:27, 70:20, 73:24, 103:6, 134:8
independence ^[4] - 99:6, 114:27, 130:18, 130:20
independent ^[28] - 17:15, 25:16, 25:27, 26:6, 26:21, 27:3, 28:17, 52:17, 59:20, 74:21, 85:29, 86:7, 86:8, 99:4, 99:7, 100:2, 107:1, 110:9, 114:26, 116:23, 118:7, 127:18, 128:24, 132:21, 142:9, 142:22, 157:11
INDEX ^[1] - 4:1
index ^[1] - 105:5
indicate ^[2] - 32:7, 106:12
indicated ^[2] - 31:21, 117:22
indicates ^[1] - 135:9
indications ^[1] - 27:9
indicia ^[1] - 100:5
indirect ^[3] - 57:22, 58:9, 71:2
indiscriminate ^[1] - 56:28
indispensable ^[4] -

68:9, 68:18, 120:13, 140:22
individual ^[37] - 22:1, 25:3, 25:14, 26:2, 26:7, 26:9, 26:29, 28:4, 48:29, 89:18, 89:19, 90:29, 96:8, 96:12, 96:21, 101:13, 102:15, 104:8, 109:20, 112:26, 114:24, 117:24, 120:11, 120:24, 122:11, 124:12, 124:17, 126:9, 127:5, 127:20, 134:23, 135:16, 137:9, 137:15, 144:2, 144:4, 145:26
individual's ^[3] - 25:24, 69:13, 70:11
individuals ^[13] - 21:3, 21:15, 25:15, 26:18, 27:7, 32:12, 58:18, 86:28, 112:20, 122:5, 124:10, 143:7, 145:8
inextricably ^[2] - 126:1, 134:19
inflexible ^[1] - 120:16
influence ^[1] - 27:7
inform ^[2] - 32:12, 95:6
information ^[55] - 14:27, 18:25, 22:14, 26:3, 28:27, 30:11, 31:9, 31:19, 31:20, 31:21, 32:5, 33:6, 42:25, 51:6, 52:16, 53:11, 53:16, 53:17, 64:9, 66:2, 67:19, 68:28, 78:16, 78:18, 80:28, 88:12, 93:14, 96:10, 119:23, 121:13, 121:15, 121:21, 126:24, 127:8, 129:15, 129:20, 129:27, 130:9, 131:21, 131:27, 132:3, 134:28, 139:27, 141:24, 146:7, 146:17, 146:18, 148:14, 148:19, 150:1, 152:23, 154:20, 155:28, 156:9
INFORMATION ^[1] - 3:8
information.. ^[2] - 132:7, 155:5

informed [5] - 23:29,
106:22, 127:7,
149:12, 157:25
infrequently [1] -
103:15
infringed [3] - 61:25,
121:2, 155:17
infringing [1] -
141:25
inherent [2] - 15:16,
15:17
injunctive [1] - 51:6
injuries [1] - 52:25
injury [1] - 46:13
inquire [1] - 156:9
inquiry [1] - 156:25
insofar [18] - 8:10,
29:22, 31:4, 41:5,
42:21, 45:11, 71:26,
101:16, 102:6,
104:15, 104:18,
114:22, 125:12,
138:18, 144:9,
149:23, 158:14
Inspector [1] - 25:28
Inspector-Generals
[1] - 25:28
instance [1] - 139:5
instead [1] - 140:11
instituting [1] -
123:20
institution [1] -
119:29
institutions [1] -
145:9
Instructed [3] - 2:7,
2:12, 3:3
instructed [4] - 2:18,
2:23, 2:28, 3:9
instructions [2] -
95:4, 148:18
instrument [1] -
104:12
Integration [1] -
128:1
Intelligence [2] -
25:22, 42:15
intelligence [15] -
17:16, 18:25, 19:28,
21:7, 24:28, 26:22,
27:26, 55:19, 55:21,
63:8, 105:21, 126:14,
139:20, 141:10, 143:4
intended [2] - 58:9,
90:3
intends [1] - 22:13
intensified [1] -
13:18
intents [1] - 66:29
inter [1] - 100:1

intercept [3] -
118:18, 131:13,
135:29
intercepted [15] -
46:11, 114:14,
114:17, 115:6, 115:9,
118:3, 119:3, 123:22,
128:17, 129:2, 129:6,
129:9, 129:15,
129:22, 133:28
intercepted.. [1] -
131:4
intercepting [3] -
116:11, 116:19, 117:4
Interception [2] -
110:17, 116:13
interception [35] -
68:3, 68:8, 110:4,
110:5, 111:5, 111:25,
114:3, 114:20,
114:25, 115:1, 115:6,
115:21, 116:11,
116:16, 117:2,
117:14, 117:29,
118:5, 118:6, 118:18,
119:10, 119:12,
119:13, 128:3, 128:5,
128:14, 129:5,
129:23, 129:24,
130:25, 131:12,
131:27, 132:4,
133:28, 140:21
interception.. [1] -
131:15
interceptions [1] -
130:9
interest [10] - 17:1,
17:8, 21:28, 56:26,
59:6, 69:13, 72:18,
139:26, 140:23,
153:23
interesting [5] -
48:23, 56:21, 60:12,
76:8, 76:10
interests [8] - 53:1,
56:7, 56:10, 58:22,
68:18, 148:11,
149:19, 152:24
interfered [2] - 65:7,
74:4
interference [20] -
17:15, 18:7, 19:6,
19:19, 23:1, 23:4,
65:29, 66:15, 66:20,
67:2, 111:26, 112:27,
113:29, 115:28,
119:8, 122:12, 124:7,
126:19, 126:21,
127:24
interferences [2] -

27:26, 128:6
interfering [1] -
38:23
internal [2] - 115:4,
152:14
international [2] -
103:23, 107:17
internet [3] - 19:29,
95:13
interpret [1] - 151:13
interpretation [9] -
41:15, 85:6, 103:13,
107:16, 151:21,
151:27, 152:6,
153:11, 154:5
interpretations [1] -
89:25
interpreted [6] -
86:14, 111:7, 121:11,
152:27, 153:4, 157:18
interprets [1] -
101:27
interrupt [3] - 34:23,
39:18, 94:18
interrupted [3] -
38:25, 38:28, 40:10
intersect [1] - 90:29
intervention [1] -
142:9
intimidate [1] -
115:22
introduced [3] -
12:26, 24:11, 34:18
introducing [1] -
143:6
introduction [1] -
28:15
intrusion [1] -
116:18
invalid [2] - 37:17,
65:16
inverse [1] - 113:13
investigated [4] -
25:4, 25:15, 27:1,
96:14
investigating [1] -
108:7
investigation [5] -
8:26, 24:1, 56:25,
75:10, 108:26
investigations [3] -
61:21, 62:4, 106:24
investigatory [3] -
25:28, 27:4, 28:17
Investigatory [4] -
109:18, 109:25,
109:26, 128:18
inviolate [1] - 65:6
invited [1] - 144:12
invoke [3] - 50:7,

50:10, 63:24
invoking [1] - 155:22
involve [4] - 6:3,
27:3, 28:21, 38:18
involved [5] - 5:16,
109:22, 117:2,
118:15, 149:27
involves [2] - 39:21,
62:22
involving [3] - 16:24,
19:6, 53:3
IPT [6] - 114:29,
117:28, 118:4, 118:7,
118:11, 118:16
IPT's [1] - 118:20
IPT.. [1] - 118:3
Ireland [4] - 5:6,
65:14, 67:18, 82:6
IRELAND [1] - 1:12
ironically [1] -
107:11
irreconcilable [1] -
5:29
irrelevant [1] -
103:13
irrespective [1] -
156:25
is.. [1] - 132:5
isolated [1] - 87:22
issue [53] - 9:21,
20:13, 20:14, 34:7,
34:25, 35:15, 35:20,
38:15, 38:16, 38:17,
40:11, 40:13, 42:26,
43:15, 45:13, 46:3,
46:5, 50:14, 52:20,
53:12, 54:29, 55:4,
56:16, 67:7, 73:3,
74:3, 74:13, 75:5,
76:9, 82:11, 86:26,
95:17, 97:4, 97:7,
98:12, 98:16, 100:13,
101:7, 101:20,
125:21, 125:28,
136:15, 136:25,
139:4, 139:7, 141:1,
141:2, 143:22,
144:11, 145:24,
148:15, 149:26
issued [1] - 30:15
issues [20] - 6:10,
7:26, 29:18, 29:22,
37:17, 41:3, 42:11,
44:29, 45:3, 48:12,
53:21, 67:6, 71:17,
75:2, 92:23, 102:18,
103:13, 136:12,
138:22, 146:12
issues' [1] - 149:2
it'll [1] - 72:20

it's.. [1] - 92:15
item [1] - 40:19
itself [22] - 16:24,
29:26, 30:11, 39:10,
40:17, 41:20, 41:28,
56:27, 63:12, 66:15,
72:3, 73:3, 86:16,
90:2, 92:13, 93:23,
98:18, 114:23, 124:4,
126:18, 143:3, 154:17

J

J's [2] - 64:1, 139:6
JAMES [1] - 2:17
jeopardise [3] -
61:21, 62:4, 126:10
jeopardised [1] -
108:26
jeopardising [3] -
126:22, 127:17,
134:26
JOHN [1] - 2:24
joint [1] - 28:20
journalist [1] - 119:1
JRA [1] - 44:18
judge [8] - 55:10,
60:27, 67:27, 93:5,
93:6, 94:3, 138:12,
158:21
Judge [134] - 5:13,
7:18, 8:1, 9:21, 11:25,
12:2, 12:8, 12:13,
13:3, 13:9, 14:17,
14:29, 15:6, 16:14,
17:28, 18:19, 20:5,
20:26, 22:23, 23:11,
23:22, 24:16, 26:20,
27:21, 28:24, 29:20,
29:26, 33:10, 34:1,
34:21, 34:23, 35:9,
36:3, 38:24, 39:3,
39:15, 39:21, 40:16,
40:19, 40:25, 42:23,
42:29, 43:7, 44:5,
45:18, 46:5, 46:29,
47:21, 50:13, 50:21,
53:2, 53:19, 54:1,
54:8, 54:27, 54:28,
57:3, 60:12, 61:6,
63:3, 63:27, 68:20,
69:2, 71:12, 72:7,
72:20, 74:8, 76:9,
81:6, 82:22, 82:29,
83:10, 84:21, 86:16,
89:28, 91:3, 92:5,
94:17, 94:23, 94:24,
95:1, 95:17, 95:24,
96:3, 97:4, 97:14,
98:7, 98:18, 98:24,

99:18, 101:7, 102:6,
103:9, 103:18,
104:15, 104:21,
105:1, 105:6, 107:20,
109:7, 109:12,
110:14, 110:26,
113:12, 116:2,
117:17, 117:19,
118:23, 118:29,
119:4, 121:6, 122:26,
125:6, 128:21,
130:21, 132:24,
133:7, 133:12,
136:11, 136:14,
136:17, 137:8, 139:9,
139:10, 139:28,
141:17, 146:23,
149:22, 150:3,
152:18, 153:28,
157:13, 157:29,
158:26
judge.. [1] - 117:27
judges [3] - 75:19,
75:21, 110:21
judgment [18] -
13:16, 28:2, 41:20,
46:14, 64:1, 82:25,
102:27, 119:1,
125:21, 125:23,
139:7, 143:13,
147:18, 148:26,
148:28, 152:26,
154:10
Judicial [1] - 130:24
judicial [34] - 8:4,
21:12, 22:16, 28:8,
52:17, 64:27, 69:16,
70:8, 71:27, 71:28,
87:21, 90:6, 110:18,
112:25, 116:25,
118:10, 122:10,
123:8, 125:16,
130:23, 131:1, 131:5,
131:11, 132:9, 136:3,
140:18, 142:26,
149:7, 149:8, 149:29,
151:17, 154:13,
155:4, 155:7
jurisdiction [17] -
50:24, 66:29, 68:28,
79:20, 88:13, 90:25,
99:29, 107:15,
117:28, 118:3,
128:18, 151:12,
154:19, 154:28,
155:23, 156:9, 157:19
jurisdictions [1] -
90:7
jurisprudence [2] -
86:10, 122:27

JUSTICE [117] - 1:17,
5:4, 5:8, 5:14, 7:23,
8:28, 9:25, 9:28,
10:27, 11:7, 11:12,
13:5, 13:11, 23:14,
23:16, 23:19, 24:17,
26:25, 29:19, 30:1,
30:21, 31:10, 32:19,
33:14, 36:4, 36:9,
36:13, 36:15, 36:19,
36:27, 37:10, 37:13,
37:21, 38:3, 38:7,
38:21, 39:4, 39:7,
39:27, 40:9, 43:18,
47:29, 49:5, 49:9,
49:11, 50:3, 50:8,
55:7, 55:11, 55:23,
60:3, 60:16, 60:23,
61:1, 61:3, 64:13,
70:5, 72:5, 72:8,
77:26, 78:3, 78:7,
78:9, 81:7, 82:4, 82:7,
82:21, 82:26, 82:28,
83:1, 83:8, 83:11,
83:14, 86:18, 89:11,
89:23, 90:14, 90:20,
91:5, 92:9, 92:12,
92:16, 92:20, 96:1,
96:4, 97:9, 97:12,
97:24, 98:5, 98:8,
98:19, 98:23, 98:25,
99:20, 99:22, 102:23,
103:2, 105:2, 105:5,
105:7, 105:10,
105:15, 107:5,
108:17, 108:21,
110:25, 112:1, 112:5,
112:7, 113:19,
119:16, 124:24,
125:11, 134:14,
143:15, 158:24,
158:27
Justice [24] - 13:16,
17:19, 19:5, 22:29,
57:6, 57:18, 63:6,
65:14, 68:25, 71:9,
79:25, 89:5, 97:25,
98:13, 98:16, 101:27,
103:12, 103:22,
109:27, 125:7,
126:29, 146:3, 151:11
justice [1] - 109:23
Justice's [1] - 28:2
justification [6] -
5:25, 57:26, 75:8,
75:12, 75:13, 76:2
justification.. [1] -
134:25
justified [2] - 124:11,
148:1

justify [2] - 56:27,
124:16
justifying [3] - 19:18,
112:18, 122:3

K

keep [1] - 117:4
keeping [2] - 98:19,
127:23
KELLEY [1] - 2:27
Kennedy [8] - 97:23,
109:10, 109:12,
109:17, 114:7, 123:4,
123:26, 128:12
Kennedy.. [1] - 122:2
kept [1] - 139:16
key [7] - 12:27, 45:5,
68:13, 84:23, 99:7,
113:22, 141:2
KIERAN [1] - 2:11
kind [10] - 21:28,
68:17, 84:6, 97:17,
97:26, 99:8, 100:21,
102:7, 132:15, 135:6
Kingdom [5] - 111:4,
128:15, 147:9,
147:15, 147:22
KINGSTON [1] - 2:22
Klass [8] - 109:9,
110:28, 111:2, 111:6,
111:18, 121:7,
121:10, 127:12
Klass.. [2] - 120:23,
127:14
knowing [2] - 51:27,
51:29
knowledge [8] -
5:17, 106:4, 125:1,
126:20, 127:6,
131:11, 134:24,
154:26
known [1] - 41:18

L

L207-35 [1] - 29:29
L2073 [1] - 13:10
laboured [1] - 143:11
lack [3] - 82:13,
95:20, 130:8
lacks [1] - 130:20
lag [1] - 101:26
lagen [1] - 55:15
laid [4] - 19:15,
72:26, 99:1, 116:28
language [9] - 46:26,
47:10, 57:8, 64:16,
70:23, 71:2, 80:15,

