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, 3rd MARCH 2017 - DAY 15

15

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

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THE HEARING RESUMED AS FOLLOWS ON FRIDAY, 3RD MARCH 2017

REGISTRAR: At hearing Data Protection Commissioner -v- Facebook Ireland Ltd. and another. 11:04

MS. JUSTICE COSTELLO: Yes, Ms. Barrington.

SUBMISSION BY MS. BARRINGTON:

MS. BARRINGTON: Judge, thank you very much. We had left off yesterday, Judge, I was just concluding with the PCLOB report, which the court may have at Book 5 Tab 56, and I had asked court to look at page 98 behind Tab 56. 11:04

MS. JUSTICE COSTELLO: 98. Yes? 11:05

MS. BARRINGTON: That's the portion of the report, Judge, that deals with the treatment of non-US persons and under heading (a) *"existing legal protections for non-US persons privacy"*, I'm going to ask the court to look at the second paragraph there: 11:05

"*The first important privacy protection provided to non-US persons is the statutory limitation on the scope of Section 702 surveillance which requires that targeting be conducted only for purposes of collecting foreign intelligence information.*" 11:05

The definitions are set out there, Judge. And then the last two lines read:

"*Further limitations are imposed by the required certifications identifying the special categories of foreign intelligence information which are reviewed and approved by the FISC. These limitations do <u>not</u> permit unrestrictive collection of information about foreigners.*" 11:05

The second group of privacy protections is then identified and they are identified as the penalties that apply to government employees. And reading just a little in from the second, start of the second paragraph: 11:06

"*Thus, if an intelligence analyst were to use the Section 702 program improperly to enquire information about a non-US person, he or she could be the subject, not only to the loss of his or her employment, but to criminal prosecution. Finally, a non-US person who is a victim of a criminal violation of either FISA or the Wiretap Act could be entitled to civil damages and other remedies and so if a US intelligence analyst were to use the Section 702 programme to collect information about a non-US person where it did not meet the definition of foreign intelligence and relate to one of the certifications approved by the FISA court, he or she could face, not only the loss of a job, but the prospect of a term of imprisonment and civil damage suits.*" 11:06 11:06

The third privacy protection covering non-US persons is the statutory restriction on improper secondary use found at section 806 under which:

"*Information required from FISA-related electronic surveillance may not used or disclosed by federal officers or employees except for lawful purposes. Congress included this language to ensure that information concerning foreign visitors and other non-US persons is not used for illegal purposes. Thus, use of Section 702 collection for the purpose of suppressing or burdening criticism or dissent or for disadvantaging persons based on their ethnicity, race, gender, sexual orientation, or religion would violate section 1806.*" 11:07

And finally, Judge, then the exclusionary remedy is dealt with at the end of that page and at the top of the next page. And lastly, the last paragraph under that heading, Judge, states as follows: 11:07

"*As a practical matter, non-US persons also benefit from access and retention restrictions required by the different agency's minimisation or targeting procedures. While these procedures are legally required only for US persons, the cost and difficulty of identifying and removing US person information from a large body of data means that typically the entire data set is handled in compliance with the higher US*

person standards."

And, Judge, the court may note that that report is July 2014 before the PPD-28 section 4 procedures that I opened to the court yesterday -- 11:08

MS. JUSTICE COSTELLO: Mm hmm.

MS. BARRINGTON: -- that extend the retention requirements.

MS. JUSTICE COSTELLO: To non-US persons.

MS. BARRINGTON: Applicable to US persons to non-US persons. 11:08

Judge, there's one matter that I overlooked addressing yesterday in the context of the Privacy Shield. And that was the effect of the recent executive order of January 25th 2017. That order, Judge, is in Book 3 Tab 47. 11:09

MS. JUSTICE COSTELLO: Which 3 are we talking about? Is this US authorities?

MS. BARRINGTON: US 3. 11:09

MS. JUSTICE COSTELLO: Tab?

MS. BARRINGTON: Tab 47, Judge.

MS. JUSTICE COSTELLO: Thank you.

MS. BARRINGTON: And that, the court may recall, is the January of this year executive order entitled *"Enhancing public safety in the interior of the United States"*. I think it's clear from its terms that it relates to immigration matters and enforcement of immigration within the United States. And Mr. Collins, 11:09

when he opened the case on DAY 3, referred the court to Section 14, which is on page 6 of 7.

MS. JUSTICE COSTELLO: Yes.

MS. BARRINGTON: Which is headed *"Privacy Act"*:

"Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information." 11:10

And what Mr. Collins said about that on DAY 3 was that executive order, and the provision of the executive order in particular, was contrary to the policy that underpinned the Privacy Shield, and he said that at DAY 3 page 21. 11:10

Judge, the court will have seen from the Privacy Shield document and from Mr. Litt's letters annexed to the Privacy Shield that the Privacy Act isn't mentioned in the Privacy Shield. Judge, the Privacy Shield isn't in any way dependent on the Privacy Act, which is the focus of Section 14, and accordingly in our submission there is simply no basis for the suggestion that that executive order in any way undermines the policy of the Privacy Shield. 11:10 11:11

Section 14 doesn't affect the commitments made under the Privacy Shield and the Judicial Redress Act and the

Privacy Act are applicable law in any event within the meaning of the executive order and that executive order in no way affects the designations under the Judicial Redress Act.

11:11

That was the position articulated in the joint expert report by Prof. Swire, but even a cursory analysis of the Privacy Shield will demonstrate that it isn't predicated on the Privacy Act at all. It is, I think again surprising, that the Data Protection Commissioner should have thrown up that issue which it wasn't apparent was the subject of any particular consideration because there was no reference back to the Privacy Shield.

11:12

11:12

Finally, Judge, if I could ask the court to look at our submissions, they are in Book 12 at Tab 5. I'm just going to ask the court to look at a short number of points made in the submissions because I think most of it has been addressed already, Judge.

11:13

If I could start with page 3 paragraph 9.

MS. JUSTICE COSTELLO: Mm hmm.

MS. BARRINGTON: The approach taken, Judge, and it is set out in the last sentence in that paragraph, in the submissions generally is to address US law under a number of headings: That US law provides for clear and accessible rules for access to personal data, ensures that data is collected for legitimate ends in

11:13

accordance with the principles of proportionality, provides for meaningful oversight and affords effective remedies. And that approach to considering the issue under those various headings is one that the court will see stems from our analysis of the Convention jurisprudence that we're not going to go through but Facebook will. The court will see that in the footnotes, that that is the source of what we say is the correct approach to an assessment of a legal system to ensure that the correct balances are in place. And we make that point, Judge, over the page at page 4 paragraph 18. 11:13 11:14

MS. JUSTICE COSTELLO: 18?

MS. BARRINGTON: I beg your pardon, 11. And again just looking at the last sentence: 11:14

"*Remedies exist not justice through individual causes of action, but through internal oversight and through oversight by the judicial and legislative branches of the government.*" 11:14

And the court will know that that is the essential thrust of our argument in relation to adequacy. Page 6 at paragraph 17.

MS. JUSTICE COSTELLO: Sorry, I note there in footnote 6 you refer to **Kennedy -v- UK**. 11:14

MS. BARRINGTON: Yes.

MS. JUSTICE COSTELLO: Is that a...

MS. BARRINGTON: That's a Convention.

MS. JUSTICE COSTELLO: Convention decision.
MS. BARRINGTON: Court of Human Rights decision.
MS. JUSTICE COSTELLO: I see that, but it's on the Convention.
MS. BARRINGTON: Yes, it is, Judge, on Article 8. 11:14

At paragraph 17, Judge, page 6, we make the point that, because surveillance measures must often be carried out secretly, the Court of Justice and the Court of Human Rights have emphasised the need to build effective 11:15
safeguards into legal régimes and these safeguards include rules concerning the scope of permissible surveillance, authorisation procedures, limitations on duration, limitations on access to data obtained by the authorities. While the courts have recognised the 11:15
importance of effective remedies, they have also acknowledged that the right to a remedy does not require authorities to provide notice to affected individuals if providing such notice would undermine an investigation or compromise intelligence methods. 11:15

Reference is made there to the cases I referred to yesterday to, **Zakharov**, **Klass** and **Weber and Saravia**, all of which are again decisions of the Court of Human Rights which address the question of oversights 11:15
generally and also refer to the issue of notification.

