

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 FRIDAY, 17th FEBRUARY 2017 - DAY 7

7

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1 THE HEARING RESUMED AS FOLLOWS ON FRIDAY, 17TH FEBRUARY
2 2017

3
4 **REGISTRAR:** In the matter of Data Protection
5 Commissioner -v- Facebook Ireland Ltd. 11:20

6
7 **SUBMISSION BY MR. GALLAGHER:**

8
9 **MR. GALLAGHER:** Judge, it may help you to know the
10 books that I'll be referring to. 11:20

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

12 **MR. GALLAGHER:** Book 1, which contains the Draft
13 Decision, and books, I call them 1, 2, 3 of Book 13
14 which are the materials on, agreed core, it says it's
15 European, I think, agreed Irish and EU law authorities 11:20
16 1 to 3.

17 **MS. JUSTICE COSTELLO:** Thank you. (Short pause)

18 **MR. GALLAGHER:** Judge, while the issues of the SCCs are
19 of course central to this matter, in order to
20 understand the points that we raise and put them in 11:21
21 context, including the national security point, it is
22 necessary to refer to the Directive in more detail than
23 Mr. Collins did.

24
25 what I intend to do, because I want to manage the time, 11:21
26 is I won't open them in any elaborate way, I'll draw
27 your attention to the essence of what they say so that
28 I outline the extent of the dispute between us. And if
29 you would be kind enough to go then in the first

1 instance to the Directive, which I think you will find
2 in divide 4 of that book to remind you perhaps of one
3 or two provisions that you have seen and draw your
4 attention to those that you haven't been directed to.

11:22

5
6 In the recitals you'll see in recital 8 this issue of
7 trade. That's in the context of trade between Member
8 States and removing barriers to trade but this concept
9 of trade informs the approach of the Directive and the
10 EU to this matter. Because the recognition, even back 11:22
11 in '95, that this was essential to trade is clear from
12 the Directive.

13
14 Then if you would move to recital 43 on the next double
15 pagination, page 35, you will see, it says:

11:22

16
17 *"Whereas restrictions on the right of access and*
18 *information and on certain obligations of the*
19 *controller may similarly be imposed by Member States*
20 *insofar as they are necessary to safeguard, for 11:23*
21 *example, national security, defence, public safety or*
22 *important public economic or financial interests."*

23
24 I am just going to use the phrase 'national security'
25 as encompassing those matters that are addressed there 11:23
26 and are excluded from the Directive and which are
27 principally national security, but it's a little bit
28 broader than that.

29

1 Mr. Collins drew your attention to paragraphs 57 and 59
2 of the recitals on page 37, but 58 is also important.
3 57 talks about the transfer of personal data being
4 prohibited where there is not an adequate level of
5 protection. But 58 goes on and says:

11:23

6
7 *"where provisions should be made for exemptions from*
8 *this prohibition in certain circumstances"* and it
9 identifies those, they are the 26(1), consent etc.

10 11:23

11 So you identify the prohibition and you identify that
12 it is necessary to make an exemption. And 59:

13 *"whereas particular measures may be taken to compensate*
14 *for the lack of protection in a third country in cases*
15 *where the controller offers appropriate safeguards."*

11:24

16
17 So it's always what the controller offers. And that's
18 why, as I said, it's so misguided, apart from anything
19 else, to suggest that because the controller hasn't
20 offered some contractual arrangement with the State or
21 a basis for suing the State, that that can't be
22 compliant with the Directive.

11:24

23
24 If one goes to the body of the Directive on page 38 you
25 will see that processing is broad and it does of course
26 involve collection, transfer, making available, there's
27 no issue about that. The controller then is identified
28 in 1(d), but Article 3 is of particular importance.

11:24

1 The Directive - this tells you scope of the Directive,
2 so it applies to the processing of personal data,
3 whether it's automatic or manual means. And 2:
4 *"The Directive shall not apply to the processing of*
5 *personal data."*

11:25

6
7 That's very clear. It is putting it outside the scope
8 of the Directive so processing: *"In the course of an*
9 *activity which falls outside the scope of Community*
10 *law, such as those provided for in those titles of the*
11 *previous Treaties and in any case to processing*
12 *operations concerning public security, defence and*
13 *State security."*

11:25

14
15 So processing done in the context of State security is
16 not covered by the Directive. And those remedies, the
17 absence of which or alleged absence of which are
18 criticised in a US context, are matters that do not
19 arise in the context of State security because they are
20 remedies deriving from the Directive and this tells you
21 the Directive doesn't apply. The significance of that
22 and how that has led to an error I will hopefully
23 explain in more detail shortly.

11:25

11:25

24
25 And then this confusion on the part of the DPC's
26 submissions with regard to the relevance of Member
27 State law, this is a Directive, and, as you will know,
28 that involves implementation at a Member State level.
29 The whole structure proceeds on the basis that the

11:26

1 protections and rights and obligations in the Directive
2 are implemented in Member State law and it then becomes
3 the applicable Member State law. But it is a renvoi,
4 so to speak, back to Member State law and you will see
5 the significance of that shortly. And 4(1) expresses 11:26
6 that:

7
8 *"Each Member State shall apply the national provisions*
9 *it adopts pursuant to the Directive to the processing*
10 *of personal data where."* 11:26

11
12 And it sets it out, but that's within the scope of the
13 Directive.

14
15 But what's fundamental is of course that this is not 11:26
16 just an exclusion by the Directive. It is an exclusion
17 which arises as a fundamental part of European law and
18 the principle of conferral. And if you go back to 3
19 you will see the Treaty on the European Union and
20 Article 4(2) of that Treaty sets out the matters that 11:27
21 are within the scope. And you will see 4(2) says:

22
23 *"The Union shall respect the equality of Member States*
24 *before the Treaties as well as their national*
25 *identities, inherent in their fundamental structures,* 11:27
26 *political and constitutional, inclusive of regional and*
27 *local self-government. It shall respect their*
28 *essential state functions, including ensuring the*
29 *territorial integrity of the state, maintaining law and*

1 *order and safeguarding national security."*

2
3 So the Directive, even if it wanted, couldn't have
4 encroached on those fundamental aspects of sovereignty
5 not conferred on the Union. And it goes on and says -- 11:28

6 **MS. JUSTICE COSTELLO:** Can I just clarify, you are
7 talking about a State here being a Member State, not
8 the US?

9 **MR. GALLAGHER:** Absolutely.

10 **MS. JUSTICE COSTELLO:** Yes. 11:28

11 **MR. GALLAGHER:** And that's why this is all excluded
12 from the scope of the Directive. So the Member States
13 when processing data for the purposes of their national
14 security are not subject to the Directive. So the
15 rights conferred by the Directive in terms of 11:28
16 notification and access and all of those, those are not
17 rights that apply to the Member States in this sphere,
18 and that's something in looking at the position in the
19 US becomes a vital importance.

20 11:28
21 So it goes on in 4(2) to say in the last sentence: "*In*
22 *particular, national security remains the sole*
23 *responsibility of each Member State.*"

24
25 Then that is reinforced by Articles 5, (2) and (3) and 11:28
26 5(2) in particular which refers to the principle of
27 conferral and it's: "*The union being obliged to act*
28 *only within the limits of the competences conferred*
29 *upon it by the Member State.*"

1
2 when I take you to look at the decisions, Schrems,
3 Watson, the Privacy Shield, they all recognise this
4 area of limitation in a way that's just not reflected
5 in any sense in the Draft Decision. How it operates is 11:29
6 a matter that requires a little more explanation, but
7 this area of national security is in a different
8 category from the other, if I may call it, private
9 area, solely for the purpose of expression, to which
10 the Directive clearly attaches. 11:29

11
12 One needs then to draw a distinction as to what are the
13 rules, if any, that apply in the context of national
14 security. And, as you know, the decision focuses
15 solely on the context of national security and the 11:29
16 alleged lack of remedies without ever examining what
17 are the remedies that are appropriate in that context,
18 what remedies need to be provided in that context and
19 what is the basis for any such requirement.

20 11:30
21 It's in that vital respect that national security is
22 critical to this case and it has, unfortunately, just
23 not even got a mention in the Draft Decision. And
24 indeed in the submissions that were put forward to this
25 court, you were never offered an explanation as to how 11:30
26 you deal with it. Even the speaking note yesterday
27 just says 'we're wrong in what we say', but we're
28 certainly not wrong when we quote the clear provisions
29 of the Directive in the Treaty and we have never had

1 the benefit and the court hasn't had the benefit of any
2 explanation as to how those exclusions interplay with
3 the issues in this case. And of course it goes to the
4 comparator. When you say there are a lack of remedies
5 that render the protection inadequate, that implicitly, 11:31
6 if not explicitly, assumes a benchmark. The decision
7 refers generally to Article 47, implicitly to the
8 Directive, a fact confirmed by Mr. Murray's submissions
9 yesterday when he said 'in any event these remedies in
10 the US don't provide for notification and access'. 11:31

11
12 But notification and access are requirements of the
13 Directive which do not apply in the area of national
14 security, and of course it's a reference to the Member
15 States because the scope of EU law doesn't go beyond 11:31
16 the Member States. That's why it is so expressed in
17 those terms in the Directive and in the Treaty. But it
18 then begs the question as to what, even if you adopt
19 the adequate protection test, adequate protection
20 judged by what comparator? We're told adequate 11:32
21 protection means, as Schrems says it means, essential
22 equivalence but equivalence to what? Because it's in
23 the area of national security that we're concerned and
24 we have never been told, and the Draft Decision doesn't
25 even attempt to address to what that essential 11:32
26 equivalence applies and that fundamental error leads to
27 a wrong conclusion that the objections are well
28 founded.
29

1 Then moving back to the body of the Directive, you are
2 familiar with Article 6 which provides that: "*Member*
3 *States shall provide the processing of data*", must meet
4 certain conditions, for example, processed fairly and
5 lawfully. 11:32

6
7 Then if you go to 7: "*Member States shall provide that*
8 *personal data may be processed only if the data subject*
9 *has unambiguously given its consent*" and various other
10 conditions. 8: "*Member States shall prohibit the* 11:33
11 *processing of personal data relating to racial or*
12 *ethnic groups etc.*"

13
14 So those are things the Member States must do where the
15 Directive applies. Then if you go to Article 9 is just 11:33
16 processing of personal data, freedom of expression, we
17 don't need to delay on that. 10 is of more relevance.
18 This is information:

19
20 "*Member States shall provide that the controller or his* 11:33
21 *representative must provide a data subject from whom*
22 *data relating to himself are collected with at least*
23 *the following information.*"

24
25 And it identifies that information. 11:33

26
27 Article 11 provides for something similar: "*where the*
28 *data has not been obtained from the data subject but a*
29 *third party.*"

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And Article 12 is this right of access which Mr. Murray placed reliance on yesterday:

"Member States shall guarantee every data subject the right to obtain from the controller: without constraint et cetera; confirmation as to whether the data has been processed."

11:34

And then (b): *"As appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive."*

11:34

Then we come to the crucial provision of the Directive, Article 13: *"Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for."*

11:34

In which Articles? 6(1), that's lawful processing; 10, that's providing information from data collected; 11, ditto; and 12 the right of access: *"when such a restriction constitutes a necessary measure to safeguard, inter alia, national security."*

11:34

MS. JUSTICE COSTELLO: It is also 21.

MR. GALLAGHER: Excuse me 21 as well, Judge. But the particular ones I suppose that focuses on here are those.

11:34

MS. JUSTICE COSTELLO: Hmm.

MR. GALLAGHER: Now that is there because of course while the Member State when it's doing its processing

1 is outside the scope of the Directive, there may be
2 situations in which a controller that is not the Member
3 State has data and if the Member State has access to
4 that data the rights which would otherwise apply to the
5 data subject need to be constrained in effect to enable 11:35
6 the Member State to perform the national security
7 operations. So, for example --

8 **MS. JUSTICE COSTELLO:** So it wouldn't generally be
9 covered by what you say is the Article 4(2) of the TEU?

10 **MR. GALLAGHER:** Exactly, that's exactly it. So, Judge, 11:35
11 if you had Paul Gallagher as a data controller and the
12 government said we need that for national security
13 purposes, I hand over a bunch of data, I have to be
14 relieved of what would be my obligations as a
15 controller. The Member State is relieved because it is 11:35
16 outside the scope. So Article 13 addresses that. And
17 so it says: "*where it's necessary to safeguard - that*
18 *word again - for national security.*"

19
20 So this is a cleverly woven fabric that presents a 11:36
21 structure that knits neatly together and interacts in
22 the context of national security in a way that I will
23 further elaborate on.

24
25 And really, I'll take you through when we're doing our 11:36
26 full submissions the other provisions of the Directive,
27 but I think it's perhaps instructive if I move now to
28 Article 21 which is the "*publicising of processing*
29 *operations*" which, as you pointed out, is excluded or,

1 sorry, may be restricted by Article 13. And then the
2 remedies --

3 **MS. JUSTICE COSTELLO:** Hmm.

4 **MR. GALLAGHER:** -- in 22 and liability 23 in which so
5 much reliance has been placed. 22 is: 11:36

6
7 *"without prejudice to any administrative remedy for*
8 *which provision may be made - so that's an*
9 *administrative remedy being acknowledged as something*
10 *that is certainly relevant - before the supervisory* 11:37
11 *authority referred to in Article 28, prior to the*
12 *referral to the judicial authority, Member States shall*
13 *provide for the right of every person to a judicial*
14 *remedy for any breach of the rights guaranteed him by*
15 *the national law applicable to the processing."* 11:37

16
17 So this is implemented through national law, national
18 law will reflect these obligations. It gives rights
19 and it must give a remedy, but it is giving a remedy in
20 respect of the rights which it is obliged by this 11:37
21 Directive to confer. They don't extend to the national
22 security because national security is excluded. So the
23 applicable national law is that which applies following
24 the implementation of the Directive and therefore the
25 very obligation, leave aside 47 of the Charter which 11:37
26 I'll deal with separately, but in terms of the
27 Directive, the remedies are conditioned for a remedy
28 for breach of the rights guaranteed to him by the
29 national law applicable.

1
2 And then "liability" in 21 [sic]: "Member state shall
3 provide that any person who has suffered damage as a
4 result of an unlawful processing operation or of any
5 act incompatible with the national provisions adopted 11:38
6 pursuant to this Directive is entitled to receive
7 compensation from the controller."

8
9 So again tied in to the Directive: "Unlawful
10 processing operation or of any act incompatible with 11:38
11 the national provisions."

12
13 That which is done by the National Security Agency in
14 any Member State is not unlawful processing and is not
15 incompatible with the Directive. It is outwith the 11:38
16 scope of the Directive and therefore the liability in
17 respect of damages doesn't arise.

18
19 They can't be ignored in terms of their significance
20 when you are looking for the comparator. When you are 11:38
21 saying US law doesn't provide adequate remedies,
22 adequate by reference to what? Adequate remedies for
23 national security processing when no such remedies are
24 mandated by the Directive and are excluded therefrom.

25 11:39
26 And then we come to 25 and 26. You are familiar with
27 their provisions and 25(1), the last two lines: "The
28 third country in question ensures an adequate level of
29 protection."

1
2 That's a basis on which a Member State, and it is
3 always a Member State, shall provide for the transfer
4 to the third country. And when examining the adequate
5 level of protection, 25(2) tells you what to do, it is: 11:39

6
7 *"The adequacy of the level of protection afforded by a*
8 *third country shall be assessed in the light of all the*
9 *circumstances surrounding a data transfer operation or*
10 *set of data transfer operations; particular 11:40*
11 *consideration shall be given to the nature of the data,*
12 *the purpose and duration of the proposed processing*
13 *operation or operations, the country of origin and*
14 *country of final destination, the rules of law, both*
15 *general and sectoral, in force in the third country in 11:40*
16 *question and the professional rules and security*
17 *measures which are complied with in that country."*

18
19 That doesn't suggest and is inconsistent with just
20 deciding to look at the rules relating to remedies. It 11:40
21 requires a much more extensive approach, as is indeed
22 confirmed by, I think it's paragraph 95 of Schrems, but
23 by Schrems in any event.

24
25 Then what is this process? It's a process that is laid 11:40
26 down in the Directive: *"The Member States and the*
27 *Commission informing each other of cases where they*
28 *consider that a third country does not ensure an*
29 *adequate level of protection."*

1
2 And in 6: *"The Commission may find, in accordance with*
3 *the procedure in Article 31(2), that a third country*
4 *ensures an adequate level of protection within the*
5 *meaning of paragraph 2, by reason of its domestic law* 11:41
6 *or of the international commitments it has entered*
7 *into, particularly upon conclusion of negotiations."*
8

9 So the Commission, as it did, entered into
10 negotiations, a formal process provided for by 31(2), 11:41
11 satisfied itself on various matters and that is the
12 adequate level of protection. And if that be the test,
13 which we say it isn't, then it is a test enshrined in
14 25(2) which refers to Article 31 process which in turn
15 is reflected in the Directive which binds the court to 11:41
16 the decision made by the Commission in respect of that
17 particular question.
18

19 That is different and I stress if there had been some
20 complaint before the DPC about the adequacy decision 11:42
21 and the Privacy Shield and she made an adjudication,
22 provisional or otherwise, on that complaint and that
23 then became before the court, that would be what
24 happened in Schrems 1 and that then might be a
25 situation, depending on what view the court took, it 11:42
26 might make a reference.
27

28 But here that was not the basis of the complaint, and
29 Mr. McCullough very helpfully read out the nature of

1 the complaint yesterday; no suggestion in any respect
2 in relation to any mistake in relation to the Privacy
3 Shield or the adequacy decision. So in those respects,
4 for the purpose of this proceeding, the court, as you
5 will see, is bound by that, if that be the test. And 11:42
6 the begins and ends there and there is no basis for a
7 referral.

8
9 But what is surprising is the light touch, if I may use
10 that overused phrase, that is given to Article 26. I'm 11:43
11 not sure it's mentioned in the Draft Decision, but
12 I may be wrong, and it is not mentioned with any
13 enthusiasm in the submissions before the court but just
14 sort of a general reference to say there is a conflict,
15 we say the Article 26 test applies, without actually 11:43
16 explaining really why it doesn't.

17
18 And the first words of Article 26(1) are clear: "By
19 *way of derogation from Article 25 and save where*
20 *otherwise provided by domestic law, governing* 11:43
21 *particular cases, Member States shall provide that a*
22 *transfer or set of transfers of personal data to a*
23 *third country which does not ensure an adequate level*
24 *of protection."*

25 11:43
26 So you are transferring to a country which doesn't
27 ensure an adequate level of protection. That's what
28 you are doing. So that raises the question as to how
29 you proceed to examine these transfers by reference to

1 a standard that applies to Article 25 when the whole
2 purpose of Article 26 is to enable you to transfer to a
3 country that doesn't have an adequate protection.
4 And, if one just stops for a moment, it is evident why
5 that is so. If everything, including 26, is to be 11:44
6 governed by the standard of adequacy of protection in
7 Article 25 you would have a potentially horrific
8 situation. Because there is *no* evidence to suggest
9 that other countries equal the protection in the EU.
10 Indeed the EU is recognised as having a level of 11:44
11 protection that few, if any, other countries can match.
12 If that then becomes the basis for trade, then you just
13 don't have any trade outside the EU in a modern
14 environment. That much is clear from Prof. Meltzer's
15 evidence which is not disputed. 11:45

16
17 The European Union wasn't foolish, it recognises the
18 necessity for trade. The recitals that I referred you
19 to, 56 to 58, recognise that. There has to be some
20 mechanism for getting it over because the EU 11:45
21 recognises, notwithstanding its great power and
22 influence, it cannot force other countries to adopt its
23 level of protection. And, if that is the benchmark,
24 then what we're really saying is, on the DPC's thesis,
25 it is Article 25 or nothing. And it has to be 11:45
26 Article 25 or nothing because countries do have
27 national security, that much is recognised in the
28 Directive, the contractual conditions can never deal
29 with national security, that's what we are told, so

1 it's a self-fulfilling failure. You have an Article 26
2 dealing with a situation that can in fact never be
3 addressed by Article 26. It's no point in saying 'well
4 it can address the private sphere' because the private
5 sphere is only one part of the matrix that needs to be 11:46
6 addressed. Every country has processing of data for
7 national security purposes, using it in that broad
8 sense.

9
10 The contract, as the DPC says, can't deal with that 11:46
11 issue. So any country in the world that does not have
12 an essentially equivalent legal position in the
13 protection of data to the EU cannot be traded with,
14 which is a proposition that needs only to be stated to
15 see how it must be wrong and how it would engulf the 11:46
16 European Union in an enormous crisis that in truth
17 would make the financial crisis of the last eight years
18 seem very minor.

19
20 The idea that a body that is set up for trade, that its 11:47
21 whole rationale initially was trade within the Union,
22 that has all these trade agreements with other
23 countries, that it cannot trade now in the modern era
24 where, even if you do a credit card transaction, you
25 are transferring data. It can't trade with countries 11:47
26 outside the EU unless they have an essentially
27 equivalent level of protection to the EU. That cannot
28 be so and it isn't so and Article 26(2) tells us why
29 it's not so:

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"without prejudice to paragraph 1, a Member State may authorise a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) where the controller."

11:47

Not anybody else, the controller, the Facebooks of this world, the Microsofts, the Googles, the SMEs, the businesses all over Ireland and Europe. Where the controller that has the data: *"Adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual conditions [sic]."*

11:48

11:48

So it is saying, the safeguards can result from appropriate contractual conditions, contracts we're told can't bind the State bodies of other countries, so therefore they must be capable of being, generating sufficient safeguards, they at least warrant an examination. Such as an examination was not conducted here by the DPC, nor indeed in the opening of this case.

11:48

11:48

And in 26(4): *"where the Commission decides in accordance with the procedure referred to in Article 31(2), that certain standard contractual*

1 *clauses offer sufficient safeguards as required by*
2 *paragraph 2, Member States shall take the necessary*
3 *measures to comply with the Commission's decision."*

4 So that's the procedure that's set out, that's the
5 procedure that's being challenged. And then if you 11:49
6 would kindly go to Article 31 just to complete this
7 picture of the Directive.

8
9 You will see: "*The Commission shall be assisted by a*
10 *committee composed of the representatives of the Member* 11:49
11 *State and shared by the representatives of the*
12 *Commission.*

13 *2. The representative of the Commission shall submit*
14 *to the committee a draft of the measures to be taken*
15 *and the Committee shall deliver an opinion on the* 11:49
16 *draft. The opinion shall be delivered by the majority*
17 *laid down for in the Treaty and the Commission shall*
18 *adopt measures."*

19
20 So that's the procedure that's referred to in 11:49
21 Article 25. And the Commission did adopt on 8th July
22 in the official statement from the European Commission,
23 if I can hand it in to you, the Privacy Shield. You
24 will see what it says (SAME HANDED TO THE COURT):

25 11:50
26 "*Today Member States have given their strong support to*
27 *the EU-US Privacy Shield, the renewed safe framework*
28 *for transatlantic data flows. This paves the way for*
29 *the formal adoption of the legal texts and for getting*

1 *the EU-U.S. Privacy Shield up and running. The EU-US*
2 *Privacy Shield shall ensure a high level of protection*
3 *for individuals and legal certainty for business. It*
4 *is fundamentally different from the old 'Safe Harbour':*
5 *It imposes clear and strong obligations on handling the* 11:50
6 *data and makes sure that these rules are followed and*
7 *enforced in practice. For the first time, the U.S. has*
8 *given the EU written assurance that the access of*
9 *public authorities for law enforcement and national*
10 *security will be subject to clear limitations,* 11:50
11 *safeguards and oversight mechanisms and has ruled out*
12 *indiscriminate mass surveillance of European citizens'*
13 *data. And last but not least the Privacy Shield*
14 *protects fundamental rights and provides for several*
15 *accessible and affordable redress mechanisms. Pending* 11:51
16 *the formal adoption process, the Commission has*
17 *consulted as broadly as possible taking on board the*
18 *input of key stakeholders, namely the independent data*
19 *protection authorities and the European Parliament.*
20 *Both consumers and companies can have full confidence*
21 *in the new arrangement, which reflects the requirements*
22 *of the European Court of Justice. Today's vote by*
23 *Member States is a strong sign of confidence.*

24
25 *The Commission presented a Draft Decision on* 11:51
26 *29 February. In accordance with the Data Protection*
27 *Directive, the independent data protection authorities*
28 *issued an opinion on 13 April. The European Parliament*
29 *adopted a resolution on 26 May. Member States*

1 *representatives approved the final version of the EU-US*
2 *Privacy Shield, paving the way for its adoption."*

3
4 That's the formality, the importance, it's the
5 procedure that was gone through that you are now being 11:51
6 asked to effectively cast aspersions on by way of what
7 is undoubtedly a collateral challenge to the Privacy
8 Shield.

9
10 So we say the wrong test was applied for the reasons 11:52
11 which I have said and that's our first major criticism.
12 I now want to move to the SCC decisions themselves
13 which you will find -- sorry, before doing so, just one
14 matter that I will make in the context of the SCC
15 decision, but perhaps I should just draw your attention 11:52
16 to it now.