87:9, 89:15
large [2] - 41:26,
104:2
largely [2] - 67:7,
85:17
last [7] - 5:9, 60:28,
86:5, 135:23, 144:7,
145:20, 158:21
latter [4] - 134:23,
135:18, 148:26,
154:28
law [144] - 6:11, 6:19,
11:5, 11:16, 12:10,
12:16, 12:17, 12:29,
14:5, 14:19, 17:1,
17:5, 17:8, 18:1,
18:15, 18:23, 20:8,
20:17, 21:24, 22:27,
23:10, 23:11, 25:26,
35:1, 37:15, 40:20,
41:5, 43:4, 43:17,
44:11, 45:8, 45:20,
45:21, 48:14, 48:18,
48:19, 48:21, 49:21,
49:28, 51:10, 51:24,
52:1, 53:6, 54:13,
54:16, 54:21, 55:5,
55:13, 55:17, 55:19,
55:20, 55:24, 63:15,
63:16, 64:25, 65:4,
65:8, 65:13, 67:6,
67:7, 67:12, 67:14,
67:22, 67:24, 69:12,
69:14, 70:11, 70:17,
70:25, 71:6, 71:18,
71:26, 72:15, 72:27,
73:17, 74:21, 77:5,
77:23, 78:17, 79:19,
79:22, 84:13, 87:11,
88:2, 88:8, 88:23,
93:12, 93:26, 96:14,
98:28, 99:28, 100:2,
100:24, 101:9,
101:14, 101:24,
101:25, 103:1, 103:5,
103:19, 104:1,
104:18, 104:21,
104:23, 105:25,
106:2, 106:6, 106:12,
107:17, 108:4, 108:5,
108:9, 108:12,
112:21, 119:25,
119:28, 120:2, 122:6,
123:1, 124:10, 128:8,
128:10, 130:1,
130:11, 130:13,
131:19, 132:8, 134:6,
135:13, 139:15,
144:2, 145:11,
150:11, 151:8,

151:14, 151:22,
151:27, 152:16,
154:12, 155:25
law' [2] - 49:15,
49:17
law.. [2] - 134:1,
135:6
law] [1] - 153:24
lawful [2] - 110:6,
115:22
lawfully [1] - 147:8
lawfulness [2] -
142:2, 155:1
laws [10] - 5:23,
25:16, 25:18, 55:4,
77:29, 82:14, 96:10,
101:12, 102:14,
156:18
lawyers.. [1] - 118:10
lay [1] - 145:7
lays [2] - 34:26,
153:18
leads [1] - 50:14
leak [1] - 129:7
learned [2] - 129:14,
131:14
least [9] - 5:20,
14:14, 21:7, 27:2,
57:22, 58:8, 79:24,
106:25, 131:26
leave [2] - 54:19,
145:25
leaves [1] - 33:1
leaving [1] - 70:21
led [1] - 76:14
LEE [1] - 2:7
left [1] - 36:25
leg [1] - 39:14
legal [31] - 17:25,
21:7, 27:25, 28:4,
28:14, 33:22, 33:23,
61:22, 63:19, 64:27,
68:21, 69:13, 69:29,
70:27, 79:5, 80:25,
87:14, 88:20, 94:13,
103:26, 104:3,
104:14, 107:28,
108:29, 110:8,
113:21, 118:20,
125:26, 143:19,
152:2, 155:16
LEGAL [1] - 3:9
legality [1] - 152:10
legally [2] - 103:20,
143:2
legislation [26] -
19:5, 20:27, 52:16,
56:27, 57:17, 57:18,
58:11, 62:16, 68:16,
69:15, 69:17, 109:25,

111:17, 112:28,
119:10, 120:27,
122:13, 123:12,
123:15, 123:18,
123:19, 124:19,
127:15, 134:5, 135:9,
135:19
legislation [1] -
141:6
legislative [2] -
120:19, 145:6
legislature [1] -
116:24
legitimate [4] -
18:26, 29:17, 127:26,
155:26
legitimately [1] -
59:28
length [1] - 74:6
lengthy [1] - 133:13
less [1] - 70:12
letter [3] - 17:12,
24:22, 96:17
level [26] - 14:22,
24:25, 30:5, 76:24,
79:22, 80:21, 83:21,
83:29, 84:6, 84:12,
84:15, 84:24, 85:3,
85:7, 85:10, 85:15,
85:23, 86:23, 113:1,
113:5, 118:21,
122:15, 122:19,
123:24, 142:14, 154:8
liability [2] - 92:27,
93:19
liable [2] - 61:21,
62:3
liberal [1] - 109:4
lies [1] - 8:13
life [4] - 66:13,
121:16, 121:22,
131:22
light [16] - 19:13,
27:17, 45:18, 67:18,
69:22, 80:18, 86:14,
104:22, 112:11,
115:20, 141:4,
151:18, 152:7, 154:6,
157:15, 157:17
likelihood [13] -
46:11, 48:8, 51:5,
78:14, 91:17, 91:18,
108:14, 108:20,
111:27, 114:3,
114:13, 114:19,
121:20
likelihood' [1] -
111:11
likely [5] - 50:28,
57:21, 64:12, 115:15,

127:9
likewise [1] - 158:19
limit [3] - 18:7,
112:12, 152:23
limitation [6] - 19:13,
22:11, 72:13, 153:19,
153:22, 153:29
limitations [14] -
5:18, 6:23, 17:4,
17:22, 19:25, 21:23,
44:18, 44:27, 49:28,
68:14, 72:10, 72:17,
96:16, 153:17
limited [11] - 6:15,
16:29, 19:8, 21:15,
32:24, 37:11, 37:14,
58:10, 67:1, 129:28,
157:24
limits [9] - 16:19,
19:15, 57:15, 57:27,
106:15, 127:25,
136:27, 144:5, 150:21
limits' [2] - 144:13,
150:20
line [1] - 13:14
linguistic [1] - 85:2
link [2] - 57:22, 58:8
linked [2] - 126:1,
134:19
List [1] - 31:17
list [5] - 40:20, 71:20,
91:19, 105:17, 158:22
list' [1] - 30:28
listed [5] - 30:17,
65:22, 115:7, 115:19,
133:21
listening [1] - 95:12
litigants [1] - 47:3
litigate [1] - 78:15
litigation [1] - 42:24
lives [2] - 66:2,
116:19
loaded [1] - 6:2
loaned [1] - 3:24
loathe [1] - 34:23
location [1] - 56:29
lodge [3] - 114:25,
120:9, 129:17
lodged [3] - 139:13,
147:26, 147:29
loggerheads [1] -
144:14
logic [1] - 62:22
logically [2] - 89:8,
91:19
long-term [1] -
126:11
look [50] - 12:2,
12:13, 14:10, 14:17,
15:6, 16:11, 21:21,

30:22, 34:13, 40:2,
40:5, 42:1, 43:7, 44:8,
48:12, 48:21, 48:24,
51:23, 55:2, 55:3,
62:8, 63:29, 71:22,
71:24, 71:28, 77:6,
82:23, 82:24, 91:21,
94:24, 95:1, 98:18,
99:10, 103:10,
103:19, 103:29,
104:21, 104:26,
106:28, 107:4,
107:20, 107:22,
108:2, 110:14, 112:8,
125:3, 139:8, 141:18,
142:7, 151:1
looked [4] - 36:5,
38:12, 63:15, 138:22
looking [6] - 60:7,
60:9, 73:14, 73:20,
92:17, 95:27
looks [5] - 29:20,
74:8, 75:27, 86:12,
108:23
Lord [3] - 97:25,
109:27
loss [5] - 51:4, 51:15,
71:15, 91:12
lost [4] - 29:28,
50:21, 112:17, 122:2
louder [1] - 77:18
low [2] - 113:9,
122:23
lower [4] - 52:29,
53:26, 85:23, 125:10
LOWER [1] - 3:10
lowest [1] - 102:5
LTD [1] - 1:12
Ltd [2] - 5:6, 82:6
lunch [2] - 80:5,
153:27
LUNCHEON [2] -
81:11, 82:1

M

mails [1] - 95:13
main [4] - 140:20,
141:1, 148:16, 151:28
maintained [1] -
30:29
majority [2] - 69:28,
75:19
Malone [4] - 1:21,
3:23, 3:25, 111:2
MALONE [1] - 1:31
man [2] - 78:11,
78:12
mandatory [3] -

11:18, 56:17, 119:21
manifestly [1] - 67:5
manner [13] - 3:24,
65:7, 68:29, 84:17,
84:26, 96:7, 101:22,
106:10, 120:3,
141:12, 153:4, 154:8,
157:26
manuals [1] - 106:3
map [1] - 89:20
MARCH [3] - 1:18,
5:1, 159:2
margin [4] - 104:7,
107:29, 116:6, 128:22
marks [2] - 39:8,
39:9
married [1] - 147:7
MASON [1] - 2:13
masses [1] - 135:29
match [2] - 48:18,
71:18
material [6] - 115:25,
117:3, 118:12,
118:19, 148:7, 152:2
materials [3] -
104:29, 116:11, 117:1
matter [14] - 6:22,
10:25, 23:2, 28:29,
40:25, 44:6, 66:1,
78:17, 82:5, 144:20,
149:4, 150:18, 150:26
matters [5] - 6:14,
11:28, 44:17, 44:19,
94:11
Maurice [1] - 90:24
MAURICE [1] - 2:27
MAXIMILLIAN [1] -
1:14
McCANN [1] - 2:23
McCullough [6] -
2:16, 73:1, 78:26,
80:2, 93:4, 93:18
McKechnie [2] -
69:8, 119:19
mean [16] - 8:11,
11:10, 23:14, 39:7,
48:2, 48:4, 49:6, 60:9,
68:3, 80:9, 80:10,
86:4, 90:3, 95:1,
103:3, 158:6
meaning [7] - 36:16,
36:24, 40:1, 72:25,
80:6, 80:17, 114:29
meaningful [1] -
64:27
means [20] - 12:28,
16:6, 22:20, 26:1,
28:24, 31:4, 32:27,
33:7, 34:1, 51:1, 62:6,
74:20, 79:17, 85:13,

128:11, 138:21,
143:29, 144:9, 158:6
meant [6] - 9:25,
70:27, 82:14, 89:16,
89:17, 110:3
measure [6] - 57:15,
120:12, 126:10,
126:24, 127:21,
134:28
measures [49] -
18:24, 108:10,
111:12, 111:18,
111:28, 112:19,
112:22, 112:23,
112:28, 113:2, 113:4,
114:4, 115:24,
115:26, 119:12,
119:13, 120:21,
120:26, 120:27,
120:28, 121:4,
121:17, 122:4, 122:7,
122:8, 122:14,
122:16, 122:19,
122:29, 123:6,
123:11, 123:12,
123:15, 124:13,
124:18, 124:19,
126:7, 126:9, 126:16,
129:19, 131:10,
134:3, 134:18,
134:24, 135:7,
135:25, 136:3, 152:13
measures.. [1] -
121:3
mechanical [1] -
120:15
mechanism [19] -
17:14, 24:21, 24:24,
25:2, 25:19, 26:16,
26:29, 28:16, 28:22,
33:15, 82:18, 85:21,
85:28, 87:5, 92:25,
92:27, 120:13, 127:23
Mechanism [1] -
26:6
mechanisms [1] -
143:7
meet [9] - 13:19,
17:1, 52:26, 52:27,
72:18, 130:17,
153:23, 154:3, 154:7
meeting [1] - 110:11
meets [3] - 29:10,
116:5, 125:19
member [1] - 43:14
Member [31] - 10:28,
11:17, 80:27, 86:21,
93:28, 99:26, 101:9,
101:13, 101:24,
101:26, 102:4, 102:5,

102:15, 105:21, 105:29, 137:7, 137:9, 137:16, 138:15, 142:17, 144:2, 145:10, 146:27, 149:10, 149:14, 149:17, 150:9, 152:12, 152:22, 155:24, 158:16 members [4] - 10:28, 116:17, 118:9, 133:8 memorable [1] - 80:7 memorandum [1] - 33:15 men [1] - 115:14 menace [1] - 124:3 mentioning [1] - 83:1 mere [9] - 52:27, 68:2, 112:27, 119:9, 120:26, 122:12, 123:11, 124:18, 152:14 met [2] - 53:13, 101:23 methods [1] - 126:13 MICHAEL [2] - 2:5, 3:2 middle [1] - 39:2 might [18] - 5:11, 6:20, 11:7, 50:23, 58:24, 58:26, 59:3, 59:9, 60:4, 96:27, 112:1, 120:24, 121:13, 126:10, 126:12, 134:4, 134:7, 158:25 mildly [1] - 14:2 mind [12] - 40:7, 40:9, 42:6, 48:11, 83:28, 85:15, 86:13, 103:9, 103:20, 105:13, 130:10, 153:11 minimising [3] - 7:8, 7:9 minimum [2] - 80:29, 105:28 Minister [2] - 110:16, 116:26 Ministers [1] - 127:3 misapprehension [1] - 68:24 miscarriages [1] - 109:22 misfeasance [1] - 51:26 missing [2] - 62:5, 62:6 mistaken [3] - 63:1, 75:20, 97:6 misunderstood [4] - 35:8, 36:21, 37:24, 68:13 mitigated [1] - 9:8 mitigates [1] - 8:17 mobile [3] - 69:7, 119:10, 119:20 modalities [1] - 104:5 modern [2] - 56:24, 68:8 moment [7] - 29:2, 30:23, 36:4, 38:21, 55:7, 77:2, 105:16 moments [1] - 12:8 monitored [2] - 109:24, 127:20 monitoring [2] - 28:19, 134:21 moreover [4] - 21:12, 26:11, 27:7, 142:25 Moreover [2] - 19:26, 134:17 morning [7] - 5:4, 82:9, 95:25, 104:27, 137:9, 138:24, 139:6 most [5] - 45:25, 47:18, 79:21, 122:1, 137:25 motion [1] - 120:14 move [8] - 20:20, 40:19, 76:9, 78:23, 110:24, 116:2, 140:27, 158:21 movement [1] - 145:12 moves [1] - 59:12 MR [138] - 2:5, 2:5, 2:7, 2:10, 2:11, 2:12, 2:16, 2:17, 2:17, 2:27, 3:2, 3:8, 4:5, 4:6, 4:7, 5:7, 5:13, 7:16, 7:18, 7:24, 8:29, 9:27, 10:3, 10:28, 11:9, 11:13, 13:6, 13:12, 23:15, 23:17, 23:20, 24:18, 26:26, 29:20, 30:2, 30:22, 31:11, 32:20, 33:15, 34:23, 36:3, 36:8, 36:12, 36:14, 36:18, 36:23, 37:2, 37:8, 37:9, 37:12, 37:20, 37:22, 38:4, 38:8, 38:24, 39:6, 39:15, 40:8, 40:10, 43:20, 48:1, 49:8, 49:10, 49:13, 50:6, 50:10, 55:10, 55:13, 55:24, 60:12, 60:17, 60:26, 60:27, 61:2, 61:4, 61:5, 64:15, 70:6, 72:7, 72:9, 78:2, 78:6, 78:8, 78:10, 82:20, 82:22, 82:27, 82:29, 83:3, 83:10, 83:12, 83:15, 86:19, 89:20, 89:27, 90:19, 90:22, 91:6, 92:10, 92:15, 92:18, 92:21, 94:22, 94:29, 96:2, 96:5, 97:11, 97:14, 97:25, 98:7, 98:11, 98:21, 98:24, 98:26, 99:21, 99:23, 102:24, 103:4, 105:4, 105:6, 105:8, 105:12, 105:17, 107:7, 108:19, 108:22, 110:26, 112:4, 112:6, 112:8, 113:22, 119:18, 124:25, 125:12, 134:15, 143:16, 158:26, 158:28 MS [126] - 1:17, 2:6, 2:11, 2:21, 2:22, 2:27, 3:2, 3:8, 5:4, 5:8, 5:14, 7:23, 8:28, 9:25, 9:28, 10:27, 11:7, 11:12, 13:5, 13:11, 23:14, 23:16, 23:19, 24:17, 26:25, 29:19, 30:1, 30:21, 31:10, 32:19, 33:14, 36:4, 36:9, 36:13, 36:15, 36:19, 36:27, 37:10, 37:13, 37:21, 38:3, 38:7, 38:21, 39:4, 39:7, 39:27, 40:9, 43:18, 47:29, 49:5, 49:9, 49:11, 50:3, 50:8, 55:7, 55:11, 55:23, 60:3, 60:16, 60:23, 61:1, 61:3, 64:13, 70:5, 72:5, 72:8, 77:26, 78:3, 78:7, 78:9, 81:7, 82:4, 82:7, 82:21, 82:26, 82:28, 83:1, 83:8, 83:11, 83:14, 86:18, 89:11, 89:23, 90:14, 90:20, 91:5, 92:9, 92:12, 92:16, 92:20, 94:17, 94:24, 96:1, 96:4, 97:9, 97:12, 97:24, 98:5, 98:8, 98:19, 98:23, 98:25, 99:20, 99:22, 102:23, 103:2, 105:2, 105:5, 105:7, 105:10, 105:15, 107:5, 108:17, 108:21, 110:25, 112:1, 112:5, 112:7, 113:19, 119:16, 124:24, 125:11, 134:14, 143:15, 158:24, 158:27 Mummery [2] - 97:25, 109:28 murder [1] - 115:10 MURRAY [107] - 2:5, 4:5, 4:7, 5:7, 5:13, 7:16, 7:18, 7:24, 8:29, 9:27, 10:3, 10:28, 11:9, 11:13, 13:6, 13:12, 23:15, 23:17, 23:20, 24:18, 26:26, 29:20, 30:2, 30:22, 31:11, 32:20, 33:15, 36:3, 37:8, 38:24, 40:10, 43:20, 48:1, 49:8, 49:10, 49:13, 50:6, 50:10, 55:10, 55:13, 55:24, 60:12, 60:17, 60:26, 61:5, 64:15, 70:6, 72:7, 72:9, 78:2, 78:6, 78:8, 78:10, 82:20, 82:22, 82:27, 82:29, 83:3, 83:10, 83:12, 83:15, 86:19, 89:20, 89:27, 90:19, 90:22, 91:6, 92:10, 92:15, 92:18, 92:21, 94:22, 94:29, 96:2, 96:5, 97:11, 97:14, 97:25, 98:7, 98:11, 98:21, 98:24, 98:26, 99:21, 99:23, 102:24, 103:4, 105:4, 105:6, 105:8, 105:12, 105:17, 107:7, 108:19, 108:22, 110:26, 112:4, 112:6, 112:8, 113:22, 119:18, 124:25, 125:12, 134:15, 143:16, 158:26, 158:28 Murray [6] - 5:8, 34:26, 36:5, 39:16, 82:7, 94:19 must [54] - 3:23, 15:28, 19:7, 23:25, 32:7, 32:20, 33:3, 38:2, 46:13, 51:8, 57:19, 58:11, 61:18, 62:26, 70:12, 70:13, 72:14, 79:7, 79:26, 81:1, 84:7, 85:6, 85:11, 104:14, 106:2, 106:3, 106:15, 106:16, 106:18, 106:19, 110:18, 112:29, 118:9, 120:11, 122:14, 129:18, 132:20, 142:16, 151:16, 152:26, 153:1, 153:3, 153:12, 153:19, 153:22, 154:3, 154:14, 155:11, 155:24, 156:24, 157:1, 157:18, 158:17, 158:19 must've [1] - 51:19 muster [1] - 118:24 myriad [2] - 87:12, 107:27	
---	--