Over the page, Judge, we address access to personal data being governed in the US system by clear and

accessible rules. I think the court will at this stage be familiar with what's set out there, a description of the FISA Act, of the FISA court. I'm going to skip on, Judge, to page 11 paragraph 26 where we refer to the reforms introduced by the USA FREEDOM Act in 2015 which provides for additional transparency measures. 11:16

Judge, I'm not sure that the court's attention was brought to those provisions of the FISA Act, so the court may note that they are Title 50 section 1872. If the court wishes to look at the FISA legislation, it's in Book 1 of 5 -- 11:16

MS. JUSTICE COSTELLO: Mm hmm.

MS. BARRINGTON: -- behind Tab 3. And I may have got this wrong, Judge, perhaps the court does have it marked up. The relevant subchapter is chapter 5 *"Oversight"*, it's at page 244. 11:17

MS. JUSTICE COSTELLO: No, I don't think that was opened.

MS. BARRINGTON: No. 11:17

MS. JUSTICE COSTELLO: At least, put it this way, I have no marks on it and no memory of it.

MS. BARRINGTON: Yes. Page 244, Judge.

MS. JUSTICE COSTELLO: Yes.

MS. BARRINGTON: On the left-hand column, half the way down the court will see the heading *"Subchapter Oversight"* and that's where the court will find the statutory basis for the various reports that reference have been made to, the semi-annual report from the 11:17

Attorney General.

MS. JUSTICE COSTELLO: Mm hmm.

MS. BARRINGTON: The submissions to Congress are provided for at 1871. Then section 1872 is a significant section, Judge, because it does enhance the transparency of the FISA court. It provides for the declassification of significant decisions, orders and opinions: 11:17

"*Subject is subsection (b) the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order or opinion issued by the FISA court or the FISA Surveillance Court of Review that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term' and consistent with that review make publically available to the greatest extent practicable each such decision, order or opinion.*" 11:18 11:18

And then subsection (b) provides for the entitlement to redact those opinions where necessary.

1873, Judge, deals with annual reports, and it's in that section, Judge, that you also find reference to the appointment of amici. I think there was reference to five or six amici, the Act provides for five and the six have in fact been appointed, Judge. 11:18

So those are significant additional transparency protections that we make reference to in our submissions.

Page 12, Judge, if I could turn back to the submissions.

MS. JUSTICE COSTELLO: Mm hmm.

MS. BARRINGTON: We address our contention that the US legal provisions are reasonably tailored to serve legitimate public safety needs, and again we set out in that section how it is that the FISC approval mechanism operates. 11:19

At paragraph 34, Judge, page 14, we deal with PCLOB and the independent oversight it provides and address just, perhaps eight or nine lines from the bottom of that paragraph, the information that the court will have seen yesterday in the PCLOB report to the effect that, under the FISA system: 11:19 11:20

"*Individual selectors must be used and general key words such as bomb, attack, cannot be used, unlike the situation in a number of the Member States.*"

11:20

At page 16, Judge, paragraph 38, we also address the further limitations introduced by the Freedom Act in 2015 and in particular the express prohibition of bulk collection of any records pursuant to FISA authorities

or through the use of NSLs, national security letters.

From page 17 onwards, Judge, we deal with the question of independent oversight, first addressing the role of the FISC judges as tenured federal judges; second, at 11:21
paragraph 44, Judge, the various oversight mechanisms built into the Executive Branch by the requirements of personal approval by the Attorney General in relation to applications made to the FISC.

11:21

At paragraph 45 PCLOB is referred to and at paragraph 46 the Congressional oversight authorities, including the various committees.

At page 20, part 4, we deal with the question of 11:21
remedies, and I think the court has been through those in such detail at this stage that I'm going to skip over all of that section, Judge.

Then the court will see at section (c) page 26, we also 11:22
deal with the position for completeness insofar as law enforcement investigations are concerned under the same headings, addressing under each heading the accessibility of the rules, the fact that they are tailored to meet legitimate aims, the fact that they 11:22
are subject to oversight and the fact that remedies exist.

Then, Judge, at part 3 of our submissions, page 30

onwards, we make the important point that all of these provisions and mechanisms compare favourably to those in the EU Member States.

MS. JUSTICE COSTELLO: That's where I was going to ask a question of you, and it's possibly unfair to ask it of you, but at the moment, as I understand it, I have no evidence at all as a matter of fact as to what the law is in the Member States. 11:22

MS. BARRINGTON: Yes.

MS. JUSTICE COSTELLO: Because Mr. Robertson's affidavit, as I understand, we might almost describe it as being in escrow. 11:23

MR. MURRAY: Yes, in fairness we have, I think it's about to be taken out of escrow, Judge, and there's been communications between the parties with a view to agreeing the parts of the report that can be provided to the court. I'm not quite sure what the state of the correspondence is, but if it hasn't been sent already then Mason Hayes will be getting -- 11:23

MS. JUSTICE COSTELLO: Well, I will hear what Ms. Barrington has to say and then obviously if there is any bits that aren't permitted from Mr. Robertson's report I'll have to disregard so much of her submissions. 11:23

MR. MURRAY: Certainly, Judge.

MR. GALLAGHER: Judge, could I just also add.

MS. JUSTICE COSTELLO: Yes. Sorry, Mr. Gallagher.

MR. GALLAGHER: Not at all, Judge. You will remember Prof. Swire gave evidence on that and he referred to

the Brown report in particular, but his report actually also contains evidence with regard to the position generally in the Member States -- Prof. Swire. And Prof. Clarke deals with it, but Prof. Swire actually gave evidence on that. 11:23

MS. JUSTICE COSTELLO: Thank you.

MS. BARRINGTON: And the court also has of course the from a report.

MS. JUSTICE COSTELLO: I had forgotten who had exhibited that one. 11:24

MR. GALLAGHER: Prof. Robertson did that.

MS. JUSTICE COSTELLO: That's what I thought. I don't think I have read that report.

MR. GALLAGHER: No, you haven't read that. Prof. Swire exhibited the Ian Brown analysis. 11:24

MS. JUSTICE COSTELLO: Yes, I remember the Oxford University press book, yes.

MR. GALLAGHER: Yes, and I referred to that. But the more detailed is undoubtedly, you are quite correct, Judge, it's in escrow in Prof. Robertson's at the moment. 11:24

MS. BARRINGTON: I did indicate, Judge, that I was going to ask the court to look at the from a report, but I understand that Facebook propose taking the court through it so I'm not going to duplicate the work, Judge. 11:24

We have in our submissions referred to the from a report, we have also referred to portions of

Mr. Robertson's affidavit and it may be that, once agreement has been reached, we can modify those footnotes if needs be to ensure that they don't refer to anything that's not in evidence.

The submissions address then in summary form the position in the various Member States. The court will see that what we have done is address it under the same headings.

MS. JUSTICE COSTELLO: Mm hmm. 11:25

MS. BARRINGTON: So from page 32 onwards we address the question of the existence of clear and accessible laws in the various Member States. The from a report is a detailed and complicated document, Judge, so I'm not going to try to summarise what it says under these various headings, save to say that it says that five Member States have a detailed régime for signals intelligence, SIGINT, although it is acknowledged that more Member States than those five have the capacity and may very well be conducting signals intelligence. 11:25 11:26

One might have got the impression from submissions that were made that only the United States performed this type of signals intelligence and the from a report shows that's certainly not the case, Judge. The five who have rules, accessible rules setting out how they go about signals intelligence are France, Germany, the Netherlands, Sweden and the UK. The point is made that it is something that does require significant 11:26

resources. The report cites, for example, that in the UK GCHQ has five and a half thousand staff and accordingly have the resources to perform signals intelligence.

11:26

The point is made at paragraph 80 of our submissions that, unlike the position in the United States where selectors must be used and key words such as jihadi can't be used. That is permitted in certain of the Member States and reference is made to the newly enacted UK position under the Investigatory Powers Act, which I think is referred to in the press as the Snooper's Charter, and the fact that bulk interception is envisaged under that legislation.

11:27

11:27

Oversight mechanisms in the Member States is touched upon, Judge, at page 36. Again I could perhaps summarise the position by saying that the report shows that independent judicial ex ante oversight is not the norm and that in the countries that carry out signals intelligence, the five that have accessible rules, none provide for judicial ex ante authorisation. So the US régime compares very favourably, Judge.

11:27

Insofar as notification is concerned, again two Member States have a notification régime in respect of signals intelligence which is a caveated one, although certain Member States provide for a generalised notification obligation, subject to national security restrictions.