17
18 Article 26, as I said, doesn't require that the
19 contractual causes give rights against the US State
20 authorities or the public authority of any country. It 11:52
21 self-evidently could not do so and accordingly the fact
22 that the data maybe the subject of interference by US
23 public authorities can't be the test for whether there
24 are doubts as to the position.

25 11:53
26 This becomes clear when you look at the SCCs and we'll
27 perhaps look, and we know the amendment, the recent
28 amendment, but it's really the substance in the 2010
29 which is in divide 10 of the book that I want to draw

1 your attention to now.

2 **MS. JUSTICE COSTELLO:** This book?

3 **MR. GALLAGHER:** The same book, excuse me, sorry. I'll
4 be on this book for a while. I do apologise.

5 11:53
6 You will see that recital 2 on the first page refers to
7 Article 22 [sic] providing that: "*Member State may*
8 *authorise, subject to certain safeguards, the transfer*
9 *or set of transfers of personal data to third countries*
10 *which do not ensure an adequate level of protection.* 11:53
11 *Such safeguards may in particular result from*
12 *appropriate contractual clauses.*"

13
14 Then on 7: "*Much experience has been gained since the*
15 *adoption of the original decision. In addition, the* 11:53
16 *report on the implementation of Decisions on standard*
17 *contractual clauses for the transfers of personal data*
18 *to third countries has shown that there is an*
19 *increasing interest in promoting the use of these*
20 *clauses for international transfers of personal data to* 11:54
21 *third countries not providing an adequate level of*
22 *protection.*"

23
24 Over the page at 11: "*supervisory authorities of the*
25 *Member States play a key role in the contractual* 11:54
26 *mechanism in ensuring that personal data are adequately*
27 *protected after the transfer. In exceptional cases*
28 *where data exporters refuse or are unable to instruct*
29 *the data importer properly, with an imminent risk of*

1 *grave harm to the data subjects, the standard*
2 *contractual clauses should allow the supervisory*
3 *authorities to audit data importers and sub-processors*
4 *and, where appropriate, take decisions which are*
5 *binding on data importers and sub-processors. The* 11:54
6 *supervisory authorities should have the power to*
7 *prohibit or suspend a data transfer etc."*

8
9 So all of that is in the context obviously of the
10 private actors. And then in 12 it sets out what the 11:54
11 standard clauses should provide for. In 13:

12
13 *"In order to facilitate data flows from the European*
14 *Union, it is desirable for processors providing*
15 *data-processing services to several data controllers in* 11:55
16 *the European Union to be allowed to apply the same*
17 *technical and organisational security measures*
18 *irrespective of the Member States from which the data*
19 *transfer [originates], in particular in those cases*
20 *where the data importer receives data for further* 11:55
21 *processing."*

22
23 If you go to 19 on the next page: *"Standard*
24 *contractual clauses should be enforceable not only by*
25 *the organisations which are parties to the contract,* 11:55
26 *but by the data subjects."*

27
28 And you'll see how that's done. And then in 20: *"The*
29 *data subjects should be entitled to take action and,*

1 *where appropriate, receive compensation from the data*
2 *exporter who is the data controller of the personal*
3 *data transferred. Exceptionally, the data subject*
4 *should also be entitled to take action and, where*
5 *appropriate, receive compensation from the data* 11:55
6 *importer."*

7
8 Then if you go over the page you will see the decision
9 that was adopted: *"The standard contractual clauses*
10 *set out in the Annex are considered as offering* 11:56
11 *adequate safeguards with respect to the protection of*
12 *the privacy and fundamental rights and freedoms of*
13 *individuals."*

14
15 That's the view of the Commission. And then in (f) on 11:56
16 the right-hand column at the top of the page:
17 *"Applicable data protection law means the legislation*
18 *protecting the fundamental rights and freedoms of*
19 *individuals and, in particular, their right to privacy*
20 *with respect to the processing of personal data* 11:56
21 *applicable to a data controller in the Member State in*
22 *which the data exporter is established."*

23
24 And then 4: *"Without prejudice to their powers to take*
25 *action to ensure compliance with national provisions et* 11:56
26 *cetera, the competent authorities in the Member States*
27 *may exercise their existing powers to prohibit or*
28 *suspend data flows to third countries in order to*
29 *protect individuals with regard to the processing of*

1 *their personal data in cases where:*

2
3 *(a) it is established that the law to which the data*
4 *importer or sub-processor is subject imposes upon him*
5 *requirements to derogate from the applicable data* 11:57
6 *protection law which go beyond the restrictions*
7 *necessary in a democratic society as provided for by*
8 *Article 11 of the Directive where those requirements*
9 *are likely to have a substantial adverse effect."*

10
11 And while there seems to be some surprise at the
12 significance of this trading environment in the context
13 of these, it is the case. Prof. Meltzer's evidence is
14 not disputed. The Directive in these are designed to
15 enable trading to take place and to prevent modern or 11:57
16 to prevent the transfer of data in modern trade would
17 just have this consequence that could never have been
18 envisaged or intended by the European Union.

19
20 And if you look at the annex, which is on the next full 11:57
21 page which is page 10, you'll see it's an agreement
22 between the exporter and the importer, they are the
23 parties. Then it has the definitions which include, in
24 the next page 11(c), what the applicable data
25 protection law means and we see that defined. Your 11:58
26 attention hasn't been drawn to Clause 3 which is very
27 important, it's a third-party beneficiary clause:

28
29 *"The data subject can enforce against the data exporter*

1 *this clause. Clause 4(b) to (i), Clause 5(a) to (e)*
2 *and (g) to (j), Clause 6(1) and (2), Clause 7, Clause*
3 *8(2) and Clauses 9 to 12 as third-party beneficiary."*
4 So if you then go to Clause 4, which are the
5 obligations of the data exporter undertaken to the 11:58
6 importer, but by virtue of the third-party beneficiary
7 clause enforceable by the data subject. The first one
8 (a) is not one of those that's enforceable by the data
9 subject, but there's no need to be because, if the
10 controller doesn't process or the data exporter doesn't 11:59
11 process the data in accordance with the applicable law,
12 there's a direct cause of action under Irish law in any
13 event against the exporter.

14
15 But look at the next issue (b): "*That it has* 11:59
16 *instructed and throughout the duration of the personal*
17 *data-processing services will instruct the data*
18 *importer to process the data transferred only on the*
19 *data exporter's behalf and in accordance with the*
20 *applicable law."* 11:59

21
22 That's an instruction that it is obliged to issue and
23 issues, it's not in dispute. And they, the data
24 importer must --

25 **MS. JUSTICE COSTELLO:** Does that apply to the transfer? 11:59
26 Obviously we're talking about the data starting in the
27 EU and arriving in US?

28 **MR. GALLAGHER:** Yes, and when it gets to the importer
29 what are the importer's --

1 **MS. JUSTICE COSTELLO:** Because, as I understood the
2 opening, there was a second level of processing where
3 it may be subject to national security surveillance.
4 **MR. GALLAGHER:** Yes, you are absolutely correct, Judge.
5 The transfer is, as I mentioned in the context of the 12:00
6 definition of processing, is in itself a process or a
7 processing, an act of processing. And you can in any
8 event only make a transfer if you comply with 25 and
9 26. So even it wasn't a process you couldn't do it
10 without complying with one or other of those. 12:00
11
12 There is no doubt that when Facebook and everybody else
13 transfers the data they do it for a commercial purpose.
14 So you must meet the requirements of the Directive, so
15 you can only transfer if you meet 25 and 26. 12:00
16 **MS. JUSTICE COSTELLO:** Mm hmm.
17 **MR. GALLAGHER:** So you can meet 25 by the adequate
18 level of protection, you can meet 26 by the standard
19 clauses. In order to compensate for not having an
20 adequate level of protection, 26 provides this other 12:00
21 exception. One of those is a set of agreements with
22 the importer. So Facebook Inc. undertakes obligations
23 to Facebook and Ms. Cunnane's affidavit that was opened
24 by Mr. Murray set all of that out and what they called
25 the DPA agreement incorporates these. 12:01
26
27 So if the importer doesn't do what it is obliged to do
28 on foot of the agreement with the exporter, you have,
29 unusually in Irish law, a right for a third-party

1 beneficiary, namely the data subject, to sue.

2 **MS. JUSTICE COSTELLO:** What I was wondering was is that
3 confined to the, is this obligation between exporter
4 and importer confined to the transfer?

5 **MR. GALLAGHER:** No. 12:01

6 **MS. JUSTICE COSTELLO:** Does it apply to when you have
7 got processing in the US?

8 **MR. GALLAGHER:** I am terribly sorry.

9 **MS. JUSTICE COSTELLO:** Sorry, that's what I was asking.

10 **MR. GALLAGHER:** It applies, exactly, it does apply. 12:01

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

12 **MR. GALLAGHER:** Because what it says here is that: "*It*
13 *has instructed and throughout the duration of the*
14 *personal data processing services will instruct.*"

15 **MS. JUSTICE COSTELLO:** That's what I wasn't too sure. 12:01
16 The personal data processing services, is that just the
17 transfer across the Atlantic?

18 **MR. GALLAGHER:** No, it's all the, it encompasses
19 anything that is done with the data that constitutes
20 processing. 12:02

21 **MS. JUSTICE COSTELLO:** Even - once it's left Facebook
22 Ireland.

23 **MR. GALLAGHER:** Exactly.

24 **MS. JUSTICE COSTELLO:** And gone to Facebook Inc. it is
25 still subject to? 12:02

26 **MR. GALLAGHER:** Exactly. The reason they want to make
27 sure that the processing done by the importer meets the
28 relevant requirements. So it's not just the act of
29 transfer but the processing that is conducted and that

1 extends, Judge, as you rightly identify as an important
2 matter, to what occurs after the transfer.

3
4 So acts of processing by the importer. You'll see, if
5 you go back to just under the names of the parties, 12:02
6 they have: *"Agreed on the following contractual*
7 *clauses in order to adduce adequate safeguards with*
8 *respect to the protection of privacy and fundamental*
9 *rights et cetera for the transfer of the data exporter*
10 *to the data importer of the personal data specified in* 12:03
11 *Appendix 1."*

12
13 That is achieved by: *"That it has instructed and*
14 *throughout the duration of the personal-data processing*
15 *services."* 12:03

16
17 That's what's being provided by the importer: *"will*
18 *instruct the data importer to process the personal*
19 *data."* So any processing by the importer transferred
20 only on the data exporter's behalf and in accordance 12:03
21 with the applicable data protection law and the clauses
22 and the clauses are defined as these provisions.

23
24 And then, if you go over the page, and: *"The data*
25 *importer will provide sufficient guarantees in respect* 12:03
26 *of the technical and organisational security measures*
27 *specified in Appendix 2;*

28
29 (d) *that after assessment of the requirements of the*

1 *applicable data protection law, the security measures*
2 *et cetera et cetera."*

3
4 So that's what the exporter is undertaking. And you'll
5 see down at (i), the second last one there before you 12:04
6 come to Clause 5: "*That in the event of sub-processing*
7 *- because you could have sub-processing over there as*
8 *well and you want to ensure the sub-processing done in*
9 *the appropriate way - that that will be carried out in*
10 *accordance with Clause 11 by a sub-processor providing* 12:04
11 *at least the same level of protection for the personal*
12 *data and the rights of the data subject."*

13
14 And then what are the obligations of the data importer
15 and (a) is of critical importance: "*To process the* 12:04
16 *personal data only on behalf of the data exporter and*
17 *in compliance with its instructions and the Clauses; if*
18 *it cannot provide such compliance for whatever reason,*
19 *it agrees to inform promptly the data exporter of the*
20 *inability to comply, in which case the data exporter is* 12:05
21 *entitled to suspend the transfer."*

22
23 So to process the personal data only on behalf of the
24 data exporter and in compliance with its instructions
25 and its instructions in (b) were: "*Throughout the* 12:05
26 *duration of the personal data-processing service that*
27 *the data processing would be carried out in accordance*
28 *with the applicable law."*

1 The law of Ireland --

2 **MS. JUSTICE COSTELLO:** Sorry, which (b) were you
3 referring to there?

4 **MR. GALLAGHER:** I was referring back to (b) on 4(b).

5 **MS. JUSTICE COSTELLO:** Oh, sorry, yes. 12:05

6 **MR. GALLAGHER:** Because that's what (a) is the sort of
7 corollary of.

8 **MS. JUSTICE COSTELLO:** Sorry. It's not the (b)
9 following on.

10 **MR. GALLAGHER:** And the applicable law there, as 12:05
11 I said, is Irish law having implemented the Directive
12 with the Directive's provisions and protections.

13

14 Then if you go to (b) that: *"That it has no reason to*
15 *believe that the legislation applicable to it prevents* 12:06
16 *it from fulfilling the instructions;*
17 *(C) that it has implemented the technical and*
18 *organisational security measures."*

19

20 And can I draw your attention to the footnote which is 12:06
21 a footnote to the heading of that clause:

22

23 *"Mandatory requirements of the national legislation*
24 *applicable to the data importer which do not go beyond*
25 *what is necessary in a democratic society on the basis* 12:06
26 *of one of the interests in Article 13(1) of the*
27 *Directive, that is, if they constitute a necessary*
28 *measure to safeguard national security et cetera and*
29 *the prevention of financial -- sorry, the prevention,*

1 *detection and prosecution of criminal offences or of*
2 *breaches of ethics for the regulated professions, an*
3 *important economic or financial interest of the state*
4 *or the protection of the data subject or the rights and*
5 *freedoms of others are not in contradiction with the* 12:07
6 *standard contractual clauses. Some examples of which."*

7
8 And it gives some examples. So that's very important.
9 Firstly, mandatory requirements. It understands that
10 the data importer is subject to mandatory requirements 12:07
11 which include national security. So they envisage
12 that. They don't say you have to have a contract with
13 the national authorities, far from it.

14
15 Those provisions from (a) to (e) in clause 5 and then 12:07
16 in addition (g) all benefit from, (g) to (j), all
17 benefit from that third-party beneficiary clause.

18
19 And then clause 8, liability. *"The parties agree"* --
20 6, excuse me, sorry: 12:07

21
22 *"The parties agree that any data subject, who has*
23 *suffered damage as a result of any breach of the*
24 *obligations referred to in clause 3 by any party or*
25 *sub-processor is entitled to receive compensation from* 12:08
26 *the data exporter for the damage suffered."*

27
28 So what is that? That reflects back on 3 where: *"The*
29 *data subject can enforce against the exporter those*

1 *clauses.*" So while the importer undertakes an
2 obligation to the exporter, if the importer breaches
3 that, the data exporter is liable and liable to the
4 data subject.

5
6 And then if you go to 2: *"If a data subject is not*
7 *able to bring a claim for compensation in accordance*
8 *with paragraph 1 against the data exporter, arising out*
9 *of a breach by the data importer or his sub-processor*
10 *of any of their obligations referred to in Clause 3 or* 12:08
11 *in Clause 11, because the data exporter has factually*
12 *disappeared or ceased to exist in law or has become*
13 *insolvent, the data importer agrees the data subject*
14 *may issue a claim against the data importer as if it*
15 *were the data exporter."* 12:09

16
17 And then 3: *"If the data subject is not able to bring*
18 *a claim against the exporter or data importer arising*
19 *out of a breach by the sub-processor of any of the*
20 *obligations referred to in those clauses or the* 12:09
21 *exporter and data importer have factually disappeared*
22 *or ceased to exist in law or become insolvent the*
23 *sub-processor agrees that the alternate data subject*
24 *may issue a claim against the sub-processor."*

25
26 So it brings the sub-processor within the web of
27 remedies and contractual obligations. Sorry, Judge.

28
29 I'll just draw your attention very briefly, there's a

1 mediation and jurisdiction provision in clause 7:

2
3 *"The data importer agrees that if the data subject*
4 *invokes against it third-party beneficiary rights*
5 *and/or claims compensation for damages under the*
6 *clauses, the data importer will accept the decision of*
7 *the data subject:*

8 *(a) to refer the dispute to mediation."*

9
10 That's relevant in the context of the protections 12:10
11 provided by the Privacy Shield in arbitration. Here
12 you're getting a mediation agreed to. Co-operation
13 with the supervisory authorities is dealt with. What
14 is the governing law? The clause shall be - the
15 clauses, that's all of those clauses - shall be 12:10
16 governed by the law of the Member State in which the
17 exporter is established. Irish law. And then the
18 sub-processing.

19
20 So when we heard so much about standing, or the alleged 12:10
21 *lack* of standing, it's surprising that nobody addressed
22 this. If there is a breach of the obligations by the
23 importer then there is an action for damages, there is
24 mediation and it is governed by Irish law. And I'll
25 come back and explain that in more detail when we are 12:11
26 dealing with the Privacy Shield.

27
28 So that's the obligations. And if the exporter doesn't
29 carry it out and the importer doesn't carry it out in

1 accordance with Irish law, there is a remedy and there
2 is this extensive network of remedies and a framework
3 in which they can be delivered.

4
5 If I could take you to the privacy --

12:11

6 **MS. JUSTICE COSTELLO:** So can any of this apply to
7 breaches by the US Government or its officials in
8 relation to -- I mean, I understand what you're saying
9 here, there's protection inter-companies and the data
10 protection -- and you've shown me that.

12:12

11 **MR. GALLAGHER:** Yes.

12 **MS. JUSTICE COSTELLO:** As I understood, the complaint
13 and concern of the Data Commissioner *wasn't* that
14 Facebook or Facebook Inc. or their sub-processors were
15 going to mishandle his data, but he was concerned if US
16 national security bodies mishandled his data.

12:12

17 **MR. GALLAGHER:** Absolutely. But you saw in 4(b) - 4(b)
18 - that the processing, the exporter instructs the
19 importer to carry out the processing in accordance with
20 the provisions of Irish law.

12:12

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

22 **MR. GALLAGHER:** In 5(a) the importer *agrees* that they
23 will do that.

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

25 **MR. GALLAGHER:** So if Irish law makes illegal - because
26 this is the comparator - makes illegal what is done in
27 the US and the processing is not carried out in that
28 way because data is made available to the national
29 security authorities, then there is a remedy against

12:12

1 the importer and the exporter. And that's why the
2 provision in relation to mandatory requirements is of
3 such importance. You'll see "Obligations of the
4 *Importer*".

5 **MS. JUSTICE COSTELLO:** So he doesn't have to sue the 12:13
6 State at all?

7 **MR. GALLAGHER:** No.

8 **MS. JUSTICE COSTELLO:** Any entity of the State? Okay.

9 **MR. GALLAGHER:** Exactly. That's why this reference to
10 mandatory requirements that relieves the importer of 12:13
11 the mandatory, of that obligation, so therefore the
12 importer is not in breach if the importer is complying
13 with the mandatory requirements. But if the importer
14 is *not* complying with the mandatory requirements and
15 this is unlawful and there has been a breach of the 12:13
16 relevant laws then there were no mandatory requirements
17 and the liability does arise.

18
19 So the issue of standing which has been put forward as
20 in and of itself a basis for saying there is inadequate 12:13
21 protection is dealt with by *giving* you standing against
22 the exporter *and* the importer if the processing is not
23 carried out in accordance with Irish law, save where
24 that deviation results from a mandatory requirement
25 that meets those criteria. 12:14

26 **MS. JUSTICE COSTELLO:** But just to take an example - I
27 mean, it may not be a very good example, because I'm
28 just thinking of it on the spot here; the data is
29 transferred across pursuant to clauses that comply with

1 this decision and it's subject to lawful surveillance -
2 I won't even wonder which of the many possibilities in
3 the US - and let us say we have Rogue 1 operating in
4 one of these unidentified security bodies in the US and
5 he has, or she or it has a downer on, let us say for 12:14
6 argument's sake, gay people and he discovers that
7 somebody or other, a well-known person in the EU is
8 engaging in an activity that he doesn't approve of and
9 he wants to leak this. That would be, you could argue,
10 a breach of his data, our notional EU person. Would 12:15
11 the -- how would that remedy be dealt with? Because
12 it's come through national security and it's, as I say,
13 a rogue member of the national security.

14 **MR. GALLAGHER:** well, there are two aspects. The
15 importer is processing. The importer, in making data 12:15
16 available to national security pursuant to a Directive,
17 is engaged in an act of processing. If the importer
18 makes data available to the national security and ought
19 not to have done so because there wasn't the legal
20 authority to do it, it didn't comply with Section 702, 12:15
21 that's clearly a breach by the importer, because the
22 importer is processing in a way that is not following
23 the instructions of the exporter and is not protected
24 by saying 'I was complying with a mandatory provision
25 of the law'. 12:16

26
27 So you can sue the importer and you get your remedy for
28 the fact that the importer processed that data in a way
29 that was inconsistent. Of course there can be a

1 further processing when it goes to the national
2 security agency, but if you get your remedy against the
3 *importer* --

4 **MS. JUSTICE COSTELLO:** No, I was thinking where the
5 importer has done it right, the importer *has* provided 12:16
6 it lawfully. Maybe it's one of these "about", maybe
7 it's one of these "about" mechanisms we were talking
8 about.

9 **MR. GALLAGHER:** Yeah. That is answered then simply by
10 saying of course where the national security do the 12:16
11 processing, that's a separate matter. But that's not
12 under the purview of European law, that's national
13 security processing, even under European law, is
14 outwith the scope of the Directive.

15 **MS. JUSTICE COSTELLO:** So you're not saying that that 12:16
16 situation is governed by these clauses --

17 **MR. GALLAGHER:** No.

18 **MS. JUSTICE COSTELLO:** -- you're saying it's TEU
19 Article IV?

20 **MR. GALLAGHER:** Exactly. But even more so; a lot of 12:17
21 the complaints are said 'Here was a Directive issued
22 under Section 702 or 1881 or whatever, that should
23 never have been issued, it was unlawful'. You try and
24 sue the US because of that and you don't have standing
25 for whatever reason. But the act of handing over the 12:17
26 data is an act of processing. You're protected if it's
27 on foot of a mandatory requirement. And if it's not
28 and you haven't challenged it and handed it over, you
29 can be sued. The normal thing in the US might be to

1 sue both it and the US, but you can be sued and there
2 is a remedy.

3
4 what the national security do in terms of processing is
5 done for national security purposes. In Europe that's 12:17
6 not subject to the data Directive and there is no basis
7 on which it being done elsewhere is subject to the data
8 Directive or subject to EU law. And you'll see the way
9 in its which it's approached when I come to dealing
10 with national security in the decision; that is 12:18
11 accepted, national security will process the data, they
12 may do it correctly or incorrectly, but that is in a
13 separate sphere. And what we're looking at here is:
14 Are there remedies in situations where data is
15 collected, there isn't an authorisation, a proper 12:18
16 authorisation for collecting that data and data is
17 handed over other than in compliance with the mandatory
18 requirements of the law and, therefore, not processed
19 in accordance with the applicable law in Ireland? And
20 there *is* a remedy. 12:18

21
22 But *nobody* in *any* jurisdiction - and it's not being
23 suggested - has a remedy in respect of the processing
24 that is then done with that data by the national
25 security. That's within the national security sphere 12:18
26 and that is excluded. It's an essential attribute of
27 sovereignty and that is separate.

28
29 So to ignore the fact that there are remedies in this

1 context is to ignore a critical part of the
2 architecture that has been put in place to provide
3 safeguards. And that's what we're talking about,
4 safeguards. I'll leave perhaps a further expansion of
5 that until I just put it in the context of the Adequacy 12:19
6 Decision and you'll see how that has dealt with, Judge.

7
8 If you come to page two of the Adequacy -- sorry, it is
9 in divide 13 and page two. Firstly you will see what
10 they say in paragraph 5 of the recitals: 12:19

11
12 "Pursuant to Article 25(2)... the level of data
13 protection afforded by a third country should be
14 assessed in the light of all the circumstances
15 surrounding a data transfer operation" -- 12:20

16 **MS. JUSTICE COSTELLO:** Sorry, which number?

17 **MR. GALLAGHER:** Oh, I'm terribly sorry. It's page two
18 and it's recital 5 at the top of the page.

19 **MS. JUSTICE COSTELLO:** 5, sorry, yes. "*Pursuant to*".

20 **MR. GALLAGHER:** "*Afforded by a third country should be 12:20*
21 *assessed in the light of all the circumstances*
22 *surrounding a data transfer operation or set of data*
23 *transfer operations, including the rules of law, both*
24 *general and sectoral.*"

25
26 Again telling you what you have to look at when you're
27 examining adequacy.

28
29 Recital 7: "*The Commission considered that the*

1 *fundamental basis of the Safe Harbour scheme had to be*
2 *reviewed."* So we know they came to it with an idea of
3 trying to, or a purpose of trying to remedy what they
4 saw as the deficiencies.

5
6 *"8. Based on evidence gathered by the Commission,*
7 *including information stemming from the work of the*
8 *EU-US Privacy Contact Group and the information on US*
9 *intelligence programs received in the... Working Group,*
10 *the Commission formulated 13 recommendations for a*
11 *review of the Safe Harbour scheme. These*
12 *recommendations focused on strengthening the*
13 *substantive privacy principles, increasing the*
14 *transparency of US self-certified companies' privacy*
15 *policies, better supervision, monitoring and*
16 *enforcement by the US authorities of compliance with*
17 *those principles, the availability of affordable*
18 *dispute resolution mechanisms, and the need to ensure*
19 *that use of the national security exception... is*
20 *limited to an extent that is strictly necessary and*
21 *proportionate."*

22
23 So recognising a national security exception, saying it
24 must be limited to the extent that is strictly
25 necessary and proportionate.