N

named [1] - 1:26
namely [7] - 20:15,
42:26, 107:26,
129:28, 132:27,
140:23, 150:27
narrow [1] - 37:18
National [2] - 95:11,
139:21
national [138] - 5:18,
9:24, 9:28, 9:29, 10:2,
10:10, 10:17, 16:19,
16:20, 16:24, 17:1,
17:7, 17:14, 18:7,
21:6, 33:17, 35:1,
38:5, 38:15, 42:22,
48:14, 48:26, 48:27,
53:5, 53:11, 53:21,
54:28, 55:2, 56:7,
56:27, 57:5, 57:17,
57:28, 58:10, 58:13,
58:21, 58:29, 59:6,
59:7, 59:17, 59:27,
60:2, 60:8, 61:6,
61:12, 61:17, 61:19,
62:16, 62:19, 62:23,
62:26, 63:5, 63:10,
65:4, 66:18, 67:6,
68:27, 69:12, 69:15,
69:17, 71:7, 73:14,
73:21, 75:17, 75:24,
82:13, 106:23, 108:4,
108:5, 108:9, 108:12,
109:1, 112:25, 113:1,
122:10, 122:15,
123:8, 123:23,
124:14, 124:27,
128:8, 128:10,

132:29, 133:11,
136:14, 136:24,
136:26, 137:11,
137:17, 138:4,
138:10, 138:13,
138:14, 139:4,
139:28, 140:4,
140:24, 141:14,
143:9, 143:17,
143:28, 143:29,
144:4, 144:13,
145:17, 146:12,
146:13, 146:15,
147:7, 149:25,
149:28, 150:11,
150:16, 150:20,
151:1, 151:11,
151:12, 151:14,
151:15, 151:26,
155:20, 156:8,
156:12, 156:18,
156:21, 156:26,
157:1, 157:5, 157:6,
157:18, 157:20,
158:2, 158:11,
158:15, 158:18
nationality.. [1] -
147:6
nationals [1] - 54:3
natural [1] - 142:12
nature [3] - 132:29,
135:2, 155:27
necessarily [4] -
5:14, 8:15, 68:3, 68:4
necessary [28] -
16:29, 19:9, 26:3,
26:13, 27:4, 35:22,
55:29, 56:4, 56:6,
56:29, 58:10, 71:22,
72:17, 73:18, 73:23,
85:29, 90:4, 115:6,
127:25, 133:29,
140:22, 142:14,
142:22, 152:2,
153:22, 155:3,
157:24, 157:27
necessary.. [1] -
126:19
necessity [2] -
25:11, 135:28
necessity' [1] - 48:4
need [11] - 91:16,
109:4, 113:9, 122:24,
123:5, 124:8, 124:12,
138:9, 151:19,
155:29, 158:23
needless [1] -
143:27
NESSA [1] - 3:2
networks [1] - 66:12

never [15] - 8:20,
34:25, 35:7, 35:24,
35:25, 38:9, 38:11,
38:12, 39:22, 43:27,
45:26, 53:23, 57:6,
62:25, 79:25
nevertheless [2] -
69:14, 153:18
Nevertheless [1] -
133:26
new [6] - 13:18,
17:14, 24:21, 33:15,
34:25, 135:28
next [7] - 76:9,
91:19, 95:17, 101:7,
102:21, 118:29,
147:12
NGO [1] - 133:8
NIAMH [1] - 2:11
nobody [2] - 38:25,
140:6
non [14] - 6:2, 8:24,
21:13, 23:25, 23:28,
25:18, 26:16, 41:6,
44:20, 52:10, 71:28,
96:18, 96:19, 116:27
non-compliance [4]
- 25:18, 26:16, 96:18,
96:19
non-disclosure [3] -
23:25, 23:28, 116:27
non-EU [1] - 44:20
non-judicial [1] -
71:28
non-loaded [1] - 6:2
non-notification [1] -
8:24
non-US [3] - 21:13,
41:6, 52:10
none [6] - 43:1,
50:11, 73:23, 74:10,
132:16, 151:2
nonetheless [1] -
66:27
normally [2] - 22:1,
120:1
NORTH [2] - 3:4, 3:4
notable [1] - 135:4
note [17] - 10:24,
28:1, 56:21, 61:5,
63:4, 66:6, 72:21,
93:4, 127:2, 129:13,
131:18, 137:25,
137:26, 137:27,
138:8, 145:2, 158:9
noted [2] - 43:7,
142:18
notes [4] - 1:25,
115:3, 116:22, 131:4
nothing [6] - 13:8,

57:8, 137:20, 139:26,
140:11, 156:13
notice [18] - 5:17,
5:20, 8:1, 8:6, 8:11,
8:17, 45:21, 50:13,
54:26, 63:3, 63:23,
63:24, 69:25, 74:25,
75:10, 75:11, 132:19,
134:13
noticeable [1] -
76:20
notification [28] -
8:24, 8:27, 11:18,
45:28, 48:28, 61:20,
62:3, 63:9, 108:26,
109:3, 109:4, 118:4,
125:22, 125:28,
126:5, 126:9, 126:12,
126:21, 127:15,
127:23, 128:19,
130:8, 130:27,
134:18, 134:26,
135:6, 136:12, 154:18
notified [7] - 8:26,
23:27, 93:27, 126:17,
127:21, 129:2, 135:20
notify [12] - 27:16,
61:18, 62:1, 62:2,
63:8, 108:24, 108:29,
128:3, 128:13,
128:23, 128:27, 133:5
notify.. [1] - 132:6
notifying [1] - 8:20
noting [1] - 129:16
notion [4] - 85:27,
99:6, 101:11, 134:6
notwithstanding [1]
- 149:13
November [1] -
43:10
NSA [3] - 54:4,
78:16, 141:4
NSLs [2] - 23:24,
23:26
number [18] - 12:20,
21:4, 41:26, 43:3,
43:9, 43:24, 49:14,
52:24, 57:10, 89:14,
99:27, 104:2, 109:8,
111:4, 111:19,
118:26, 120:7, 125:24
numbers [4] - 55:8,
80:5, 105:15, 143:15

O

o'clock [1] - 158:27
O'DWYER [1] - 3:8
O'SULLIVAN [1] -

2:17
oath [1] - 41:15
object [3] - 27:10,
66:28, 127:9
objected [1] - 148:7
objecting [1] - 39:16
objection [2] - 64:19,
65:1
objections [1] - 77:4
objective [17] -
18:26, 19:14, 51:20,
56:25, 57:20, 57:29,
58:11, 58:17, 58:25,
59:10, 73:18, 83:21,
85:7, 87:4, 89:10,
92:1
objectively [3] -
46:10, 48:7, 48:8
objectives [4] -
72:18, 86:15, 140:23,
153:23
objects [1] - 131:9
obligated [1] - 32:1
obligation [18] -
26:14, 27:16, 49:22,
62:1, 62:2, 62:11,
62:21, 63:7, 66:9,
69:24, 93:18, 96:9,
108:23, 108:24,
108:29, 117:4,
128:27, 133:4
obligations [1] -
107:17
observation [1] -
40:9
observations [3] -
11:26, 57:9, 140:29
observe [9] - 16:12,
43:2, 43:20, 47:10,
85:26, 125:28,
132:24, 142:25,
157:11
observed [7] - 18:20,
50:15, 63:17, 97:19,
117:12, 121:27, 143:3
observes [6] -
113:28, 114:23,
115:18, 116:10,
119:7, 129:1
observing [1] - 40:12
obstacle [7] - 44:24,
47:3, 47:5, 47:8, 47:9,
87:28, 91:8
obtain [19] - 18:24,
28:6, 50:16, 50:18,
50:26, 51:2, 51:5,
52:2, 56:1, 56:5,
79:11, 88:2, 91:11,
91:12, 92:28, 112:15,
129:24, 130:9, 132:7

obtained [2] - 22:14,
59:4
obtaining [2] - 53:17,
154:17
obvious [9] - 7:22,
12:20, 24:11, 36:11,
67:5, 76:1, 95:25,
98:2, 151:26
obviously [14] - 7:3,
9:28, 21:22, 27:23,
40:25, 43:15, 59:28,
60:23, 66:23, 84:21,
87:12, 98:5, 98:8,
132:12
occasion [2] -
101:26, 145:21
occasioned [3] -
120:26, 123:10,
124:18
occasions [7] - 23:7,
43:4, 43:25, 47:4,
49:14, 111:19, 140:6
occupations [1] -
115:15
occur [1] - 50:28
occurred [1] - 51:3
occurring [1] - 50:27
occurs [2] - 12:1,
52:3
ODNI [3] - 17:10,
22:5, 96:17
OF [2] - 2:21, 4:4
of.. [1] - 147:9
offence [1] - 130:3
offences [3] - 57:23,
58:2, 106:8
offer [2] - 139:15,
142:25
offers [1] - 84:15
office [4] - 51:27,
110:19, 116:25,
118:10
offices [1] - 145:9
official [4] - 13:26,
14:20, 30:16, 130:28
official's [1] - 130:15
Ombudsman [29] -
12:17, 12:25, 12:26,
12:28, 17:15, 24:10,
24:11, 24:13, 26:10,
26:21, 27:24, 33:23,
34:18, 35:2, 86:6,
95:17, 95:18, 95:20,
95:24, 95:26, 96:6,
96:11, 96:20, 96:22,
98:1, 98:3, 106:28,
109:28, 142:7
Ombudsman' [1] -
25:19
Ombudsman's [1] -

96:26
Ombudsperson [20] - 24:21, 25:2, 25:6, 25:23, 25:26, 26:1, 26:6, 26:14, 26:27, 27:5, 28:16, 28:21, 29:1, 29:7, 29:8, 29:18, 34:9, 35:23, 38:19
ON [2] - 1:18, 5:1
once [5] - 7:7, 96:5, 126:17, 135:18, 136:15
ONE [1] - 2:23
one [91] - 7:19, 8:5, 9:8, 9:11, 11:14, 15:24, 16:12, 16:18, 22:11, 23:9, 29:20, 42:10, 42:16, 42:29, 44:6, 44:23, 46:18, 51:23, 54:2, 57:10, 57:22, 57:23, 58:1, 58:19, 60:4, 60:21, 63:19, 64:24, 67:27, 71:1, 71:21, 72:4, 74:11, 74:29, 75:27, 76:18, 76:20, 77:11, 78:22, 78:27, 79:11, 80:23, 80:25, 82:8, 87:22, 88:14, 88:24, 89:13, 89:23, 89:29, 90:12, 90:25, 91:27, 91:28, 92:23, 93:20, 93:21, 94:5, 94:24, 94:25, 97:13, 99:9, 99:13, 99:16, 100:5, 100:21, 101:7, 101:28, 102:17, 108:2, 108:23, 110:3, 115:6, 116:17, 121:25, 125:10, 131:8, 131:11, 132:13, 133:29, 134:10, 136:9, 137:1, 138:2, 138:19, 140:6, 142:13, 144:21, 145:18, 155:26, 156:21
one-size-fits-all [2] - 89:13, 89:29
one.. [1] - 72:4
ones [3] - 97:13, 107:23, 136:4
ongoing [1] - 5:19
open [16] - 15:14, 36:29, 54:29, 73:6, 79:28, 83:3, 95:29, 98:19, 102:25, 106:4, 107:21, 109:11, 125:24, 133:12,

148:28, 151:6
opened [24] - 10:5, 11:14, 13:4, 26:22, 46:15, 48:22, 51:10, 63:28, 64:5, 65:19, 69:2, 70:3, 79:29, 83:6, 102:22, 107:21, 109:8, 111:21, 129:5, 138:24, 139:6, 144:17, 145:20, 158:8
opening [13] - 10:25, 15:22, 34:26, 35:25, 36:25, 36:28, 40:6, 40:11, 75:24, 83:5, 88:27, 88:28, 137:4
operate [2] - 90:14, 108:25
operated [1] - 146:4
operates [2] - 94:13, 104:15
operation [5] - 68:23, 89:10, 126:14, 136:2, 156:23
operational [2] - 129:19, 131:10
operational-search [2] - 129:19, 131:10
operations [1] - 133:25
operative [1] - 156:25
opinion [5] - 9:19, 42:10, 47:24, 53:4, 92:2
opportunity [1] - 128:5
opposed [1] - 67:13
opposes.. [1] - 155:21
opposition [1] - 148:8
orange [1] - 78:5
oranges [2] - 71:4, 78:23
order [21] - 5:15, 24:15, 24:18, 28:5, 54:23, 58:12, 85:15, 88:3, 99:25, 106:9, 111:26, 112:25, 115:22, 118:14, 118:18, 118:19, 120:9, 122:10, 129:17, 142:16, 154:28
ordering [2] - 106:17, 135:26
orders [2] - 96:15, 106:3
ordinary [3] - 21:18, 56:16, 145:6

organisation [9] - 16:2, 31:16, 31:17, 31:20, 32:4, 32:12, 32:18, 32:20, 133:20
organisation's [1] - 31:15
organisational [1] - 31:18
organisations [8] - 14:28, 15:10, 15:26, 30:7, 30:27, 32:1, 39:12, 85:19
organised [1] - 56:23
organization [3] - 32:26, 32:29, 33:2
original [3] - 24:29, 75:22, 136:2
originally [3] - 40:5, 75:18, 126:11
otherwise [6] - 52:18, 57:11, 87:10, 87:27, 151:2, 156:27
ought [1] - 78:18
ourselves [1] - 125:29
outcome [1] - 143:21
outline [1] - 98:22
outlined [12] - 5:25, 15:15, 54:23, 71:12, 73:28, 74:5, 74:23, 75:1, 81:3, 133:3, 138:20, 147:4
outset [2] - 85:26, 142:13
outside [7] - 59:1, 112:24, 122:9, 123:7, 136:1, 150:18, 156:12
over-laboured [1] - 143:11
overall [1] - 26:29
overlap [2] - 7:22, 54:28
overlooked [2] - 138:28, 139:7
oversee [1] - 25:21
overseeing [1] - 116:14
oversight [11] - 6:13, 15:19, 17:14, 20:11, 25:20, 25:27, 26:6, 26:12, 27:3, 28:17, 143:4
overturned [1] - 49:7
overused [1] - 76:19
own [13] - 10:6, 10:25, 11:1, 44:24, 61:11, 66:24, 69:22, 76:6, 87:21, 94:13, 107:18, 118:8, 148:4
ownership [1] - 69:6