11:28

So the court will hear ultimately that the position is diverse in the Member States, that there are different approaches taken to the oversight of signals intelligence and that the from a in considering 11:28
appropriate oversight mechanisms does, precisely as we contend ought to be done, by looking at the totality of the protections available in the régime. That comes as no surprise because the from a report in turn, Judge, seeks to synthesise the Convention jurisprudence in the 11:29
area.

In summary, Judge, we address these points at page 39 of our report, paragraph 90 where we say:

11:29

"*The EU Member States employ a wide range of legal régimes governing national security surveillance, and they ensure that privacy rights are protected through a variety of standards unique to their authorities and infrastructures. Not all Member States provide clear* 11:29
accessible rules; many authorise surveillance measures for broad purposes and/or without the use of individual discriminants; most do not require independent authorisation from judges. Oversight and redress mechanisms also vary and range from internal executive 11:29
controls to measures afforded by legislative authorities or by hybrid bodies."

And by hybrid bodies we mean in particular Ombudsperson

mechanisms that the court will see exist in a number of Member States:

"*By comparison - we say - the privacy safeguards afforded by the US are equivalent to, if not in many respects greater than, the safeguards afforded in practice throughout the EU. Critically, the variety of manners in which EU Member States protect their citizens' privacy through regulation of national security surveillance highlights that the EU's 'Essential Guarantees' cannot be imposed in a rigid or uniform manner.*" 11:30

Judge, those, I think, are the major points from our submissions, save one that I'm sorry I did say I would come back to in going through the submissions and that's paragraph 74, Judge, and that deals with the WTO point that I touched upon yesterday. 11:30

MS. JUSTICE COSTELLO: Yes.

MS. BARRINGTON: The point is a fairly straightforward one, Judge, that if the US provides equivalent or better protection than is the case in the Member States and if the SCCs are struck down so that data cannot be transferred to the United States, then that gives rise to a potential issue under the WTO rules which, as paragraph 74 sets out, has two elements that could be brought into play. And we say this, Judge, in paragraph 74, about ten lines down: 11:31 11:31

"*Where the US provides the same or greater privacy*

protections as EU Member States, this would put the EU and Member States at considerable risk of providing less favourable treatment to these US companies than their competitors in the EU. Member States, contrary to the EU's and Member States' GATS obligations. In addition, this would put the EU and Member States at considerable risk of providing US companies less favourable treatment than their competitors in other EU countries."

11:31

11:32

And we make the point, Judge, that there is a general principle of European law that European law be interpreted in a manner consistent with international obligations and the WTO is of course an international obligation binding on the EU.

11:32

MS. JUSTICE COSTELLO: Just how does that pay in? Because it sounds like initially what you are, sorry feed into the interpretation of the SCCs and the Directive? Because it sounds like you're identifying a possible consequence of one particular analysis?

11:32

MS. BARRINGTON: Yes.

MS. JUSTICE COSTELLO: And are you saying that, as part of the analysis of both the SCCs and the Directive --

MS. BARRINGTON: And the Directive.

MS. JUSTICE COSTELLO: -- you have to take into account the terms of the WTO and the GATS arrangements?

11:32

MS. BARRINGTON: The fact that these provisions exist in those agreements and that the Directive should be interpreted, insofar as possible, in a manner

consistent with those agreements and, accordingly, the position in the Member States, it is argued that the position in the Member States isn't relevant, but we contend that it is relevant for a number of reasons, including because the court must know whether, if it's the case that the US provides equivalent or greater protections, then that could give rise to an issue under the WTO agreements. 11:33

MS. JUSTICE COSTELLO: But, for example, would that have also applied to the Safe Harbour decision which the Court of Justice struck down? 11:33

MS. BARRINGTON: Hmm.

MS. JUSTICE COSTELLO: In other words --

MS. BARRINGTON: Yes.

MS. JUSTICE COSTELLO: -- you might strike something down and then have to replace it with something else? 11:33

MS. BARRINGTON: Yes, but I suppose in **Schrems 1** the court was only considering the question of the absence of the Commission's finding of adequacy as a procedural issue in the Safe Harbour agreement. 11:33

MS. JUSTICE COSTELLO: But there were two decisions, that was one of them.

MS. BARRINGTON: Yes.

MS. JUSTICE COSTELLO: But there were two decisions in **Schrems**, the other one was that the Data Commissioner was entitled to investigate. 11:34

MS. BARRINGTON: Yes. That's certainly true, yes, Judge.

MS. JUSTICE COSTELLO: That she wasn't bound by it as

far as I recollect. I can't remember the exact wording.

MS. BARRINGTON: Yes, but the court didn't enter into the debate as to substantive adequacy.

MS. JUSTICE COSTELLO: No, but in striking something down arguably it would have the result that you are saying would arise here if these standard contractual clauses are struck down. I mean I must say I'm not in a position one way or the other to strike them down, but if it were to result in the standard contractual clauses being struck down you are saying that that would have implications for WTO and GAT obligations of the EU? 11:34 11:34

MS. BARRINGTON: Yes, but it's perhaps a different assessment criterion that's coming into play. In **Schrems 1** what was at issue was the formal validity from the European law perspective of the decision in and of itself in circumstances where it didn't address the key issue required to be addressed in Article 25. 11:34

MS. JUSTICE COSTELLO: Mm hmm. 11:35

MS. BARRINGTON: Here what is being asked is that the decisions be arguably struck down by the Court of Justice if the court or this court in referring to that court were to consider that there was a deficiency in adequacy, so it's in coming to -- 11:35

MS. JUSTICE COSTELLO: So you are talking about a merits point as opposed to a formal point?

MS. BARRINGTON: Exactly. Sorry, I'm not expressing it very well.

MS. JUSTICE COSTELLO: Well I don't think my question was very clear either.

MS. BARRINGTON: But one is a procedural point and one is a substantive merits point.

11:35

Finally, Judge, if I could say this in conclusion: The position of the United States generally is, in summary, first, that these proceedings don't raise a live issue in view of the adoption of the Privacy Shield; if they do raise a live issue in the court's consideration then 11:35 the court has to consider the national security issue and Article 25/26 issue and in that regard we support Facebook's arguments.

If the court finds in the DPC's favour on those issues 11:36 then it may go on to consider the question of adequacy. If that consideration is to be conducted, our fundamental submission is that we must, the court must consider the position in the round having regard to the totality of the safeguards in place and that's the only 11:36 approach consistent with what the Commission has done in the Privacy Shield with what the case law of the European Court of Human Rights demonstrates and requires. And, viewed in that way, it can't be disputed that the US régime compares favourably and 11:36 meets the transparency requirements. Our submissions make the point that no other country has explained its national security system in the way that the United States has in the context of the Privacy Shield.

Member State practice is a relevant issue under any proportionality analysis or under the Directive. And, on the basis of an assessment properly conducted, ultimately we contend that the court must come to the conclusion that the United States *does* provide an adequate system and, accordingly, no reference should be required. Those are our submissions. 11:37

MS. JUSTICE COSTELLO: Thank you very much.

11:37

SUBMISSION BY MR. MAURICE COLLINS:

MR. MAURICE COLLINS: May it please the court.

MS. JUSTICE COSTELLO: Mr. Collins.