12:21

26
27 Then in 9:

28
29 *"In its judgment of 6 October 2015 in... Schrems, the*

1 *Court of Justice... declared [the Safe Harbour*
2 *Decision] invalid. Without examining the content of*
3 *the Safe Harbour Privacy Principles, the Court*
4 *considered that the Commission had not stated in that*
5 *decision that the United States in fact 'ensured' an*
6 *adequate level of protection by reason of its domestic*
7 *law or its international commitments."*

8
9 That is identifying the ratio of Schrems, which, as you
10 will see when we look at it briefly, was simply that 12:22
11 the Safe Harbour decision did not contain a *statement*
12 of compliance, not an *assessment* of the compliance by
13 the law of the US or of its adequacy.

14 **MS. JUSTICE COSTELLO:** I should, in fairness to you,
15 Mr. Gallagher, point out that we should be ending this 12:22
16 by one. Because we'd decided on -- I'd allowed for a
17 half day for both Mr. Doherty and yourself and you've
18 had the half hour yesterday, so that takes up my
19 questions. I'm just warning you.

20 **MR. GALLAGHER:** No, thank you -- 12:22

21 **MS. JUSTICE COSTELLO:** And you are conscious of minding
22 your time?

23 **MR. GALLAGHER:** I'm very conscious of mind --

24 **MS. JUSTICE COSTELLO:** Because we've only five days
25 next week, even allowing for the fact that Tuesday may 12:22
26 not be a full day in the circumstances.

27 **MR. GALLAGHER:** Yeah, I'm very conscious of that. Then
28 11:

1 *"The Court of Justice criticised the lack of sufficient*
2 *findings in [the Decision] regarding the existence, in*
3 *the United States, of [the issue of the protection]."*

4
5 Then just to tell you how it's set out. You then see 12:23
6 the EU-US Privacy Shield. And the system is identified
7 in 14. In 15, if you look at the last sentence, the
8 third line:

9
10 *"The Principles apply solely to the processing of*
11 *personal data by the US organisation in as far as*
12 *processing by such organisations does not fall within*
13 *the scope of Union legislation."*

14
15 Then it says:

16
17 *"The Privacy Shield does not affect the application of*
18 *Union legislation governing the processing of personal*
19 *data in the Member States."*

20
21 So again recognising that limitation on Union
22 legislation.

23
24 Then 18: The system will be administered and monitored
25 by the Department of Commerce, as you know. 12:23

26
27 *"30. The EU-US Privacy Shield provides for oversight*
28 *and enforcement mechanisms in order to verify and*
29 *ensure that US self-certified companies comply with the*

1 *Principles*" - the importance of oversight mechanisms.

2
3 In 36, a system of monitoring referred to.

4
5 *"41. Data subjects may pursue cases of non-compliance 12:24*
6 *with the Principles through direct contacts with the US*
7 *self-certified company. To facilitate resolution, the*
8 *organisation must put in place an effective redress*
9 *mechanism to deal with such complaints."*

10
11 And that mechanism is put in place.

12
13 I should've drawn your attention to 19, Judge, if you
14 go back three pages, on page four:

15
16 *"As part of their self-certification under the EU-US*
17 *Privacy Shield, organisations have to commit to comply*
18 *with the Principles."*

19
20 So all the private organisations comply with those 12:24
21 principles. Those principles are monitored. If
22 there's a breach, there has to be a system of redress.
23 And that's dealt with in 43, 44 and 45. And if you go
24 over the page to 11, you'll see that there's a
25 reference to the Privacy Shield being subject to 12:25
26 investigation and enforcement powers of the FTC.

27 **MS. JUSTICE COSTELLO:** Which paragraph now?

28 **MR. GALLAGHER:** I'm terribly sorry, 54 and following
29 paragraphs. And then in 61:

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"In the light of the information in this section, the Commission considers that the Principles issued by the US Department of Commerce as such ensure a level of protection of personal data that is essentially equivalent to the one guaranteed by the substantive basic principles... in [the Directive]."

So that's dealing with the private authorities, it's dealing with the companies that was companies that have subscribed to the Privacy Shield. And what I will say now - I won't have time to elaborate - the sort of protections and procedures and commitments are the equivalent of those in the SCC decisions; the arbitration process, the system of redress, the commitment to doing it in accordance with the applicable Member State law. And you don't have to satisfy yourself of that, but you *will* be satisfied. But what's significant is it's not even *examined* by the DPC when assessing the SCC decisions.

Then they deal separately with the public authorities. And this is important, because -- 64, on page 13:

"Adherence to the Principles is limited to the extent necessary to meet national security, public interest or law enforcement."

So adherence to the principles, which are designed to

1 give the protection of the Member State law, is limited
2 to that extent - the same matter as the footnote in the
3 heading to Clause 5 of the SCCs.

4
5 Then 65:

12:26

6
7 *"The Commission has assessed the limitations and*
8 *safeguards available in US law as regards access and*
9 *use of personal data transferred under the EU-US*
10 *Privacy Shield by... public authorities for national*
11 *security, law enforcement and other public interest*
12 *purposes. In addition, the US government, through its*
13 *office of the Director of National Intelligence (ODNI),*
14 *has provided the Commission with detailed*
15 *representations and commitments that are contained in*
16 *Annex VI to this decision. By letter signed by the*
17 *Secretary of State and attached as Annex III to this*
18 *decision the US government has also committed to create*
19 *a new oversight mechanism for national security*
20 *interference, the Privacy Shield Ombudsperson, who is*
21 *independent from the Intelligence Community."*

22
23 Then:

24
25 *"Finally, a representation from the US Department of*
26 *Justice, contained in Annex VII to this decision,*
27 *describes the limitations and safeguards applicable*
28 *to... use of data by public authorities for law*
29 *enforcement and other public interest purposes."*

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So it looks separately and *recognises* that the position of the public authorities is different and what remedies might apply and protections is different. It describes the limitations and safeguards applicable to access and use of data. And in 67, its analysis shows a number of limitations on the access and use of data and sets those out by reference to PPD-28 etc. And all of the rest of it there, up until paragraph 82 on page 18, contains an examination of those, including the PCLOB. 12:28 12:28

"82. Moreover, in its representations the US government has given the European Commission explicit assurance that the US Intelligence Community 'does not engage in indiscriminate surveillance' - your attention was drawn to that perviously.

At 88, you'll see that:

"On the basis of all of the above, the Commission concludes that there are rules in place in the United States designed to limit any interference for national security purposes with the fundamental rights of the persons whose personal data are transferred."

And that included its assessment of the role of the PCLOB and the other limitations, its examination of FISA. Then in 94, on page 20:

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"In the Commission's assessment, this conforms with the standard set out by the Court of Justice in... Schrems, according to which legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter" --

MS. JUSTICE COSTELLO: 94?

MR. GALLAGHER: Sorry, it's 90, excuse me.

"Is not limited to what is strictly necessary where it authorises, on a generalised basis, storage of all the personal data."

So it carries out its assessment. It is satisfied, as 91 tells you, that the oversight mechanisms that exist with regard to any interference by US intelligence authorises with personal data transferred to the US and the avenues available for EU data subjects to seek individual redress. It sets out in some detail then the oversight by the US Government and Inspector Generals and PCLOB. And that continues right through, Judge, until 110.

12:29

12:30

It then identifies the individual redress in the way that has been identified for you in this case. And it recognises, Judge, in 115, the issue of standing and the inability that might arise to have a complaint made admissible before the courts because of standing, and it refers to the footnote. Then in 118, in order to

12:30

1 provide for additional redress avenue accessible to all
2 EU data subjects, the government has decided to create
3 an Ombudsman/person mechanism. So having recognised
4 the limitations, it provides for the Ombudsman --
5 Ombudsperson mechanism.

12:31

6
7 Then if you go to 122:

8
9 *"Overall, this mechanism" - it has gone through and*
10 *examined it - "ensures that individual complaints will*
11 *be thoroughly investigated and resolved, and that at*
12 *least in the field of surveillance this will involve*
13 *independent oversight bodies with the necessary*
14 *expertise and investigatory powers and an Ombudsperson*
15 *that will be able to carry out its functions free from*
16 *improper... political influence...*

17
18 *123. On the basis of all the above, the Commission*
19 *concludes that the United States ensures effective*
20 *legal protection."*

21
22 Now, if you just stop there, Judge, for a moment and
23 compare that with what the DPC did. Firstly, it
24 divided the protections in the private sphere, then it
25 looked in the public sphere. In the public sphere it
26 didn't go straight to remedies and say 'Oh, there are
27 standing problems' and 'Oh, these statutes only provide
28 redress in certain circumstances' and 'Oh, the
29 oversight bodies aren't relevant'; they look at those,

12:31

1 but they look at it having looked at the substantive
2 features. Because in its assessment of the public
3 sphere, the national security sphere, a different
4 standard applied, and that is whether the protections
5 in that sphere met the requirements of being strictly 12:32
6 necessary in terms of the achievement of the national
7 security objectives - which is, of course, a different
8 test and a test which involves a recognition that the
9 method of processing and what processing is done is a
10 matter for the national security authorities, what I 12:32
11 suppose we'd call the margin of appreciation at an ECHR
12 level. But the one thing it *didn't* do was just look at
13 the remedies and say 'we have doubts about those, those
14 are inadequate' and exclude everything else. And
15 that's *precisely* what you are being asked to do here. 12:32

16
17 So it's relevant in terms of (A) the methodology is
18 wrong on the part of the DPC. But secondly, the DPC,
19 in examining the State intervention, hasn't applied the
20 correct legal test. Because effectively the comparator 12:33
21 is the remedies provided for by the Directive. That's
22 not the comparator applied by the Commission, that's
23 not the comparator that *can* be applied by reason of the
24 exclusions from the scope of the Directive and EU law.
25 The comparator that you apply is: Are these provisions 12:33
26 strictly necessary for the objective and do the
27 safeguards and limitations meet that criterion? It's a
28 different analysis, which was *not* carried out here.
29

1 So national security *does* have that exclusionary
2 element, but it also imposes a different basis of
3 assessment. And in that basis of assessment, you don't
4 have to have the extensive legal remedies that you have
5 against the private actor. And that is clear from this 12:34
6 and it's also clear as a matter of law that I will
7 elaborate on when we're making our full submissions.

8
9 The adequate protection then, the final recitals are at
10 136 to 140 on page 12. The periodic review is 12:34
11 identified in 145. And then the formal decision for
12 the purposes of Article 25(2) - this is on page 35 -
13 Article 1(1): "... *the United States ensures an*
14 *adequate level of protection.*"

15 12:34
16 So that's a formal decision. And the significance of
17 that formal decision can be appreciated if you'd be
18 kind enough to get out book two of these materials.
19 You've already seen Article 31 and now you see the
20 applicable law by which this is to be all assessed, and 12:35
21 that's our 1988 Act as amended. And in --

22 **MS. JUSTICE COSTELLO:** which tab, sorry?

23 **MR. GALLAGHER:** It's in the first tab, excuse me. And
24 section --

25 **MS. JUSTICE COSTELLO:** 16, is it? Yes, thank you. 12:35

26 **MR. GALLAGHER:** Oh, sorry. Excuse me, Judge, it is 17,
27 I do apologise, in mine. I think you might have 16.
28 I'm one out I think.

29 **MS. JUSTICE COSTELLO:** Oh, yes, there's a sort of a --

1 the combined one. What section do you want me to go
2 to?

3 **MR. GALLAGHER:** It's Section 1(4) on page 14. "*This*
4 *act*" - at the bottom of the page - "*does not apply to* -
5 *(a) personal data that in the opinion of the Minister* 12:35
6 *or the Minister for Defence are, or at any time were,*
7 *kept for the purpose of safeguarding the security of*
8 *the State.*"

9

10 So if processing is done by the State and, as you 12:35
11 pointed out in your example, inappropriate processing
12 if it were done by a private actor, or whatever the
13 processing, it's just outside the scope of the
14 applicable law. So how do you carry out a comparison
15 of the remedies by reference to an applicable law that 12:36
16 at its least treats national security differently?

17

18 Then if you go, Judge, to paragraph -- or section,
19 excuse me, 8, which you will find on page 40.

20 **MS. JUSTICE COSTELLO:** Thank you. 12:36

21 **MR. GALLAGHER:** There's a further restriction on the
22 application of the Act to processing of personal data
23 by a member of the Garda Síochána or by a member of the
24 defence forces.

25 **MS. JUSTICE COSTELLO:** Sorry... 12:36

26 **MR. GALLAGHER:** Page 40 and down at the bottom is
27 Section 8, just to draw your attention to it.

28 **MS. JUSTICE COSTELLO:** Just a moment, I'm not quite...

29 **MR. GALLAGHER:** It's hard to follow the sections

1 because of the form of the Act.

2 **MS. JUSTICE COSTELLO:** It's page 41

3 **MR. GALLAGHER:** Oh, it's 41 in yours, is it? Sorry,
4 it's 40 in mine. And it's just (a) and (b), Judge,
5 just to draw your attention to that. Then 10, which in 12:37
6 mine is 44, is the enforcement of data protection --
7 45.

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

9 **MR. GALLAGHER:** "*The Commissioner*" - and this is what's
10 happened here - "*may investigate, or cause to be 12:37*
11 *investigated, whether any of the provisions of this Act*
12 *have been, are being or are likely to be contravened*
13 *[...] in relation to an individual.*"

14

15 That's what's happening here. The Commissioner is 12:37
16 given a role of investigator and it's through that
17 process in respect of this particular complaint that
18 the matter comes before this court. And that's an
19 important context.

20 12:37

21 Then, Judge, if you go to Section 11 - I'm 48 and I
22 suspect you're 49.

23 **MS. JUSTICE COSTELLO:** Section 11, is it?

24 **MR. GALLAGHER:** Section 11.

25 **MS. JUSTICE COSTELLO:** I'm back on 48. 12:38

26 **MR. GALLAGHER:** If you go to Section 11(1), it deals
27 with the transfer of data in fairly similar terms. And
28 in (2) you'll see:
29

1 that, in terms of the public actor and the law that
2 governs the public actor, the Adequacy Decision says
3 that that law complies with what it's *required* to
4 comply with, namely that these are provisions that
5 allow national security to process data, that they meet 12:40
6 the requirement of being strictly necessary for the
7 particular objective. The fact that you don't have
8 notification, the fact that you don't have access
9 doesn't undermine their adequacy.

10
11 So when you're looking at the bit that's the subject of
12 the draft decision, namely, I'll call it the public law
13 relating to public security, the Adequacy Decision in
14 and of itself finds that that meets the requirements of
15 EU law. 12:40

16 **MR. MURRAY:** well, sorry to interrupt Mr. Gallagher,
17 Judge. I'm not sure that he's answered your question
18 and I *am* anxious to find out exactly what he's saying.
19 Is he now saying - because this has not been pleaded
20 and not stated in submissions - is he now saying that 12:41
21 the Privacy Shield Decision, under the provision to
22 which he has referred, binds the court to a particular
23 conclusion?

24 **MR. GALLAGHER:** That's exactly what I said.

25 **MR. MURRAY:** well, that's never been pleaded and never 12:41
26 been stated.

27 **MR. GALLAGHER:** It's a matter of law --

28 **MR. MURRAY:** It's a matter of law that we're entitled
29 to be told he's saying before he's on his feet. I'll

1 come back to it after lunch, Judge.

2 **MR. GALLAGHER:** It's a matter of law that doesn't *need*
3 to be pleaded, as Mr. Murray well knows. And Section
4 11 governs the very process for which the Data
5 Protection Commissioner is responsible. 12:41

6 **MR. MURRAY:** Sorry, Judge, with the greatest of
7 respect, this is absurd. The Statute of Limitations is
8 matter of law, it has to be pleaded, parties have to be
9 told about it. I'm not concerned about the pleading
10 aspect - we can deal with that - I'd just like to have 12:41
11 known in advance that this is the case that's being
12 made. I'll come back to it after lunch.

13 **MR. GALLAGHER:** This is entirely different from the
14 Statute of Limitations, as Mr. Murray well knows, and
15 -- 12:41

16 **MS. JUSTICE COSTELLO:** I'm not going to take a pleading
17 point. It's a question of what precisely the case is
18 being advanced --

19 **MR. GALLAGHER:** Yes, exactly.

20 **MS. JUSTICE COSTELLO:** -- and what's been -- and you're 12:42
21 saying it's Privacy Shield is a binding --

22 **MR. GALLAGHER:** Exactly. And the Privacy Shield *is*
23 referred to --

24 **MS. JUSTICE COSTELLO:** That's fine, that's your case.

25 **MR. GALLAGHER:** And in the reply it is stated the 12:42
26 Privacy shield *hasn't* been taken into account, though
27 it's raised in the Defence. And further, it was only
28 when Mr. Collins opened the case that it was absolutely
29 clear that they are sticking their -- nailing their

1 colours to the Section 25 test. And when they nail
2 their colours to the Section 25 test and the adequacy,
3 the DPC -- this is not a private plaintiff, the DPC
4 *knows* of this decision, has made a *conscious* decision
5 not to take it into account, *knows* the law that governs 12:42
6 her investigations, *knows* the law that governs the
7 transfers for which she is responsible for overseeing.

8
9 So it *is* clear that this is a Community finding and it
10 *is* clear that the court is bound by it. And it doesn't 12:42
11 become not bound by it because they refuse to raise it
12 and say 'we've made our decision prior to it, we're
13 leaving it out'. That *can't* be done.

14
15 Judge, that brings me to one very important point - I 12:43
16 can see why Mr. Murray is so exercised about it.
17 Because what has happened here is the DPC, for her *own*
18 reasons, reasons of her *own* choosing, is asking this
19 court to endorse her opinion of adequacy, or well
20 founded concerns about adequacy, which is *not based on* 12:43
21 *the current legal position*. The current legal position
22 is reflected in the Adequacy Decision. And she
23 herself, at footnote 22, says 'I'm not taking it into
24 account' and reiterated this in paragraph six of her
25 reply. 12:43

26
27 So she is putting the court in the position of having
28 to make a decision on the basis of assumed facts,
29 namely 'we'll assume the legal position in respect of

1 which we're saying there is insufficient adequacy is
2 that which no longer exists'. And she does that
3 because she made her decision on 24th May and this came
4 out on 8th July and she could've delayed it. And
5 that's the one thing she's not entitled to do. So I 12:44
6 understand why it is a matter of concern that so
7 exercises Mr. Murray.

8 **MR. MURRAY:** Sorry, Judge, that sort of --

9 **MS. JUSTICE COSTELLO:** No, no, it's all right. I just
10 really, I understand that -- I just wanted to know what 12:44
11 the case being outlined to me was.

12 **MR. MURRAY:** As do we.

13 **MS. JUSTICE COSTELLO:** whether you have been misled or
14 not or whatever is another day's work entirely. I'm
15 being selfish here and focusing on what *I* want to 12:44
16 understand.

17 **MR. MURRAY:** Thank you, Judge.

18 **MR. GALLAGHER:** It's specifically pleaded in our
19 Defence that we will -- or, sorry, in the reply I
20 should say, paragraph 6.1 of the reply, to which I 12:44
21 referred, that "*the Commissioner will refer to the*
22 *entirety of the Privacy Shield Decision at the hearing*
23 *hereof for its true meaning and effect.*" They have
24 pleaded it. And if Mr. Murray is saying, as he seems
25 to be mirthfully reflecting on, that its effect does 12:45
26 not embrace the statutory effect of what the Commission
27 did under that formal process then that is
28 misconceived. But the idea that this wouldn't be
29 brought to your attention, we wouldn't say this is

1 something that is critical --

2 **MS. JUSTICE COSTELLO:** well, to be fair, it was. I
3 mean, my version of it is all completely marked up,
4 because Mr. Collins spent quite a bit of time opening
5 it up. But it was merely a question as to the 12:45
6 particular legal weight *you* were attaching to it. I
7 mean, "full force legal and effect" is a little bit
8 ambiguous. But you're saying it's an 11(2) issue?

9 **MR. GALLAGHER:** It is clearly an 11(2) issue, yeah.

10 **MS. JUSTICE COSTELLO:** And that's fine. That's your 12:45
11 case.

12 **MR. GALLAGHER:** Yeah. And Mr. Collins certainly opened
13 this section. But I think the significance of it, that
14 it's actually binding because it relates to an Article
15 31 process, that is something that is *very* important. 12:46

16
17 But leave that aside; even if it *weren't* binding, they
18 have the difficulty that they are asking you to decide
19 this on an assumed basis of US law which is not in fact
20 the correct basis. And I mentioned yesterday the 12:46
21 **Lofinmakin** decision, where the Supreme Court make it
22 clear (A) you can't decide a moot and the court
23 shouldn't do it and (B) in the concurring judgment of
24 McKechnie J. he says the court must decide cases on
25 *real* facts, not imagined or assumed facts. And that's 12:46
26 a very important issue.

27
28 So without having analysed that, without having
29 formed -- sorry, followed the process in Section 10 of

1 looking at that in terms of the complaint, that issue
2 is skipped over and it's brought then to the court and
3 the court is asked to give deference to a decision
4 which doesn't take it into account and the court is
5 asked to share the well founded concerns, and that is 12:47
6 ignored.

7
8 Judge, the next section I want to deal with briefly is
9 the incorrect comparator. And it's not that we are
10 asking for some lower standard in terms of what is the 12:47
11 comparator for judging adequacy. Firstly, we say - and
12 this is not a matter that *you* will determine - that
13 national security entirely is outside of the scope of
14 this - that's clear from the Article IV TEU. But even
15 taking the *narrower* position, national security is 12:47
16 different. And when you're examining what is required
17 by national security, it is a different process that is
18 used, not an examination of national security by
19 reference to the rights in the Directive.

20 12:48
21 what the court did here and what the court -- sorry,
22 what the Commission did here and what the court does in
23 the cases is to apply that standard of not looking at
24 the substance of the sort of processing that's done,
25 but saying 'Are these measures strictly necessary to 12:48
26 achieve the objective?' That's a different analysis,
27 one which was *never* conducted by the DPC.

28
29 The next issue that I want to deal with is it is said

1 in the opening that, well, you just look at 7 and 8 and
2 47 in isolation. I should've drawn your attention,
3 Judge - and I won't ask you to take out the book again
4 - but Article 51 of the Charter *expressly* says that the
5 Charter only applies in circumstances where the court 12:49
6 is -- or, sorry, the Union institutions are
7 implementing EU law. The Charter does not extend the
8 scope of EU law. And the field of application in 51
9 is:

10
11 *"The provisions of the Charter are addressed to the*
12 *institutions, bodies, offices and agencies of the Union*
13 *with due regard for the principle of subsidiarity and*
14 *to the Member States only when they are implementing*
15 *Union law."* 12:49

16
17 And it goes on: *"The Charter does not extend the field*
18 *of application of European law."*

19
20 So European law has to apply before the Charter 12:49
21 applies. And it's said that where a Member State is
22 exercising a *derogation*, that the Charter applies in
23 those circumstances. We don't agree with that. But of
24 course, that's not the issue here. The *Member State* is
25 not exercising a derogation. This is excluded from 12:50
26 European law. So do to do your analysis by reference
27 to Articles 7, 8 and 47 in the abstract is just wrong.
28 And what the Commission does is a different exercise,
29 much more akin to the exercise done under the ECHR,

1 where, if *Union* law doesn't apply then in most Member
2 States - Ireland is different because the ECHR or the
3 Convention is not part of our law as such - in most
4 countries you determine it by it by reference -- or,
5 sorry, ECHR is part of their law, so the reference back 12:50
6 to the Member State law this will consider the
7 Convention.

8
9 And in these circumstances, the Convention looks at
10 whether the national security measures are strictly 12:51
11 necessary. But it gives a wide margin of appreciation
12 to the State. And the significance of that is in
13 Leander -v- Sweden; you don't have to inform the
14 subject of the surveillance or give them access to
15 rectify your data - rights which would, in any event, 12:51
16 clearly be inconsistent with the objective of the
17 national security and the surveillance. But that's
18 what ECHR law says. And also, Article 13 of the
19 Convention gives you a right to a remedy, but not a
20 remedy before a tribunal. 12:51

21
22 So it *is* very important to decide what are you
23 comparing it with? And you're just told the Charter
24 you're comparing it with, though Article 51 says the
25 Charter doesn't extend the scope of EU law. And this 12:52
26 is different and very different from Watson and from
27 Schrems, as I will explain shortly.

28
29 So that is wrong, that is the incorrect approach. And

1 even if it was the Charter that was applicable, you
2 don't just look at the Charter and say 'well, Article
3 47 gives remedies and we think those remedies don't
4 mirror what's in the Directive'. Because of course,
5 Article 47, like Articles 7 and 8, can have their 12:52
6 protections limited. Obviously the limitations have to
7 be proportionate and they have to meet the normal
8 standards of any limitation of a fundamental right.

9
10 Article 52 says limitations are only relevant if you 12:53
11 don't destroy the *essence* of the right. But
12 Mr. Collins and Mr. Murray certainly said 'Oh, these
13 restrictions destroy the *essence* of the right'. Well,
14 (A) they don't and that's a mistake, and it's a mistake
15 because the DPC's draft decision doesn't so conclude; 12:53
16 in fact, she concludes that there are remedies, but
17 that she doesn't think that they are sufficient.