P

PAGE [1] - 4:2
page [73] - 8:23, 10:6, 10:7, 13:9, 29:28, 31:9, 31:12, 31:27, 32:10, 32:11, 32:17, 32:20, 33:11, 33:13, 35:13, 38:4, 44:12, 46:2, 46:14, 46:23, 47:14, 50:26, 55:9, 55:10, 55:22, 56:14, 57:13, 58:5, 60:20, 60:27, 61:2, 69:8, 70:2, 70:4, 84:29, 86:17, 92:7, 94:3, 96:2, 105:14, 107:4, 107:5, 107:7, 107:8, 110:15, 110:24, 110:25, 112:17, 116:3, 119:4, 121:6, 121:26, 122:26, 125:23, 133:12, 134:12, 134:14, 134:15, 139:10, 140:15, 141:8, 141:17, 141:19, 142:6, 147:3, 148:23, 150:3, 150:4, 150:5, 152:18, 157:13
pages [6] - 10:4, 11:14, 41:25, 79:15, 125:24, 144:16
paid.. [1] - 118:19
pains [1] - 28:28
paper [2] - 8:22, 137:26
paragraph [97] - 11:28, 18:1, 18:2, 18:20, 18:21, 19:22, 20:12, 20:19, 20:26, 20:29, 21:20, 21:27, 23:6, 23:12, 24:3, 24:14, 30:25, 31:27, 33:12, 50:4, 55:5, 55:11, 55:22, 56:14, 57:13, 58:4, 59:13, 59:27, 61:9, 61:15, 63:23, 64:4, 64:6, 65:19, 65:27, 66:21, 67:28, 68:20, 69:9, 71:13, 73:9, 74:9, 80:5, 80:7, 83:2, 83:13, 86:6, 86:19, 99:20, 99:21, 110:14, 110:26, 113:24, 116:3, 116:7, 117:19, 119:4, 119:25, 121:26, 123:2, 125:22, 125:27,

125:29, 130:5, 130:21, 133:7, 133:17, 134:12, 134:15, 135:23, 139:10, 140:15, 140:27, 141:8, 141:17, 141:18, 143:14, 145:2, 145:3, 145:16, 146:23, 147:3, 147:12, 148:23, 149:4, 150:5, 151:5, 151:6, 152:19, 152:26, 154:9, 155:14, 157:3, 157:13
paragraph.. [1] - 119:15
paragraphs [20] - 6:12, 12:18, 15:14, 15:18, 16:14, 16:17, 16:26, 16:28, 17:28, 18:13, 20:12, 34:14, 51:9, 70:7, 79:29, 83:4, 83:5, 102:27, 131:24, 143:13
parameter [1] - 59:1
parameters [1] - 132:18
park [1] - 39:4
Parliament [5] - 43:13, 107:2, 116:28, 138:5, 145:5
part [22] - 12:5, 15:16, 15:17, 35:7, 35:19, 36:10, 37:3, 38:13, 40:3, 52:18, 55:19, 57:26, 64:19, 71:5, 74:18, 96:28, 100:16, 100:20, 103:1, 103:4, 135:23, 155:9
partes [1] - 100:1
participating [1] - 85:19
participation [1] - 16:1
particular [40] - 5:15, 6:16, 12:16, 12:18, 18:27, 24:7, 25:1, 25:24, 27:6, 31:6, 39:19, 40:28, 44:8, 56:23, 58:21, 59:5, 74:24, 79:19, 80:4, 80:18, 87:1, 112:26, 114:2, 115:2, 115:8, 117:13, 120:20, 122:11, 126:6, 133:1, 137:24, 138:22, 139:3, 139:20, 148:29, 151:18, 152:7, 153:15,

153:19, 156:22
particularly [1] - 78:25
parties [5] - 36:29, 44:10, 105:22, 155:10, 155:18
parties' [1] - 107:15
parts [1] - 55:1
Party [1] - 142:19
party [16] - 3:24, 87:11, 87:13, 87:19, 88:20, 89:3, 90:6, 90:17, 91:22, 92:11, 92:24, 92:26, 93:7, 97:1, 158:12
pass [3] - 55:17, 104:19, 118:24
passages [1] - 138:23
passing [2] - 15:20, 104:27
past [2] - 51:3, 60:18
patently [1] - 49:24
PAUL [1] - 2:10
pause [1] - 7:13
PCLOB [1] - 25:29
PD28 [1] - 24:24
pecuniary [2] - 51:15, 71:15
people [9] - 41:27, 45:26, 47:15, 69:28, 106:13, 112:5, 115:13, 146:16
per [1] - 42:10
peradventure [1] - 64:21
perceive [1] - 134:4
perhaps [13] - 7:20, 33:11, 40:22, 42:9, 44:9, 50:22, 52:23, 54:28, 76:19, 95:27, 100:10, 103:18, 106:27
period [3] - 32:25, 41:26, 66:13
periodic [1] - 116:10
periodically [1] - 23:26
permanent [5] - 99:29, 100:24, 143:2, 145:26, 150:28
permissible [1] - 71:28
permission [2] - 3:25, 148:20
permit [1] - 153:5
permits [1] - 152:22
permitted [1] - 120:18
permitting [10] -

111:17, 112:28, 114:5, 119:10, 120:27, 121:18, 122:13, 123:12, 123:15, 124:19
persistently [1] - 15:26
person [29] - 8:16, 22:15, 22:16, 23:3, 35:2, 43:4, 55:28, 78:15, 91:9, 108:19, 110:18, 111:8, 115:5, 116:24, 118:1, 121:11, 123:21, 123:27, 128:16, 129:7, 129:13, 129:18, 130:13, 131:11, 133:27, 134:8, 152:23, 154:14, 157:20
person's [4] - 66:13, 129:21, 129:28, 131:21
personal [44] - 14:23, 15:7, 15:8, 15:28, 16:6, 17:6, 17:23, 18:9, 19:10, 28:5, 30:6, 30:25, 31:20, 31:21, 32:2, 32:5, 32:14, 32:21, 32:24, 39:11, 64:22, 66:24, 83:19, 83:23, 84:2, 84:5, 85:22, 86:2, 86:22, 93:24, 95:2, 124:20, 127:3, 140:22, 141:3, 141:25, 141:28, 142:11, 142:27, 143:8, 144:24, 144:28, 145:8, 148:19
personally [1] - 124:21
persons [26] - 18:9, 19:11, 19:25, 21:13, 21:16, 27:27, 41:6, 44:21, 58:24, 61:19, 66:3, 75:14, 106:21, 108:13, 123:18, 126:16, 126:25, 129:1, 131:25, 132:3, 134:29, 135:19, 136:1, 141:12, 141:14
persons' [1] - 134:7
person's [1] - 156:1
persuasive [1] - 6:19
petitioner [1] - 6:9
phenomenon [1] - 107:26
PHILIP [1] - 2:7
phone [1] - 119:20

photocopied [1] - 3:23
phrase [8] - 14:26, 32:18, 45:14, 46:7, 46:22, 60:17, 93:11, 113:23
pick [2] - 15:20, 81:6
picked [1] - 125:22
picks [1] - 9:11
picture [1] - 90:16
pieces [1] - 20:27
place [16] - 18:6, 25:7, 25:9, 42:27, 45:22, 68:7, 83:20, 89:10, 110:6, 112:14, 115:1, 115:21, 116:5, 116:20, 130:25, 135:26
placed [2] - 14:3, 42:25
placing [1] - 31:16
plain [1] - 68:16
PLAINTIFF [2] - 1:7, 2:5
Plaintiff's [1] - 36:10
planning [1] - 58:18
plausibly [1] - 138:12
play [2] - 149:26, 150:29
played [1] - 84:4
plays [1] - 102:22
pleaded [1] - 40:14
pleadings [3] - 36:6, 40:2, 40:13
pleasure [1] - 100:16
plug [1] - 34:18
plus [1] - 18:16
point [46] - 5:15, 6:14, 8:26, 9:11, 10:4, 12:1, 15:21, 24:26, 28:11, 34:24, 38:29, 39:19, 39:28, 40:15, 42:29, 43:23, 44:3, 51:11, 52:6, 52:9, 60:3, 62:2, 65:13, 88:27, 89:28, 89:29, 95:15, 98:9, 103:9, 103:29, 109:2, 128:4, 128:14, 129:3, 133:21, 133:22, 136:19, 137:7, 137:14, 138:2, 140:1, 143:11, 144:7, 144:8, 154:27
pointed [1] - 29:27
points [11] - 6:27, 43:1, 44:15, 48:18, 52:7, 54:1, 54:15, 54:17, 54:20, 63:15,

74:29
Police [1] - 133:22
police [3] - 115:11, 127:4, 127:9
policies [2] - 96:10, 96:16
policy [4] - 18:26, 75:16, 147:1, 149:11
Polish [1] - 76:12
political [1] - 27:7
popularis [1] - 120:1
pose [1] - 70:16
posed [1] - 67:16
posited [2] - 11:8, 48:24
position [24] - 10:26, 11:2, 28:29, 33:28, 37:24, 41:2, 41:8, 46:1, 47:18, 52:1, 53:4, 53:23, 54:21, 56:17, 65:12, 75:29, 88:22, 104:23, 125:26, 129:11, 154:29, 156:27, 156:28
positions [1] - 36:29
possession [3] - 119:20, 129:18, 132:3
possibilities [1] - 21:12
possibility [12] - 5:17, 5:20, 28:4, 44:22, 63:9, 108:9, 113:3, 114:28, 119:22, 122:17, 130:8, 132:6
possible [8] - 5:27, 13:18, 18:27, 57:20, 71:27, 106:23, 154:24, 154:25
possibly [5] - 100:17, 123:16, 126:15, 138:16, 138:28
post [1] - 106:25
postal [1] - 124:5
potential [2] - 103:5, 124:6
potentially [6] - 7:3, 57:17, 115:25, 117:23, 124:25, 125:4
potentially" [1] - 124:24
power [9] - 10:8, 88:13, 118:12, 118:14, 127:19, 131:20, 133:23, 142:2, 154:19
powers [13] - 6:25, 25:28, 27:5, 28:18,

51:27, 106:2, 106:29, 113:6, 122:21, 124:1, 133:11, 134:21, 141:5
Powers [4] - 109:19, 109:25, 109:26, 128:18
practicable [1] - 127:8
practical [2] - 70:28, 128:9
practically [2] - 70:13, 70:19
practice [8] - 14:19, 59:15, 64:25, 84:14, 111:17, 117:8, 120:2, 126:4
practices [4] - 105:29, 116:29, 121:18, 139:15
pre [1] - 134:4
pre-empt [1] - 134:4
preamble [1] - 68:5
preceding [5] - 21:27, 41:17, 131:23, 152:25, 154:9
precise [3] - 106:9, 136:17, 157:8
precisely [6] - 62:28, 71:8, 129:11, 153:7, 153:27, 157:21
preclude [3] - 52:29, 53:15, 98:15
precluded [2] - 50:19, 148:17
preclusion [3] - 9:14, 9:23, 87:23
predated [1] - 101:4
predicated [1] - 82:13
prejudice [1] - 154:18
prejudiced [2] - 8:27, 127:10
preliminary [1] - 147:26
preparation [1] - 58:2
prepared [1] - 43:25
prescribed [1] - 130:1
presence [1] - 147:16
present [10] - 67:5, 91:17, 91:18, 113:28, 117:27, 119:7, 128:29, 147:25, 152:26, 154:9
presentation [1] - 39:18
presented [4] - 14:4,

76:25, 137:4, 138:3
presenting [2] -
47:9, 146:12
presents [1] - 90:2
preservation [2] -
68:9, 140:24
presidential [1] -
96:15
presume [1] - 103:2
pretend [1] - 77:5
pretty [1] - 67:20
prevailing [1] - 85:27
prevent [4] - 9:16,
60:25, 72:27, 94:14
preventative [2] -
60:7, 60:8
preventing [3] -
56:8, 56:9, 57:24
prevention [3] -
59:24, 61:11, 140:24
prevents [1] - 75:14
previously [2] -
26:10, 117:22
primacy [1] - 92:1
Prime [2] - 110:16,
116:26
principal [4] - 45:11,
112:21, 122:6, 149:29
principle [16] -
21:13, 61:27, 62:21,
63:16, 69:12, 72:16,
75:9, 83:18, 108:24,
117:26, 134:22,
149:7, 151:22,
153:21, 154:2, 155:9
Principle [1] - 16:29
principles [20] -
5:29, 6:23, 6:24, 6:26,
10:19, 13:25, 15:11,
15:15, 15:27, 20:11,
30:15, 31:2, 32:1,
32:21, 32:24, 35:13,
38:2, 86:14, 137:11,
158:1
Principles [4] - 16:5,
32:13, 32:28, 33:5
prism [1] - 46:25
prison [1] - 109:20
PRIVACY [1] - 3:7
Privacy [73] - 6:11,
6:15, 11:27, 11:29,
12:6, 12:9, 12:10,
12:11, 12:15, 13:8,
13:28, 15:7, 15:23,
17:7, 18:10, 18:17,
25:23, 25:26, 26:14,
28:19, 28:25, 28:27,
29:6, 30:3, 30:7,
30:14, 31:17, 32:3,
32:4, 32:15, 32:21,
32:22, 32:23, 32:26,
33:1, 33:2, 33:19,
33:26, 34:2, 34:4,
34:10, 34:11, 34:22,
34:28, 35:5, 35:10,
35:19, 35:26, 35:28,
36:2, 36:9, 37:5, 37:7,
37:28, 38:13, 39:12,
39:24, 44:19, 51:9,
54:5, 61:3, 73:25,
95:28, 96:6, 96:11,
96:19, 96:22, 97:21,
100:9, 101:4, 101:16
privacy [21] - 5:16,
8:2, 13:25, 20:10,
23:2, 42:23, 42:25,
50:17, 52:1, 53:1,
53:25, 53:26, 65:3,
65:6, 65:24, 66:1,
71:16, 75:15, 84:6,
86:27, 103:8
privacy.. [1] - 131:23
private [15] - 35:12,
35:17, 38:1, 38:10,
39:23, 53:3, 53:27,
66:2, 66:13, 67:2,
116:18, 121:16,
121:22, 131:21,
141:26
problem [9] - 21:10,
27:14, 90:9, 90:12,
91:7, 94:16, 95:10,
95:23, 151:29
problems [1] - 90:15
procedural [4] -
70:10, 155:25, 156:1,
157:6
Procedure [2] -
20:29, 131:6
procedure [8] -
97:26, 100:1, 118:8,
129:29, 135:18,
145:6, 146:4, 148:9
procedures [3] -
59:23, 61:20, 106:16
proceed [2] - 49:4,
69:29
proceeded [3] - 63:1,
138:26, 148:22
proceedings [14] -
22:16, 69:14, 129:4,
140:17, 140:20,
141:2, 145:29, 148:6,
148:16, 149:27,
151:9, 155:4, 155:7
proceedings.. [1] -
131:16
proceeds [5] - 12:24,
18:1, 26:20, 139:27,
157:11
process [5] - 33:17,
95:2, 95:26, 139:27,
150:20
processed [1] -
96:24
processing [15] -
84:1, 85:23, 93:23,
135:15, 136:26,
137:11, 137:17,
138:10, 143:8,
143:18, 144:5, 145:8,
150:19, 158:3
produce [2] - 10:14,
10:16
produced [3] -
41:25, 79:18, 137:26
products [1] -
107:25
Prof [38] - 8:22, 9:17,
11:15, 11:21, 23:21,
41:1, 41:2, 42:2, 42:7,
42:9, 42:17, 43:25,
44:9, 44:12, 44:13,
45:9, 45:12, 45:29,
46:19, 46:27, 47:1,
47:8, 47:14, 47:21,
50:25, 52:9, 53:2,
53:9, 53:19, 53:22,
54:6, 54:8, 70:21,
91:7, 104:26, 104:28,
105:9
profile [1] - 115:10
profoundly [1] -
104:20
programmes [1] -
143:5
prohibited [1] -
90:26
prompt [1] - 24:5
prompted [1] -
126:11
promptly [1] - 95:6
proof [7] - 25:12,
91:11, 91:13, 112:13,
112:14, 130:24,
130:28
proper [8] - 62:25,
77:1, 77:2, 88:3,
91:29, 100:8, 100:10,
116:20
properly [4] - 25:3,
25:14, 47:2, 96:14
proportion [1] -
113:13
proportionality [19] -
9:2, 9:3, 48:4, 48:13,
61:28, 61:29, 62:10,
71:21, 72:16, 73:14,
74:3, 74:10, 75:4,
75:9, 102:13, 132:28,
153:22, 153:28, 154:3
proportionality [1] -
62:9
propose [1] - 45:2
proposing [1] -
18:14
proposition [9] -
29:13, 41:11, 60:20,
62:15, 64:7, 79:2,
102:9, 138:18, 145:15
propositions [1] -
71:19
prosecuting [1] -
131:26
prosecution [2] -
59:24, 60:18
prosecutions [1] -
44:22
prosecutor [1] -
130:20
prosecutor.. [1] -
130:15
prospect [1] - 45:28
protect [3] - 96:9,
116:21, 156:24
protected [2] -
71:23, 88:24
protecting [1] -
116:17
PROTECTION [1] -
1:7
protection [61] - 6:4,
6:24, 13:7, 14:23,
15:7, 16:5, 17:25,
27:25, 28:8, 30:5,
33:6, 41:24, 64:26,
65:5, 65:24, 67:2,
70:8, 72:28, 76:25,
80:19, 80:25, 83:21,
83:23, 83:29, 84:5,
84:7, 84:12, 84:15,
84:18, 84:25, 84:26,
85:3, 85:7, 85:10,
85:16, 85:23, 86:2,
86:23, 86:27, 87:25,
88:4, 88:23, 93:13,
93:26, 103:6, 103:8,
107:14, 120:13,
139:16, 141:28,
142:11, 142:14,
142:23, 142:28,
144:24, 144:27,
145:7, 146:11, 149:7,
149:29, 154:8
Protection [6] - 5:5,
7:1, 24:4, 54:16,
80:27, 82:5
protection [1] -
80:21
protection.. [1] -
69:16
protections [9] - 7:2,
7:7, 18:16, 20:18,
22:26, 38:10, 38:18,
87:6, 87:15
protective [1] - 52:1
prove [13] - 22:19,
51:4, 51:16, 51:28,
64:9, 71:15, 91:17,
114:8, 121:15,
129:21, 131:3, 155:3
proved [1] - 129:29
proven [1] - 87:24
proves [2] - 95:15,
138:9
provide [21] - 24:15,
24:19, 27:9, 33:5,
41:9, 67:1, 76:23,
76:29, 77:7, 77:9,
77:24, 92:26, 94:8,
95:4, 96:7, 96:11,
118:13, 119:29,
132:8, 146:18, 154:20
Provided [1] - 68:6
provided [26] - 13:7,
17:10, 18:16, 19:27,
21:24, 22:7, 22:26,
26:9, 28:14, 31:18,
38:10, 46:18, 49:28,
61:23, 65:7, 72:14,
74:20, 87:8, 88:21,
126:25, 127:15,
129:27, 132:20,
134:29, 142:29,
148:27
providers [1] - 66:10
provides [16] - 16:5,
23:25, 28:17, 29:6,
55:26, 64:2, 64:26,
92:24, 92:25, 110:16,
117:9, 117:15,
124:15, 127:4,
130:13, 131:19
providing [9] - 28:3,
56:27, 72:27, 75:10,
75:11, 90:21, 96:16,
148:18, 156:8
proving [3] - 110:10,
128:25, 157:6
provision [10] - 8:1,
8:5, 45:21, 73:1,
74:12, 78:19, 100:23,
109:29, 127:22,
152:26
provisions [14] -
35:1, 52:11, 54:11,
71:18, 77:20, 93:25,
94:1, 114:24, 115:4,
117:11, 133:27,
135:13, 146:27, 153:3