MR. MAURICE COLLINS: I am very conscious of the fact that, firstly, I am appearing on behalf of an amicus in these proceedings and, secondly, that I am effectively the seventh party to be addressing the court by way of submissions. The court has heard detailed submissions already and will be hearing further detailed submissions no doubt and has heard detailed evidence. 11:37 11:38

What I propose to do in my submissions to the court today is to focus on, I suppose, the central aspect of our written submissions, I know the court has read those. I'm not going to address all of the issues that are in the written submissions, I'm going to focus on four issues that are very closely related and interconnected. 11:38

The first is what we say is the relationship and the critical distinction between Articles 25 and 26 of the Directive; secondly, to look at the SCC decisions and the SCC clauses; thirdly, to look at the DPC's investigation and Draft Decision; and, fourthly, to address what is ultimately, I suppose, the central question before the court which is whether a reference to the CJEU is necessary or appropriate. 11:38

But before addressing those questions I think it's fair to observe that there are two very striking features of these proceedings that are now in their 15th day, I think. One is how little attention has been paid to Article 26 and to the SCC decisions and the SCC clauses. And I suggest that anybody who had sufficient masochistic tendencies to be sitting voluntarily at the back of the court over the last 14 and a half days. 11:39

MS. JUSTICE COSTELLO: I like your use of the word voluntarily. 11:39

MR. MAURICE COLLINS: You are excused that characterisation by virtue of compulsion, would be forgiven for understanding that this was a case that implicated the Privacy Shield, that what the court was being asked to do was to endorse well-founded concerns of the DPC concerning the Privacy Shield and in particular the integral part of that decision which concerns the Adequacy Decision in respect of the United States. But of course it's not that. 11:39

The other striking feature of these proceedings is that the DPC has come to court effectively saying that it wants to throw the ball in respect of issues arising in a complaint made by Mr. Schrems against Facebook in circumstances where both Mr. Schrems and Facebook say there should not be a reference, there's no need for a reference and where in fact Mr. Schrems says in his written submissions that he considers the SCC decisions to be valid and consistent with the Treaty and consistent with the Charter. 11:40 11:40

That's not to say that the court is precluded from taking the view that there are well-founded concerns about the validity of the SCC decisions, but it's a striking first starting point that the parties who are the parties to the complaint that implicate, according to the DPC, the validity of the SCC decisions are of the one mind and the one word, that in fact that's not correct, and that the analysis that has led the DPC to say that she has well-founded concerns concerning the SCC decisions is one which, from their very different perspectives, the parties to the complaint say is completely wrong. I'm going to come back to that in a little bit more detail when I come particularly to the separate question at the end of whether there should be a reference. 11:41 11:41 11:41

But the position of the BSA insofar as, to assist the

court, is that there ought not to be a reference. There's no need for a reference because the concerns which the DPC has expressed, and which has been communicated so skillfully by Mr. Collins and Mr. Murray, have been generated by virtue of an analysis of Article 26 and the SCC decisions that is fundamentally wrong. There has not been in fact any proper consideration by the DPC of the proper operation of and effect of and level of protection afforded by the SCC decisions and the SCC clauses to which they give effect. 11:42 11:42

Now one of the issues that we have not engaged in at all in our written submissions is the question of US law. There are other issues in our submissions that you will have seen such as the situation in the EU and within the Council of Europe area concerning national security and the treatment of national security. We have made some references, for example, to that same compendious report that has just been mentioned by Ms. Barrington. I'm obviously not going to address any of those issues in my submissions to the court, but what I want to make clear is that nothing that I say is to be taken as an indication that the BSA accepts that there is a lack of adequate protection in the United States. I'm going to explain to the court why it is that that's not a relevant question at all and certainly not the central and determinative question which is presented to you or as it is presented to you 11:42 11:43 11:43

by the DPC.

But we do, BSA does wish to endorse the submission of Facebook that the contention that there is not, and I use the present tense advisedly, that there is not adequate protection in the United States is contradicted by the adequacy finding that is a central part of the Privacy Shield decision, and that's not impugned in these proceedings. 11:44

But what is clear, and again not to imply that there is anything less than adequate protection in the United States, what is clear, and I'll come back to explain what I say is the relevance of this, is that, even on the view of the DPC, there is significant protection in the United States. That's clear from her Draft Decision at paragraph 62 and 64 where she accepts that there are at least cases where EU citizens can pursue effective legal remedies and where she says at paragraph 64 that there's an absence of a complete framework for remedial, for effective remedies in the United States. 11:44 11:45

So clearly on the DPC's own case, and this is borne out, and I'm not going to make any observation in detail on the evidence that the court has heard, there is a significant framework of protection in the United States, and that's not to engage in the question of whether it is adequate protection within the meaning of 11:45

Article 25, it is as a matter of fact significant protection. That is a factor that I'll come back to to explain why it may be relevant in the context of an Article 26 analysis.

11:45

But the point I'm making initially, I suppose, is to say that adequate protection is not the touchstone for assessing the validity of any SCC decisions made pursuant to Article 26 or for assessing the efficacy of the operation of SCC clauses provided for by those decisions.

11:46

And, Judge, hopefully you have them readily to hand, I'm going to be referring to a very limited number of documents.

11:46

MS. JUSTICE COSTELLO: I have your written submissions, but which other documents do you want me to have.

MR. MAURICE COLLINS: If you have got Core Book 1.

MS. JUSTICE COSTELLO: Yes.

MR. MAURICE COLLINS: And if you have the Draft Decision of the Commissioner. There may be some transcript references I'm going to make. And, sorry, I'm going to refer also to the book of submissions, you may that already.

11:46

MS. JUSTICE COSTELLO: I do.

11:46

MR. MAURICE COLLINS: It may be where you have my submissions.

MS. JUSTICE COSTELLO: Yes.

MR. MAURICE COLLINS: And if the court turns to Core

Book 1 Tab 5 one finds the Directive itself. Mr. Cush brought you through some of the provisions of this yesterday and the court has been brought through the provisions comprehensively in the earlier submissions of counsel. I should just say that I adopt Mr. Cush's submissions and that means I can shorten my submissions today. I'll make some particular references to some of the points made by Mr. Cush as I go through my own submissions. 11:47

But if the court just turns to chapter 4 which is where one finds both Article 25 and 26, it's internal page 45. One finds here --

MS. JUSTICE COSTELLO: Sorry, I think I'm in the wrong document, which tab is it again? 11:47

MR. MAURICE COLLINS: I believe it's Tab 5. Sorry, it's Tab 4, I'm sorry.

MS. JUSTICE COSTELLO: Yes.

MR. MAURICE COLLINS: I beg your pardon.

MS. JUSTICE COSTELLO: Yes, I had the wrong one. And it's 45, is it? 11:47

MR. MAURICE COLLINS: 45. '25' the court is familiar with.

MS. JUSTICE COSTELLO: Yes.

MR. MAURICE COLLINS: But can I just bring your attention to paragraph, sorry sub-Article 2. Because this tells us what are the elements of adequacy of protection for the purposes of Article 25: 11:48

"*The adequacy of the level of protection afforded by a*

third country shall be assessed in the light of all of the circumstances surrounding a data transfer operation or set of data transfer operations. Particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin, country of final destination."

And then I emphasise particularly: "*The rules of law both general and sectoral in force in the third country in question and the professional rules and security measures which are complied with in that country.*" 11:48

And that is, to use Mr. Collins' phrase on Day 1, *"directed to the legal order of the third country"*. 11:49 And there's no dispute about that.

The premise of Article 25 is that when a third country is designated for the purposes of Article 25, data can be transferred to it because there is, to use the language of the clause itself, an adequate level of protection in that jurisdiction deriving from or principally deriving from the incidence of the legal order in that jurisdiction. 11:49

And that legal order in the receiving third country jurisdiction includes, and for the purposes of these proceedings it's a particularly important element of it, includes a remedial framework, a remedial régime in

the third country.

The court has heard submissions and heard significant evidence focussed on that question, the remedial régime in the United States, the effect -- the extent to which 11:50
it is an effective remedial régime and the extent to which, on the DPC's analysis, the extent to which it satisfies Article 47, substantively satisfies the requirements of Article 47 of the Charter. So that's Article 25. 11:50

Adequacy of protection is interwoven with the legal order of the country to which the data is being transferred. And we know, I think various figures have been, we have recited, I think, nine countries and 11:51
there are some regions as well such as Jersey and Guernsey that have been identified as countries the subject of Commission decisions designating them as countries in which there is adequate levels of protection, including, we saw yesterday, Israel and 11:51
Ms. Barrington gave the court the decision in respect of Israel.

I appreciate that the court has effectively ruled in its ruling on the admissibility of the amici 11:51
affidavits, that the court is immediately concerned only with the transfer of data to the United States under the SCC decisions.

MS. JUSTICE COSTELLO: Hmm.

MR. MAURICE COLLINS: But the court knows that SCC decisions are not geographically limited.

MS. JUSTICE COSTELLO: Yes.

MR. MAURICE COLLINS: And of course the vast majority, it doesn't matter whether there are nine states or eleven states, and I think those numbers are in various submissions, that are the subject of adequacy decisions under Article 25, the vast majority of jurisdictions outside the EU are not the subject of adequacy decisions. And I should just say, that doesn't mean that they are not adequate, it just means that they have not been assessed and certified, so to speak, as being adequate, and that's a point of some little importance to which I'll come back. 11:52 11:52

Then, looking at Article 26, one sees, it's described as derogations and there are a series of circumstances identified in Article 26 where a transfer of data or transfers of data may take place lawfully to a third country where there is not or where there has not been a finding that there is an adequate level of protection. 11:53

And, pausing there, that, I think, starting premise is accepted, at least nominally by the DPC, but it's a key point to understand: All of the transfers, the occasions of transfers permitted by Article 26 are ex hypothesi transfers to third countries where there is not an adequate level of protection, and I use that 11:53

shorthand, there is no finding of adequate protection.