18 **MS. JUSTICE COSTELLO:** May I just ask you to clarify
19 one thing? You said there that "*even* if the Charter
20 applies". 12:53

21 **MR. GALLAGHER:** Yes.

22 **MS. JUSTICE COSTELLO:** Were you saying that it doesn't
23 apply because of your Article 4(2) TEU argument?

24 **MR. GALLAGHER:** Exactly.

25 **MS. JUSTICE COSTELLO:** That's all right. Because you 12:53
26 had been talking about the Convention and I just wanted
27 to make sure that I understood why.

28 **MR. GALLAGHER:** I'm terribly sorry.

29 **MS. JUSTICE COSTELLO:** No, no, no, that's okay, I'm

1 clear now.

2 **MR. GALLAGHER:** 4(2) and 51 of the Charter. So that's
3 not the comparator. But I'm going back now and saying
4 even if they're right and that is the comparator and
5 I'm *wrong* on all of that, well, before deciding that 12:54
6 the remedies are inadequate, you can't exclude the fact
7 that the restriction on remedies here is in the
8 national security sector. So you have to say: Is the
9 restriction in the remedies provided for in Article 47
10 consistent with the Charter? Because these rights can 12:54
11 be limited. Whether the rights are *validly* limited
12 involves a consideration of whether it's strictly
13 necessary and proportionality. No such consideration
14 was conducted.

15
16 And the DPC's submissions don't allege that the US law
17 interfered with the right of the privacy, the written
18 submissions, though a different position was adopted
19 orally. The draft decision doesn't deal with that
20 issue and say 'The essence of these rights has been 12:54
21 infringed and, therefore, no balancing'. And they
22 couldn't say that, because paragraph 95 of **Schrems**, on
23 which they rely, says that the essence of the rights is
24 infringed if there is a lack of *any* possibility, *any*
25 possibility to pursue legal remedies. And in fact at 12:55
26 paragraph 44 of the draft decision the DPC says that
27 the data subject is not completely without redress and
28 a number of remedial mechanisms are available.
29

1 So the essence of the right, Judge - and Mr. Collins
2 did mention this in his submission - is of importance,
3 because the ability under Article 52 to limit the
4 rights - this entitlement to limit is recognised -
5 doesn't apply if the essence of the rights is 12:55
6 compromised. 52(1) says:

7
8 *"Any limitation on the exercise of the rights and*
9 *freedoms recognised by this chapter must be provided*
10 *for by law and respect the essence of those rights and 12:56*
11 *freedoms. Subject to the principle of proportionality,*
12 *limitations may be made only if they are necessary and*
13 *generally meet the objectives."*

14
15 So here you can't look at remedies and say 'Oh, you 12:56
16 don't have all those remedies. This is national
17 security. Limitation on rights. Is it necessary?'
18 None of that has been examined. And they can't claim
19 the essence is infringed, because they do acknowledge
20 there are remedies there, and that's consistent with 95 12:56
21 of Schrems. And that's important, because this engages
22 so many rights: The right to life under the Charter, I
23 think it's Article 4, the right to do business, Article
24 16. There are other rights and this is a balancing
25 exercise. So to say that there are well founded 12:56
26 concerns that the protections enshrined in EU law were
27 not met would involve you carrying out some such
28 exercise, and none is carried out.
29

1 I want to deal then briefly with the cases relied on
2 and just very briefly at this stage, but just to say
3 where we are with those, Judge. Firstly, the
4 provisions of the Treaties cannot be ignored and
5 there's nothing in any of the decisions which says 12:57
6 Article 4(2) doesn't mean what it says. And indeed
7 there are a number of decisions that actually
8 specifically address this issue which have not been
9 overruled and recognise it.

10
11 Firstly, there are a host of directives that recognise 12:57
12 this national security special position - the parts in
13 the Data Protection Directive, there's the E-Privacy
14 Directive, the forthcoming General Data Protection
15 Regulation, which will be introduced in 2018, 12:57
16 recognises it, the 2008 framework Directive, the Law
17 Enforcement Directive of 2016 recognises it.

18
19 **Lindqvist**, the court, at paragraph 43, says the
20 activities mentioned by way of an example in the first 12:58
21 indent of Article 3(2) of the Data Protection Directive
22 - in other words, state security - are in any event
23 activities of the "*state or of state authorities and*
24 *unrelated to the fields of activity of individuals.*"

25 **Parliament and Council -v- Commission on Passenger Name** 12:58
26 **Records** is to the same effect, as is **Ireland -v-**
27 **Parliament**, all recognising this different position.

28
29 **Digital Rights**, where the Directive was struck down,

1 was a case where the court clearly exercised its
2 jurisdiction, because the Directive had been brought in
3 to harmonise the laws in terms of data retention. It
4 aimed to harmonise Member States' provision. So of
5 course the court had to consider whether it was valid. 12:58
6 And it struck it down because it focused on retention
7 by the providers and it says their obligations to
8 retain - that is the providers, not the national
9 security authorities - doesn't conform with the
10 equivalent of Article 13, that it wasn't necessary to 12:59
11 achieve those objectives. So nowhere is it suggested
12 that they're resiling from what is the position
13 previously laid out.

14
15 Schrems is very careful in determining just one 12:59
16 fundamental matter - the Safe Harbour decision didn't
17 address this issue, didn't contain the statement by the
18 Commission that it examined it and that it was
19 adequate.

20 12:59
21 Then there is Tele2 -v- Watson. And the essential
22 question in that -- that was, firstly, directives --
23 or, sorry, legislation in the UK and Sweden being
24 judged by reference to the E-Privacy Directive. And
25 the question referred by Sweden related to whether the 13:00
26 obligations of retention for criminal law purposes were
27 compliant with the Directive. So that issue, in terms
28 of compliance with the Directive, was raised and the
29 court did look as to whether they were strictly

1 necessary and just said 'Actually, the retention
2 obligation is effectively freestanding, in the sense
3 that it's not clearly related to the necessity for
4 criminal enforcement'. But of course, criminal
5 enforcement, Judge, as you're aware, and criminal law 13:00
6 is now the subject of the TFEU. Title V of the TFEU
7 now gives Union law, confers on Union law a power over
8 the area of criminal law. So that exclusion is now
9 gone. State security still survives.

10
11 And in that case, the statements that were made with
12 regard to information and access that Mr. Murray drew
13 attention to yesterday were, as I will show you when we
14 are doing our submissions, specifically made in the
15 context of criminal law of the and the court was very, 13:01
16 very careful not to get involved in an assessment of
17 the position in terms of national security, for very
18 obvious reasons, because that engages different
19 principles.

20
21 I'm finished now, Judge, but just to say that even
22 *without* the Commission decision, the Adequacy Decision,
23 we would say that US law is adequate. It doesn't, as
24 Schrems says, have to provide the same protection, it's
25 essential equivalence, and the means by which it is 13:02
26 done has to be looked at, it doesn't have to provide it
27 by the same means. There are some differences between
28 the experts. We believe that the position put forward
29 by our experts, as we'll hope to demonstrate, is the

1 correct one. But if it comes to you resolving that, we
2 believe that's how it should be resolved. But even on
3 the basis of the information contained in the decision
4 properly understood, US law is adequate. And that's a
5 matter that we'll address in some detail. So --

13:02

6 **MS. JUSTICE COSTELLO:** Just that last point, which
7 decision were you referring to there? Because there's
8 so many decisions. The draft decision?

9 **MR. GALLAGHER:** The draft -- I'm sorry, I should say
10 the DPC --

13:02

11 **MS. JUSTICE COSTELLO:** It seemed to be inherent in it,
12 but I just want to avoid ambiguity.

13 **MR. GALLAGHER:** No, you're absolutely right. I used
14 "the Commissioner's", it should be "the DPC" is the
15 nomenclature that should be used for that. Thank you,
16 Judge.

13:02

17 **MS. JUSTICE COSTELLO:** Thank you. So two o'clock.

18

19

20

(LUNCHEON ADJOURNMENT)

13:02

21

22

23

24

25

26

27

28

29

1 THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS
2 FOLLOWS

3
4 **REGISTRAR:** Matter of Data Protection Commissioner -v-
5 Facebook Ireland Ltd. and another. 14:00

6 **MS. JUSTICE COSTELLO:** Now, Mr. Gallagher, you have
7 completed?

8 **MR. GALLAGHER:** Thank you very much indeed, Judge,
9 thank you.

10 **MS. JUSTICE COSTELLO:** Thank you. Now I think the next 14:00
11 matter we had to decide was the issue in relation to
12 the affidavits, so had you discussed amongst yourselves
13 how you wished to approach this? Are the people who
14 filed affidavits going to make their application first
15 and then responses? 14:00

16 **MR. MAURICE COLLINS:** I think that makes sense, Judge.

17 **MR. GALLAGHER:** Yes. It may assist you, Judge.
18 I don't think you are going to have to deal with the
19 Robertson affidavit, we may be able to resolve that, so
20 that shouldn't take up any time this afternoon. 14:01

21 **MS. JUSTICE COSTELLO:** Excellent.

22 **MR. GALLAGHER:** We won't be addressing that, it's only
23 the amici.

24 **MS. JUSTICE COSTELLO:** Thank you. Yes, Mr. Collins?
25 14:01

26 **SUBMISSION BY MR. MAURICE COLLINS:**

27
28 **MR. MAURICE COLLINS:** I appear on behalf of BSA The
29 Software Alliance, Judge.

1 **MS. JUSTICE COSTELLO:** Yes.

2 **MR. MAURICE COLLINS:** And I seek to have the court
3 admit an affidavit of Mr. Thomas Boué. I hope I'm not
4 doing any disservice to him in terms of the
5 pronunciation of his name. It's an affidavit sworn on 14:01
6 17th November.

7

8 Unless anybody has any objection or the court has any
9 objection, I think the court should look at that
10 affidavit. It's in Book 11 which is in Evidence & 14:01
11 Expert Reports - Part J and I don't know if the court
12 wants to look at it electronically or look at it
13 physically, but it's in Book 11.

14 **MS. JUSTICE COSTELLO:** I don't mind, if we have it on
15 the -- 14:01

16 **MR. MAURICE COLLINS:** I can tell you it's certainly
17 included amongst the documents on the tablet.

18 **MS. JUSTICE COSTELLO:** I have it. Yes, I have his
19 affidavit, yes.

20 **MR. MAURICE COLLINS:** Now I have prepared a Book of 14:02
21 Authorities, Judge, but it just may not have copies of
22 them just to hand but I have got a copy for you.
23 There's nothing in there that will cause surprise to
24 any of the other parties. There is a very significant
25 overlap I think between the authorities that are in 14:02
26 that book and the authorities that were before the
27 court when the application to be joined was first made.

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

29 **MR. MAURICE COLLINS:** Perhaps before looking at the

1 affidavit of Mr. Boué, just to make some observations
2 which I think derive properly from the case law.

3
4 The first is that the amicus jurisdiction itself is one
5 that is not set in stone and is developing. Secondly, 14:02
6 and significantly in the present context, there appears
7 to be no absolute rule against an amicus adducing
8 evidence. In the case at Tab 2 of the book I've just
9 handed up, HI -v- Minister for Justice, the Supreme
10 Court per Keane CJ at page 204 cites with apparent 14:03
11 approval a judicial statement from an Australian case
12 to the effect that an amicus is not normally entitled
13 to adduce any evidence. So there doesn't appear to be
14 an absolute rule and rather there appears to be a
15 default assumption that an amicus should not be 14:03
16 permitted to adduce evidence.

17
18 It's not difficult in my respectful submission to
19 identify the considerations that underpin that
20 presumption, and I think they are relevant to the 14:03
21 court's consideration of the issues here. In the first
22 place, in inter partes litigation the parties
23 themselves are in the best position to adduce relevant
24 evidence and are likely between them to be able to
25 adduce all relevant evidence. And as a matter of 14:04
26 practicalities it's unlikely to be the case that an
27 amicus is going to be in a position to adduce relevant
28 evidence that is beyond the reach of the parties.
29

1 Secondly, permitting an amicus to adduce evidence
2 obviously may add to the length and/or cost burden of
3 proceedings; and, thirdly, it may be thought to be
4 inconsistent with the role of an amicus to adduce, to
5 be permitted to adduce evidence which may favour one 14:04
6 party over another or - and this was the case in the
7 decision of Kelly J, EMI, where an amicus sought to
8 effectively introduce by way of evidence evidence which
9 contradicted the position of both of the parties as to
10 the state of affairs on the basis of which they were 14:05
11 litigating.

12
13 But none of those considerations apply in this case.
14 This is not, as Mr. Collins was keen to emphasise and
15 careful to emphasise in the course of his opening 14:05
16 before you, a lis inter partes in any normal sense of
17 that term and that feature of the litigation was also
18 emphasised by McGovern J in his judgment on the joinder
19 applications in these proceedings.

20 14:05
21 Secondly, and I'm addressing specifically my affidavit
22 here, Judge, my affidavit isn't controversial. It
23 doesn't seek to address any contested area of fact. It
24 doesn't seek to express an opinion or give evidence
25 that is supportive of the position of one party rather 14:05
26 than another in relation to any of the issues that are
27 in dispute and a striking aspect of this, and the court
28 will remember that I mentioned this when this was
29 before you on the first case management, very brief

1 case management mention.

2 **MS. JUSTICE COSTELLO:** Hmm.

3 **MR. MAURICE COLLINS:** That at that stage my affidavit
4 had been sworn I think and with all of the parties,
5 including the amici, for a period in excess of two 14:06
6 months and in the course of that period not one party
7 had indicated any objection to any aspect of its
8 content or had taken issue with any aspect of it, and
9 that remains the position today. At no stage has any
10 of the parties in the broadest sense indicated any 14:06
11 objection to the contents of Mr. Boué's affidavit or
12 suggested that it was a matter of controversy in itself
13 or was not relevant to the court's considerations of
14 the issues arising in these proceedings, and that's a
15 matter of very considerable significance in my 14:07
16 respectful submission.

17
18 And no one has suggested, for instance, that if the
19 affidavit is to be admitted it will have to be answered
20 or that there is some basis for taking issue with the 14:07
21 contents of it, as I have said, or that, for instance,
22 Mr. Boué would have to make himself available for
23 cross-examination, thereby lengthening the duration of
24 these proceedings.

25 14:07
26 So none of those considerations that may be thought to
27 underpin the normal rule actually apply to this
28 affidavit in this case. But ultimately, in my
29 respectful submission, it's a matter for you to

1 determine, Judge, whether this affidavit, not on some a
2 priori basis all of the affidavits, but this affidavit
3 is one which would assist you or may assist you in
4 determining the issues in these proceedings. And when
5 I say determining the issues, I mean determining also 14:07
6 the question of whether there should be a reference and
7 in what terms that reference should be formulated and
8 what is the factual basis that the court should set out
9 for that reference if it decides to make one.

10
11 The rationale on which the BSA was permitted to be
12 joined, Judge, suggests in my respectful submission
13 that it is logical that the affidavit material that
14 Mr. Boué has prepared should be admitted. Because in
15 the course of his judgment, and this is the judgment at 14:08
16 Tab 1 of the book that I've handed up to you,
17 McGovern J observed at page 9, 9 into 10:

18
19 *"Having considered its application - that's the BSA*
20 *application - and the submissions made on its behalf 14:08*
21 *I am satisfied that it meets the criteria for being*
22 *admitted as an amicus curiae. Its members include some*
23 *of the largest technology providers in the world and in*
24 *my view it is in a position to offer relevant views*
25 *which might otherwise not be available to the court."* 14:08
26

27 And that's precisely what Mr. Boué seeks to do or to
28 make good on that understanding by way of the
29 affidavit.

1 Because while there is evidence from the parties,
2 including in particular the evidence of Facebook and
3 the affidavit and report of Dr. Meltzer in particular
4 as to the use of SCCs and the economic consequences
5 that would follow if their use was struck down, BSA is 14:09
6 effectively in a, perhaps to say it's in a unique
7 position is perhaps to run the risk of overstating it
8 slightly, but in a particularly advantageous position
9 to give that information to the court. Because it has,
10 as Mr. Boué avers, a wide range of members, some of 14:09
11 whom are primarily based in Europe, some of them
12 primarily based in the US, engaging in different
13 commercial activities but all of which involve to one
14 extent or another the use of standard contractual
15 clauses. 14:10

16
17 Part of the evidence which Mr. Boué seeks to put before
18 the court are the results of a survey undertaken
19 specifically for the purposes of these proceedings, and
20 I'll come to that in just a little bit more detail when 14:10
21 I bring the court to the affidavit. And the results of
22 that survey, we respectfully say, will undoubtedly
23 assist the court in its understanding both of the use
24 of SCCs and also the safeguards that those users apply
25 to ensure data protection of, the protection of the 14:10
26 data being transferred.

27
28 we respectfully also say that in any proceedings that
29 sort of evidence would be relevant to the court and

1 perhaps helpful to it, but it's particularly so in
2 circumstances where the application before the court,
3 though it's not one that obviously the court has
4 determined, the application before the court is for a
5 reference to the Court of Justice. And where - and 14:10
6 we've included in the book the Irish Creamery Milk
7 Suppliers Association -v- Ireland where the Court of
8 Justice indicated that it was important and appropriate
9 that when a reference was made that it should enable
10 the court: "*To take cognizance of all of the features 14:11*
11 *of fact and of law which may be relevant to the*
12 *interpretation of Community law which it is called upon*
13 *to give.*" And that's at Tab 6.

14
15 So if I can just perhaps ask you then to turn to the 14:11
16 affidavit. I'm not going to read it out to you unless
17 you want me to do so, Judge.

18 **MS. JUSTICE COSTELLO:** No, no, it's okay.

19 **MR. MAURICE COLLINS:** But what I just propose to do is
20 just show you in outline what is addressed. He sets 14:11
21 out some brief details of the BSA at paragraph 8
22 onwards.

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

24 **MR. MAURICE COLLINS:** And you'll see in paragraph 9
25 that: 14:12

26
27 "*BSA is a not-for-profit international trade*
28 *association whose members include international*
29 *technology providers such as Apple, IBM, Microsoft,*

1 *Intel, Siemens PLM, SAS and Oracle."*

2
3 So some of the largest names in technology are members
4 of the BSA. He indicates in paragraph 10 that:

5
6 *"Based on SEC filings the combined revenue of the*
7 *members in 2015 was in excess of 550 billion dollars,*
8 *explains that BSA has had an active presence and*
9 *extensive operations in Europe for nearly 30 years and*
10 *BSA member companies employ over 15,000 people in*
11 *Ireland."*

12
13 Then he goes on to address the SCCs and the legal
14 issues to be addressed, that's at paragraph 16 and 17.
15 Then he talks about the SCCs and, taking it up at
16 paragraph 21, he discusses how SCCs are used in
17 practice, and that's a point he comes back to in light
18 of the survey. He talks about the proceedings at
19 paragraph 24 onwards. And then at paragraph 28 onwards
20 he addresses himself to two recent surveys, one of
21 which was carried out by BSA itself and the other of
22 which was carried out by a third party organisation,
23 that's the one referred to at paragraph 31.

24
25 Those surveys indicate the central importance of SCCs.
26 The BSA's own survey indicates that, of the members who
27 responded, something in the order of one third relied
28 on SCCs exclusively for cross Atlantic border transfer.
29 And the majority of the remainder -- sorry, in other

1 words, more than 50% of the overall number, relied on
2 SCCs as the principal tool for transfer of data outside
3 of Ireland. So only a minority did not rely on SCCs
4 either exclusively or primarily.

5
6 Some of those results are summarised in the bullet
7 points in paragraph 35. They also make the point, and
8 this is a point made by Mr. Boué, and it arises from
9 the survey of course, that SCCs - the court I think
10 will already know this - SCCs apply in principle or are 14:14
11 available for use in respect of transfer from Ireland
12 or from any EU Member State or to any other state. It
13 doesn't depend on any adequacy of protection or
14 findings of adequacy of protection and it's not just,
15 even though this case focuses on the transfer of data 14:14
16 from the EU to the United States, SCCs themselves are
17 available and apply in respect of transfers from the EU
18 to any third country, not just in United States, and
19 are relied on as such, and that's one of the questions
20 that was raised in the survey. 14:15

21
22 At paragraph 36 he says: "*The BSA and IAPP surveys*
23 *clearly demonstrate that SCCs are indispensable in the*
24 *conduct of global data flows, including transatlantic*
25 *movement of data, and so are the lifeblood of economic* 14:15
26 *activity between the EEA and the rest of the world.*"

27
28 He goes on to say a little bit more about the use of
29 SCCs at paragraph 37 onwards and gives some of the

1 results from both the BSA survey and the IAPP survey,
2 and I'll come to those when I just bring you to that
3 exhibit. Then at paragraph 44 onwards he talks about,
4 again in the context of a question asked in the BSA
5 survey, the use of additional safeguards by companies
6 relying on SCCs to ensure adequate protection or
7 appropriate protection of data and adequate compliance
8 with the SCC obligations.

14:15

9
10 There's an important section at paragraph 47 onwards
11 when he talks about the other mechanisms for
12 transferring data, and they are of course, Privacy
13 Shield is one of those, and there are others that
14 I think the court has heard of, consent, binding
15 corporate rules and so on.

14:16

16
17 At paragraph 47 he says: "*SCCs, moreover, are not*
18 *simply one amongst many mechanisms for data transfer.*
19 *For more than a third (35%) of the companies BSA*
20 *surveyed, they are the exclusive means relied on for*
21 *data flows from the EEA to the United States and*
22 *elsewhere. Additionally, over half of the respondents*
23 *use standard clauses as their principal method for data*
24 *transfer.*"

14:16

14:16

14:16

25
26 Then at paragraphs 50 onwards he talks about the
27 economic and societal implications of any decision that
28 would invalidate the SCCs or render them unusable.
29 You'll see that is a lengthy section of his affidavit,

1 but if the court turns to paragraph 58 you'll see that
2 he refers to a report by the Information Technology and
3 Industry Council:

4
5 *"which analyses the consequence to trade if*
6 *international data flows were seriously disrupted or*
7 *stopped, including."*

14:17

8
9 And he gives a number of bullet points: *"The negative*
10 *impact on EU GDP could reach -0.8% to -1.3%. This is*
11 *roughly equivalent to three to four times the economic*
12 *decline that Europe experienced during the 2012*
13 *economic downturn;*
14 *EU services exports to the United States would be*
15 *expected to drop by 6.7%, and EU manufacturing exports*
16 *could decrease by up to 11%;*
17 *The direct welfare effects for consumers would be*
18 *equivalent to a loss of USD 102 billion to USD 170*
19 *billion."*

20
21 And a copy of that report is amongst the material that
22 Mr. Boué exhibits.

23
24 So, Judge, as I say that affidavit, nobody has
25 suggested either that the material that's in this
26 affidavit is not relevant or that it would not be
27 helpful to the court. No one has suggested that it's
28 inaccurate in any way. And it is clear that those,
29 some of the points that Mr. Boué addresses are

14:18

1 addressed in Facebook material. He has brought to bear
2 or the BSA is bringing to bear a particular expertise
3 and a particular wealth of knowledge and information by
4 virtue of the diverse membership that it has. And this
5 survey, the survey material that Mr. Boué has adverted 14:18
6 to, is nowhere else in the evidence before the court.

7
8 So in my respectful submission, Judge, this is an
9 affidavit which, ultimately if the court accepts that
10 the touchstone for its admission is whether it would 14:19
11 assist the court, the answer is yes; and if the court
12 then asks itself are there considerations which
13 nonetheless dictate that it should be excluded, as
14 might be the case, for example, if it were disputed
15 evidence that would lead to some satellite issue 14:19
16 detaining the court and impeding the expeditious
17 determination of the underlying proceedings, the answer
18 is that there are no countervailing or contrary
19 factors.

20
21 If I just perhaps then can just ask you to take up the
22 book of materials very briefly, just to bring you to
23 some of the material that I have looked at or, sorry,
24 that I have adverted to. Tab 1 is the judgment of
25 McGovern J. 14:19

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

27 **MR. MAURICE COLLINS:** I indicated to you that he said
28 in the course of his judgment and he emphasised in this
29 particular context that we're concerned with here the

1 admission of and the role of, appropriate role of amici
2 in these proceedings. At paragraph 15, which is on
3 page 7, he says that the proceedings:

4
5 *"Involve issues of public law but they are not in any* 14:20
6 *real sense a lis inter partes. One of the reliefs*
7 *sought by the plaintiff is a reference to the CJEU. It*
8 *is accepted by all the applicants that, if a reference*
9 *is made, they cannot be heard before the CJEU unless*
10 *they were involved in some way before the court of*
11 *first instance."*

12
13 It goes on to say in respect of my client then at
14 paragraph (iii) at the bottom of page 9. At the very
15 bottom he says position: 14:20

16
17 *"Its members include some of the largest technology*
18 *providers in the world."*

19
20 And that's obviously correct: *"And in my view it is in* 14:20
21 *a position to offer relevant views which might*
22 *otherwise not be available to the court."*

23
24 And that's exactly what Mr. Boué's affidavit does. It
25 offers relevant information which might not otherwise 14:21
26 be available to the court. There's an overlap with
27 some of the evidence before the court but this evidence
28 is particular and much it is specific to Mr. Boué's
29 affidavit and would not otherwise be available to the

1 court.