proviso [1] - 95:19
public [33] - 17:1, 17:7, 17:8, 17:24, 19:16, 35:14, 35:21, 39:26, 51:26, 56:11, 56:12, 57:16, 57:21, 57:25, 58:22, 59:8, 66:11, 75:16, 99:3, 113:6, 116:18, 116:21, 116:26, 122:20, 124:1, 140:23, 146:29, 147:1, 147:17, 148:2, 149:11
publically [1] - 30:29
publication [1] - 118:20
publicly [1] - 66:10
published [1] - 13:24
pulling [1] - 143:26
purpose [14] - 29:14, 30:4, 56:8, 58:9, 80:18, 80:19, 82:12, 126:11, 126:22, 127:17, 134:27, 137:11, 137:17, 151:29
purposes [16] - 14:15, 17:9, 18:8, 19:17, 20:6, 21:6, 30:25, 31:5, 55:29, 57:1, 67:1, 77:2, 99:17, 139:28, 141:1, 143:9
pursuant [3] - 33:19, 52:15, 152:11
pursue [1] - 28:4
pursued [1] - 19:14
put [14] - 5:10, 14:2, 25:7, 25:9, 37:1, 43:3, 53:22, 72:5, 89:12, 99:9, 104:28, 114:12, 122:27, 154:28
putting [3] - 44:5, 83:7, 120:13

Q

QC [3] - 97:7, 97:15, 105:13
qualified [2] - 108:25, 145:3
quash [1] - 118:17
QUAY [2] - 2:24, 3:4
question.. [1] - 150:10
questioned [1] - 45:9
questions [8] - 5:10, 40:12, 60:19, 71:20,

74:15, 82:8, 151:19, 151:21
QUESTIONS [1] - 4:4
quickly [3] - 13:3, 54:22, 64:1
QUIGLEY [1] - 2:18
quite [6] - 34:17, 72:1, 90:28, 101:10, 104:24, 151:26
Quite [1] - 66:23
quotation [1] - 70:2
quote [1] - 127:28
quoted [4] - 11:21, 61:5, 71:13, 121:6
quotes [3] - 69:9, 80:8, 111:21
quoting [1] - 10:7

R

raise [3] - 24:27, 34:7, 52:20
raised [7] - 9:21, 39:28, 40:11, 69:5, 140:6, 146:1, 149:27
raises [1] - 67:6
raising [1] - 34:25
random [1] - 117:13
range [6] - 48:25, 94:15, 113:12, 134:7, 136:2, 136:8
ranging [1] - 73:13
rather [12] - 36:21, 60:5, 60:25, 73:5, 84:22, 92:13, 101:13, 106:2, 107:2, 109:1, 119:12, 128:9
re [4] - 31:16, 40:6, 75:21, 79:28
re-certification [1] - 31:16
re-heard [1] - 75:21
re-open [1] - 79:28
re-read [1] - 40:6
reach [4] - 40:26, 79:15, 133:3, 144:13
reached [4] - 26:26, 34:17, 109:14, 157:10
reaches [1] - 40:26
reaching [1] - 136:10
read [9] - 40:6, 41:19, 41:22, 60:28, 61:24, 135:14, 152:7, 154:6, 157:17
readily [2] - 47:2, 87:18
reading [2] - 95:12, 154:16
reads [1] - 65:19

real [1] - 139:15
really [15] - 14:2, 36:19, 60:24, 65:1, 71:5, 72:1, 75:25, 80:14, 83:6, 90:20, 91:29, 94:29, 139:23, 139:24, 140:10
realm [1] - 135:27
realms [1] - 59:29
reason [12] - 11:5, 25:7, 33:1, 65:16, 74:5, 84:10, 104:6, 112:21, 122:6, 136:27, 150:11, 150:25
reasonable [14] - 46:10, 48:7, 48:8, 75:14, 78:14, 99:3, 108:14, 108:19, 111:27, 114:3, 114:13, 114:19, 121:20
reasonably [2] - 95:10, 121:14
reasoned [1] - 59:22
reasoning [1] - 66:23
reasons [15] - 5:24, 29:16, 34:8, 36:11, 73:27, 81:2, 95:5, 100:25, 112:18, 115:18, 122:3, 131:23, 154:15, 154:18, 155:23
reassessed [1] - 28:22
recalled [1] - 151:8
receive [3] - 22:1, 25:16, 129:26
received [5] - 15:28, 32:14, 32:22, 32:25, 114:12
received] [1] - 155:18
recent [4] - 107:22, 108:15, 122:1, 137:25
recently [1] - 65:13
recertify [1] - 16:2
recipients [1] - 23:26
recital [14] - 6:12, 6:16, 12:19, 13:9, 14:17, 15:6, 15:20, 15:24, 16:16, 17:19, 18:2, 24:14, 26:24, 33:26
recitals [8] - 14:21, 16:14, 20:8, 24:17, 24:18, 27:21, 29:28, 34:14
recitation [1] - 143:20

recited [1] - 43:18
recognised [2] - 72:14, 153:24
recognition [1] - 120:20
recollection [1] - 60:13
Recommendation [1] - 127:2
recommendations [1] - 13:15
recommended [1] - 8:23
reconsideration [2] - 8:23, 46:1
recorded [4] - 22:6, 42:14, 70:20, 71:20
recording [1] - 150:4
records [6] - 17:20, 21:28, 22:3, 26:21, 43:8, 117:4
recourse [1] - 134:22
recoverability [1] - 45:4
recovering [1] - 87:23
rectification [2] - 28:6, 88:11
recurrence [1] - 51:5
recurring [1] - 49:16
redolent [1] - 121:24
Redress [1] - 54:4
redress [10] - 16:15, 21:4, 21:12, 24:15, 24:19, 26:7, 26:9, 35:1, 38:18, 128:6
reduce [1] - 143:7
refer [7] - 10:15, 18:2, 21:26, 71:8, 97:15, 98:14, 154:22
referable [1] - 21:27
reference [22] - 7:5, 10:6, 11:25, 19:22, 20:26, 20:28, 33:10, 33:12, 33:25, 62:17, 71:1, 73:5, 75:9, 91:16, 99:26, 101:12, 101:13, 102:26, 104:27, 135:16, 137:28, 140:5
references [7] - 15:22, 16:10, 16:12, 43:17, 136:22, 139:2
referred [24] - 8:1, 11:28, 13:4, 20:19, 23:7, 36:25, 43:29, 47:4, 47:5, 49:27, 66:14, 73:1, 105:13, 132:2, 136:16, 144:11, 145:18,

146:3, 149:5, 151:25, 152:6, 155:10, 157:16, 158:9
referring [5] - 22:5, 49:11, 60:29, 62:18, 138:14
refers [7] - 34:28, 68:5, 103:14, 105:27, 138:13, 154:22, 158:11
reflected [2] - 73:6, 73:7
reflects [4] - 16:7, 26:16, 33:8, 62:28
refracted [1] - 46:25
refusal [1] - 145:25
refuse [1] - 151:25
refused [1] - 146:8
refusing [3] - 147:23, 148:15, 152:10
regard [19] - 34:29, 43:8, 53:12, 57:15, 58:15, 77:12, 83:28, 84:1, 84:5, 85:26, 94:9, 100:11, 103:12, 112:29, 116:5, 122:14, 123:1, 145:8, 155:8
regarded [1] - 58:9
regarding [8] - 11:27, 24:27, 25:11, 26:27, 40:26, 42:14, 42:26, 155:27
regardless [1] - 58:8
regards [8] - 17:5, 23:24, 34:8, 42:4, 86:28, 116:9, 130:23, 155:7
regime [9] - 62:6, 73:2, 80:19, 116:15, 119:22, 120:19, 141:26, 149:25, 150:17
regimes [1] - 121:28
Register [1] - 13:24
registered [1] - 58:15
REGISTRAR [2] - 5:5, 82:5
regularly [1] - 49:16
regulate [1] - 104:4
regulated [1] - 55:15
regulating [1] - 127:3
regulation [1] - 68:22
Regulation [2] - 109:18, 109:24
reiterated [1] - 111:18

reiterates [1] - 130:16
rejected [1] - 131:1
rejecting [1] - 140:19
related [3] - 44:19, 145:24, 157:23
relates [11] - 14:26, 25:25, 35:11, 35:14, 35:20, 38:16, 46:5, 145:17, 149:26, 150:10, 152:6
relating [11] - 7:19, 28:5, 33:17, 55:18, 66:13, 73:21, 129:24, 145:7, 145:12, 146:27, 152:9
relation [28] - 5:26, 6:26, 7:24, 14:6, 34:6, 35:3, 35:16, 38:17, 39:5, 40:14, 40:21, 45:20, 46:6, 54:9, 58:16, 63:27, 64:25, 74:24, 74:25, 82:21, 94:27, 122:28, 138:19, 151:28, 153:28, 154:16, 156:29
relationship [3] - 32:7, 97:22, 109:2
relatively [4] - 7:25, 54:22, 105:20, 105:23
relaxation [1] - 9:10
relevance [3] - 6:9, 45:1, 151:19
relevant [25] - 7:10, 16:8, 35:20, 35:27, 37:5, 38:14, 39:25, 66:7, 75:4, 75:5, 86:5, 92:7, 93:17, 93:25, 93:27, 93:29, 117:1, 120:2, 120:19, 120:29, 143:9, 146:26, 149:14, 154:3, 154:26
reliance [4] - 32:2, 32:14, 32:22, 34:3
relied [2] - 148:8, 149:16
relief [7] - 50:18, 50:26, 51:2, 51:6, 90:26, 91:13, 91:15
reliefs [1] - 90:16
relies [1] - 14:15
rely [9] - 11:10, 11:15, 11:17, 25:23, 25:27, 36:16, 36:23, 37:3, 52:11
remain [1] - 65:6
remaining [1] - 44:23
remains [3] - 10:8, 150:8, 158:3
remedial [12] - 12:16, 12:21, 21:23, 23:9, 24:13, 29:6, 42:27, 79:22, 94:14, 100:8, 100:12, 136:3
remediation [1] - 26:15
remedied [8] - 25:18, 77:20, 79:6, 88:16, 88:24, 89:8, 90:12, 96:19
remedied' [1] - 91:25
remedies [39] - 20:15, 20:20, 28:4, 28:14, 35:22, 44:20, 48:29, 49:15, 49:17, 50:5, 50:6, 71:27, 71:28, 73:26, 74:1, 87:21, 100:15, 108:5, 113:1, 113:14, 113:15, 122:15, 123:23, 123:25, 124:15, 124:26, 125:2, 125:16, 126:1, 128:7, 130:11, 131:20, 131:24, 132:2, 134:19, 135:8, 136:9, 143:6, 143:19
remedy [42] - 8:4, 29:8, 29:10, 29:13, 44:22, 44:26, 49:20, 49:28, 50:2, 50:10, 51:7, 61:22, 63:24, 69:29, 71:2, 74:12, 77:1, 77:2, 77:7, 77:9, 77:24, 77:28, 79:11, 81:4, 88:1, 90:21, 94:8, 94:14, 95:18, 96:23, 97:17, 98:29, 106:25, 108:3, 108:12, 109:1, 123:27, 132:9, 132:21, 132:22, 142:26, 155:16
remedy' [1] - 97:1
remember [5] - 35:10, 51:23, 75:18, 93:11, 114:7
remembering [1] - 78:1
remind [6] - 9:17, 47:21, 67:27, 80:1, 97:3, 101:11
reminding [1] - 139:2
removal [1] - 15:29
removed [2] - 15:27, 147:25
render [2] - 69:18, 70:13
rendered [1] - 128:7
rendering [1] - 70:18
renewable [1] - 110:20
repeat [1] - 26:23
repeated [1] - 73:19
repeatedly [1] - 22:29
repeating [2] - 91:4, 101:19
replaced [1] - 54:10
reply [5] - 22:2, 36:16, 38:23, 38:29, 39:2
Report [4] - 10:5, 11:10, 43:10, 43:11
report [21] - 10:8, 11:15, 11:21, 12:23, 41:4, 41:24, 41:28, 42:5, 42:9, 42:13, 42:17, 43:26, 44:14, 44:15, 45:9, 46:2, 104:26, 105:8, 116:26, 145:20, 158:2
reports [1] - 116:25
represent [2] - 141:14, 148:10
representation [1] - 17:18
representations [7] - 13:26, 14:20, 17:11, 19:26, 20:9, 22:6, 30:16
represented [1] - 148:3
reproduced [1] - 3:24
request [9] - 25:25, 59:22, 96:5, 129:15, 129:17, 130:9, 132:7, 141:23, 147:26
requesting [1] - 154:17
requests [3] - 26:2, 33:17, 96:24
require [7] - 22:8, 118:13, 118:18, 126:4, 149:8, 150:1, 154:19
required [9] - 31:18, 73:17, 74:10, 77:10, 85:8, 88:3, 88:8, 88:15, 111:10
requirement [13] - 16:7, 23:28, 46:12, 71:14, 79:22, 82:19, 107:28, 110:27, 128:3, 128:13, 132:6, 132:18, 141:13
requirements [19] - 5:18, 9:5, 13:19, 17:2, 23:25, 29:10, 31:14, 33:8, 52:26, 59:3, 64:3, 67:12, 74:1, 81:1, 89:4, 125:15, 153:5, 153:12, 158:4
requires [5] - 69:15, 107:13, 117:3, 153:21, 154:2
requiring [3] - 65:22, 101:27, 157:18
requisite [1] - 130:18
rescue [1] - 133:24
rescuing [1] - 42:2
reserve [1] - 40:1
resided [1] - 147:8
residence [4] - 146:28, 147:9, 147:15, 147:20
resident [3] - 143:2, 145:26, 150:28
residing [1] - 147:27
resolution [3] - 141:22, 141:27, 142:1
resolve [3] - 26:18, 95:23, 97:2
resolved [4] - 20:24, 27:2, 79:12, 110:1
resolves [1] - 96:27
resorted [1] - 47:11
resources [1] - 32:5
respect [22] - 28:1, 28:7, 31:20, 32:24, 38:8, 50:1, 50:24, 57:3, 57:16, 65:17, 71:10, 72:15, 75:25, 86:26, 89:3, 89:19, 93:17, 94:6, 140:7, 140:13, 153:19, 158:17
respected [2] - 59:16, 73:10
respectful [33] - 8:18, 9:4, 10:3, 10:22, 20:5, 20:21, 41:1, 41:8, 42:5, 45:7, 49:23, 62:13, 63:14, 67:10, 67:21, 71:29, 74:28, 75:1, 76:5, 81:2, 94:16, 97:3, 97:29, 100:29, 102:10, 125:18, 132:17, 138:20, 144:8, 144:20, 150:14, 156:16, 158:7
respectfully [9] - 29:12, 34:1, 45:18, 73:27, 79:13, 80:12, 91:27, 95:15, 125:6
respects [5] - 52:23, 74:23, 89:28, 118:26, 154:1
responded [1] - 36:15
respondent [2] - 3:24, 121:12
responding [3] - 36:20, 40:4, 82:11
response [5] - 7:28, 26:2, 96:7, 96:11, 137:27
responsibility [3] - 78:28, 150:9, 151:16
responsible [1] - 107:1
restrict [1] - 124:4
restricted [2] - 19:18, 63:9
restriction [3] - 126:23, 134:27, 146:27
restrictions [1] - 73:16
restricts [1] - 21:17
result [13] - 13:24, 66:9, 87:1, 112:23, 112:27, 113:20, 115:9, 119:9, 119:12, 122:8, 122:12, 123:6, 152:15
resulting [2] - 75:22, 153:13
results [1] - 158:1
RESUMED [2] - 5:1, 82:1
retain [3] - 16:2, 33:3, 66:12
retained [6] - 58:7, 59:4, 59:17, 61:18, 121:16, 121:21
retention [7] - 53:10, 55:25, 56:17, 56:28, 57:19, 65:22, 119:22
Retention [1] - 65:15
retracted [1] - 41:18
retrospective [1] - 52:18
return [2] - 15:28, 29:17
reveal [2] - 57:21, 126:13
revelations [2] - 64:20, 139:18
review [16] - 10:8, 28:20, 52:17, 52:19, 100:22, 100:23, 112:13, 113:12, 116:10, 116:29, 117:13, 120:2,