So the transfers permitted by Article 26 all of them, and they are, as Mr. Cush brought you through yesterday, slightly differently structured. We're concerned with effectively Article 26(2) and Article 26(4) because they are related. There are many other circumstances in which transfers may occur identified in Article 26(1). But all of them have this common feature that they are transfers to a country where the data subject cannot look to the legal order in that jurisdiction for protection; or, perhaps to express it more correctly, that the legality of the transfer is not dependent upon there being an availability of judicial protection in the third country to which the data is transferred. 11:53 11:54 11:54

Looking again at, going back to 26 and looking at 26(2), you'll see:

11:54

"*Without prejudice to paragraph 1 a Member State may authorise a transfer or 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 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* 11:55

result from appropriate contractual clauses."

And then just for completeness I'll read 4: "*Where the Commission decides, in accordance with the procedure referred to in Article 31(2)."* 11:55

And that's a procedural requirement to engage with a committee for this purpose: "*That certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary members to comply with the Commission's decision."* 11:55

Now Mr. Cush has already addressed yesterday, and in my respectful submission addressed very persuasively, the textual literalist argument that the DPC makes in respect of Article 26. It says well, and Mr. Collins said this in terms in the course of his opening, well it refers to *adequate* safeguards, Article 25 refers to *adequate* levels of protection, that must mean the same thing as a matter of language. Mr. Cush has demonstrated that that isn't correct in terms of the different languages in which the Directive has been adopted, but it's also contradicted of course by the fact that Article 26(4) refers to *sufficient* safeguards. So that analysis clearly is not sustainable. 11:55 11:56 11:56

But, more fundamentally, it's wrong structurally and in

principle. There's just one other point about the language in the Directive of course. This is a Directive and then pursuant to the Treaty on the Functioning of the European Union, it's to Member States to translate this Directive into their own implementing acts, they have the choice as to form and methods under the Treaty. So it seems wrong in any event to say that the precise wording of the Directive is somehow to be given primacy. 11:56

But the whole premise and purpose of Article 26 is to facilitate and enable the transfer of data into jurisdictions where there *isn't* adequate protection. So it can't be the case that you read into Article 26 a requirement for adequate protection, because that's to effectively revoke or repeal Article 26 and to make it impossible to comply with and to make it impossible to use, and that's exactly what the DPC's construction of Article 26 and the SCC decisions does. It sets a bar for the reliance on SCC decisions that, as a matter of hypothesis, can never be satisfied. 11:57 11:57

MS. JUSTICE COSTELLO: Is the flip side of that, that if sort of 130 odd countries of the world can receive data, taking away eleven or nine or whatever it is, I'm not quite sure how many countries we have at the moment. 11:58

MR. MAURICE COLLINS: Ever changing I'm sure.

MS. JUSTICE COSTELLO: You can in effect come below the adequacy protection level, which is what the Directive

is overridingly seeking to achieve. I think one person, described in the context of a US situation, the exception that disproves the rule.

MR. MAURICE COLLINS: No, it's not that at all. There is a different protective mechanism provided for by Article 26 and this is what the Commissioner has failed to address her mind to. 11:58

It's not that transfers pursuant to SCCs are not protected or that the rights and interests of the data subjects are not protected, they are protected differently. And to look to see whether they are protected in the way that they would have to be protected if Article 25 was the mechanism whereby the transfer was occurring will yield only one answer as a matter of hypothesis. Because, if you look to an SCC transfer or the concept of SCC transfers, and you say, as the Commission does, and I'll bring you to the terms of her Draft Decision in that regard, you say well there has to be adequate protection in the jurisdiction to which the data is being transferred even though this is not an Article 25 transfer, it's an Article 26 transfer, means that you simply cannot satisfy that requirement as a matter of hypothesis because otherwise you would be transferring pursuant to Article 25. 11:58 11:59 11:59

I think the stenographers just want to change. And that's, I suppose, in a sense an obvious point, that if the premise and purpose of Article 26 is to enable the

transfer of data to jurisdictions that do not offer an adequate level of protection then if you say that Article 26 transfers or any subset of Article 26 transfers - and we're talking here about the subset labelled "SCC" - nonetheless can only be permitted if it can be shown that there's an adequate level of protection in the jurisdiction to which the data has been transferred, it means that Article 26 is effectively neutered. 12:00

It *doesn't* follow *at all* - and I want to emphasise that - it *doesn't* follow that one is saying that data can be transferred to the non-Article 25 countries in circumstances where there is no protection or inadequate protection, but it's to say that the protection under Article 26 is, of necessity, a different structure of protection. It's not protection deriving from the legal order of the third country - that's Article 25 - it's the protection - and I'm talking now about SCCs rather than any of the other subsets of Article 26 transfers - it's the protection deriving from the SCCs. That's the fundamental premise of Article 26(2). 12:01 12:01

And it follows, because it's a contractual remedy, that *nobody* could have thought or intended that somehow the contractual remedies would provide adequate protection in the sense in which that term is used in Article 25, because of the fact, as the Commission observes, 12:02

Commissioner observes - correctly, as far as it goes - in her decision, SCCs can't bind public authorities or government authorities or create remedies in courts in a legal order. So to say that that's the touchstone is clearly wrong. 12:02

And the remedies derive from the SCCs and they derive not *just* from the SCCs, but they derive from the SCCs and their interaction with the remedial structures that are required and available in the relevant EU Member State. And that's the fundamental point. It's *not* the case that data subjects whose data is transferred pursuant to SCCs have no legal or judicial remedy; they don't have that remedy in the third country, as they would have if one was talking about an Article 25 transfer, but they have the judicial remedy in the Member State of the EU and -- 12:03 12:03

MS. JUSTICE COSTELLO: So, for example, if your breach from which you were complaining was a wrongful retention or a failure to - what's the right word - eradicate... 12:03

MR. MAURICE COLLINS: "Erase" I think is the term du jour.

MS. JUSTICE COSTELLO: ... or erase is the word they use, erase the data which has been taken and is allowed to be held for a certain period of time and it's not being held -- if it was in a Member State or a company that -- a country that has an Article 25 designation, you could sue in that country and get that remedy in 12:03

those courts, but if it's a case where the data is being transferred under an SCC, you won't be able to get the relief of erasure if it's held by a third -- a governmental institution, but you'll have whatever remedies you may have under the SCCs in a Member State in --

MR. MAURICE COLLINS: Exactly. Exactly. And part of that remedial structure - and I'll come back to this in a little while - is, of course, the protection provided by the supervisory authorities in each Member State - here, the Data Protection Commissioner. So the Data Protection Commissioner has an important role in terms of the operation of the SCC structure, as we'll see when we come to see the recitals in the SCC decision. I'm only going to refer to the 2010 SCC decision, which I think is the one that everybody has been referring to.

But it follows from that analysis that I've offered to the court, if the court accepts it, and follows clearly and ineluctably that an assertion or even a finding that the level of protection in any given third country, to move it away from the United States for a moment and to make it more general, falls short of the standard of adequate level of protection in terms of Article 25 simply cannot indicate that there is a lack of protection or that there cannot be a lawful transfer pursuant to Article 26.