2
3 Then there are a number of decisions of both this court
4 and the Supreme Court in relation to the circumstances
5 in which an amicus curiae can be joined or participated 14:21
6 to participate in the proceedings. HI is at Tab 2 and
7 at the conclusion of that judgment of the Chief Justice
8 he refers at page 204, the very last page of the tab,
9 refers to an Australian decision of United States
10 Tobacco Company -v- Minister for Consumer Affairs. 14:21

11
12 It was said in that case, this is the last sentence in
13 the second last paragraph: "*It was said in that case*
14 *that an amicus curiae, unlike an intervener, has no*
15 *right of appeal - that's not relevant to anything the* 14:22
16 *court is considering now - and is not normally entitled*
17 *to adduce any evidence.*"

18
19 And that clearly indicates that that's a normative
20 position as opposed to some hard-edged exclusionary 14:22
21 rule. Then, Judge, there are cases which I think turn
22 on their own facts and really don't perhaps assist.

23
24 I should just bring to the court's attention the
25 decision of Hogan J in Schrems, the follow on decision, 14:22
26 that's at Tab 5. That was an application made by
27 Digital Rights Ireland to be joined as an amicus after
28 the court had given its original judgment. It had
29 given its judgment indicating that it considered it

1 appropriate to make a reference and it had given - in
2 that judgment it had set out the questions that the
3 court was proposing to refer.

4
5 Digital Rights came to the court subsequent to that, 14:23
6 sought to be joined and sought to have an additional
7 question added to the reference. The court permitted
8 the joinder but declined in the circumstances to allow
9 that additional question to be joined. The additional
10 question was in fact the one that was determined by the 14:23
11 Court of Justice, it was as to the validity of the Safe
12 Harbour Decision, but the court considered that that
13 was a question which the applicant had not sought to
14 have referred and it wouldn't be appropriate for the
15 amicus to be permitted to join that question. 14:23

16
17 For present purposes could I ask you just to turn to
18 page 514 and paragraph 18 he said, Hogan J said:

19
20 *"It is also clear - and at this stage he has referred 14:23*
21 *to a number of cases, including I -v- Minister for*
22 *Justice and Fitzpatrick which is one of the cases*
23 *included in this book - it is also clear that the*
24 *amicus does not have the status of a party to the*
25 *litigation - so that, for example, it cannot call 14:24*
26 *evidence or lodge an appeal and it cannot add*
27 *materially to the costs of the litigation by, for*
28 *example, seeking its own costs. The case must*
29 *furthermore normally involve questions of public law,*

1 *often with significant implications for the general*
2 *public. Moreover, as Keane C.J. stressed in I, the*
3 *jurisdiction is one to be 'sparingly exercised'."*
4

5 Judge, I mean that appears to put the matter further 14:24
6 than Keane CJ in I, but it's not clear from the
7 judgment of Hogan J what was the basis for apparently
8 saying that there was an absolute rule that no evidence
9 could be adduced. Because the only case that he refers
10 to in his analysis that touches on that question is in 14:24
11 fact the decision in VI.

12 **MS. JUSTICE COSTELLO:** Did Digital apply to adduce
13 evidence as opposed to adduce a new question, if I can
14 put it that way?

15 **MR. MAURICE COLLINS:** No. No, they didn't. Sorry, 14:24
16 I should qualify my answer, so far as appears from the
17 judgment, no. They wished to make submissions in the
18 Court of Justice but they also wished to modify or by
19 addition the reference and the questions to be
20 referred. 14:25

21
22 unless there is anything else I can assist the court
23 with they are my submissions.

24 **MS. JUSTICE COSTELLO:** Thank you. Now, who wished to
25 reply to that first? 14:25

26 **MS. HYLAND:** I think there are two other parties who
27 have affidavits so perhaps it may make sense for them
28 to go first.

29 **MR. O'DWYER:** Yes, Judge.

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SUBMISSION BY MR. O'DWYER:

MS. JUSTICE COSTELLO: Yes, Mr. O'Dwyer, your affidavit is --

14:25

MR. O'DWYER: I am for EPIC, Electronic Privacy Information Centre and perhaps if I could begin, Judge, just by introducing --

MS. JUSTICE COSTELLO: You are Book 10; isn't that right?

14:25

MR. O'DWYER: Pardon me?

MS. JUSTICE COSTELLO: Your one is in Book 10.

MR. O'DWYER: Yes, exactly. And ours is obviously, our affidavit is slightly different than Mr. Collins' client's affidavit. But first, Judge, if I could just explain a little bit about EPIC and perhaps indicate why McGovern J allowed them to be joined as an amicus in the first place.

14:25

EPIC is a privacy and freedom of information organisation, an NGO, based in Washington in the United States of America and it has particular expertise in the legal framework for government surveillance of personal electronic data and electronic privacy issues. This is what the organisation actually specialises in. So unlike ACLU, for example, who might deal in some cases with these privacy issues, this is effectively all that EPIC deals with. It's, I suppose, a real expert in this particular field. Most of its work is

14:26

14:26

1 as an amicus in the United States.

2
3 I noticed Mr. Murray placed considerable emphasis on
4 two cases on one of the earlier days, Clapper -v-
5 Amnesty and then Spokeo, both about standing and I can 14:27
6 indicate to the court that EPIC was an amicus in both
7 of those cases, including the before the Supreme Court
8 in Clapper, so that might give the court an indication
9 of how involved they would be with this area in the
10 United States. 14:27

11
12 we made, the court may not be aware that there was
13 I think ten applicants or more I think in the end,
14 there may have been 12 applicants to be amici or
15 putative amici that came before McGovern J, a number of 14:27
16 which would be similar enough to EPIC. There was the
17 Electronic Freedom Foundation and a number of other
18 bodies. But McGovern J decided that EPIC for a number
19 of reasons, I suppose primarily an affidavit that was
20 filed which indicated their high level of expertise, 14:27
21 would be the best party to deal as an amicus the legal
22 issues that arise, I suppose specifically issues of
23 American law and practice in respect of that law being
24 the type of thing we've been hearing about for the past
25 few days which is the remedies and how one might access 14:28
26 the remedies and standing. Clearly, even by the
27 example I have given in relation to Clapper and Spokeo,
28 EPIC can certainly provide a perspective to the court
29 that may be missing from the experts that are

1 effectively employed by the parties to provide.

2
3 I am not in any way contradicting anything that they
4 may say but just simply as an independent perspective
5 but a very expert perspective. That was the basis upon 14:28
6 which EPIC were joined. So it is specifically dealing
7 with the law and, I suppose, implementation of the law
8 and the way that the law operates and the way that the
9 remedies operate in America, these issues of standing
10 etc. 14:29

11
12 The difficulty I suppose in respect of that, we were
13 obviously very happy to be joined and came all the way
14 to Ireland to be joined as an amicus, it is what they
15 do effectively. The issue then arose that if we are 14:29
16 dealing with law, if we specifically are joined for the
17 purpose of dealing with the law in the US and with,
18 shall we say, legal issues and with remedies and
19 matters of that sort, that in general terms in Ireland,
20 as the court is of course aware, foreign law must be 14:29
21 proved and in general in most cases that would be
22 proved by way of an affidavit of an expert lawyer.

23
24 And on that basis we decided that it would be
25 appropriate and it would help the court for us to do an 14:30
26 affidavit or for Prof. Butler to do an affidavit, who
27 is the senior legal counsel with EPIC, in which he
28 would lay out the law and actually exhibit the various
29 statutes, the relevant parts and the executive orders

1 and all of that which he has done and to speak about
2 all of these different executive orders and the matters
3 we've been hearing about for the last few days.

4
5 So that was one of the reasons we decided to do an 14:30
6 affidavit. There was also some other materials,
7 including reports by EPIC itself, which Mr. Butler
8 believed would be helpful to the court, again dealing
9 in general with the same issues and decided that an
10 affidavit would be the best way to put those before the 14:30
11 court.

12
13 But, Judge, in preparing that affidavit, that was at a
14 very early stage in these proceedings, we didn't what
15 information and Mr. Butler couldn't have known what 14:31
16 information or what evidence was going to be put before
17 the court in respect of US law. Because at that stage,
18 while there were a couple of affidavits made available
19 to us, shall we say, very early in proceedings from the
20 DPC and we would have seen Prof. Serwin's first report, 14:31
21 we wouldn't have seen any material from Facebook or
22 anything like that, so we didn't know what law was
23 going to be properly before the court from the US.

24
25 So Mr. Butler I would respectfully submit, or 14:31
26 Prof. Butler, took the appropriate course to try and
27 exhibit everything he was talking about by way of
28 affidavit, which is of course in effect evidence. But
29 it's primarily, and if you look at the affidavit,

1 I know it's quite lengthy, but if you look at it you
2 will see that most of the exhibits are actually the
3 executive order, the particular statute, the Fourth
4 Amendment, so that they are before the court. Now as
5 it turns out a lot of that information was put before 14:32
6 the court by Facebook and a number of the experts, a
7 lot, not all of it but most of it. So perhaps you
8 could say that in some ways the requirement, there
9 wasn't a requirement to do an affidavit but we couldn't
10 have known that in advance and that was the basis upon 14:32
11 which the affidavit was submitted.

12
13 Now as I said there was a little bit more than just
14 laws to it for sure, but I don't think there is
15 anything particularly, there is nothing very unusual. 14:32
16 These are all, any of the reports are, say, reports
17 from the PCLOB that you've heard quite a bit about and
18 things like that. So there's nothing, I mean it's only
19 more information that we really felt should be before
20 the court and, taking the duty as amicus, most 14:32
21 seriously believed that they would be best put before
22 the court, as would normally happen in cases, by way of
23 affidavit. That was the purpose of the affidavit.

24
25 I don't know whether the court wants to actually have a 14:33
26 look through the affidavit. I think probably the
27 easiest way is on the electronic device.

28 **MS. JUSTICE COSTELLO:** Yes, I have it. I have the
29 electronic device here.

1 MR. O'DWYER: Yes, and if you go to case documents A09.

2 MS. JUSTICE COSTELLO: Yes.

3 MR. O'DWYER: And you see "*Proposed Evidence*" and at
4 No. 1 there is affidavit of Alan Butler.

5 MS. JUSTICE COSTELLO: Mm hmm. 14:33

6 MR. O'DWYER: As I probably indicated Mr. Butler is a
7 very experienced lawyer. He is, which isn't mentioned
8 on it, but he is also a professor in Georgetown
9 University in respect of some of these issues but he is
10 here primarily producing this affidavit as the senior 14:33
11 legal counsel for EPIC.

12
13 But you can see, Judge, what he goes through. He
14 begins with just a description I suppose of the
15 protection, the general system for protection of 14:34
16 personal data in the United States, the definitions of
17 personal information. Then goes through surveillance
18 law. I think he takes a very even-handed approach, as
19 you would expect from somebody who is involved as an
20 amicus in so many cases before the courts in the United 14:34
21 States; the Fourth Amendment, FISA. He then goes
22 through Section 702, EO 12333 that we heard about the
23 other day, PPD-28, USSID 18, all of these various
24 executive orders and statutes that we've dealt with.
25 He does elaborate upon them and I suppose gives some 14:34
26 detail about how they operate in practice in the United
27 States.

28 He talks about PRISM and Upstream and give perhaps -
29 and in a case that really does seem to have so many

1 different perspectives about the same things, he gives
2 a different perspective about those I think than any of
3 the other experts who, we've already heard about their
4 reports. He gives a different perspective on those, a
5 different perspective on the various executive orders. 14:35

6
7 Then, Judge, I suppose most significantly he goes on,
8 having dealt with all of those, which are very,
9 obviously germane in these proceedings, he deals with
10 the remedies. And he is in an almost unrivalled 14:35
11 position to deal with these because he's been involved
12 in these big cases about standing and so, particularly
13 in relation to standing, is in a good position to be
14 able to assist the court and through the affidavit
15 tries to do so to explain how an EU citizen might have 14:36
16 difficulties and the various problems in relation to
17 standing.

18
19 He wasn't, as I said, Judge, when the affidavit was
20 drafted, he hadn't sight of most of the affidavits that 14:36
21 come in since so it couldn't be said he was
22 deliberately trying to fall on one side or the other.
23 As it happens, I suppose - I mean admittedly it does
24 seem to more fall on the side of, and this is not in
25 any way - I suppose this is just a fact; if you get a 14:36
26 number of experts there will be a direction in which
27 most of them are going and it seems that, I suppose,
28 the affidavit would indicate opinions closer to those
29 of Serwin, Richards and the DPC and to a certain extent

1 Mr. Schrems. But that was in no way intentional and
2 that was without, it wasn't in an effort to fall on one
3 side in the dispute. In fact at that stage we didn't
4 know what, we wouldn't have known what Facebook were
5 actually disputing as such.

14:37

6
7 So I still think, Judge, although a lot of the matters
8 will be covered by the experts and they will of course
9 be cross-examined over the next week or so, that this
10 affidavit provides a slightly different perspective and
11 certainly an independent perspective that might be very
12 useful to the court. Even if Prof. Butler has to give
13 evidence in terms of cross-examination, we think it
14 would be quite brief. Because, if you are to accept
15 his affidavit, well then we will take it that his
16 affidavit is evidence and has been introduced by the
17 affidavit and then it would simply be a matter of him
18 being cross-examined.

14:37

14:37

19
20 But because he is, I suppose, such an expert we think
21 even that cross-examination might be very valuable to
22 the court because you'll be hearing the
23 cross-examination of someone entirely independent of
24 the parties and his answers, and indeed the court can
25 of course can him questions as well in the course of
26 that, might turn out to be very useful to the court
27 I suppose in terms of providing a different perspective
28 and giving you a very particularly expert view but an
29 independent view. So a lot of these matters that have

14:38

1 arisen where there appears to be almost a direct clash
2 between the witnesses for one side and the other --
3 **MS. JUSTICE COSTELLO:** I have two questions for you.
4 **MR. O'DWYER:** Yes.
5 **MS. JUSTICE COSTELLO:** One, I mean all the experts are 14:38
6 meant to give views independent of their clients.
7 **MR. O'DWYER:** Yes. Of course, Judge, and I didn't mean
8 in any way to denigrate any of the experts in any
9 sense.
10 **MS. JUSTICE COSTELLO:** I definitely wasn't implying 14:38
11 that you were. So to what extent, is this notionally
12 more of the same, that's the first question; and the
13 second question is to what extent would you be limited
14 in your ability to make submissions on the basis of the
15 other affidavits and evidence that will be led to the 14:39
16 court as opposed to introducing your own evidence, if
17 I can put it that way?
18 **MR. O'DWYER:** Yes, Judge. I suppose I would have to
19 admit that quite a bit of the affidavit as it turned
20 out could only be described as more of the same. 14:39
21 **MS. JUSTICE COSTELLO:** Mm hmm.
22 **MR. O'DWYER:** But there is certain parts of it,
23 I suppose it's - I mean difficult to go through them
24 now and highlight all of the different parts.
25 **MS. JUSTICE COSTELLO:** No, no, I understand. 14:39
26 **MR. O'DWYER:** But there are many parts where he is
27 providing a different view, perhaps a little bit
28 different than Ms. Gorski or perhaps not reaching
29 conclusions that Ms. Gorski on last Friday or the

1 Friday last reached. He has a different view on a
2 number of the, I suppose, executive orders and
3 certainly the remedies and standing issues than any of
4 the experts I've seen.

5
6 while it's veering and I'm trying to be, because the
7 whole purpose is to try and assist the court, I am
8 trying to -- I suppose my feeling is that it is veering
9 towards, that the evidence would certainly be veering
10 towards the evidence of some of the experts for the DPC 14:40
11 and Mr. Schrems, but it is different and I think the
12 differences would be very valuable to the court by
13 looking at the affidavit.

14
15 In terms of our submission -- sorry, if I could just 14:40
16 finish on that, Judge, just to say that I think in
17 particular there is one area where he can provide very
18 valuable extra, I suppose, evidence, if you want to put
19 it that way to the court, which is in relation to the
20 remedies which he has really, as I said, unrivalled 14:40
21 experience in, and that might be useful to the court.

22
23 Because you do have to, I mean if nothing else the
24 court is certainly going to have to decide, whether you
25 have to decide about surveillance or not seems to be 14:41
26 and how much surveillance is taking place and whether
27 they access it offshore or onshore, those issues the
28 court may not actually have to really decide upon. But
29 it does appear as though the court will have to decide

1 upon the remedies because that is the key issue that
2 the DPC is putting forward. Because otherwise is there
3 remedies available for EU citizens in respect of
4 breaches, is there notice? If they don't have notice,
5 can they have standing. Those issues the court is 14:41
6 probably going to have to make some findings, if even
7 to find that the doubts expressed by the Commissioner
8 are reasonable or whatever test is going to be used in
9 respect of that. You are going to have to,
10 I respectfully submit, take some view on that. 14:41
11 Certainly on reading the affidavit and having that
12 affidavit before you and possibly even hearing from him
13 would be very useful in that respect, particularly
14 useful, and that's where there might be a difference
15 really to be frank. 14:42
16
17 In respect of our submissions, our submissions because,
18 as I said originally, there was a very specific reason
19 for putting in an affidavit to deal with this issue of
20 foreign law, we felt we had to do an affidavit. 14:42
21 **MS. JUSTICE COSTELLO:** Hmm.
22 **MR. O'DWYER:** An awful lot of that material is now
23 before the court from the parties. It would only take
24 fairly minor amendments, rather than referring to his
25 affidavit, for us to refer to specific, you know to the 14:42
26 exhibit of Mr. Serwin or whoever.
27 **MS. JUSTICE COSTELLO:** Or aspects of EU law directly,
28 yes.
29 **MR. O'DWYER:** Exactly. I mean I wouldn't like to be

1 disadvantaged by that.

2 **MS. JUSTICE COSTELLO:** No, but it would be - for
3 example, you could refer directly to the US materials
4 rather than --

5 **MR. O'DWYER:** Exactly, Judge. 14:42

6 **MS. JUSTICE COSTELLO:** -- wherever it appears.

7 **MR. O'DWYER:** But I hope the court will understand that
8 that wasn't.

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

10 **MR. O'DWYER:** Had we known all of that information, we 14:42
11 wouldn't have, obviously we wouldn't have exhibited or
12 felt the need to exhibit it, but that's the way it
13 turned out. But we could certainly amend the
14 submissions to refer directly to those. I mean we
15 would obviously, I mean I would prefer if the 14:43
16 affidavit, if the court would simply take the affidavit
17 and read it particularly in relation to the issues I've
18 been talking about, the standing and things like that.
19 I do think there is differences that might go beyond.

20 14:43

21 But I suppose the submissions will be taken, I mean
22 I am told by Prof. Butler that in the United States the
23 rules are very similar. There is a little bit of
24 difference between contact between the parties and
25 amici and things like that, it's a little, shall we 14:43
26 say, less strict in that regard, but in general the
27 rules are similar. It would be very rare, as here,
28 that the amici would be putting in, would be
29 introducing evidence themselves by way of affidavit.

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It potentially could happen just as it potentially could happen here, as Mr. Collins has pointed out. I mean the Supreme Court have said, literally referring to an Australian case, but has said that it's the norm. But that might be the normative position, that doesn't necessarily mean it's a hard absolute rule, it's not written down anywhere in that sense that they can't introduce evidence.

14:44

14:44

But what actually seems to happen to a large extent in the States is they would make their submissions and all of this material, reports and everything else would be submitted by way of, I suppose, footnote and annexes to the submissions and are accepted right the way up to the Supreme Court on that basis, otherwise they don't do an affidavit exhibiting those to put them in. But again they are rarely dealing with the issue of foreign law, obviously in the United States Supreme Court.

14:44

14:44

So, Judge, I suppose overall, I mean my overriding submission is that the affidavit should be accepted for reasons that it does add something. I mean McGovern J did indicate that the amici would provide affidavits and we seem to be slightly at odds. We thought it was file affidavits. I think all of the other amici, apart from the United States, felt that that's what the learned judge was telling us to do.

14:45

1 **MS. JUSTICE COSTELLO:** Yes.

2 **MR. O'DWYER:** And clearly he would have been completely
3 alive to this issue about evidence because indeed in
4 the DPC's submission in respect of the amici it was
5 brought to his attention because the DPC said in their 14:45
6 submissions, written submissions, that if any of these
7 amici were to be introduced that they would be dealing
8 with foreign law and of course that would mean they
9 would have to do an affidavit and that would be
10 something that would be outside the norm for amici. 14:45
11

12 McGovern J still allowed these four amici to be joined
13 and indeed indicated that they should, I think the word
14 now is *submit* rather than *file* which we took, most of
15 us, I think, took to mean file. But it must have been 14:46
16 envisaged when he joined them and indicated that we
17 would, or at least gave us the facility to submit
18 affidavits, that they would contain evidence or would
19 at least have exhibits that might count as evidence.
20 14:46

21 And so on that basis, Judge, I would ask you not to
22 exclude it. I think it would be, it will be useful to
23 the court.

24 **MS. JUSTICE COSTELLO:** No, I have that point.

25 **MR. O'DWYER:** Yes, Judge. (Short pause) 14:46
26 **MS. JUSTICE COSTELLO:** Thank you.

27 **MR. O'DWYER:** Thank you, Judge. But if the court is
28 otherwise minded we can, with the permission of the
29 court, amend our submissions just in terms of, if the

1 court isn't minded to allow it in. Thank you, Judge.

2
3 **SUBMISSION BY MS. CAHILL:**

4
5 **MS. CAHILL:** May it please the court. I appear on 14:47
6 behalf of Digital Europe.

7 **MS. JUSTICE COSTELLO:** Yes, Ms. Cahill.

8 **MS. CAHILL:** Digital Europe is the principal
9 representative body for the digital technology industry
10 throughout Europe. 14:47

11
12 The description of Digital Europe in the judgment of
13 McGovern J of 19th July I think is a helpful one set
14 out at page 10 of his judgment. He expressed his
15 satisfaction from the evidence: "*That Digital Europe* 14:47
16 *is one of the most substantial and representative*
17 *groups for the digital technology industry in Europe*
18 *and that many of its members have an interest in and*
19 *will be affected by any decision made in this context.*"

20 14:47
21 Just to contextualise that statement, Judge. Digital
22 Europe has a number of trade representative body
23 members and a number of corporate members. Altogether
24 it represents some 23270 companies throughout Europe.
25 Its interests also represent a vast number of 14:47
26 employees, some 7.5 million employees in Europe.
27 I think it cannot be in dispute that the interests of
28 Digital Europe's members will be severely affected or
29 potentially severely affected by the outcome of these

1 proceedings and it's for that reason that Digital
2 Europe made the application to join as an amicus.

3
4 With respect to the affidavit that has been filed, it's
5 an affidavit of Mr. John Higgins. The affidavit is a 14:48
6 very brief one, it runs merely to six pages, Judge, it
7 appears at Tab 11 of Book 11. The purpose of the
8 affidavit is to set forward the position of Digital
9 Europe's members and we believe that that position is
10 not otherwise before the court, certainly not in the 14:48
11 form in which it's been presented in Mr. Higgins'
12 affidavit. The principal focus of Mr. Higgins'
13 affidavit is to set forward the use of the standard
14 contractual clauses for transfers of data from the EU
15 to other third countries. Now it's absolutely not a 14:48
16 factual dispute in these proceedings that the SCCs are
17 used for worldwide transfers, Mr. McCullough I think
18 mentioned that point in his submissions yesterday to
19 the court. It's not in dispute.

20 14:48
21 But we would say there isn't actually the evidence of
22 the digital industry in Europe to substantiate that
23 submission. So what we are saying is that it is
24 critically important that the interests of those who do
25 use the SCCs to transfer data to other countries other 14:49
26 than the US are put before this court.

27
28 The affidavit also addresses in very brief form the
29 different situations in which the standard contractual

1 clauses are used by the European business entities that
2 are the members of Digital Europe, this is set forward
3 at paragraphs 18 to 22 of Mr. Higgins' affidavit. And
4 he concludes at paragraph 22 that:

14:49

5
6 *"The invalidation of the SCC decisions would not only*
7 *disrupt current business, it would also prevent the EEA*
8 *from benefitting from new innovation and services*
9 *emanating from other parts of the world. This would*
10 *affect European business' potential to develop and*
11 *digitalise as fast as the competition and could limit*
12 *European companies' ability to keep and attract skilled*
13 *staff, especially in the ICT sector, where it is vital*
14 *for an employer to be in the front-line of technology*
15 *in work-tools and awareness."*

16
17 He then goes on in the following paragraphs to address
18 the particular use of SCCs for transfers to third
19 countries. And he states at the end of paragraph 23
20 that, having received feedback from members of Digital
21 Europe, he believes that: *"SCCs are the most commonly*
22 *used legal instrument to transfer data from the EU to*
23 *third countries."*

14:50

24
25 I don't propose to open the affidavit, not that it
26 would take long to do so, it is, as I say, brief, but
27 I think that is the important submission that is sought
28 to be advanced by Digital Europe.

14:50

1 they don't represent the digital industry and they
2 don't submit the impact this would have on transfers to
3 third countries. So in our submission that is a
4 missing link in the evidence before the court and we
5 think that the evidence of John Higgins does provide 14:51
6 useful factual information not otherwise before the
7 court.