130:23, 140:18,
154:13, 154:29
Review [1] - 130:24
review.. [1] - 59:19
reviewed [3] - 23:26,
156:19
reviewing [1] - 95:13
reviews [1] - 117:8
rhetorical [1] - 67:16
RICHARD [1] - 2:12
Richards [5] - 43:25,
45:12, 47:8, 53:22,
97:5
rightly [2] - 77:21,
77:22
rights [42] - 18:8,
19:6, 27:27, 52:1,
52:12, 52:14, 61:25,
66:16, 68:2, 69:18,
70:11, 70:20, 70:29,
72:11, 72:13, 72:15,
72:23, 72:24, 72:25,
73:17, 74:4, 85:8,
86:27, 86:29, 90:17,
98:27, 107:14,
107:17, 108:6, 119:9,
121:2, 121:28, 128:7,
130:14, 130:26,
146:6, 153:18,
154:24, 155:9, 156:2,
156:23, 158:17
Rights [21] - 11:1,
11:19, 48:22, 49:1,
57:7, 65:14, 69:4,
72:5, 75:28, 101:23,
101:29, 103:23,
103:24, 104:2, 104:6,
104:10, 104:17,
107:13, 107:25,
111:3, 119:19
Rights.. [1] - 128:2
rigid [1] - 120:15
RIPA [13] - 55:25,
97:26, 109:24,
110:16, 114:7,
114:22, 114:23,
115:1, 115:4, 115:20,
116:9, 116:14, 117:11
rise [2] - 62:17,
120:4
risk [16] - 57:24,
58:1, 64:10, 113:1,
113:8, 115:2, 115:8,
115:25, 119:11,
122:16, 122:23,
124:13, 124:21,
124:25, 125:4, 134:2
RIVERSIDE [1] -
2:23
road [1] - 89:20

Robertson [6] -
97:10, 97:11, 97:15,
105:11, 105:12,
105:13
ROGERSON'S [1] -
2:24
role [6] - 84:4,
102:21, 102:25,
116:17, 117:11, 143:5
roll [1] - 136:8
rolled [1] - 43:28
rolled-up [1] - 43:28
room [1] - 46:8
routinely [1] - 64:22
RUDDEN [1] - 2:18
rule [22] - 8:16, 8:20,
8:24, 9:4, 9:9, 9:15,
25:11, 58:16, 59:18,
62:27, 75:13, 75:16,
100:2, 105:24, 106:3,
106:6, 124:9, 125:2,
142:2, 151:25, 152:25
Rule [1] - 44:29
ruled [1] - 97:13
rules [27] - 9:23,
18:6, 25:11, 27:15,
33:20, 54:9, 69:25,
70:10, 71:5, 71:8,
73:21, 85:12, 85:13,
86:1, 94:13, 106:3,
106:5, 106:19,
107:10, 109:4, 118:8,
145:7, 145:12, 148:9,
151:2, 155:25, 157:7
ruling [2] - 80:4,
147:26
ruling.. [1] - 151:23
rulings [1] - 118:20
running [1] - 12:19
Ruritania [1] - 90:15
Ruritania's [1] -
88:12
Russia [2] - 119:2,
129:1
Russian [6] - 130:11,
130:13, 131:19,
132:8, 132:12, 132:13
régime [3] - 12:21,
114:23, 116:9
régimes [2] - 105:24,
113:21

S

Safe [4] - 13:14,
43:11, 71:14, 140:12
safe [1] - 85:17
safeguard [2] -
116:22, 128:10

safeguarding [1] -
70:11
safeguards [12] -
17:5, 19:1, 65:17,
68:6, 86:24, 86:29,
96:17, 106:18,
116:20, 134:20,
135:10, 135:14
safeguards' [1] -
19:8
safety [1] - 56:11
satisfactory [1] -
85:3
satisfied [4] - 27:18,
111:27, 123:13,
142:16
satisfies [1] - 100:17
satisfy [3] - 88:10,
100:17, 130:29
save [6] - 15:22,
54:14, 54:17, 65:7,
72:20, 101:11
saved [1] - 12:17
saves [1] - 125:25
saw [1] - 48:6
SC [10] - 2:5, 2:5,
2:10, 2:11, 2:16, 2:17,
2:21, 2:27, 3:2, 3:8
SCC [10] - 7:21,
33:25, 35:16, 78:27,
79:6, 89:9, 89:10,
91:23, 92:6
SCCs [47] - 14:15,
15:23, 16:12, 29:1,
29:7, 33:8, 33:10,
33:12, 33:24, 34:6,
38:11, 39:23, 76:10,
76:16, 76:18, 76:21,
76:29, 77:7, 77:10,
77:17, 77:20, 77:24,
78:19, 79:12, 79:18,
79:20, 81:4, 82:8,
82:10, 82:14, 82:23,
88:21, 89:12, 89:16,
89:18, 90:3, 90:4,
90:9, 90:13, 90:14,
90:16, 90:29, 91:21,
93:19, 95:21
scenarios [1] - 47:19
scheme [6] - 8:19,
13:14, 21:23, 42:27,
85:17, 85:19
SCHREMS [1] - 1:14
Schrems [27] -
13:17, 19:5, 19:22,
23:6, 28:2, 29:11,
37:14, 57:8, 62:29,
63:18, 64:1, 64:28,
66:24, 67:17, 71:13,
74:9, 80:4, 82:27,

82:28, 98:26, 101:14,
125:15, 138:23,
139:4, 139:13,
140:17, 140:29
Schrems' [1] - 64:8
scope [8] - 6:10,
37:11, 72:25, 85:5,
123:14, 134:22,
135:25, 145:11
scrutiny [7] - 108:11,
113:9, 118:21,
122:24, 123:24,
124:9, 137:19
se [1] - 42:11
SEAN [1] - 2:17
search [2] - 129:19,
131:10
searches [1] - 131:8
second [14] - 6:22,
9:21, 12:6, 12:13,
33:10, 35:13, 44:8,
46:5, 74:15, 89:7,
103:18, 108:11,
138:18, 158:14
Second [8] - 47:27,
48:6, 49:2, 49:5,
49:12, 75:19, 121:24,
152:8
secondary [1] - 76:4
Secondly [1] -
123:22
secrecy [5] - 54:10,
112:22, 122:7, 123:5,
127:24
secret [34] - 106:5,
111:17, 112:19,
112:28, 113:1, 113:4,
113:6, 113:25, 114:5,
115:23, 120:20,
120:21, 120:26,
120:27, 121:3,
121:17, 121:18,
122:4, 122:13,
122:16, 122:18,
122:21, 122:29,
123:11, 123:12,
123:15, 123:28,
124:1, 124:13,
124:18, 124:19,
125:1, 126:16, 135:21
Secretary [14] -
17:12, 24:22, 24:25,
25:20, 25:29, 98:4,
100:16, 116:12,
145:21, 147:14,
147:24, 148:6,
148:27, 152:11
Section [4] - 51:17,
55:25, 96:24, 117:9
section [9] - 55:28,

95:28, 96:6, 105:18,
110:15, 115:7,
115:19, 133:21,
142:29
sections [2] - 31:1,
52:3
sector [1] - 127:4
secured [1] - 135:14
securing [1] - 135:9
security [116] - 5:19,
6:7, 9:24, 9:28, 10:1,
10:2, 10:10, 10:17,
16:19, 16:20, 16:21,
16:25, 17:1, 17:8,
17:14, 18:8, 21:6,
33:17, 35:1, 38:5,
42:22, 42:23, 42:25,
48:14, 48:27, 53:11,
53:21, 54:29, 55:3,
56:7, 57:5, 57:25,
58:22, 58:29, 59:6,
59:7, 59:8, 59:28,
60:2, 60:8, 61:6,
61:12, 62:17, 62:19,
62:23, 62:26, 63:5,
63:10, 64:21, 64:26,
67:3, 68:10, 68:27,
73:15, 73:21, 75:17,
75:24, 86:8, 106:4,
106:23, 111:9,
121:12, 121:20,
132:29, 133:11,
136:15, 136:24,
136:26, 137:12,
137:18, 138:4,
138:10, 138:13,
138:14, 139:4, 140:4,
140:24, 141:5,
141:15, 142:3, 143:9,
143:18, 143:29,
144:5, 144:13,
145:17, 146:13,
146:15, 147:1, 148:2,
149:20, 149:26,
150:8, 150:17,
150:20, 151:1,
152:14, 152:15,
152:24, 155:23,
155:26, 156:8,
156:12, 156:18,
156:21, 156:26,
157:1, 157:7, 158:2,
158:11, 158:15,
158:19
Security [2] - 95:11,
139:21
security' [1] - 139:28
security.. [1] -
149:11
see [51] - 12:17,

14:10, 14:26, 14:29,
15:16, 24:10, 30:4,
31:11, 31:28, 32:10,
32:17, 39:7, 44:11,
48:23, 55:22, 58:29,
61:9, 61:27, 64:6,
69:4, 69:21, 70:6,
71:22, 89:20, 92:10,
92:21, 92:23, 97:20,
99:13, 101:16,
101:21, 102:2,
105:14, 105:17,
108:3, 108:14,
110:14, 113:12,
117:17, 125:18,
128:21, 133:16,
136:28, 137:24,
138:27, 139:8, 142:6,
146:23, 148:23,
149:22, 151:5
seek [4] - 69:29,
128:6, 149:28, 150:15
seeking [2] - 88:14,
148:18
seem [1] - 37:25
sees [2] - 21:23,
94:25
seized [1] - 52:16
seizures [1] - 131:9
selection [1] -
117:14
self [11] - 14:28,
15:10, 31:5, 31:14,
31:15, 31:22, 32:8,
85:18, 141:26, 141:29
self-assessment [1]
- 85:18
self-certification [5]
- 31:14, 31:15, 31:22,
85:18, 141:26
self-certified [3] -
14:28, 31:5, 141:29
self-certifies [1] -
32:8
semantic [2] - 8:6,
85:4
senior [1] - 24:25
Senior [1] - 33:16
sense [6] - 57:5,
62:20, 75:25, 90:24,
140:13, 144:4
sensible [1] - 158:25
sensitive [1] - 66:3
sent [1] - 152:23
sentence [3] - 11:20,
27:12, 49:21
separately [4] -
35:15, 38:4, 38:16,
89:22
separation [1] -
151:10
sequence [1] - 12:18
series [2] - 5:9,
126:6
serious [7] - 56:21,
56:22, 57:22, 57:24,
58:19, 140:25
seriously [1] - 70:16
serve [2] - 126:13,
140:22
served [1] - 109:20
serves [2] - 68:17,
107:11
services [14] - 63:8,
64:22, 66:11, 86:9,
111:9, 121:13,
121:20, 123:20,
124:5, 126:14,
139:20, 141:11,
141:13, 142:29
Services [3] - 1:22,
3:23, 3:25
SERVICES [1] - 1:32
serving [1] - 100:15
Serwin [3] - 24:8,
42:21, 43:3
Serwin's [3] - 44:13,
45:8, 54:17
set [11] - 11:1, 11:22,
19:4, 24:21, 57:27,
86:21, 106:2, 109:21,
131:23, 149:8, 152:25
sets [3] - 105:23,
107:15, 132:18
setting [1] - 57:15
settled [2] - 151:8,
154:12
seven [1] - 54:2
seventh [1] - 54:2
several [2] - 121:9,
131:5
shall [6] - 28:20,
72:25, 72:27, 102:12,
110:16, 145:7
sharp [1] - 63:15
shield [15] - 14:6,
14:8, 14:12, 14:14,
14:24, 14:27, 15:3,
15:17, 15:27, 15:29,
27:29, 30:12, 30:20,
30:26, 31:5
Shield [73] - 6:11,
6:15, 11:27, 11:29,
12:6, 12:9, 12:10,
12:11, 12:15, 13:8,
13:29, 15:8, 15:23,
17:7, 18:11, 18:17,
25:19, 25:23, 25:26,
26:14, 28:19, 28:26,
28:27, 29:6, 30:3,
30:8, 30:14, 30:28,
31:17, 32:3, 32:4,
32:15, 32:21, 32:22,
32:23, 32:26, 33:1,
33:2, 33:19, 33:26,
34:2, 34:3, 34:4,
34:10, 34:11, 34:22,
34:28, 35:5, 35:10,
35:19, 35:26, 35:29,
36:2, 36:9, 37:5, 37:7,
37:28, 38:13, 39:13,
39:24, 51:9, 61:3,
73:25, 95:28, 96:6,
96:11, 96:19, 96:22,
97:21, 100:9, 101:4,
101:16
short [6] - 7:13, 24:3,
41:25, 88:15, 102:27,
135:9
shortly [5] - 44:26,
46:22, 46:23, 46:26,
48:17
should've [3] -
139:25, 140:10,
143:26
show [11] - 21:17,
29:2, 31:7, 38:22,
46:20, 64:28, 77:7,
101:25, 120:11,
124:20, 130:25
showing [1] - 22:12
shown [2] - 18:23,
100:26
shows [2] - 93:10,
104:19
shutters [1] - 143:26
SIAC [7] - 147:17,
147:29, 148:2, 148:9,
148:20, 148:25,
148:28
side [4] - 44:6, 76:3,
99:9, 102:17
sight [2] - 112:17,
122:2
sign [3] - 35:12,
38:2, 101:20
signals [2] - 19:28,
24:27
signed [3] - 17:12,
31:4, 37:7
significance [7] -
43:1, 45:29, 54:7,
106:27, 138:2,
139:29, 153:13
significant [11] -
8:29, 12:21, 20:22,
21:23, 23:9, 34:19,
47:3, 53:24, 54:3,
78:25, 118:26
significantly [1] -
24:28
signing [2] - 35:4,
37:27
Silver [1] - 109:9
similar [6] - 12:22,
70:12, 88:18, 126:28,
146:11, 146:12
similarity [2] - 47:10,
135:3
Similarly [1] - 151:14
similarly [2] -
144:17, 146:17
simple [4] - 79:13,
79:15, 79:17, 98:2
simplest [1] - 45:20
simply [4] - 41:11,
143:26, 151:1, 158:10
SIR [1] - 2:24
sit [2] - 35:9, 37:24
situation [17] -
22:21, 50:1, 53:20,
59:5, 67:13, 76:1,
77:8, 88:6, 90:22,
94:11, 94:12, 95:1,
112:2, 113:24,
124:20, 128:27, 156:7
situations [5] -
57:16, 58:21, 59:4,
113:19, 133:26
six/six [1] - 75:22
sixth [1] - 52:22
size [2] - 89:13,
89:29
slides [1] - 92:1
SMITH [1] - 2:27
Snowden [2] - 64:20,
139:18
so' [1] - 77:10
society [3] - 68:8,
117:25, 133:20
Software [1] - 2:27
sole [1] - 33:23
solely [4] - 35:4,
69:6, 150:9, 151:14
solicitor [1] - 148:3
SOLICITORS [2] -
2:7, 2:28
solution [1] - 80:12
solutions [1] -
128:22
solve [1] - 95:10
solving [1] - 60:7
someone [4] -
100:15, 124:27,
150:15, 150:27
somewhat [4] -
10:23, 38:22, 42:9,
77:18
soon [6] - 61:20,
106:22, 126:21,
127:8, 127:16, 134:25
sorry [41] - 16:14,
23:10, 23:15, 24:16,
32:18, 37:9, 39:15,
44:12, 46:8, 46:14,
48:27, 49:10, 55:7,
59:7, 77:12, 82:29,
83:8, 83:10, 92:18,
97:11, 97:14, 99:21,
103:2, 103:4, 105:15,
107:7, 116:2, 124:25,
125:7, 133:7, 136:22,
137:25, 138:2, 139:9,
141:18, 143:15,
143:16, 144:22,
146:14, 150:21, 156:7
sort [17] - 5:10, 5:26,
6:2, 6:19, 6:22, 7:10,
43:28, 64:13, 78:3,
82:9, 82:17, 89:13,
89:16, 97:21, 101:24,
102:24, 112:1
sorts [1] - 6:14
sought [3] - 67:17,
90:27, 151:27
source [2] - 14:2,
133:23
sources [1] - 155:27
SOUTH [1] - 2:13
sovereign [1] - 45:3
speaking [6] - 10:24,
137:25, 137:26,
137:27, 138:8, 158:9
speaks [1] - 40:17
special [11] - 112:18,
122:3, 128:11,
135:15, 146:20,
147:17, 148:10,
148:11, 148:17,
148:22, 148:28
Special [2] - 145:29,
146:4
specialist [1] -
141:22
specific [11] - 15:4,
19:17, 20:13, 20:14,
32:11, 58:26, 96:22,
107:10, 117:14,
119:13, 156:22
specifically [2] -
59:2, 97:4
spelled [1] - 106:9
spent [1] - 70:25
sphere [10] - 35:3,
35:12, 35:14, 35:17,
35:21, 38:6, 38:10,
39:23, 39:26, 120:19
Spokeo [5] - 41:22,
45:16, 52:22, 53:7,
53:24