So it can't tell us -- and the court will have seen and no doubt the court will hear more of this, that in a sense the whole tenor of the Commission's draft decision -- the Commissioner's draft decision is to say, wrongly on two fronts - and I'll explain the other front in just a moment - that **Schrems**, the conclusions of the Court of Justice in **Schrems** effectively point to the conclusion that the SCC regime is invalid. And that's wrong on two quite different grounds. 12:05

The first is, of course, that the Court of Justice in **Schrems** made no finding as to the adequacy of the regime in the United States *at all*, rather its finding, apart from its finding about the availability of and the jurisdiction of the DPC, its finding was that the Commission had not effectively addressed its mind and made the relevant findings before it could make a valid Adequacy Decision. 12:06

But the second and perhaps more fundamental basis on which that approach is wrong is that even *if* it is correct that the United States does not provide an adequate level of protection, it doesn't in *any* sense point to the conclusion that the transfer of data to the United States pursuant to SCCs is invalid or even questionable. Because as I've sought to articulate, the fundamental premise of Article 26(2) and Article 26(4) and the SCC decisions that they enable is that the contract pursuant to which the data is transferred 12:06 12:07

can, in combination with the remedial regime available in the EU, provide sufficient protection to data subjects in terms both of substantive protection, i.e. restrictions applicable to the processing of data *and* the availability of remedies. And that's the precise point that's been made; we've referred in paragraph 13 of our submissions - it's not necessary for you to go to them - to a 1998 opinion of the Article 29 Working Party. 12:07

Mr. Cush brought the court through some of the transcripts of the DPC's opening yesterday where there has been, in my respectful submission, a significant conflation of Article 25 and 26 by virtue of the insistence that adequate protection in the sense in which that term is used in Article 25 must be read into Article 26, even though to do so renders Article 26 effectively null and void as a useful piece of legislation. 12:08

There's also a confusion, in my respectful submission, on the side of the DPC as between two issues - and again it's perhaps the same point expressed slightly differently - between the *level* of protection that is required in respect of data transfer and *how* that protection is achieved. And what the DPC is effectively saying to the court is that the protection that is required by the Directive, even in respect of Article 26 transfers, is the adequate protection 12:08

provided for by Article 25, the protection deriving from the legal order of the third country to which the transfer is taking place.

The SCCs were not and are not intended and could not have been intended to plug the gap or to remedy the inadequacy in third country protection, as counsel for the Commissioner contended on day six, pages 80 to 82. Nor is it the case, as Mr. McCullough suggested on the same day at page 114, that the point of the SCCs is to bring you back into compliance with the test that you have failed under Article 25. 12:09 12:09

In the first place, Article 26 is not available only where a country has, to use the language of Mr. McCullough, *failed* under Article 25, it is a freestanding separate regime for the transfer of data outside of the EU and perhaps a series of regimes, because the regimes are different. I'm talking again primarily about the SCC regime. Because - and we'll see this when we come to look at the draft decision - if you approach this on the basis of saying 'Well, this is an Article 26 transfer, but let's look at the adequate level of protection in the third country' and if you conclude, as the DPC concluded, that there was inadequate protection because of inadequacies in terms of the judicial remedies, then if you look to see whether the SCCs plug the gap or remedy the inadequacy, there can only be one answer and that is no, as a 12:10 12:10

matter of hypothesis.

But if that *is* the test - and it's not - if that is the test then Article 26 means nothing, Article 26(2)/Article 26(4), they mean nothing, they are chimeras; they carry with them the possibility, or appear to carry the possibility of... 12:11

MS. JUSTICE COSTELLO: I think he means pertaining to a chimera.

MR. GALLAGHER: Yes, I was just saying it was a west Cork pronunciation. 12:11

MR. MAURICE COLLINS: It's always particularly gratifying to provide Mr. Gallagher with a bit of fun.

MS. JUSTICE COSTELLO: Well, it's the rivalry between west Cork and Kerry. We can appreciate it's very important. 12:11

MR. MAURICE COLLINS: But seriously, what it involves is effectively to hold out this imaginary basis for transferring data but which, as a matter of hypothesis, is never going to be available, *never*. Because if effective remedies in the third country, effective judicial remedies are a sine qua non for lawful transfer under Article 26(2) then it can *never* be satisfied. Because Article 26(2) is premised on a wholly different regime, not one dependant on the legal order of the third country *at all*. Article 26(2) creates a regime, or provides for a regime that operates independently of the legal order of the third country. 12:12 12:12

Now, there *are* points --

MS. JUSTICE COSTELLO: I don't think you could describe it as completely stand-alone, because --

MR. MAURICE COLLINS: No. 12:12

MS. JUSTICE COSTELLO: -- it is described as derogation.

MR. MAURICE COLLINS: Well, yes, it's a derogation. And that's what it is. A derogation does not mean that it is somehow qualified by Article 25 or subject to 12:13 Article 25. And it couldn't be. It is a derogation in the sense that the fundamental premise of Article 25, adequacy of protection in the member state -- or, sorry, the third country to which transfer has taken place, is not a requirement of transfer under Article 12:13 26. That's what that means. It doesn't mean and couldn't mean and no authority has been identified that could possibly provide a basis for saying that because it's a derogation, Article 26 is nonetheless somehow to be read as subject to the requirements that are in 12:13 Article 25. Then it wouldn't be a derogation at all.

So -- and the point is -- and there are, of course, intersections, and I'll come to that when I look at the SCC decisions and the SCC clauses. They provide for 12:13 and contemplate intersections between the parties under an SCC *and* the legal order to which data is transferred. But the point I'm making here is not that, but that the premise of Article 26(2) and (4) is

not in any sense dependant upon the availability of protection in the third country. And a moment's reflection indicates why that should be important. Because if it were otherwise, if it *were* the case - and in truth, and I'll come to this, this is the implication of what the DPC's analysis is - but if it *were* the case that transfers under the Directive can only take place to countries that have an adequate level of protection in the sense indicated in Article 25 and in the sense indicated by the Court of Justice in **Schrems**, then it would follow inevitably that *no* transfers of data could take place to vast parts of the trading world. 12:14 12:14

And if that, as I'll come to show, I hope, to the satisfaction of the court, if that is the logic that underpins, or if that is the consequence of the logic that underpins the draft decision of the Commissioner - as it *is* - then it's clearly wrong. It's clearly wrong to say that even where SCCs are involved, there must be adequate judicial remedies in the country to which the data is being transferred. And that's what the Commission says in its decision. 12:15 12:15

I emphasise that all of these submissions are made entirely without prejudice to the question of whether the protection in the United States is adequate - it's not intended to imply that it's not - but this is clearly an issue that goes beyond any particular 12:15

country. These SCC provisions in Article 26 and the SCC decisions are, in principle, capable of being relied on for transfers to every jurisdiction in the world.

Perhaps I'll just ask you to look then at the SCC decision. But before I do that, perhaps I'll ask you to look at the draft decision itself. And I'm sorry, all of the points that I'm making effectively are very closely related. I don't know if the court has that readily to hand? 12:16

MS. JUSTICE COSTELLO: I do.

MR. MAURICE COLLINS: Well, if the masochistic observer that would wonder whether this case was about Article 25 rather than Article 26 read this draft decision, he or she would've the same reaction perhaps, that this is a decision that concerns Article 25, because it spends so much time talking about adequacy of protection in the United States. And remarkably, the analysis of the adequacy question effectively takes up almost the entirety of the decision. 12:16 12:17

If the court turns to internal page 29, paragraph 60, this is the paragraph, the conclusionary paragraph in respect of the Article 25 adequacy of protection analysis: 12:17

"*For all of the reasons outlined above, therefore, I have formed the view, subject to consideration of such*

submissions as may be submitted in due course by the Complainant and Facebook that, at least on the question of redress" - and of course, that's what this case is about, redress - "*the objections raised by the CJEU in its judgment in Schrems have not yet been answered.*"

Now, that appears to reflect a misunderstanding of what **Schrems** decided and what its holdings related to.

"*It is also, in my view*" -- there's then two paragraphs, I think it's fair to say, two paragraphs of discussion of the SCCs and one further reference to them, and an important reference, in 64. But looking at 61, it says: 12:18

"*It is also my view that the safeguards purportedly constituted by the standard contract clauses set out in the Annexes to the SCC Decisions do not address the CJEU's objections concerning the absence of an effective remedy compatible with the requirements of Article 47 of the Charter, as outlined in Schrems. Nor could they.*"

And of course that's correct; they don't *have* to. That's where the DPC is wrong. But she's certainly not wrong in saying that they *could* not. Because of course, as a matter of hypothesis, they could not. 12:18

MS. JUSTICE COSTELLO: Yes, I've got that point. We don't need to re-firm that.

MR. MAURICE COLLINS: But the important point here is that where is the effective remedy being located by the DPC? It's located in the third country. It's the SCCs cannot provide an effective remedy in the United States. And that becomes clear as we read on: 12:19

"*On their terms, the standard contract clauses in question do no more than establish a right in contract, in favour of data subjects, to a remedy against either or both of the data exporter and importer. Importantly for current purposes, there is no question but that the SCC Decisions are not binding on any US government agency or other US public body; nor do they purport to be so binding. It follows that they make no provision whatsoever for a right in favour of data subjects to access an effective remedy in the event that their data is (or may be) the subject of interference by a US public authority, whether acting on national security grounds, or otherwise. On this basis, I have formed the view, subject to consideration of such further submissions... that the protections purportedly provided by the standard contract clauses contained in the Annexes to the Sec Decisions are limited in their extent and in their application.*"

So here we have a completely *negative* discussion of the SCC decisions and the clauses about what they do *not* do. There's no discussion whatsoever of what they *actually* do or *how* they are intended to operate and how

they provide for a judicial remedy.