8 **MS. JUSTICE COSTELLO:** would you say there is any
9 difference between the material covered by Mr. Higgins
10 and the material covered by, is it Prof. Boué. 14:51

11 **MS. CAHILL:** Prof. Boué of the BSA. I would say they
12 are very complementary, Judge. They do cover similar
13 material in terms of the importance of the SCCs to the
14 transfers from the EU to the US, but the BSA, The
15 Software Alliance, in my submission is not solely 14:52
16 focussed on transfers from the EU to other third
17 countries. It is one of the questions in their survey
18 as to whether or not its members do use SCCs to
19 transfer data to third countries. But the membership
20 of the BSA is not as widely representative, I don't 14:52
21 believe, as the membership of Digital Europe.

22
23 Digital Europe is largely made up of small and medium
24 size enterprise, whereas I think, as Mr. Maurice
25 Collins fairly pointed out, the membership of BSA is a 14:52
26 lot of larger corporations. There are equally
27 obviously viewpoints, Judge, but I would say they both
28 should be before the court when the court is assessing
29 the potential impact of the SCCs, if that matter does

1 come to be assessed and determined by the court.

2
3 with regard to the legal position on amici, I don't
4 propose to repeat or attempt to in any way engage in
5 material that's been covered by Mr. Maurice Collins. 14:53
6 I full adopt his submissions with respect. The only
7 additional authority or one of the authorities I wish
8 to highlight to the court is Fitzpatrick -v- FK.

9 Because in the written submissions that we received
10 from Facebook yesterday evening there is a statement 14:53
11 therein that it's unambiguous that amicus curiae can't
12 involve themselves in specific facts.

13
14 Now it seems to me that that statement is derived from
15 a passage in the judgment in Fitzpatrick -v- FK, a 14:53
16 judgment of Clarke J. I'm not certain which tab that
17 is in the book that was handed up to you.

18 **MR. MAURICE COLLINS:** Tab 3, Judge.

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

20 **MS. CAHILL:** At paragraph 30 of that judgment Clarke J 14:53
21 sets out the criteria for joining of amici. I think
22 it's important that the cases all deal with the joinder
23 of amici rather than the admission of evidence of amici
24 and of course it is fundamentally a question of the
25 discretion of the court as to whether to admit amici 14:53
26 and whether to admit evidence on behalf of amici.

27
28 In paragraph 30, the third sentence of that paragraph,
29 Judge, begins:

1
2 "Proceedings at trial are likely to involve significant
3 issues concerning the facts of the individual case.
4 Even where a case may be said to be a 'test case' where
5 it may be likely that general principles will be
6 defined, nonetheless the jurisprudence of the courts in
7 this jurisdiction make it clear that issues of
8 constitutional importance are only likely to be decided
9 when it is necessary on the facts to decide them. The
10 extent to which it may become necessary to decide
11 issues of principle in any particular case will depends
12 on the facts of that case. Questions of the standing
13 of a claimant or, indeed, the possibility of the
14 application of a 'reverse standing' test as identified
15 above will inevitably focus on the facts of an
16 individual case." 14:54

17
18 And the following sentence is I believe the one from
19 which the proposition was derived that it's *unambiguous*
20 that they could not involve themselves in the facts. 14:54

21
22 In fact what the judge says: "*It is obvious,*
23 *therefore, that an amicus should not be permitted to*
24 *involve itself in the specific facts of an individual*
25 *case.*" 14:54

26
27 So, Judge, what I say to that is this is not, as I was
28 saying, it is not a normal case. And, furthermore,
29 McGovern J when he gave judgment in this case has

1 already made the decision that it is not a normal inter
2 partes proceedings. His judgment appears i believe in
3 paragraph 31 of Book 1.

4 **MR. MAURICE COLLINS:** Tab 1.

5 **MS. CAHILL:** Tab 1 of the book of authorities. Then 14:55
6 what the judge said there at paragraph 16 is that:

7
8 *"Because there is no factual dispute or lis inter*
9 *partes in these proceedings, the applicants argue that*
10 *the usual rule, excluding the involvement of an amicus*
11 *curiae at the first instance hearing, does not apply.*
12 *Furthermore, when the issues raised in the proceedings*
13 *are almost certain to involve a reference to the CJEU,*
14 *it is essential that any party who has a right to be*
15 *heard as an amicus curiae should be heard in the*
16 *proceedings before the High Court. It seems to me that*
17 *this is a reasonable view."*

18
19 And, Judge, I would say on that basis the High Court,
20 McGovern J, has already decided that this is not a case 14:55
21 in which the delineation between the appellate and the
22 trial court treatment of amicus is appropriate. He
23 already decided this is not a typical trial stage of
24 proceedings. And I would say, therefore, that the
25 typical rule that the amicus affidavit should not be 14:55
26 admitted simply isn't applicable. There is no factual
27 dispute here, no factual dispute of relevance to the
28 affidavit that I have submitted on behalf of Digital
29 Europe.

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With regard to John Higgins' affidavit, Judge, I would repeat in large part what's been said by Mr. Maurice Collins on behalf of the BSA. There is no controversy with regard to the content of the affidavit, there's been no application to cross-examine, there will be no need to reply to it. I don't believe it will add to the cost of these proceedings and I believe it would be of assistance to this Honourable Court. May it please the court.

14:56
14:56

MS. JUSTICE COSTELLO: Thank you.

MS. HYLAND: Judge, I think the DPC is going to go next.

MS. JUSTICE COSTELLO: Yes, thank you. Ms. Donnelly, you are dealing with it?

14:56

SUBMISSION BY MS. DONNELLY:

MS. DONNELLY: Yes, Judge. The Commissioner is opposing this application really for --

14:56

MS. JUSTICE COSTELLO: Each of them?

MS. DONNELLY: Each of them.

MS. JUSTICE COSTELLO: You are not making any distinctions.

MS. DONNELLY: Each of them, we are not distinguishing between the three. It's really on a point of principle primarily, Judge.

14:56

We say in the first instance that these applications really run counter to the very rationale and purpose

1 for the joinder of amici in the first instance.
2 I think Mr. Collins alluded to this concern and we
3 adopt that concern very strongly, we say this is
4 clearly contrary to the envisaged role for amici.

14:56

5
6 Second, Judge, we would suggest that, not only is there
7 no authority to support the applications made, but in
8 fact, as you will have already seen from the cases, the
9 authority is clearly against it. This would be quite
10 an unusual and exceptional step to take in the

14:57

11 proceedings to allow the amici to put in evidence. We
12 say that it runs counter again to some very weighty
13 statements that have been made both by the Supreme
14 Court and by the High Court. I know Mr. Collins drew
15 attention to slightly nuances, but we would say in more
16 recent cases if anything the statements have become
17 more robust and strong in terms of this question of
18 evidence.

14:57

19
20 Third, Judge, we would just say we have not heard
21 anything in terms of the submissions that would warrant
22 departure from what appears to be the general
23 principle.

14:57

24
25 Fourth, Judge, in terms of the evidence, we would say
26 that the evidence, and it has been described to the
27 court already, we would suggest that there is overlap
28 between the evidence that is already before the court,
29 very direct overlap, and that to allow this evidence to

14:57

1 be admitted would involve the amici effectively
2 launching themselves into the facts arising before the
3 court and that that is really entirely impermissible
4 and not an appropriate role for an amicus to play.

14:58

5
6 Now, Judge, we do have a small booklet, and I apologise
7 it's a direct overlap in terms of the cases with
8 Mr. Collins. The only differences, Judge, that we have
9 a set of submissions, I won't bring you to the
10 duplication of the cases, but these are our submissions
11 from the amicus application last July.

14:58

12
13 Now the Commissioner took a neutral position with
14 respect to individual applications, but the submissions
15 really purport to set out the various principles and
16 I just want to draw your attention just to a couple of
17 paragraphs in those submissions. They are at Tab 1.

14:58

18 **MS. JUSTICE COSTELLO:** Yes.

19 **MS. DONNELLY:** Just to page 2. Just with respect to
20 this first point, what is the purpose of the joinder of
21 an amicus? It must be recalled, and I think it does
22 have an impact on the court's approach to the question,
23 that this is a jurisdiction that ought to be exercised
24 sparingly. Judge, you will see at paragraph 5 on
25 page 2, we cite the HI authority to which you have
26 already been referred. But also this point is made by
27 Hogan J in the Schrems case and that obviously has an
28 impact on the terms of participation of any amicus, we
29 would say. The jurisdiction is particularly limited at

14:58

14:59

1 the trial.

2
3 I know Ms. Cahill suggested that, as it were,
4 McGovern J has already determined that because the
5 amici have been admitted at the trial and therefore 14:59
6 that distinction between trial level participation and
7 appellate participation falls away. We would not agree
8 with that. I think it still has to have an impact on
9 the manner in which each amicus participates in the
10 proceedings. You will see that from the rationale 14:59
11 behind this distinction that is normally applied
12 between trial and appellate level that we have set out
13 in paragraphs 8 and onwards in those submissions.

14
15 So for example, in the Fitzpatrick case, this is a case 14:59
16 that has been referenced already, Clarke J made it very
17 clear that an amicus would be more readily joined at
18 appellate stage. As he put it there was no absolute
19 dispute bar to parties being joined at trial stage,
20 but:

21
22 *"This should be confined to cases where there is no*
23 *significant likelihood that the facts of an individual*
24 *case are likely to be controversial or to have a*
25 *significant effect on determining what issues of* 15:00
26 *general importance may require to be determined."*

27
28 So the caution around that distinction between trial
29 and appellate level really is precisely linked to the

1 situation that is arising here with amici trying to
2 involve themselves in the facts that arise for
3 determination by the court. Those sentiments have been
4 echoed in the Doherty case in the dissenting judgment
5 of Macken J. You will see an extract at paragraph 9 of 15:00
6 our submissions. She points to that clear distinction
7 between appellate and trial level and this concern
8 about not assisting any party in the proceedings
9 against another party because effectively amici really
10 should not be appointing strangers to the litigation 15:00
11 who in turn seek to assist one party over another.

12
13 Similarly in the EMI case, which is also in
14 Mr. Collins' book, you will find a fairly robust
15 statement there also that an amicus should not involve 15:01
16 itself in the factual aspects of the trial. That was a
17 factor in that case that weighed against the joinder of
18 Digital Rights Ireland in a dispute around blocking of
19 access to particular websites.

20 15:01
21 Judge, a third principle which is uncontested, I won't
22 dwell on it, but just in the heading there: the
23 proceedings must have a public law dimension.
24 Absolutely that is correct and we accept that that is
25 the position here. But I think the premise of that 15:01
26 criterion in itself suggests that amici will be getting
27 involved in the legal debate or the public law debate.
28 By its very nature it does not really envisage a role
29 for amici to get involved with the factual disputes

1 before the court.

2

3 And, Judge, if you might then turn to page 7 of these
4 submissions. The Commissioner had set out the
5 principles surrounding the question of what the role of 15:01
6 an amicus should be. We fully accept, and the point
7 has been made, that this is a matter for you, Judge.

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

9 **MS. DONNELLY:** It is a matter in the exercise of your
10 discretion. I would just correct something that 15:02
11 Mr. O'Dwyer mentioned. He suggested that McGovern J
12 had already provided for affidavits to be filed.
13 I think that is clearly incorrect. The last paragraph
14 of the judgment given makes it clear that he will make
15 ancillary orders following the joinder. 15:02

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

17 **MS. DONNELLY:** And in the hearing on 25th July
18 McGovern J actually expressed concern that the "*genie*
19 *would be out of the bottle*" if affidavits were
20 permitted to be filed. And so Mr. Collins on behalf of 15:02
21 the Plaintiff suggested that affidavits would be
22 delivered and then there would be a hearing as to
23 whether or not they would be filed.

24 **MS. JUSTICE COSTELLO:** where do I find that?

25 **MS. DONNELLY:** well it's not in the books we have. 15:02
26 It's a transcript of 25th July.

27 **MS. JUSTICE COSTELLO:** If it's a transcript it may be
28 possible to put it on the tablet.

29 **MS. DONNELLY:** Very good, Judge, we can arrange for

1 that, certainly. It is at page 7, it starts around
2 line 25.

3 **MS. JUSTICE COSTELLO:** 25th July?

4 **MS. DONNELLY:** 25th July, page 7, line 25. I think
5 it's just important to be clear that this is not a 15:03
6 matter on which Judge McGovern has made any ruling or
7 given any indication of a position and this really is a
8 matter for your discretion, Judge, and we fully accept
9 that. I just want to clarify that.

10 **MS. JUSTICE COSTELLO:** In relation to, obviously he 15:03
11 joined the amici so that they could add, I am just
12 trying to use his wording, they have something to
13 assist the court. They are in a position to offer
14 relevant views, for example, is what's said in relation
15 to BSA. In relation to Digital Europe: "*The applicant* 15:03
16 *will be in a position to assist the court to bring to*
17 *bear its expertise in a way which might not otherwise*
18 *be available to the court.*"

19
20 How are they to do that in the absence of having their 15:03
21 affidavits before the court?

22 **MS. DONNELLY:** well I would say, Judge, that they are
23 able to do that in a way that any amicus would normally
24 provide the same expertise or the same views. I think
25 it's important that Judge McGovern did use the language 15:04
26 of *expertise* in respect to Digital Europe. In respect
27 of BSA he mentioned relevant views and in respect of
28 EPIC, Judge McGovern referred to EPIC providing a
29 "*countervailing perspective from the US government*".

1 And if you look at paragraph 28 of the submission these
2 are the mechanisms that amici are allowed to use to
3 present their perspective to the court.

4
5 So, for example, you'll see at paragraph 28 15:04
6 subparagraph 1: "*The normal course is that they will*
7 *provide their assistance through legal arguments.*"

8
9 Even in respect of oral argument it is suggested that
10 they should be confined to a short period of time. 15:04
11 They are "*not normally entitled to adduce evidence*" and
12 I know Mr. Collins placed some emphasis on the fact
13 that that comment of Keane CJ in the HI case involved
14 "*not normally entitles*", so it's not an absolute rule.
15 And he did draw your attention to the distinction that 15:05
16 was made between the HI case and the formulation of
17 Hogan J in Schrems where Hogan J suggested that an
18 amicus simply cannot adduce evidence and I would
19 suggest that Kelly J in the EMI case uses a similar
20 formulation to Hogan J. 15:05

21
22 You will see also at paragraph 4 that an amicus really
23 should not be permitted to involve itself in the
24 specific facts of an individual case. So I would
25 suggest that these amici, like any other amicus, ought 15:05
26 to be entitled to present their expertise and views to
27 the court but they ought to do so in the normal way in
28 accordance with the normally established principles and
29 they do so by way of legal submissions.

1 **MS. JUSTICE COSTELLO:** And by reference, presumably, to
2 the facts adduced by the parties to the lis?

3 **MS. DONNELLY:** Apologies, Judge?

4 **MS. JUSTICE COSTELLO:** And they do so presumably by
5 reference to the facts adduced by the parties to the 15:05
6 lis?

7 **MS. DONNELLY:** Absolutely, Judge. I will just comment
8 on that now. I think there is an overlap between the
9 evidence that is proposed by the three amici and the
10 evidence that is already before the court. This is 15:05
11 most obviously the case with respect to Mr. Butler.
12 His evidence overlaps with the five experts that we
13 already have giving evidence to the court.

14
15 I know Mr. O'Dwyer suggested that the evidence had been 15:06
16 prepared at a time when it was not apparent to EPIC
17 what evidence will be presented to the court, but if
18 anything that only, I suppose, weighs against the
19 application in the sense that it is now apparent that
20 this court has voluminous evidence relating to US law, 15:06
21 very, very extensive evidence which is going to take
22 some days to work through. So I think in that respect
23 this is a direct overlap of what is there already.

24 I know Mr. O'Dwyer didn't suggest in any specific
25 respect in which EPIC was not able to make its 15:06
26 submissions. I know he suggested there were some
27 respects, but I would respectfully submit that EPIC
28 ought to be well capable of presenting its case on the
29 basis of the very extensive US evidence that is there

1 already.

2
3 with respect to BSA, I think this really largely
4 overlaps with Mr. Meltzer's evidence. There is a
5 reference to the survey. You can already see the scope 15:07
6 for distraction because there may be questions around
7 what the weight of any such survey would be. But even
8 setting that aside, the rest of Mr. Boué's case or the
9 substantial part of it deals with the economic and
10 societal consequences of invalidation of the SCCs. 15:07
11 I think this broadly overlaps with Mr. Higgins as well.
12 I know Ms. Cahill described it as complementary, but he
13 deals with the economic significance of EU data
14 transfers, the situations in which businesses rely on
15 Commission decisions, the uses of SCCs, control of 15:07
16 SCCs, consequences to European business.

17
18 I think it is just worth taking a moment to look at
19 what Mr. Meltzer says about his evidence. He said he
20 has been working, he was working on the implications of 15:07
21 internet and cross border data flows for trade and
22 economic growth, he said that at page 1. On page 2 he
23 says that he has been asked to provide an expert
24 opinion on the economic and trade implications in
25 restricting transfers from the EU of personal data to 15:08
26 the US and globally. He gives various statistics and
27 data flows, economic value, global value change, SME
28 participation, international e-commerce opportunities.
29 I think the overlap is really evident between the BSA

1 and the Digital Europe affidavit and Mr. Meltzer's
2 report. I really think there's a very striking overlap
3 there.

4
5 In fact, in terms of the submissions, there's no reason 15:08
6 why these parties ought not to be able to make their
7 submissions by reference to this evidence that is
8 already before the court. And if we even look at the
9 submissions that have been filed on behalf of these
10 parties, I mean they give their perspective on the 15:08
11 critical legal questions that are before the court.
12 Digital Europe presents its perspective on the
13 interaction between the provisions of the Directive,
14 the remedies under the SCCs, the Draft Decision, the
15 application of the Charter, the question to be referred 15:09
16 to the Court of Justice. BSA sets out the protections
17 in the SCCs, makes criticisms of the Draft Decision and
18 comments on the reference as well. EPIC also can
19 provide its view, I would respectfully submit, with
20 reference to the evidence already before the court. 15:09

21
22 So I see no reason for the participation of these amici
23 to be diminished in any way by a decision that would
24 refuse to adduce the affidavit evidence. It seems very
25 clear that they are very capable of participating, 15:09
26 notwithstanding the absence of affidavit evidence, and
27 there is comprehensive extensive evidence on all of the
28 issues that they wish to opine on already before the
29 court.

1
2 Just to deal with a couple of other matters. I think
3 Mr. Collins suggested that there might be a
4 distinction -- oh, apologies.

5
6 Mr. Collins suggested there might be a distinction
7 between putting in evidence and putting in evidence
8 that is in dispute. With respect, I say the
9 authorities don't suggest that there is any such
10 distinction. They seem very clear. Keane CJ, in HI, 15:10
11 did not draw such a distinction, he just said that it's
12 a question of whether -- it's just simply amici are not
13 normally entitled to adduce any evidence. Judge Hogan,
14 in Schrems and Judge Kelly, in EMI - and I've already
15 referred to those comments, but just to mention Judge 15:10
16 Kelly, in the EMI case, observed that there is no role
17 for an amicus curiae in respect of the evidence and the
18 facts.

19
20 So I suggest that it makes no difference whether or not 15:11
21 they are actually getting into the issue of disputing
22 facts, as opposed to overlaying additional evidence
23 before the court on top of evidence that is already
24 there. Either way, I would respectfully submit that
25 the authorities are very clear that this is not an 15:11
26 appropriate role for an amicus. And in any event, I
27 would simply note that BSA and Digital Europe, as I've
28 said already, they are offering evidence that is very
29 similar to Mr. Meltzer's evidence.

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The final point then; Ms. Cahill suggested that these were exceptional cases. But I would suggest that that does not mean that we have to depart from the normal rules of procedure and practice in that regard. The authority is very clear and the existing rules, I think, are well capable of enabling the court to determine the issues before it without taking this very unusual step. There is no shortage of evidence before the court, as the court is aware and I think the questions arising will certainly be capable of being dealt with. 15:11

MS. JUSTICE COSTELLO: But just in the context of if I do decide to make a reference to the Court of Justice - and obviously one of the roles of the national court making a reference is to find the facts and put the facts before the Court of Justice so it can determine the question - would there be any deficit in any such reference if I don't include this material? 15:12

MS. DONNELLY: well, I would say -- 15:12

MS. JUSTICE COSTELLO: or at least use it in some way?

MS. DONNELLY: I would say no, Judge, for the reasons I think that I've already set out. I regard the BSA and Digital Europe evidence as overlapping with that of Mr. Meltzer; it is about the economic and societal consequences of invalidation of the SCCs, the use of the SCCs, the trade consequences, the consequences for global economic interactions. It is effectively the same evidence using different 15:12

1 statistics or slightly different figures. But it is
2 the same evidence.

3
4 Mr. Meltzer's report is quite lengthy, I think it's
5 well over 30 pages, it is a detailed report and I think 15:13
6 it is more than adequate to enable the court to
7 determine that aspect of it. And with respect to
8 Mr. Butler, I say again that that is overlapping with
9 the very comprehensive evidence on US law. So I would
10 suggest there is no gap there that is needed to be 15:13
11 filled by these amici and instead what the amici are
12 doing is, as I put it previously, overlaying an
13 additional layer of evidence on the same issues that
14 are already before the court and entangling and
15 embroiling themselves in those issues in circumstances 15:13
16 in which there *is* no gap, it is clear that the issues
17 arising have already been adequately addressed.

18
19 If I may just very briefly finish by just going back to
20 the Fitzpatrick case, which I know Ms. Cahill, she has 15:13
21 already opened. I think in Mr. Collins' book it's at
22 tab three.

23 **MS. JUSTICE COSTELLO:** Yes, thank you.

24 **MS. DONNELLY:** I think Ms. Cahill had referred
25 to paragraph 30. And at 31 then: 15:13

26
27 *"It is obvious, therefore, that an amicus should not be*
28 *permitted involve itself in specific facts of an*
29 *individual case."*

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And I do say that that is what is being attempted to be done here. But it's worth reading the rest of the paragraph. Judge Clarke goes on to say:

"It is only after those facts have been determined that the extent to which issues of general importance may remain for decision will be clear. That is far more likely to be the case at the appellate rather than the trial level."

And he goes down to say, and this is the approach to which I drew your attention previously:

"while I am not persuaded that there is an absolute bar... I believe that the circumstances in which it would be appropriate [to join] should... be confined to cases where there is no significant likelihood that the facts of an individual case are likely to be controversial."

Then you'll see also paragraph 23, that one of the reasons that Judge Clarke refused the joinder in that case -- and you'll see it, it's at paragraph 33, it's at the second part of it:

15:14

"There would be risk, certainly at the trial stage, associated with the society being involved in proceedings which involve the facts of the individual"

1 case."

2

3 So actually, involvement in the facts was a reason in
4 that case to refuse the joinder. And if these
5 applications are to be submitted, I would -- or to be 15:15
6 successful and if the evidence is to be admitted, I
7 would suggest that this is a real departure from the
8 already established principles.

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

10 **MS. DONNELLY:** Thank you, Judge. 15:15

11 **MS. JUSTICE COSTELLO:** Ms. Hyland?

12

13 **SUBMISSION BY MS. HYLAND**

14

15 **MS. HYLAND:** Judge, I'm afraid there's been a 15:15
16 terrible failure of co-operation between the parties,
17 because I also have a book. And I'm going to hand it
18 in, but I'm not going open any of it in fact.

19 **MS. JUSTICE COSTELLO:** I've decided it's a conspiracy.

20 **MS. HYLAND:** Yes. And, Judge, you'll see 15:15
21 there's submissions that were put before the court last
22 time. But as I say, you've heard really all of this
23 already, so I won't go over it again.

24

25 But can I just say one thing first of all in relation 15:15
26 to what McGovern J. did? There's an order of the court
27 which I think makes it absolutely clear and it's at --

28 **MS. JUSTICE COSTELLO:** It's in book one isn't, it?

29 **MS. HYLAND:** It's in book one, exactly. Book

1 one, tab three. And I think that just puts it beyond
2 doubt what the position was. And I can just open that
3 to the court, it's the last page of the order, when the
4 court has that. There were two orders in fact and this
5 was the earlier one from July. 15:16

6 **MS. JUSTICE COSTELLO:** These are at tab three I think.

7 **MS. HYLAND:** Yes, exactly, it's at tab three.