SQUARE ^[1] - 2:29
staff ^[1] - 25:20
stage ^[2] - 5:20, 36:7
stand ^[1] - 24:13
standard ^[22] - 6:4, 9:22, 11:3, 11:16, 11:22, 16:8, 19:4, 22:1, 33:19, 51:17, 87:5, 87:25, 88:7, 88:16, 92:13, 95:22, 101:12, 107:15, 108:16, 111:14, 116:5, 125:9
standards ^[6] - 9:10, 105:20, 105:23, 105:28, 107:12, 130:18
standing ^[55] - 8:15, 9:10, 9:16, 23:18, 25:11, 27:15, 41:24, 44:23, 45:13, 45:14, 46:7, 46:20, 47:1, 47:17, 47:23, 48:7, 49:19, 50:7, 50:11, 50:13, 50:16, 51:2, 51:14, 52:26, 63:27, 64:3, 66:7, 67:12, 67:18, 67:23, 69:6, 69:8, 69:13, 69:25, 71:8, 74:24, 75:13, 75:23, 87:29, 90:9, 90:16, 91:8, 96:29, 100:14, 108:13, 109:3, 109:4, 110:27, 113:16, 113:17, 113:21, 125:2, 133:4, 134:12, 136:12
stands ^[2] - 76:5, 76:6
stark ^[1] - 11:7
start ^[10] - 54:14, 73:2, 83:15, 109:10, 137:8, 139:1, 139:9, 140:10, 145:15, 153:29
starting ^[1] - 103:29
starts ^[1] - 123:2
State ^[35] - 17:13, 24:22, 24:26, 25:29, 64:26, 68:4, 68:10, 68:18, 69:5, 86:21, 93:28, 94:1, 98:4, 99:26, 100:16, 101:24, 116:13, 119:22, 121:12, 139:17, 145:21, 147:14, 148:6, 148:27, 149:10, 149:14, 149:17, 149:19, 150:8, 152:11, 152:15, 152:24, 155:23, 155:26, 157:7
state ^[14] - 42:13, 49:24, 52:15, 52:20, 54:9, 66:28, 75:16, 77:28, 87:11, 87:13, 87:19, 89:3, 92:26, 104:8
state's ^[1] - 133:10
State.. ^[2] - 147:24, 155:24
statement ^[2] - 66:6, 135:3
statements ^[1] - 10:11
states ^[13] - 48:29, 79:19, 80:28, 89:14, 92:24, 104:8, 105:22, 113:14, 113:15, 113:20, 138:14, 140:29, 158:12
STATES ^[1] - 2:21
States ^[67] - 10:28, 11:3, 11:17, 12:22, 16:21, 17:24, 18:7, 18:10, 27:28, 29:14, 30:5, 30:7, 30:27, 39:12, 42:27, 46:9, 47:27, 48:5, 62:6, 64:24, 67:14, 67:22, 68:23, 68:27, 74:2, 80:27, 81:3, 90:1, 101:9, 101:13, 101:26, 102:4, 102:5, 102:15, 105:21, 105:29, 107:14, 118:27, 119:17, 129:11, 132:15, 136:26, 137:7, 137:9, 137:16, 137:18, 138:15, 139:15, 139:16, 139:19, 139:27, 141:5, 141:10, 142:3, 142:17, 142:28, 143:1, 143:3, 143:4, 144:3, 145:10, 146:27, 150:9, 152:13, 152:23, 158:16, 158:18
States" ^[1] - 14:29
states' ^[1] - 144:4
States.. ^[1] - 141:23
status ^[6] - 6:16, 11:26, 102:28, 133:17, 145:27
statute ^[2] - 52:27, 106:2
statutes ^[2] - 52:29, 96:15
stay ^[1] - 78:22
stems ^[1] - 23:13
stenographer ^[2] - 46:16, 117:17
stenographic ^[1] - 1:25
Stenography ^[3] - 1:21, 3:23, 3:25
STENOGRAPHY ^[1] - 1:31
step ^[2] - 91:19, 108:6
still ^[3] - 5:19, 50:27, 137:6
stocking ^[1] - 78:24
stood ^[1] - 38:28
stop ^[4] - 27:12, 48:2, 86:4, 92:22
storage ^[4] - 19:10, 19:24, 106:17, 135:15
stored ^[1] - 127:6
stores ^[1] - 32:29
strain ^[1] - 59:26
strands ^[3] - 36:1, 37:29, 39:21
Strasbourg ^[11] - 86:9, 103:14, 103:21, 104:1, 104:18, 104:20, 113:13, 113:16, 113:17, 125:9, 128:23
STREET ^[3] - 2:14, 2:19, 3:10
strengthening ^[2] - 13:13, 143:5
stressed ^[1] - 22:29
strict ^[5] - 48:4, 106:15, 106:16, 106:19, 135:28
strictly ^[6] - 19:9, 19:18, 35:21, 58:10, 152:27, 157:24
striking ^[4] - 48:5, 76:18, 101:28, 140:11
strong ^[1] - 106:18
structure ^[1] - 71:6
structure' ^[1] - 26:5
structures ^[1] - 68:22
stuff ^[2] - 5:27, 40:3
sub ^[1] - 133:22
sub-point ^[1] - 133:22
Subject ^[1] - 72:16
subject ^[40] - 9:1, 15:8, 21:5, 23:29, 32:13, 32:20, 42:18, 45:7, 45:13, 46:21, 46:22, 52:7, 54:3, 54:5, 59:19, 61:28, 81:6, 91:10, 92:21, 93:1, 95:19, 96:9, 100:22, 106:13, 107:29, 110:11, 116:27, 118:5, 122:1, 128:3, 128:5, 128:13, 129:5, 129:23, 131:13, 139:29, 153:21, 154:2, 158:3
subjected ^[7] - 106:21, 115:26, 119:11, 123:28, 129:20, 134:3, 137:19
subjects ^[2] - 21:3, 24:20
SUBMISSION ^[4] - 4:5, 4:6, 4:7, 7:16
submission ^[46] - 8:18, 9:5, 10:3, 10:22, 20:5, 20:22, 29:24, 34:13, 41:2, 41:8, 42:5, 45:7, 49:23, 60:5, 62:13, 63:14, 67:10, 67:22, 71:29, 74:28, 75:2, 76:5, 81:2, 82:15, 90:23, 92:3, 94:16, 97:3, 97:29, 100:29, 102:10, 108:22, 125:14, 125:17, 125:18, 132:18, 138:20, 144:9, 144:20, 150:4, 150:14, 156:17, 156:29, 158:7, 158:12, 158:13
submissions ^[14] - 35:25, 38:27, 39:2, 40:13, 40:15, 51:22, 76:19, 80:14, 104:16, 136:20, 136:29, 138:7, 140:2, 145:19
submit ^[7] - 29:12, 34:2, 45:19, 73:27, 80:12, 125:6, 136:11
submits ^[1] - 151:20
submitted ^[2] - 131:5, 151:21
submitted.. ^[1] - 59:23
submitting ^[3] - 96:8, 96:12, 131:25
subscribed ^[1] - 103:27
subscribers ^[1] - 58:15
subsection ^[2] - 56:1, 56:5
subsequent ^[3] - 19:17, 126:5, 134:18
Subsequent ^[1] - 126:9
Subsequently ^[1] - 148:14
subsequently ^[4] - 33:1, 109:21, 126:17, 145:27
subsidiary ^[1] - 106:3
substance ^[1] - 144:10
substantial ^[5] - 44:24, 47:5, 47:9, 87:28, 91:8
substantive ^[3] - 17:29, 20:17, 73:20
substitute ^[1] - 90:5
substitution ^[2] - 100:7, 100:11
suddenly ^[1] - 59:29
sue ^[3] - 25:12, 49:23, 52:13
sue' ^[1] - 75:17
suffered ^[1] - 23:3
sufficient ^[20] - 7:13, 48:9, 65:16, 67:23, 67:24, 71:22, 71:24, 76:11, 76:13, 85:4, 85:21, 91:29, 94:7, 108:29, 114:15, 119:20, 121:17, 134:11, 135:14, 156:1
suggest ^[5] - 57:3, 57:4, 57:10, 70:26, 156:29
suggested ^[6] - 9:12, 38:12, 62:7, 90:27, 104:16, 104:18
suggesting ^[1] - 47:22
suggestion ^[3] - 38:9, 39:22, 144:3
suggests ^[1] - 57:9
summarised ^[1] - 55:5
summarises ^[2] - 110:28, 119:25
summarising ^[1] - 77:27
superimposed ^[1] - 29:2
superintends ^[1] - 103:24
superior ^[1] - 130:15
supervised ^[1] - 10:1
supervising ^[1] - 106:29
supervision ^[7] - 11:1, 112:24, 116:9,

120:23, 122:9, 123:8,
142:21
supervisor [1] -
130:17
supervisory [2] -
117:26, 142:9
supplement [1] -
88:20
supplied [1] - 3:24
support [4] - 23:27,
29:23, 114:16, 138:18
supported [1] -
73:28
supports [3] - 29:12,
34:15, 60:20
suppose [17] -
11:27, 48:23, 50:14,
74:28, 79:28, 83:6,
84:23, 88:26, 98:12,
98:22, 103:9, 103:20,
113:12, 125:13,
136:7, 144:7, 153:26
Supreme [7] - 41:16,
41:19, 46:10, 48:1,
49:7, 69:26, 121:25
surge [1] - 42:1
surmount [1] - 51:1
surprise [1] - 14:2
surveillance [94] -
18:24, 21:5, 21:14,
22:15, 25:25, 27:3,
27:10, 38:15, 45:22,
46:21, 46:22, 47:15,
48:27, 53:6, 68:8,
68:22, 75:16, 78:12,
78:13, 91:10, 96:21,
105:24, 105:29,
106:8, 106:13,
106:16, 106:22,
106:29, 107:12,
108:10, 108:14,
108:20, 110:11,
111:9, 111:17,
111:28, 112:14,
112:28, 113:2, 113:4,
113:6, 113:8, 113:25,
114:5, 114:8, 115:2,
115:24, 116:15,
116:29, 117:6,
120:20, 120:21,
121:19, 122:13,
122:16, 122:19,
122:21, 122:23,
122:29, 123:6,
123:11, 123:12,
123:15, 123:29,
124:1, 124:3, 124:13,
126:7, 126:12,
126:16, 126:17,
126:20, 126:24,

127:16, 127:21,
128:26, 132:29,
133:11, 133:23,
134:18, 134:28,
135:21, 139:17,
140:21, 142:28,
146:14, 146:15,
146:16, 149:25,
150:17, 156:18,
158:16, 158:19
surveillance [1] -
125:1
surveillance.. [1] -
128:12
surveilled [5] - 7:6,
7:8, 45:26, 47:16,
69:29
survey [1] - 101:24
suspected [2] -
58:18, 128:16
suspects [2] - 118:2,
123:28
suspend [1] - 95:8
suspended [1] -
126:10
suspension [2] -
89:18, 126:8
suspicion [4] -
113:5, 122:20,
123:29, 124:15
sustain [1] - 41:11
SUZANNE [1] - 2:22
Sweden [1] - 56:18
Swedish [3] - 55:5,
55:13, 55:20
Swire [9] - 8:22,
11:21, 41:1, 41:2,
42:2, 45:29, 47:14,
104:28, 105:9
Swire's [1] - 42:7
synthesis [2] -
122:27, 125:26
system [44] - 48:15,
54:24, 63:19, 65:23,
74:2, 79:5, 86:1,
87:14, 87:20, 87:21,
87:27, 88:3, 88:6,
88:10, 88:16, 88:20,
90:6, 91:1, 91:23,
94:13, 100:8, 100:12,
104:19, 109:1, 110:8,
116:4, 118:23,
118:25, 123:20,
123:26, 124:14,
124:27, 125:2,
125:19, 128:24,
132:12, 132:13,
132:14, 137:18,
142:11, 142:21,
153:13, 158:18

system [1] - 142:23
systems [9] - 70:27,
80:25, 90:1, 100:19,
103:26, 104:3,
104:14, 107:28,
132:16
systems.. [1] - 118:1
Szabo [1] - 109:13
Szabó [1] - 133:8

T

tab [10] - 54:27, 64:3,
69:4, 72:4, 82:28,
104:28, 105:3, 133:7,
139:5, 144:23
Tab [11] - 12:3,
82:29, 83:10, 86:17,
92:8, 99:13, 99:18,
99:19, 99:20, 99:21,
105:6
tailored [3] - 18:26,
54:11, 123:5
talks [4] - 13:12,
13:17, 60:14, 66:18
target [2] - 24:1,
96:21
targeted [2] - 18:28,
123:18
targets [1] - 115:16
task [2] - 120:1,
157:5
tasked [1] - 116:14
tease [1] - 6:29
techniques [2] -
56:25, 155:25
technologies [1] -
135:29
telecommunication
[1] - 124:5
telecommunication
s [1] - 127:24
telephone [4] - 69:7,
95:12, 119:11, 131:3
ten [1] - 41:17
tend [1] - 136:8
tends [2] - 108:6,
108:12
term [3] - 6:20,
110:20, 126:11
termination [3] -
126:23, 127:17,
134:27
terminus [1] - 137:23
terms [16] - 8:14,
11:16, 30:10, 31:8,
44:10, 54:19, 76:6,
79:2, 80:15, 105:23,
109:14, 110:8,