"*So far as the question of access to an effective remedy is concerned, it is my view that they cannot be said to ensure adequate safeguards for the protection of the privacy and fundamental rights and freedoms of EU citizens whose data is transferred to the US.*"

Then:

"*Accordingly, I consider that the SCC Decisions are likely to offend against Article 47... insofar as they purport to legitimise the transfer of the personal data of EU citizens to the US in the absence in many cases of any possibility for any such citizen to pursue effective legal remedies in the US*" - in the US - "*in the event of any contravention by a US public authority of their rights under Articles 7 and/or 8... That being the case, I consider that the Complainant's contention that SCC Decisions cannot be relied on to legitimise the transfer of the personal data of EU citizens to the US in such circumstances is well founded.*"

So here is the Commissioner - and it becomes clearer, I'll just bring to you 64, where this is the first paragraph in just a short conclusions and findings section: 12:21

"*I have formed an the view, pending receipt of such further submissions... that a legal remedy compatible with Article 47... is not available in the US to EU citizens whose data is transferred to the US and whose personal data may be at risk of being accessed and processed by US State agencies for national security purposes in a manner incompatible with Articles 7 and 8... Against that backdrop, I consider that the SCC Decisions are likely to offend against Article 47 of the Charter insofar as they purport to legitimise the transfer of the personal data of EU citizens to the US notwithstanding the absence of a complete framework for any such citizen to pursue effective legal remedies* in the US."

So we can see *what* the decision here, the draft decision is. It is that there isn't adequate protection in the US because there isn't effective remedies. So therefore, there isn't adequate protection as that term is interpreted, explained in Article 25 and interpreted by the Court of Justice in **Schrems**. You look to see whether, to use the language, I think, that *was* used certainly by the court on day six, but I think summarising what had been said to it by counsel for the DPC, you look - this is according to the Commissioner - you look to see whether that lack of effective remedy *in the US* is a gap that can be plugged by the SCCs or whether, to characterise it in the language that Mr. Murray used on day six, whether that

12:21

12:22

inadequacy of protection, the lack of effective remedies *in the US*, is remedied by the SCC decisions. And the answer to that is no. And therefore -- and that's the premise on which the Commissioner concludes that the SCC, that she has doubts as to the validity of the SCC decisions and that's the doubt that she brings to *this* court and asks the court to effectively *share* the doubt for the purposes of making a reference pursuant to paragraph 65, I think it is, of the judgment of the court in **Schrems**. 12:22 12:23

So if those building blocks are wrongly placed, it follows that the doubt is not well founded. And if it's wrong, as I respectfully say it *is* wrong, to expect the SCCs to look to the SCCs to provide a remedy in the third country then it follows that the concern expressed by the Commission is misplaced. The Commission *hasn't* -- the Commissioner *hasn't* looked at or considered what the SCCs *do*, as opposed to identifying in uncontroversial terms what they don't do, what they don't seek to do and what they could not do. 12:23 12:23

And if that's correct, Judge, if the DPC's analysis is correct, it means that in every jurisdiction, every third country to which data is transferred pursuant to SCCs that, quite apart from *complying* with the requirements of Article 26 and with the requirements of the SCC decisions and with the contractual clauses that 12:24

they provide for, that transfers can *only* take place *if* there is adequate legal protection -- adequate level of protection in that third country, including an Article 47 compliant remedial regime. Which means that the Treaty and/or the Charter and/or the Directive is to be interpreted as meaning that there can be no transfer of data from the EU to any *other* country unless that country has an Article 47 compliant remedial regime. 12:24

And if that were so, clearly it would mean -- and it may be the answer to that, it might be said, is, well, if that is so, so be it. But if that is so, it means that effectively the transfer of data from the EU is now limited to nine or ten countries. But it also frustrates the purpose of the Directive, which is to enable the transfer of data and it gives to Article 47 an extra-territorial effect that certainly nothing that has been urged on the court to this point in the proceedings provides a basis for asserting. 12:25 12:25

But more fundamentally than that again in terms of the structure and purpose of the Directive, it wholly disregards the careful structure, the distinction between Article 25 and 26, the identification in Article 26(2) and (4) of the possibility that appropriate contractual clauses will provide adequate safeguards, to use the language of (2), sufficient safeguards, to use the language of subarticle (4). 12:26 12:26

Can I ask you at that point to turn to the SCC decisions? Sorry, the decision is at, I think, tab 10 of the same core book. And I know the court has been brought to this, but can I just ask you to look at recital 11 in the first place? Because it's wrong to think that the protection given by Standard Contractual Clauses is *just* a contractual protection, because as is emphasised here, it interacts with the statutory powers and functions of the supervisory authority - here, in this jurisdiction, the DPC. 12:27 12:27

"*Supervisory authorities*" - I'm reading from 11 - "*of the Member States play a key role in this contractual mechanism in ensuring that personal data are adequately protected after the transfer. In exceptional cases where data exporters refuse or are unable to instruct the data importer properly, with an imminent risk of grave harm to the data subjects, the standard contractual clauses should allow the supervisory authorities to audit data importers and sub-processors and, where appropriate, take decisions which are binding on data importers and sub-processors. The supervisory authorities should have the power to prohibit or suspend a data transfer or a set of transfers based on the standard contractual clauses in those exceptional cases where it is established that a transfer on contractual basis is likely to have a substantial adverse effect on the warranties and obligations providing adequate protection for the data*

subject."

Then there are some recitals that Mr. Cush brought the court through yesterday. And I'm going to -- oh, I'm sorry, this is the decision. I'm sorry. There are recitals which address the enforceability of the SCCs, that's recital 19: 12:28

"*Standard contractual clauses should be enforceable not only by the organisations which are parties to the contract, but also by the data subjects, in particular where the data subjects suffer damage as a consequence of a breach of the contract.*"

And that's a fundamental aspect of the SCCs. It's not just that there are protective or restrictive obligations imposed as between exporter and importer, but the data subject is given, exceptionally is given a standing to enforce those obligations, including standing to seek damages for their breach. And that's emphasised in recital 20: 12:29 12:29

"*The data subject should be entitled to take action and, where appropriate, receive compensation from the data exporter who is the data controller of the personal data transferred. Exceptionally, the data subject should also be entitled to take action, and, where appropriate, receive compensation from the data importer in those cases, arising out of a breach by the*

data importer or any sub-processor under it of any of its obligations referred to in the paragraph 2 of Clause 3, where the data exporter has factually disappeared or has ceased to exist in law or has become insolvent."

And then:

"*Exceptionally, the data subject should be also entitled to take action, and, where appropriate, receive compensation from a sub-processor in those situations.*"

So we see here some of the key elements of the SCC protection regime. There are clauses which limit the transfer of data and/or impose obligations in respect of its processing and those clauses are enforceable by the data subject, we'll see enforceable in the Member State of the data exporter and, as we've seen in recital 11, the SCC decision itself is emphasising the important role - the key role, to use the language of recital 11 - that supervisory authorities play. 12:30 12:30

And it becomes clear that the premise of Article 26 SCC transfer is fundamentally different to the premise of Article 25 transfer. It involves contractual protection in respect of which there is a remedy in the exporter's Member State, both in terms of the role and power of the supervisory authority and also in the 12:30

availability of judicial remedies where there has been noncompliance.