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

9 **MS. HYLAND:** It's just at the very last page
10 of that order. And you'll see there that it states in 15:16
11 the second paragraph:

12
13 *"And the Court doth direct that the issue as to whether*
14 *the amici curiae will be entitled to rely on any*
15 *Affidavits they deliver is to be decided by the Court*
16 *after the Affidavits have first been delivered and that*
17 *as such the Affidavits delivered by the amici curiae*
18 *under item 6 above are not to be taken as being filed,*
19 *or as part of the Court record, unless and until the*
20 *Court indicates that they may be filed."*

21
22 So I think that's very clear and there's no issue about
23 it. Judge, in relation to the principles, the
24 principles have been well articulated, I won't repeat
25 them. It's clear that you have a discretion, it's 15:16
26 clear that amici should not get involved in factual
27 disputes and, in my submission, it's clear that the
28 affidavit that most, if you like, strays into a
29 contested and controversial area of fact is that of

1 EPIC.

2
3 I suppose can I make the following observations. It is
4 clear from your comments, Judge, and also in general
5 that the EPIC affidavit is indeed more of the same; 15:17
6 there has been already a great deal of US law evidence
7 put before you, there will be more next week when
8 further experts come before the court. And the
9 question is: will it assist the court in any way to
10 have further evidence of US law and is there any reason 15:17
11 to *exclude* that particular material if the court prime
12 facie believed that the court ought to admit some
13 evidence, is this particular evidence, i.e. that of
14 Mr. Butler, the type of evidence that there is reason
15 to exclude it? 15:17

16
17 I suppose I would just make the following quite brief
18 points. Mr. O'Dwyer said a number of things as to why
19 it should be admitted. I would say that one starts
20 off, I suppose, with the position that it ought not to 15:18
21 be, given the plethora of US law material that you
22 already have. And then he identified some reasons why
23 he said, well, even despite that - and very fairly, he
24 accepted that it did indeed duplicate a lot of the
25 material - he said 'well, there are a *few* points that 15:18
26 might influence you'. And I think most of them, when
27 one looks at them, they don't really bear fruit.

28
29 He said that EPIC had acted as an amicus in the United

1 States in a number of what he described as big cases.
2 But in fact a curiosity of the experts that you already
3 have before you is that Mr. Richards, who's here for
4 the DPC, and Ms. Gorski, who's here for Mr. Schrems,
5 also have acted as amici, actually in a number of cases 15:18
6 - I think Mr. Richards in three cases, as he identified
7 in his report, and I think Ms. Gorski -- sorry, not her
8 personally, but the ACLU have also either been
9 plaintiffs or have acted as amici. So one already, the
10 court already has here American law experts who are 15:19
11 deep in the fray, as it were. So there's nothing, if
12 you like, different about EPIC in that respect.

13
14 Also, Mr. Butler does talk a little bit about practice.
15 He says he's going to talk about it. In fact there's 15:19
16 not very much in his affidavit about practice. But if
17 the court admitted it, there might be a question as to
18 whether Mr. DeLong, who's one of our experts, who talks
19 about practice would have to reply, because he is the
20 only expert that we have who talks about practice and I 15:19
21 don't believe he was replying to that affidavit,
22 given -- I'm sorry, he wasn't, of course, given that it
23 hadn't been admitted.

24
25 There's also, I suppose, the presentation of EPIC as a 15:19
26 neutral body who's here, if you like, in a
27 disinterested fashion to help the court. And I think
28 that really isn't borne out either by the description
29 of EPIC itself or by the material it's put before the

1 court. Because if you look at the legal submissions
2 that they filed - and I don't think I need to open
3 them, but I can just read out to you, Judge, paragraph
4 two - EPIC is described as a public interest,
5 independent, nonprofit research and educational 15:20
6 organisation. It was established to focus public
7 attention on emerging privacy and civil liberties
8 issues and to protect privacy, freedom of expression
9 and democratic values in the information age. So it
10 clearly has, if you like, a mission. And very similar 15:20
11 in fact to ACLU. Because you'll remember that
12 Ms. Gorski was in, I think, what was called the, it may
13 not have been the surveillance section, I think it was
14 the national security branch, if you like -- the
15 national security project of the ACLU. So the ACLU has 15:20
16 a specific lobbying function in relation to national
17 security very similar to that of EPIC.

18
19 I think the other point then that was identified by
20 Mr. O'Dwyer was that he had identified a particular 15:20
21 area, which was the area of remedies. He said 'In many
22 areas, I overlap, I accept that, but in relation to
23 remedies I have something different to say'. And I
24 think, Judge, if one just looks really briefly at his
25 affidavit - I don't think you need to go through all of 15:21
26 it by any means - but if you look at the section on
27 remedies, in fact you'll see that that is not, in my
28 submission, the case. Because it's actually a very
29 short, it's a relatively short section compared to the

1 rest of his affidavit and it's, in my submission, again
2 very much reminiscent of everything else you've seen in
3 this area in relation to the material he relies on.

4
5 Then if one goes simply to the end, you'll see that 15:21
6 under paragraph 95 of his affidavit, it's headed up
7 "Obstacles to Redress" and he talks about hurdles, he
8 talks about the standing doctrine and the state secrets
9 privilege, and obviously you've heard a good deal about
10 those. And he said, I think, that it was -- he said, 15:21
11 he suggested that perhaps his material was more, if you
12 like, on the side of the DPC and Schrems, if I may
13 express it in that way. But in fact if one looks at
14 his legal submissions, you'll see it's absolutely clear
15 that he has also taken the position that US remedies 15:22
16 are not adequate. So I don't think there's, if you
17 like, a question mark about it, I think his position is
18 absolutely clear, as one would expect indeed with the
19 lobbying function that EPIC has. So it's clear, if you
20 like, that he has a particular view. 15:22

21
22 But I suppose what's important here, Judge, is that
23 excluding his affidavit evidence does not prevent EPIC
24 from expressing that view. Because McGovern J. said at
25 page nine of his decision, when he was deciding whether 15:22
26 to let them in or not -- and as you know, ten different
27 parties applied and only four, as it were, got in. So
28 he gave careful consideration to each one. But he said
29 that given that the US Government was being admitted,

1 it was important to have, I think, what he described as
2 a countervailing -- sorry, a counterbalancing
3 perspective. And that's how he characterised EPIC's
4 role. And that would be absolutely met by EPIC's legal
5 submissions. Because when you look at the legal 15:22
6 submissions - and I won't open them, I'll leave the
7 court to do that - you'll see that they are very
8 fulsome, detailed legal submissions which express the
9 position of EPIC. And I think Mr. O'Dwyer very fairly
10 accepted that insofar as in certain places they make 15:23
11 reference to the affidavit evidence, that in fact could
12 be amended and reference could be made to the materials
13 that are already before the court.

14
15 I suppose I should just say also that it's 15:23
16 understandable why EPIC put *in* material that has now
17 been duplicated, if you like, en masse. Because
18 contrary to what Mr. O'Dwyer said, he actually had seen
19 the Facebook affidavits and Ms. Gorski's affidavit, but
20 he hadn't seen the DPC's affidavits, because they were 15:23
21 put in on 30th November, which I think was some three
22 weeks after his was put in. So Mr. Serwin and
23 Mr. Richards, he hadn't seen that material. So it's
24 understandable how this came about, if you like. But
25 it still doesn't, I think, take away from the fact that 15:23
26 the material that he identifies and particularly the
27 material he exhibits - and I think that's where one
28 really sees the duplication - the material he exhibits
29 is the PCLOB report, the FISA statute, all of the

1 things that are already in this case.

2
3 So in my submission, that material does not need to be
4 put before the court. It's not of assistance to the
5 court. It will, I suppose, take more time. There are 15:24
6 already six reports on American law, because Mr. Serwin
7 has two, Mr. Richards, Ms. Gorski, Prof. Vladeck,
8 Prof. Swire. So there are five different experts, six
9 reports and, in my submission, it won't assist the
10 court having another expert who in fact has really 15:24
11 given the same amount -- I beg your pardon, the same
12 type of evidence that this court already has. May it
13 please the court.

14 **MS. JUSTICE COSTELLO:** And you weren't making any
15 particular observations in relation to the BSA or the 15:24
16 Digital Europe?

17 **MS. HYLAND:** No. In my submission --

18 **MS. JUSTICE COSTELLO:** Your general comments apply?

19 **MS. HYLAND:** Exactly. The situation is, I
20 think, very different given the particular position of 15:24
21 US law.

22 **MS. JUSTICE COSTELLO:** Yes, Mr. McCullough?

23
24 **SUBMISSION BY MR. MCCULLOUGH**

25 15:24
26 **MR. MCCULLOUGH:** I have four points to make,
27 Judge. The first is, Judge, that I largely agree with
28 Ms. Donnelly on the legal position. But having said
29 that, Judge, Mr. Schrems is neutral on the admission of

1 the affidavits. He does see some sense in all
2 information, all possible information being before the
3 court.

4
5 The second point I make, Judge, is that it really 15:25
6 should be all or none. And that's so for a number of
7 reasons, Judge. First, for the sake of fairness. The
8 court's aware that there are four amici. It's a
9 counsel of perfection to believe and unrealistic to
10 believe that amici aren't in fact on one side or the 15:25
11 other. And the reality is that three of the amici who
12 are before the court are firmly on the side of Facebook
13 and I don't think one can disguise the fact that EPIC
14 is firmly on the side of the DPC. So it just doesn't
15 seem fair or reasonable, Judge, that the affidavits, if 15:25
16 you like, from one *side* should be admitted while that
17 from the other side should be excluded.

18
19 That's particularly so, Judge, where, if you like, the
20 objections to their respective admissibility are 15:25
21 largely the same across the range of them. The reality
22 is, as I say, that they're all on one side or the
23 other. That objection applies equally to them all,
24 notwithstanding Ms. Hyland's attempt to make a
25 distinction between -- unsurprising, I suppose, she 15:26
26 made a distinction against EPIC and in favour of BSA
27 and Digital Europe.

28
29 The other way in which they're similar, Judge, is that

1 in reality, while they all have something to add to
2 what has been said by the affidavits delivered by the
3 parties, there is very, very substantial overlap.
4 There are some distinctions, Judge, in each of the
5 affidavits that add on the one hand to what Mr. Meltzer 15:26
6 has said and on the other hand to what the US experts
7 have said. That's the second point I want to make,
8 Judge.

9
10 The third point I want to make is, I suppose, the 15:26
11 opposite and the reflective point to Ms. Hyland's.
12 Insofar as there *is* a distinction between them, Judge,
13 well then, in my respectful submission, the distinction
14 is one that should be made in favour of EPIC and
15 against Digital Europe and BSA. And that's so, Judge, 15:26
16 for, I suppose, these reasons: If you look at BSA and
17 Digital Europe, Judge, they're, I think it's fair to
18 say, clearly partisan on one side.

19
20 Secondly, the material that they give is relevant only 15:27
21 to an issue that is *legally* tangential - it's factually
22 important, of course, to them. This is the question of
23 the business effect of the invalidation of the SCCs.
24 But in fact that's a legally tangential issue, Judge.

25 15:27
26 Then thirdly, Judge, when you look at their respective
27 submissions, what is *very* revealing is that in fact
28 those submissions rely to a very limited extent upon
29 the evidence that they respectively want to lead. Both

1 of their submissions really go back to the same legal
2 issues as all the parties are agitating. And I do
3 think that can be distinguished from the EPIC position,
4 although I acknowledge, of course, that that's entirely
5 in my favour to make that point. But I do think they 15:27
6 *can* be distinguished. EPIC, I say, is less partisan,
7 it's more of a genuinely expert body, although of
8 course it has a point of view on these matters. The
9 material that it presents to the court *is* material that
10 is directly relevant to one of the central issues 15:28
11 before the court, that's the state of US law. And then
12 thirdly, its submissions focus squarely on those
13 points. So that's material, Judge, that the court
14 should get as much of as it can. In my respectful
15 submission, therefore, if there *is* a distinction to be 15:28
16 made, it should be in that direction.

17
18 The fourth point that I want to make, Judge, is that
19 it's important, Judge, that when submissions come to be
20 made, that they should be based on the evidence. Of 15:28
21 course, the court hasn't heard all of the evidence and
22 I don't want to assume submissions *won't* be based on
23 the evidence. But certainly as matters stand, Judge,
24 it's our position that the submissions of the US
25 Government aren't based on evidence. 15:28
26

27 Now, in due course they may be based in evidence, and
28 that does depend on what the court ultimately hears.
29 But I just want to lay down that marker, Judge, that if

1 evidence *isn't* called on particular issues, in
2 particular as to the state of US law, well, then the
3 court, of course, won't be able to hear submissions on
4 material that wasn't given in evidence. May it please
5 the court. 15:29

6
7 **SUBMISSION BY MS. BARRINGTON**

8
9 **MS. BARRINGTON:** well, Judge, if I might just
10 respond on that point, because I wasn't on notice that 15:29
11 Mr. McCullough was going to make that point. But it
12 *was* something that was raised in correspondence before
13 the directions hearing the court had the week before
14 the trial started. And at that stage Mr. McCullough's
15 solicitors had written, indicating that they were 15:29
16 objecting to our submissions and we wrote back,
17 querying on what basis they were mounting that
18 objection and in particular asking them to identify the
19 portions of our submissions that they contended were
20 *not* based on the evidence. 15:29

21
22 Now, we haven't received any response to that letter,
23 so I'm very surprised to hear Mr. McCullough make that
24 observation again that he's going to take issue with
25 our submissions, in circumstances where we've had no 15:29
26 response and no basis for that submission has been
27 raised. But I'll await hearing from --

28 **MS. JUSTICE COSTELLO:** well, it is, as a matter of
29 principle, correct. Obviously if there are submissions

1 that are straying outside the factual basis, that's a
2 matter that can be raised. But if it is possible to
3 identify specifically -- I suppose they've already gone
4 off side in your opinion. I suppose that would be of
5 assistance, but...

15:30

6 **MR. MCCULLOUGH:** Yes, Judge. The reason we
7 didn't progress the issue is because we thought about
8 it and came to understand, of course, all the evidence
9 *hasn't* been given to the court yet, there's
10 cross-examination has yet to occur.

15:30

11 **MS. JUSTICE COSTELLO:** There is to be
12 cross-examination, yes.

13 **MR. MCCULLOUGH:** So I'm not *making* point now,
14 Judge, I just want to, if you like, lay down that
15 marker that in due course it's a point that may have to
16 be made.

15:30

17 **MS. JUSTICE COSTELLO:** And I suppose -- well, what I
18 was going to suggest is that at the end of the
19 evidence, if you feel there are matters that you've
20 already, if you like, mentally flagged that still
21 require to be actually flagged then I think it might be
22 of assistance if that is carried through.

15:30

23 **MR. MCCULLOUGH:** Of course, Judge.

24 **MS. BARRINGTON:** Yes, and if it was actually
25 flagged in writing in response to our letter so that we
26 have an opportunity to consider it.

15:30

27 **MS. JUSTICE COSTELLO:** Well, as Mr. McCullough says, he
28 can't do it just until he's heard the oral evidence.

29 **MS. BARRINGTON:** No, I appreciate that, Judge.

1 Thank you, Judge.

2 **MS. JUSTICE COSTELLO:** Thank you. I think at this
3 stage, in fairness to the parties, I'd better actually
4 read the submissions and consider this ruling until
5 Monday. 15:31

6 **MR. MAURICE COLLINS:** Well, I was going to the ask the
7 court just for five minutes just to respond.

8 **MS. JUSTICE COSTELLO:** Oh, yes, the reply. Yes, of
9 course. I beg your pardon.

10 **MR. GALLAGHER:** We're surprised by that, Judge. 15:31

11 **MS. JUSTICE COSTELLO:** wait now, I want to know, is
12 this *five* minutes?

13 **MR. MAURICE COLLINS:** It's not often that
14 Mr. Gallagher *admits* to surprise, even when he *is*
15 surprised. 15:31

16 **MS. JUSTICE COSTELLO:** You dodged my question.

17 **MR. MURRAY:** Not for the first time, Judge.

18 **MS. JUSTICE COSTELLO:** You're still dodging the
19 question.

20 15:31

21 **SUBMISSION BY MR. MAURICE COLLINS**

22

23 **MR. MAURICE COLLINS:** For five minutes, Judge. Judge,
24 effectively Ms. Hyland hasn't addressed *any* of her
25 submissions to BSA's affidavit and I don't need to, I 15:31
26 think, respond to anything that she has said. And
27 Mr. McCullough I'll deal with at the end of my
28 submissions. But I'll deal principally with the
29 submissions that were made on behalf of the DPC by

1 Ms. Donnelly - and they're surprising.

2
3 Firstly, it's unclear what is the legal proposition
4 that is being advanced by the DPC. Because on the one
5 hand it's suggested that there is an *absolute* rule that 15:31
6 amici cannot adduce evidence and on the other hand it
7 is accepted and was accepted in express terms more than
8 once in Ms. Donnelly's submissions that this was a
9 matter for your discretion. Well, if it's matter for
10 your discretion then clearly there is not and it must 15:32
11 be taken to be accepted by the DPC that there *is* no
12 absolute exclusion - as there *isn't*. And I'll come to
13 the suggestion that Fitzpatrick and/or EMI are
14 authority for a proposition that there is some absolute
15 exclusionary rule. There clearly isn't. 15:32

16
17 But it's surprising to hear the DPC, through counsel,
18 suggesting that the BSA is, to use the words that
19 Ms. Donnelly used, launching themselves into the facts
20 and, as it was said later, trying to involve ourselves 15:32
21 in the facts, in circumstances where we put before the
22 court evidence which the DPC perhaps could've, at least
23 in some form, put before the court but chose not to do,
24 and which *isn't* in fact before the court from any other
25 source. Because can I just ask you to look at the 15:33
26 Meltzer affidavit, which it is said both by
27 Ms. Donnelly and Mr. McCullough as effectively
28 overlapping with the affidavit of Mr. Boué? And it
29 clearly isn't. Mr. Meltzer -- sorry, this is at book

1 four, I think, Judge. Book four, A4. And hopefully
2 it's coming up on the tablet in any event.

3 **MS. JUSTICE COSTELLO:** well, I'm just having a look.
4 Is it in displaying mode?

5 **MR. MAURICE COLLINS:** well, I can't answer that 15:33
6 question for you, Judge.

7 **MS. JUSTICE COSTELLO:** I have trial book four. It's
8 not in that one.

9 **MR. MAURICE COLLINS:** Tab 18, book four. Sorry, it's
10 page 280, but it hopefully is on the "Receive" screen. 15:33
11 If the court is in "Receive" mode?

12 **MS. JUSTICE COSTELLO:** I've got it in old money.

13 **MR. MAURICE COLLINS:** Okay. You'll see there,
14 firstly, Mr. Meltzer is a lawyer. And he attaches a
15 report, which I won't go through, which doesn't address 15:34
16 at *all* the international use of SCCs, it doesn't in
17 terms address the use of SCCs *at all*. It talks, and no
18 doubt usefully and helpfully, about the international
19 data flows and the importance of international data
20 flows, but it doesn't address SCCs. And Ms. Cunnane's 15:34
21 affidavit addresses Facebook's use of SCCs.

22
23 So the suggestion that Mr. Boué's affidavit overlaps
24 with this material is simply wrong. Mr. Boué addresses
25 issues which are nowhere else addressed; the actual 15:34
26 pattern of usage of SCCs by entities that engage in
27 international data transfer, as opposed to other means
28 by which transfers may be lawfully done, as well as
29 addressing a point which does in principle overlap to

1 some extent with what Mr. Meltzer is saying - the
2 importance of the continuance of international data
3 transfer. But whereas Mr. Meltzer is talking about
4 that in general terms, Mr. Boué is talking about it and
5 the members survey material relates specifically to the 15:35
6 use of SCCs and their prime, principal reliance or
7 principal means of data transfer engaged in by the
8 members of the BSA.

9
10 Ms. Cunnane's affidavit - I'm not going to ask the 15:35
11 court to turn to that - you'll see that that addresses
12 a very specific issue, which is, as I understand it, an
13 answer to the complaint that the SCCs that are --
14 sorry, that the data transfer agreement that Facebook
15 uses is not consistent with the SCCs, as the court has 15:36
16 heard.

17
18 So it's simply wrong to suggest that there's an
19 absolute rule, it's wrong to suggest that if there's a
20 discretion it should be exercised against the BSA 15:36
21 affidavit on the basis that it substantially overlaps,
22 it's wrong to suggest that it involves the BSA
23 launching themselves into the facts. It's the very
24 opposite. It's the BSA doing exactly what it asked the
25 court in its joinder application to be permitted to do 15:36
26 and which the court said it would be useful to the
27 court hearing these proceedings to hear, which is its
28 insight into how this operates in practice and its
29 importance in practice and the consequences in practice

1 for a decision striking down these SCCs.

2
3 That information, as I said, could've been put in some
4 way or another, not obviously in exactly the contours
5 of Mr. Boué's affidavit and the material that he 15:37
6 exhibits, but it could've been put before the court by
7 the DPC and it hasn't. And it has not been put before
8 the court by Facebook, because understandably, Facebook
9 is addressing *its* position and *its* use of SCCs and
10 isn't seeking to give this industrywide more global 15:37
11 appreciation of the importance of these issues, which
12 in my respectful submission, are far from tangential,
13 as Mr. McCullough would have the court accept. They
14 are critical to any appreciation of how these issues
15 should be determined. And to answer a question that 15:37
16 the court asked of Ms. Donnelly, if that material is
17 *not* reflected in an order for reference that the court
18 may decide to make then I respectfully suggest that
19 there *would* be a deficit in the court's factual
20 framework, because it would mean that the questions 15:38
21 being referred would not have an appropriate anchor in
22 the real world.

23
24 Can I ask you just - and I appreciate now Mr. Gallagher
25 is feeling very satisfied with himself that I've 15:38
26 exceeded my five minutes...

27 **MR. GALLAGHER:** It takes more than that to
28 satisfy me. But it's noted in any event.

29 **MR. MAURICE COLLINS:** Can I bring you to Fitzpatrick

1 and to EMI for a moment please, Judge? Fitzpatrick was
2 a case involving a very difficult issue about the first
3 defendant having suffered a haemorrhage while giving
4 birth and declining a blood transfusion. And the
5 Jehovah's Witness Watchtower Bible and Tract Society of 15:39
6 Ireland sought to be joined. And the comments that are
7 made by the court at paragraph 30 into 31 - it's at
8 page 417 - are obviously addressed to the individual
9 facts relating to the interaction between the hospital
10 and the defendant giving rise to the proceedings. And 15:39
11 that appears from paragraph 31 and 30, which refers
12 back to paragraph 16, and more generally appears from
13 the judgment as a whole and to the emphasis that
14 Clarke J. gave to the need to determine exactly what
15 happened in order to determine questions of what 15:39
16 reliefs could properly be sought on the basis of those
17 facts.

18
19 So what the court was saying and *all* it was saying in
20 paragraph 30/31 is that an amicus here could not come 15:40
21 in and seek to be heard on the question of what
22 happened in, I think, the Coombe Hospital I think it
23 was, when a medical decision was made that the
24 defendant required a blood transfusion and when she
25 declined to have it because of her religious beliefs. 15:40
26

27 That's *entirely* different to the position here and
28 doesn't in *any* sense give rise to some general
29 proposition that evidence is never admissible from

1 amici. It's, rather, an illustration of one of the
2 rationales for the normal rule that evidence *isn't*
3 heard, which is that the *parties* are in a position to
4 give relevant evidence and other parties, or other
5 *non-parties* - amici - are unlikely to be in a position 15:40
6 to assist and are unlikely to have relevant evidence
7 and even if they have it, it may not be appropriate to
8 have it allowed in on one side or another.

9
10 Then if I can ask you to turn to EMI, because this 15:41
11 again was cited as an authority for some absolute rule,
12 even though it's not necessarily clear to me that the
13 DPC was ultimately advancing any such absolute rule.
14 But the comment that Kelly J. makes and that's been
15 referred to is at paragraph 68, which is on page 29. 15:41
16 EMI is at tab four.

17 **MS. JUSTICE COSTELLO:** Yes, thank you.

18 **MR. MAURICE COLLINS:** 68 says:

19
20 "*In that regard, there is no dispute but that the*
21 *operators of Pirate Bay are involved in copyright*
22 *infringement.*"

23
24 This was an application brought by copyright holders
25 against a series of internet providers seeking to block 15:41
26 access to illicit copyright material or copyright
27 infringing material.

28
29 "*Proceedings against them in other jurisdictions as*

1 *well as this provide ample evidence of that. Second,*
2 *there has never been any dispute but that Irish*
3 *internet users who avail themselves of Pirate Bay are*
4 *also involved in copyright infringement."*

5
6 So there were two issues about which there was no
7 dispute in that case between the plaintiffs and the
8 defendants. The first was that Pirate Bay were
9 involved in copyright infringement, and secondly, that
10 Irish internet users availing themselves of Pirate Bay 15:42
11 were also involved in copyright infringement.

12
13 Then the observation in 69:

14
15 *"If it is the intention of the applicant to contest 15:42*
16 *either of the factual matters dealt with in the*
17 *preceding paragraph" - in other words, the factual*
18 *matters that were common case between all of the*
19 *parties - "then it will be seeking to involve itself in*
20 *the factual aspects of the proceedings and there is no 15:42*
21 *role for an amicus curiae in that regard."*

22
23 And that's a common sense observation, that an amicus
24 could not come along and say 'I want to be heard in
25 this case and I want to be heard to dispute central 15:42
26 factual propositions that are not in fact in dispute
27 between the parties'. But again that's *not* the
28 position here. And it's disappointing, I suppose, that
29 in the lengthy submissions, relatively speaking, of the

1 DPC that, apart from asserting that our affidavit was
2 significantly overlapping with the affidavit and report
3 of Mr. Meltzer, there was no addressing the points that
4 I made concerning the fact that I was addressing issues
5 that were *not* in dispute, nobody suggested that the 15:43
6 material was not relevant. The court has, hearing this
7 application, has spent much more time than the time it
8 would spend looking at and considering the affidavit
9 itself for the purposes --

10 **MS. JUSTICE COSTELLO:** That thought has crossed my 15:43
11 mind.