132:20, 133:4, 144:25
TERRACE [1] - 2:8
terribly [2] - 32:18,
92:18
territory [3] - 107:18,
142:17, 142:18
terrorism [2] - 56:23,
60:24
terrorist [4] - 58:23,
59:7, 59:8, 133:24
test [19] - 9:1, 9:2,
46:9, 47:25, 47:26,
48:7, 48:20, 49:2,
52:28, 53:13, 80:23,
104:19, 111:6,
111:29, 121:10,
124:26, 134:10, 154:3
TEU [3] - 136:23,
144:22, 150:7
text [2] - 82:23,
158:14
textbooks [1] - 99:15
texts [2] - 80:16,
100:4
TFEU [1] - 150:8
That.. [1] - 61:22
THE [8] - 1:2, 1:7,
2:16, 4:4, 5:1, 82:1,
159:1
the.. [2] - 129:16,
155:1
theme [3] - 10:23,
49:16, 153:26
themselves [2] -
101:25, 104:9
THEN [1] - 159:1
theoretical [1] -
128:8
theory [3] - 93:10,
101:21, 132:17
thereby [2] - 124:6,
130:26
therefore [20] -
15:17, 21:4, 34:4,
37:17, 37:18, 38:13,
39:24, 62:23, 84:7,
103:29, 104:5,
107:29, 118:4, 124:8,
136:25, 137:12,
137:18, 142:11,
157:29, 158:18
Therefore [2] -
126:15, 154:5
thereof [1] - 87:22
they've [1] - 121:27
thinking [1] - 78:11
thinks [1] - 118:14
third [38] - 6:4, 9:22,
50:14, 51:11, 71:23,
74:15, 74:18, 82:14,

83:19, 83:20, 83:24,
84:8, 84:12, 84:14,
85:11, 85:22, 86:22,
87:10, 87:13, 87:19,
88:20, 89:3, 89:9,
89:17, 90:5, 90:6,
90:17, 91:22, 92:11,
92:23, 92:26, 93:7,
96:29, 138:2, 142:15,
142:18, 158:11
third-party [1] - 93:7
thirdly [2] - 30:23,
108:22
thoroughly [1] - 27:1
threat [2] - 134:5,
141:14
threatened [4] -
46:13, 58:23, 59:6,
59:8
threats [1] - 133:24
three [10] - 15:22,
16:10, 16:12, 16:16,
71:19, 71:26, 74:29,
109:12, 110:20,
146:23
three-year [1] -
110:20
threshold [1] -
110:12
throughout [1] -
62:19
ties [1] - 86:6
tightened [2] - 125:3
timely [1] - 96:7
tiny [1] - 105:15
title [1] - 13:4
to.. [1] - 105:4
today [1] - 7:26
together [5] - 13:25,
16:10, 57:26, 61:24,
122:27
tomorrow [2] -
158:24, 158:27
took [1] - 127:18
top [2] - 32:11, 150:3
tort [1] - 51:26
totality [1] - 149:15
totally [1] - 156:5
touch [1] - 19:28
touching [1] - 136:25
towards [2] - 7:7,
99:11
traffic [2] - 56:28,
95:13
transcript [1] - 1:24
Transcripts [1] -
3:23
transfer [11] - 5:28,
7:4, 31:6, 38:1, 38:5,
68:26, 83:19, 86:21,

93:23, 95:8, 141:2
transferred [29] -
14:7, 14:12, 14:23,
14:27, 15:9, 17:6,
17:23, 18:9, 19:11,
27:28, 29:7, 30:6,
30:12, 30:26, 32:2,
32:6, 34:3, 39:11,
64:23, 66:29, 79:20,
80:29, 83:24, 84:8,
95:22, 141:11,
141:21, 142:27
transferring [4] -
15:3, 28:26, 30:3,
35:28
transfers [3] - 14:13,
85:21, 86:22
transmitted [1] -
33:18
transpires [1] -
135:19
travel [1] - 98:12
travelled [1] - 147:22
travels [2] - 93:13,
93:14
traversing [1] -
19:29
treaty [2] - 103:23,
103:24
trenchantly [1] -
73:13
Tribunal [4] - 109:26,
128:18, 145:29, 146:4
tribunal [12] - 74:20,
74:21, 98:29, 99:4,
99:7, 99:16, 99:26,
114:26, 114:27,
118:9, 128:25, 132:21
tried [1] - 52:8
trigger [1] - 93:19
triggered [1] -
128:27
troubled [1] - 89:24
troubling [1] - 89:11
true [2] - 39:15,
64:28
trump [3] - 10:14,
10:17, 150:29
truth [6] - 50:2,
73:23, 79:2, 93:16,
94:6, 102:18
try [4] - 48:18,
122:26, 125:13,
136:17
trying [3] - 6:29,
60:24, 105:12
TUESDAY [2] - 1:18,
5:1
turn [24] - 13:8,
16:15, 31:9, 57:13,
58:4, 61:15, 70:2,
72:9, 86:16, 92:6,
94:3, 98:24, 99:13,
105:14, 121:26,
134:13, 136:14,
139:5, 141:17, 142:6,
146:23, 150:3,
152:18, 157:12
Turning [1] - 128:29
turning [2] - 62:22,
125:27
turns [2] - 20:13,
127:12
two [23] - 7:22, 9:8,
10:4, 12:6, 14:13,
35:11, 36:1, 37:29,
39:21, 42:29, 44:17,
44:19, 44:29, 71:24,
76:2, 81:7, 85:11,
110:3, 110:21, 140:6,
141:17, 144:23, 148:9
twofold [1] - 124:26
type [4] - 64:14,
71:15, 90:21, 115:13
types [2] - 88:19,
122:29

U

U.S [8] - 17:5, 17:6,
17:7, 17:9, 19:28,
24:27, 25:26, 96:14
UK [10] - 55:24,
56:18, 109:18, 111:8,
114:7, 115:5, 116:5,
145:26, 145:29, 146:9
ultimate [1] - 136:10
ultimately [6] -
80:16, 80:23, 116:4,
118:24, 126:28, 146:2
unadulterated [1] -
146:19
unauthorised [1] -
131:20
uncannily [1] -
126:27
unchallengeable [4]
- 112:24, 113:26,
122:9, 123:7
unclear [1] - 33:27
under [80] - 6:25,
8:4, 9:14, 10:15, 14:7,
14:12, 14:14, 14:23,
14:27, 15:3, 15:28,
17:6, 18:10, 18:16,
21:14, 22:27, 24:24,
27:28, 28:27, 30:3,
30:7, 30:12, 30:26,
35:28, 39:12, 39:13,
39:14, 47:18, 49:15,
49:17, 51:18, 52:2,
52:29, 54:21, 58:13,
61:19, 65:13, 67:14,
67:24, 68:24, 70:11,
74:1, 74:12, 75:29,
78:12, 78:13, 79:17,
79:20, 88:9, 88:23,
93:19, 95:22, 96:10,
97:26, 98:3, 100:6,
100:16, 105:18,
108:4, 108:5, 108:9,
108:12, 109:24,
115:4, 116:14,
118:25, 120:24,
128:8, 128:26, 129:3,
130:11, 130:23,
131:5, 133:27, 141:5,
146:16, 151:9, 153:6,
156:19, 157:22
Under [2] - 24:25,
25:20
Under-Secretary [2]
- 24:25, 25:20
undergrowth [1] -
29:28
underlined [1] -
123:26
undermine [2] -
69:16, 70:7
undermined [1] -
132:5
underscore [1] -
16:17
understood [4] -
36:5, 41:12, 42:11,
85:2
undertaken [2] -
61:22, 117:6
undertaking [6] -
32:23, 32:27, 94:4,
116:28, 118:11,
141:24
undertakings [1] -
142:1
undoubtedly [2] -
45:16, 103:11
unequivocal [2] -
10:12, 135:2
unfair [3] - 38:25,
100:10, 138:17
Unibet [1] - 70:3
uniformity [2] -
103:26, 107:28
unilaterally [1] - 63:7
Union [38] - 6:6,
10:11, 10:29, 13:17,
14:28, 15:9, 18:10,
27:28, 30:6, 30:27,
39:11, 67:25, 68:14,
72:27, 84:1, 84:19,
85:17, 85:27, 98:28,
141:21, 142:26,
143:8, 145:1, 145:9,
145:11, 145:15,
146:29, 149:10,
149:12, 149:16,
150:12, 150:19,
150:29, 151:22,
151:27, 152:16,
153:24
Union, [1] - 85:24
UNITED [1] - 2:21
United [50] - 11:2,
12:22, 14:28, 16:21,
17:24, 18:6, 18:10,
27:28, 29:14, 30:5,
30:7, 30:27, 39:12,
42:27, 46:9, 47:26,
48:5, 62:5, 64:24,
67:14, 67:22, 68:22,
68:27, 74:2, 81:3,
90:1, 111:4, 118:27,
119:17, 128:15,
129:11, 132:15,
136:26, 137:18,
139:15, 139:16,
139:19, 139:27,
141:5, 141:10,
141:23, 142:3,
142:27, 143:1, 143:3,
143:4, 147:8, 147:15,
147:22, 158:18
universal [1] - 89:12
unjustified [2] -
113:7, 122:22
unjustified.. [1] -
124:2
unlawful [9] - 21:5,
53:10, 53:16, 53:17,
68:5, 114:29, 116:18,
117:29, 128:6
unlawfully [2] - 51:7,
78:16
unless [11] - 50:7,
51:3, 51:4, 75:20,
83:20, 97:5, 97:12,
127:6, 129:4, 129:6,
134:23
unlike [1] - 109:28
Unlike [1] - 117:29
unlikely [2] - 66:27,
129:7
unlimited [2] - 19:24,
19:26
unpublished [1] -
106:5
unqualified [1] -
144:25
unreasonable [1] -
137:1
unsupported [1] -
158:13
unsurprisingly [1] -
51:28
untenable [1] - 41:18
UNTIL [1] - 159:1
unusual [2] - 94:11,
100:19
unusually [1] - 42:9
up [22] - 5:8, 9:11,
15:20, 20:7, 20:26,
31:5, 35:5, 35:12,
37:7, 37:27, 38:2,
38:28, 43:28, 48:19,
71:20, 81:6, 81:7,
109:21, 114:28,
125:22, 133:13, 136:8
upside [1] - 62:22
urge [1] - 51:13
urged [1] - 153:27
urgency [1] - 59:19
US [94] - 5:23, 5:28,
6:11, 7:4, 7:6, 8:10,
8:20, 9:3, 11:22,
12:10, 12:15, 12:16,
12:29, 13:13, 13:24,
13:27, 14:5, 14:19,
14:22, 15:10, 16:24,
17:13, 17:24, 18:10,
18:15, 18:23, 19:12,
20:8, 21:7, 21:13,
21:16, 21:24, 22:12,
22:17, 23:10, 24:20,
24:22, 25:2, 25:16,
26:17, 27:14, 27:25,
28:15, 30:14, 30:15,
33:18, 37:15, 40:20,
41:5, 41:6, 42:2,
42:18, 43:4, 43:17,
44:11, 45:8, 45:20,
45:21, 45:26, 48:15,
49:15, 49:17, 49:20,
49:28, 51:10, 52:1,
52:10, 54:3, 54:13,
54:16, 54:24, 63:15,
63:17, 64:14, 64:21,
64:25, 66:26, 67:3,
69:22, 70:17, 71:18,
71:26, 73:17, 77:5,
77:23, 104:19,
104:23, 104:29,
105:7, 107:11,
107:16, 125:19,
143:17
us [1] - 140:11
US-type [1] - 64:14
USA [1] - 23:24
useful [4] - 12:1,
70:6, 125:17, 152:3

users [4] - 58:15,
123:19, 124:6
uses [2] - 32:29,
91:28

V

valid [1] - 60:21
validity [2] - 34:6,
133:10
validly [1] - 59:18
value [1] - 117:13
various [12] - 6:13,
13:27, 17:29, 18:16,
20:27, 52:2, 52:7,
54:20, 67:18, 71:18,
121:27, 135:13
variously [1] - 43:16
vast [1] - 69:28
verbatim [1] - 1:24
Verholen [1] - 69:9
verify [2] - 31:14,
31:17
version [2] - 80:8,
139:24
VI [3] - 17:12, 22:6,
146:26
victim [6] - 75:29,
113:17, 120:25,
123:10, 124:17,
133:17
view [12] - 10:6,
13:18, 23:21, 27:17,
53:20, 53:24, 79:23,
83:6, 84:4, 113:16,
123:4, 144:10
viewing [1] - 132:14
viewpoint [1] - 85:2
views [1] - 42:14
VII [3] - 13:28, 17:19,
30:18
violate [1] - 93:29
violated [2] - 75:15,
98:28
violated.. [1] -
130:14
violation [13] - 25:17,
50:17, 51:20, 51:29,
52:3, 52:13, 52:27,
53:1, 120:5, 120:25,
123:10, 124:17, 136:5
violations [1] - 53:27
virtually [4] - 69:18,
69:26, 130:29, 135:26
virtue [1] - 115:15
vis-à-vis [1] - 95:22
vital [3] - 58:21, 59:5,
68:17
viz [1] - 90:8

Vladeck [13] - 9:17,
44:13, 45:9, 45:12,
46:27, 47:1, 50:25,
53:2, 53:9, 53:19,
54:6, 54:8, 91:7
Vladeck's [9] -
23:21, 42:9, 42:17,
44:9, 44:12, 46:19,
47:21, 52:9, 70:21
voiced [1] - 133:9
voluntarily [1] -
85:19
voluntary [1] - 16:1

W

waiting [2] - 105:2,
105:4
WALL [2] - 3:4, 3:4
wants [3] - 33:3,
38:29, 78:14
warrant [2] - 52:17,
126:18
warrant.. [1] - 118:16
warrants [3] - 93:21,
116:11, 116:16
WAS [1] - 159:1
Watson [10] - 8:25,
54:27, 55:4, 55:25,
73:9, 101:29, 102:27,
126:29, 135:3, 138:24
way.. [1] - 120:16
ways [3] - 9:8, 87:13,
89:14
weak [2] - 49:1,
105:20
weaker [2] - 49:2,
108:15
Weber [2] - 109:9,
111:21
Weber.. [1] - 127:14
WEDNESDAY [1] -
159:1
well-being.. [1] -
56:10
well-founded [1] -
97:29
whereas [1] - 60:7
whereby [4] - 52:15,
73:2, 88:6, 109:29
whilst [1] - 153:16
whole [7] - 26:17,
29:5, 39:13, 117:25,
132:14, 136:8, 153:14
wide [1] - 73:13
wider [1] - 6:27
widespread [4] -
113:5, 122:19,
123:29, 124:15

wilfulness [1] -
91:14
willfully [1] - 52:4
wilfulness [1] -
51:17
WILLIAM [1] - 2:28
WILTON [1] - 2:8
wish [1] - 146:18
wishes [2] - 78:22,
125:13
withdrawal [1] - 16:1
withdraws [1] - 33:2
WITNESS [1] - 4:2
witness [2] - 40:28,
43:4
witnesses [5] -
40:27, 42:17, 44:6,
69:23, 70:22
woman [1] - 78:12
wonder [1] - 94:29
wondering [2] - 5:27,
6:29
word [13] - 76:18,
77:1, 80:6, 80:8,
80:13, 83:26, 85:1,
85:5, 85:6, 86:25,
87:20, 91:28, 108:18
wording [1] - 41:19
words [5] - 8:24,
24:12, 41:25, 44:24,
47:18
workability [1] -
82:17
workable [1] - 82:16
worth [2] - 95:27,
129:16
would've [4] - 76:28,
77:3, 77:11
WOULFE [1] - 2:12
writing [1] - 45:29
writings [2] - 9:18,
54:9
written [3] - 3:25,
136:20, 136:29
wrongly [2] - 77:21,
77:22

Y

year [1] - 110:20
years [1] - 126:8
yesterday [1] - 11:15
YOUNG [1] - 2:7

Z

Zakharov [3] -
109:13, 118:29,

133:14
ZZ [18] - 10:6,
145:21, 146:8,
146:18, 147:6, 147:8,
147:18, 147:22,
147:24, 147:29,
148:2, 148:7, 148:12,
148:14, 148:19,
148:29, 149:27,
152:12
ZZ's [3] - 148:8,
148:25, 148:27
ZZ's [1] - 148:10

-

- [1] - 68:17

-

- [2] - 18:25, 18:26