12 **MR. MAURICE COLLINS:** And this is surely not what the
13 function of the court is in respect of the admission of
14 evidence in respect of the amicus curiae. And there
15 hasn't been any proper reason for the DPC to oppose the 15:43
16 admission of his affidavit articulated. Rather, as
17 I've said, it suggests that we are trying to do
18 something which we are not, which is trying to involve
19 ourselves in the facts of the case.

20 15:44
21 Insofar as there are *any* facts in dispute here, they
22 are legal facts concerning American law - because that
23 *is* a matter of fact as a matter of Irish procedural law
24 - and we have *not* sought to involve ourselves in that
25 issue *at all*. We have not put in an affidavit in 15:44
26 respect of that and we have not addressed that issue in
27 our submissions. So we have actually stayed away
28 entirely from that disputed issue of fact. Rather,
29 we've attempted to fill a lacuna of factual information

1 before the court with a view to assisting the court and
2 doing what it is that we were permitted to join these
3 proceedings to do.

4 **MS. JUSTICE COSTELLO:** I should ask the question I
5 asked of Mr. O'Dwyer; how will you be constrained in 15:44
6 your submissions if the affidavit is not admitted?

7 **MR. MAURICE COLLINS:** well, can I answer that question
8 firstly by just noting that Mr. McCullough made a point
9 about the fact that we didn't refer to our material
10 significantly in our written submissions. The reason 15:45
11 we didn't do that - and we noted this in the footnote -
12 was that at that stage the status of our affidavit was
13 uncertain. We had asked the parties - and this is a
14 source of some frustration, I suppose, on our part - we
15 had asked all of the parties to indicate whether they 15:45
16 *had* any objection to our affidavit. That
17 correspondence has gone unanswered and only very, very
18 recently was it suggested that there was a problem.

19
20 In my respectful submission, it does hamper my capacity 15:45
21 to make submissions, because it certainly *is* my
22 intention, of course the court permitting, to refer to
23 that material in my submissions and to refer not just
24 to the survey material concerning the importance of
25 SCCs, though that's part of it, but also to the survey 15:45
26 information giving information about the additional
27 safeguards that parties to SCCs use in order to ensure
28 appropriate treatment of data, including the carrying
29 out of audits and so on. And I brought the court to

1 that, but not in any detail, but it's there for the
2 court to see. And that's important information that
3 simply isn't anywhere else, it's just not in any other
4 evidential material before the court.

5
6 So it won't, to answer the court's question fairly and
7 frankly, it's not going to inhibit me from making
8 submissions, but it will impair those submissions to a
9 not immaterial extent, though clearly I will abide, of
10 course, by any direction the court gives. But it 15:46
11 certainly would be something that I had intended,
12 provided, of course, that the court allows the
13 affidavit in, to make more of in my oral submissions
14 than I felt appropriate to do in my written
15 submissions, given at that stage the status of the 15:46
16 affidavit was uncertain.

17
18 Can I just, before concluding, just address very
19 briefly what Mr. McCullough has said? He states that he
20 agrees with Ms. Donnelly on the legal position. I 15:47
21 don't know whether that means that he thinks there's an
22 absolute rule or not, but I've addressed that question
23 in any event. He says it should be all or none. I
24 don't know how *that* can be presented as some point of
25 principle or principled approach. 15:47
26

27 I deprecate the suggestion made in support of this
28 point and the third point that my clients have been
29 partisan or are clearly on the side of Facebook and

1 against the DPC. I respectfully suggest that certainly
2 there's nothing in the affidavit of Mr. Boué that
3 conceivably gives credence to that suggestion. And
4 when the court comes to consider the written
5 submissions that my clients have made, you will see 15:47
6 that in some respects they disagree with the DPC's
7 approach, for reasons which perhaps align with
8 Facebook's reasons, and in some respects they disagree
9 with the DPC's approach for reasons that actually align
10 with Mr. Schrems' position. So it's entirely unfair 15:48
11 and inaccurate to characterise my client as partisan.
12

13 And it's, in any event, entirely inappropriate for the
14 court to be asked essentially to sort of knock out an
15 affidavit on a tit for tat basis or to allow an 15:48
16 affidavit in on a tit for tat basis. The issues, and I
17 don't mean to suggest that the court, that I've any
18 view or ask the court to take any particular view on
19 Mr. O'Dwyer's application, but it's clear from all of
20 the submissions you've heard, and it's clear from the 15:48
21 affidavits themselves in any event, that the issues
22 concerning Mr. O'Dwyer's affidavit are *different* to the
23 issues that arise from my affidavit and indeed
24 affidavit of Ms. Cahill's client. They're addressed to
25 issues which are *not* in contention, they are *not* the 15:48
26 subject of overlap with other material presented by the
27 parties, to the extent that Mr. O'Dwyer very fairly
28 accepts *is* the case in respect of his affidavit.
29

1 So there isn't any reason in principle or in practice
2 or pragmatically to adopt the approach that
3 Mr. McCullough has suggested, which is to exclude them
4 all or admit them all.

5
6 Mr. McCullough's third point was that if the court is
7 going to differentiate, it should differentiate in
8 favour of Mr. O'Dwyer's affidavit. I respectfully say
9 that that's entirely wrong, based on assertions about
10 partisanship that are not well founded. And his fourth 15:49
11 point in fact wasn't a point at all to do with the
12 affidavits, but it was a point to do with
13 Ms. Barrington's position. May it please the court.

14 **MS. JUSTICE COSTELLO:** Thank you. Mr. O'Dwyer?

15
16 **SUBMISSION BY MR. O'DWYER**

17
18 **MR. O'DWYER:** Just to be very brief, Judge.
19 There was just one point I would like to highlight,
20 because I didn't in any way mean to mislead the court, 15:49
21 when I referred the --

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

23 **MR. O'DWYER:** No, but the particular decisions
24 of McGovern J. But I think, Judge, something
25 Ms. Hyland didn't open is -- the order of McGovern J. 15:50
26 is at A013, so tab three. The order of McGovern J.
27 twenty -- this is, sorry, on the electronic tablet.
28 Order of McGovern J, 25th --

29 **MS. JUSTICE COSTELLO:** This is 25th July?

1 **MR. O'DWYER:** Exactly, Judge. And I think the
2 position is a little bit different than it may have
3 been stated by both Ms. Donnelly and Ms. Hyland. If
4 you look at the orders that were actually made, you can
5 see - and this is a point Mr. Maurice Collins made as 15:50
6 well, which I do think is relevant - you can see the
7 order made by the court was affidavits, if any
8 permitted, to be filed on behalf of the amicus curiae
9 by 11th November 2016.

10
11 Mr. Collins made the point quite rightly that actually 15:50
12 by that date -- so otherwise, we were to file
13 affidavits if there hadn't been objections or if the
14 court - this was certainly *our* view and you can see
15 from the order why that's an *understandable* view - if 15:51
16 nobody was going to object to our affidavit or object
17 to the submission of an affidavit, that we would abide
18 by the order of the court and file the affidavit. And
19 that's exactly what happened.

20
21 Now, Mr. Collins is correct that the position in 15:51
22 respect of our affidavit is a little bit different than
23 his, because we clearly do deal with contentious
24 issues. In fact we deal with the meat of the case.
25 That's not any disrespect to his, the economic effect 15:51
26 is obviously a very important issue, but it's not the
27 real meat of the case here, which is the law and
28 practice in the United States.
29

1 I mean, that's by way of explanation of how the
2 affidavits went in. So I think we were correct in
3 saying that the judge did in fact indicate that
4 affidavits would be filed - that's what the order says
5 - if permitted by that date. But nobody made any
6 application in respect of the affidavits.

15:51

7
8 So I think to deal with the other points. I did say to
9 a certain extent it was more of the same - I don't know
10 whether it was my words or the court used those words.
11 Yes, it's certainly more of the same. But this is the
12 point, it's more of the same on the key issues. And
13 certainly if I used that phrase, I only meant it to say
14 it's more of the same about the same subjects, it's not
15 the *same* as those experts.

15:52

15:52

16 **MS. JUSTICE COSTELLO:** I know, I understand what you
17 say. You're --

18 **MR. O'DWYER:** And I hope you understand that,
19 Judge. In fact, I think Prof. Butler offers quite a
20 *different* perspective than *any* of the experts. And if
21 I could just return to something that Ms. Hyland said
22 that I think was a little bit unfair? I mean, she said
23 'well, the other experts have this amicus experience as
24 well' and that Prof. Richards has been an amicus, I
25 think, on one or two occasions and I think Ms. Gorski
26 as well two or three or certainly, you know, may have
27 been a plaintiff, she actually, I think, represented
28 plaintiffs.

15:52

15:52

29 **MS. JUSTICE COSTELLO:** ACLU were involved, yes.

1 **MR. O'DWYER:** But I mean, that's an entirely
2 different level of experience than EPIC, which is one
3 of the points we made very strongly to McGovern J.,
4 whereby they would be amicus in, or *have been* amicus -
5 and indeed Mr. Butler has been involved with *many* cases 15:53
6 - but they've been amicus in, I think, over 90 cases in
7 the superior courts involving these particular issues:
8 Privacy, data surveillance and standing in particular.
9

10 So for that reason, I think he *is* in a position to give 15:53
11 the court a real expert view. And obviously, no matter
12 what the parties say, there *is* a difference between
13 that evidence coming from a friend of the court,
14 particularly somebody who really understands what that
15 means, and the expert. And that's not to in any way 15:53
16 denigrate the experts. And the court will be more than
17 familiar with the way, naturally, the experts do tend
18 to move towards their clients. And nobody can gainsay
19 that.

20
21 I would just, finally, adopt the position 15:54
22 Mr. McCullough made in respect of EPIC - we obviously
23 have no position, it's not our -- I'm not going to take
24 *any* position on Mr. Collins' affidavit or whether they
25 might be more in favour or less in favour of Facebook - 15:54
26 but the point that Mr. McCullough made that the court
27 in this case is going to need as much evidence as it
28 can and the more evidence the better, particularly if
29 it's coming from a source that is, shall we say, here

1 to assist the court rather than to, shall we say,
2 assist one of the parties as such would be very useful
3 and that was a fairer submission and I think the court
4 should very much bear that in mind.

5
6 Then finally, just in respect of Mr. McCullough's other
7 submission about the US Government, Judge, I think I
8 pointed this out to you on the last day when this came
9 up that that was the very fear we had, that if we
10 *didn't* put things on affidavit, that of course somebody 15:55
11 would say - I don't know which party, but one party may
12 well say - 'Of course, you haven't founded your
13 submissions on the affidavit'. And there's still a
14 chance that -- we don't *know* what evidence is going to
15 be given next week. We have a fair idea, of course, 15:55
16 but we don't *really* know. Witnesses may not turn up,
17 one never knows.

18
19 So on that basis, we may need -- I would submit that
20 perhaps you'd leave the affidavit as is and allow it 15:55
21 in, effectively, read it and you'll see how it supports
22 our submissions, rather than leave us in a position
23 where we might be making certain submissions that are
24 only referable back to our own affidavit, but then that
25 evidence, we're hoping it will be provided, so 15:55
26 otherwise, say it be a particular EO or anything like
27 that, that that would be before the court for another
28 reason. But it may happen that it *won't* be. And can
29 he we can't tale tell that now. I think that was the

1 point that Mr. McCullough was making and I think that's
2 particularly applicable in our case. And for those
3 reasons, Judge, I'd ask you to admit it. Thank you.

4 **MS. JUSTICE COSTELLO:** Ms. Cahill.

5 15:56

6 **SUBMISSION BY MS. CAHILL**

7
8 **MS. CAHILL:** Judge, I have only two brief
9 points. I adopt the submissions made by Mr. Maurice
10 Collins on behalf of BSA setting out the legal position 15:56
11 in respect of the admission of the amicus affidavits
12 and I fully endorse what he says about Dr. Meltzer's
13 report. I've gone through the report again and I don't
14 think the term "SCC" appears therein at all. And I
15 think the proposition that it overlaps with the 15:56
16 affidavits filed on behalf of Digital Europe and BSA
17 simply doesn't stand up.

18
19 The court has asked both of the other amicus to
20 indicate to the court how their submissions will be 15:56
21 impacted by the non-admission of their affidavits and
22 perhaps that's something which the court would also
23 like to hear from Digital Europe. I've perhaps adopted
24 a more optimistic view than that of Mr. Collins. When
25 we filed, or served our affidavit, we requested in our 15:57
26 cover letter confirmation as to whether there were any
27 objections to the affidavit. And having received no
28 responses, we then served our submissions on the
29 assumption the affidavits *would* be part of the court

1 file and that they would be duly filed.

2
3 Our submissions, therefore, state in an opening
4 paragraph that the factual material stated in
5 Mr. Higgins' affidavit is not repeated in the 15:57
6 submissions, but that it should be read with them and
7 it relies on them. So we would say that the affidavit
8 is part of --

9 **MS. JUSTICE COSTELLO:** No, I understand that as drafted
10 they will refer to them. But if you were to be 15:57
11 confined to the evidence that the parties, as opposed
12 to the amici, have adduced on affidavit, I don't think
13 you're too concerned with the nuances of American law?

14 **MS. CAHILL:** No.

15 **MS. JUSTICE COSTELLO:** would you be constrained in your 15:57
16 ability to fulfil your role as an amicus?

17 **MS. CAHILL:** well, one of the positions
18 advanced in our written submissions at paragraphs 41,
19 42, 43, 54 and 55 concerns heavily the impact of any
20 decision on third countries. So it is concerned quite 15:58
21 heavily with the relevance of the SCCs used for
22 transfer of data to other countries than the US. And
23 the evidential basis for that is in our affidavit.
24 There *is* no other evidence before this court about the
25 use of SCCs by the digital industry in Europe to 15:58
26 transfer data to other countries.

27
28 Mr. Cush will perhaps be making the oral submissions on
29 behalf of Digital Europe. I can't speak for him as

1 regards to the level of inhibition that will be imposed
2 on him by the non-admission of the affidavit, but all I
3 can say is that it is part of the premise of our legal
4 submissions as they've been drafted in writing and that
5 it would certainly be part of the case that Digital 15:58
6 Europe would like to advance. I'm obliged to the
7 court.

8
9 **SUBMISSION BY MR. MURRAY**

10 15:58
11 **MR. MURRAY:** Judge, can I just draw one
12 matter to your attention, just as a matter of fact?
13 Mr. McCullough referred to this yesterday and it's been
14 suggested a couple of times in the course of the
15 submissions you've just heard. You'll see from the 15:58
16 Plenary Summons that the challenge which is brought by
17 the Plaintiff is *only* concerned with and is limited to
18 transfers to the United States, it doesn't go beyond
19 that. So just to remind the court that the relief that
20 we're seeking in the proceedings, whatever its 15:59
21 consequences may be down the line, but certainly the
22 relief which is being sought in the proceedings is
23 limited in that way.

24 **MS. JUSTICE COSTELLO:** Thank you. I'll give the ruling
25 on Monday in relation to this matter. So eleven 15:59
26 o'clock then on Monday.

27 **MR. MAURICE COLLINS:** I was just wondering, seeing as
28 all the amici are here, just in terms of timing...

29 **MS. JUSTICE COSTELLO:** Well, you're asking could I give

1 it now? No.

2 **MR. MAURICE COLLINS:** Oh, no, no, I'm not. Oh, no,
3 sorry, the court misunderstands me. Not at all. I
4 mean in terms of the submission, our submissions to the
5 court. 15:59

6 **MS. JUSTICE COSTELLO:** Oh, I have your submissions.
7 I'm sorry, I'm obviously punch drunk and not following
8 what you're asking me.

9 **MR. MAURICE COLLINS:** Sorry. The oral submissions
10 that the amici were going to make, I wonder is there 15:59
11 any greater sense of when that might likely occur?

12 **MS. JUSTICE COSTELLO:** Yes, fair enough. Yes, what is
13 the running order for next week?

14 **MR. MURRAY:** well, Judge, the position is as
15 follows: we'll be calling Prof. Neil Richards on Monday 16:00
16 morning. I will have a short number of questions to
17 ask him and I think Mr. Gallagher will then be
18 cross-examining him. Our next witness then is Andy
19 Serwin, who is also giving expert evidence, and again I
20 will be a very short period with him and I understand 16:00
21 Ms. Hyland is cross-examining him. I don't know from
22 my Friends whether they expect to get to Mr. Serwin on
23 Monday. I --

24 **MS. JUSTICE COSTELLO:** And what about Mr. McCullough?

25 **MR. MURRAY:** well, he hasn't served a notice 16:00
26 to cross-examine, Judge, and we're assuming that the
27 court will limit the cross-examination to those parties
28 who've served notices. I had understood, and I think
29 Mr. Gallagher did as well, that the court would not be

1 sitting on Tuesday, but I'm...

2 **MS. JUSTICE COSTELLO:** well, what I was saying was that
3 if you require me to and if, you know, we have American
4 witnesses over and subject to the matters that were
5 explained, I'm available to sit. 16:00

6 **MR. MURRAY:** Very good, Judge.

7 **MS. JUSTICE COSTELLO:** I'm not going to take anything
8 else up. That's why I said we've either got four or
9 five days, depending on how it pans out.

10 **MR. MURRAY:** Certainly, Judge. I'll discuss 16:01
11 that with Mr. Gallagher later. But I think if one
12 assumes that we don't sit on Tuesday, if the court
13 doesn't sit on Tuesday then my understanding is that
14 Mr. Gallagher has two expert witnesses, one of whom
15 will, in all likelihood, begin on wednesday and another 16:01
16 then on Thursday.

17 **MS. JUSTICE COSTELLO:** So you're hoping that
18 Mr. Richards and, is it Prof. Swire?

19 **MR. MURRAY:** Mr. Serwin.

20 **MS. JUSTICE COSTELLO:** Mr. Serwin. Will be dealt with 16:01
21 in one day?

22 **MR. MURRAY:** well, no, I suspect Mr. Serwin
23 may go into the wednesday. But that again just depends
24 on the length of the cross-examination. And in
25 fairness, my Friends aren't going to know how long that 16:01
26 will take.

27 **MS. JUSTICE COSTELLO:** No, I understand that. I'm just
28 going on the basis that Ms. Gorski took the day - or
29 more than a day, it was more like a five-hour day.

1 **MR. MURRAY:** Yes. So on that basis, one
2 would hope that perhaps the amici might be going into
3 submissions on --

4 **MS. JUSTICE COSTELLO:** Is there no cross-examination of
5 the -- sorry, I haven't studied the notices to 16:01
6 cross-examine. Is there no cross-examination of the
7 Facebook witnesses?

8 **MR. MURRAY:** No. There *is* a notice to
9 cross-examine on Prof. Butler, but obviously that
10 depends on your ruling. 16:02

11 **MS. JUSTICE COSTELLO:** obviously, yes, yes.

12 **MR. MURRAY:** So there would be a prospect,
13 Judge, that the amici -- because the witnesses, the
14 cross-examination may take -- I don't anticipate being
15 terribly long with Facebook's two witnesses. And if 16:02
16 that's the case then there might be a prospect that the
17 amici would start --

18 **MS. JUSTICE COSTELLO:** So which two witnesses for
19 Facebook?

20 **MR. MURRAY:** It's Prof. Vladeck and 16:02
21 Prof. Swire.

22 **MS. JUSTICE COSTELLO:** That's what I thought, yes.

23 **MR. MURRAY:** But not in that order. Sorry,
24 Prof. Swire is first, then Prof. Vladeck. There might
25 be a prospect, Judge, that the amici would begin on 16:02
26 Thursday - a prospect. And clearly we'll have to have
27 a discussion with the court, because I think it was
28 envisaged that there would be a limitation on the time
29 available to the amici to address the court.

1 **MS. JUSTICE COSTELLO:** Perhaps you might see if you
2 can, before Monday, work out for yourselves how much
3 time you estimate it might take. Because even taking a
4 crude yardstick of an hour each, that's a day. And I'm
5 only saying that's a very crude yardstick. And even 16:03
6 working on what you're talking about there, Mr. Murray,
7 that's Thursday.

8 **MR. MURRAY:** Yes. With then Mr. Gallagher
9 starting his submissions on Friday.

10 **MS. JUSTICE COSTELLO:** How many Fridays are we going to 16:03
11 have this week?

12 **MR. MURRAY:** Well, I think that we'll
13 certainly have next Friday, Judge, and --

14 **MS. JUSTICE COSTELLO:** So we're definitely into a
15 fourth week? 16:03

16 **MR. MURRAY:** We are into a fourth week. But,
17 Judge, I would be hopeful that we could have a
18 timetable in place that would ensure that we finish
19 within the fourth week, Judge.

20 **MS. JUSTICE COSTELLO:** What you might do is, obviously 16:03
21 it's not going to be cast in stone, but see what sort
22 of running order you can work out, if for no other
23 reason than for your colleagues appearing for the
24 amici, so that they can work out whether they want to
25 be here for everybody or whether they just want to be 16:03
26 here for their own slot at...

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

28 **MS. JUSTICE COSTELLO:** ... appropriate times.

29 **MR. MURRAY:** I mean, I think we may have a

1 better sense of that on Monday afternoon when we see
2 how long Prof. Richards' cross-examination is taking.
3 **MS. JUSTICE COSTELLO:** Very good. So you're looking at
4 the end of the week is the best I can give you.
5 **MR. MAURICE COLLINS:** Yes, it sounds like Friday 16:04
6 perhaps.
7 **MR. O'DWYER:** Judge, I was only going to say
8 in respect of Prof. Butler, I mean, I don't want in any
9 way, and this is the court's decision, but I do think
10 obviously if the affidavit goes in, there's going to 16:04
11 be -- there *is* a notice for cross-examination and I
12 presume that's going to be followed up upon. So that
13 would, I would imagine, take place following all of the
14 others.
15 **MS. JUSTICE COSTELLO:** well, we'll have to work around 16:04
16 that as the case may be if that follows.
17 **MR. O'DWYER:** It's just Prof. Butler is here
18 and --
19 **MS. JUSTICE COSTELLO:** Just in the way we had to
20 accommodate Ms. Gorski. If he does have to come later 16:04
21 in the play, so be it. We'll see what we can do in
22 that regard.
23 **MR. O'DWYER:** Yes, Judge.
24 **MR. GALLAGHER:** Thank you very much, Judge.
25 **MR. MAURICE COLLINS:** Thank you very much, Judge. 16:04
26 **MR. MURRAY:** Thank you, Judge.
27
28 THE HEARING WAS THEN ADJOURNED UNTIL MONDAY, 20TH
29 FEBRUARY AT 11:00

'95 [1] - 6:11
'Actually [1] - 73:1
'Are [1] - 65:25
'does [1] - 52:15
'ensured' [1] - 47:5
'Here [1] - 43:21
'in [2] - 12:9, 133:21
'national [1] - 6:24
'Of [1] - 158:12
'Oh [5] - 54:26, 54:27, 54:28, 68:12, 70:15
'reverse [1] - 112:14
'Safe [1] - 25:4
'sparingly [1] - 91:3
'test [1] - 112:4
'The [1] - 69:20
'We [1] - 55:13
'We'll [1] - 62:29
'we're [1] - 11:27
'We've [1] - 62:12
'well [4] - 22:3, 68:2, 131:25, 156:23

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0.8% [1] - 86:10

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1 [20] - 3:4, 3:10, 5:12, 5:13, 5:16, 19:24, 23:2, 34:11, 38:8, 42:3, 59:4, 80:16, 87:24, 97:4, 113:3, 113:4, 113:5, 116:17, 121:6, 123:22
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1(4) [1] - 57:3
1(d) [1] - 7:28
1.3% [1] - 86:10
10 [11] - 13:17, 14:18, 26:29, 30:21, 58:5, 64:29, 80:17, 83:4, 92:9, 92:12,

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102 [1] - 86:18
106 [1] - 4:7
11 [16] - 13:27, 14:19, 27:24, 30:8, 35:10, 38:11, 47:28, 49:24, 58:21, 58:23, 58:24, 61:4, 76:10, 76:13, 107:7
11% [1] - 86:16
11(1) [1] - 58:26
11(2) [2] - 64:8, 64:9
11(c) [1] - 30:24
110 [1] - 53:22
114 [1] - 4:7
115 [1] - 53:26
118 [1] - 53:29
11:00 [1] - 166:29
11th [1] - 155:9
12 [6] - 14:2, 14:20, 28:10, 31:3, 56:10, 93:14
122 [1] - 54:7
123 [1] - 54:18
12333 [1] - 97:22
129 [1] - 4:8
13 [12] - 3:9, 5:13, 14:14, 15:16, 16:1, 25:28, 28:11, 45:9, 46:10, 50:23, 67:18, 72:10
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145 [1] - 56:11
15 [2] - 48:7, 88:2
15,000 [1] - 83:10
154 [1] - 4:10
159 [1] - 4:10
16 [6] - 56:25, 56:27, 70:24, 83:14, 113:6, 147:12
161 [1] - 4:11
17 [2] - 56:26, 83:14

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18 [6] - 48:24, 52:10, 90:18, 97:23, 108:3, 144:9
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