So when the Data Protection Commissioner asked the question 'Do the SCCs and the SCC decisions plug the gap in the remedial regime in the United States?', she's asking the wrong question, because the SCC decisions are premised on *EU* protection, *EU*-located protection in the Member State of the data exporter and, exceptionally, remedies *in* the Member State against the data *importer* also in the circumstances set out in the SCC decisions. And the DPC has just never addressed her mind to that. It's not referred to in the decision. The decision simply looks at the question of remedy and adequacy of remedy in the US and the DPC says nothing about what the SCCs do or how they operate. Rather, she says that they *don't* operate to plug the gap or to give effective judicial remedy in circumstances where she has concluded that there is not otherwise effective judicial remedy in the United States. 12:31 12:32 12:32 12:32

Then the proper choice of law is addressed in recital 22:

"*The contract should be governed by the law of the Member State in which the data exporter is established enabling a third-party beneficiary to enforce a contract.*"

And that's, of course, a choice of law that brings with it, as we'll see explicitly in the terms of the SCCs themselves, the EU-derived national law concerning the protection of data protection -- sorry, protection of data and privacy. 12:33

Looking then at the articles of the decision itself:

"*The standard contractual clauses*" - Article 1 - "*set out in the Annex are considered as offering 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 as required by Article 26(2)...* 12:33

Article 2

This Decision concerns only the adequacy of protection provided by the standard contractual clauses set out in the Annex for the transfer of personal data to processors. It does not affect" --

MS. JUSTICE COSTELLO: I beg your pardon, which are you reading from?

MR. MAURICE COLLINS: I'm terribly sorry, I'd moved to just Article 2 of the... 12:33

MS. JUSTICE COSTELLO: Thank you. Sorry. I have that.

MR. MAURICE COLLINS: And I don't think I need to read any more of Article 2. Then there are the definitions

in Article 3, including the definition of supervisory authority. And the supervisory authority in this jurisdiction, Article 28 of the Directive, we'll see a reference to that in just a moment in a decision amending this decision, the decision that dates from December of 2016 that the court has heard of. 12:34

Article 28 is the provision of the Directive, I didn't open it, but it's the provision of the Directive that requires supervisory authorities to be given very extensive powers in order to enforce the data protection rights of data subjects. And that's, I think -- the corresponding provision in this jurisdiction, or at least *part* of the corresponding provision is Section 11 of the Act, as amended. 12:34

Then you'll see a definition of applicable data protection law at clause (f), second column on that page:

"*'Applicable data protection law' means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established.*"

So that is effectively the Data Protection Acts in *this* jurisdiction and whatever other laws that there are

that are applicable to protecting the fundamental rights and freedoms and in particular the right to privacy with respect to the processing of personal data.

12:35

Then if one goes to the clauses themselves, which begin on the next page, you'll see a definition of the applicable data protection law, which is in the same terms as the decision itself. And then you'll see - and I don't want to dwell on the detail of this - 12:35 you'll see in clause 3 the third party beneficiary clause that gives effect to the recital that data subjects should be free to enforce these obligations. Then clause 4 provides for the obligations of the data exporter: 12:36

"*The data exporter agrees and warrants:*
(a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law" - i.e. the Data Protection Acts in this jurisdiction - "*(and, where applicable, has been notified to the relevant authorities... where the data exporter is established) and does not violate the relevant provisions of that State;*
(b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data

transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses."

And so on and so forth in the following pages. There are guarantees of technical and organisational security, the -- 12:36

"*(d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss.*"

And so on. And That it will ensure compliance with 4(a) to (i). And then obligations of the data importer in Clause 5: 12:37

"*The data importer agrees and warrants:*
(a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
(b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and

that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer..."

Then you'll see in the footnote, and I think Mr. Gallagher brought the court's attention to this in his opening remarks, reference to mandatory requirements of the national legislation, which is legislation in the third country. 12:37

Then there are further obligations imposed on the data importer by the remainder of Clause 5. And then Clause 6 provides for liability in terms of damages - an important protection for data subjects obviously. And then there's a mediation and jurisdiction clause in Clause 7. And if there's a dispute, at the option of the data subject, there can be a mediation of that dispute or there can be a reference to the courts in the Member State. And the final part of that jigsaw is clause 9, which provides that the governing law shall be the law of the Member State - which, of course, includes the data protection laws themselves. 12:38 12:38 12:39

Going back then, if I may, to the decision, because I just want to bring you to Article 4, which has changed subsequently. You'll see that as --

MS. JUSTICE COSTELLO: Sorry, the decision of -- not the draft decision?

MR. MAURICE COLLINS: No, of the same document, sorry. It's page eight.

MS. JUSTICE COSTELLO: Yes. 12:39

MR. MAURICE COLLINS: Article 4 provides that:

"*Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to Chapters II, III, V and VI of Directive 95/46/EC, the competent authorities in the Member States may exercise their existing powers to prohibit or suspend data flows to third countries in order to protect individuals with regard to the processing of their personal data in cases where.*"

And number of examples are given. And the first of those is perhaps the most important:

"*It is established that the law to which the data importer or a sub-processor is subject imposes upon him requirements to derogate from the applicable data protection law which go beyond the restrictions necessary in a democratic society as provided for in Article 13 of Directive 95/46/EC where those requirements are likely to have a substantial adverse effect on the guarantees provided by the applicable data protection law and the standard contractual clauses.*"

And just for completeness, the other occasions on which there may be an intervention is where:

"*(b) a competent authority has established that the data importer or a sub-processor has not respected the standard contractual clauses...*
(c) there is a substantial likelihood that the standard contractual clauses in the Annex are not being or will not be complied with and the continuing transfer would create an imminent risk of grave harm to the data subjects."

And that has changed and has become a much simpler provision that we'll look at in just a moment. But this was the provision at the time of Mr. Schrems' reformulated complaint and at the time of the draft decision made by the DPC. And the DPC -- one of Mr. Schrems' complaints is that the DPC never had regard to Article 4. And we echo that complaint, though perhaps from a slightly different perspective. Because we respectfully submit that *no* assessment of the SCC decisions for their validity having regard to provisions of the Charter could *conceivably* take place properly without having regard to the terms of the SCC decisions and, in particular, this term giving very significant power to the supervisory authority to step in in the event that it appears that transfers of data under the SCC decisions may, to use the language, be

12:40 12:41 12:41

subject to requirements to derogate which go beyond the restrictions necessary in a democratic society.

I mentioned earlier on that Mr. Schrems in fact, in his written submissions, *explicitly* says that he doesn't regard (A) that he'd never complained of the invalidity of the SCC decisions; (B) that he wasn't contending now that they were invalid; but (C), and perhaps in this particular context most importantly, that he in fact accepts that they are *not* invalid. And that's at paragraph 72 and 73 of Mr. Schrems' written submissions. 12:42 12:42

And he refers to Article 4 as an inbuilt pressure valve whereby national authorities retain power to suspend data transfers. And that's obviously true. He suggests that that's a power that the Commissioner should've used in this case. We disagree profoundly with that. But what is clear is that no assessment of the compliance or compatibility of the SCC decisions with the Charter could properly overlook the important role of the supervisory authority, not just under Article 4, but generally. But that is what has occurred here. And rather remarkably, what the DPC has said in response to that complaint is to say 'Article 4 isn't relevant, because I *didn't* have regard to it in my draft decision', which is not an excuse for, or an explanation, in truth, but rather an *admission* of fault. 12:43 12:43

But that's not to ask the court to pluck Article 4 out and focus on it to the exclusion of the other provisions of the SCC decisions or the protections provided by the SCC clauses themselves. There's a whole regime of protection provided for in terms of restrictive obligations on data exporters, importers and provisions for access to the supervisory authority and access to the court of Member State in which the data exporter is located, all of them intended to ensure, to use the language of Article 26(2), that there are adequate safeguards, or, to use the language of Article 26(4), that there are sufficient safeguards for data subjects. And the Commissioner simply never looked at that, never assessed that, never considered the adequacy of those safeguards. 12:44 12:44 12:45

Rather, she mistakenly looked to Article 26(2) for the same protection, not just the same *level* of protection, but the same *kind* of protection that is the premise of Article 25. Not finding that, because it's not there and wasn't intended to be there and couldn't be there, she then comes to court expressing doubts about the validity of the SCC decision, which, in my respectful submission, the court should not endorse and should not share within the meaning of Article 65. 12:45 12:45

Then I was going to bring you now to the 2016 decision, which I think is at tab 14 of that book. This was

adopted --

MS. JUSTICE COSTELLO: 14 did you say, or 16?

MR. MAURICE COLLINS: 14, I think, Judge. I've got 14 written down

MS. JUSTICE COSTELLO: 16th December 2016, yes. 12:46

MR. MAURICE COLLINS: Yes. This was adopted but, I think, published -- adopted before, but published after we put in our written submissions, which is why there's no reference to this in our written submissions, just so the court knows. And it's a very brief decision 12:46 which effectively replaces all of Article 4 that we've just looked at. But the reason, it's important to understand the reason why Article 4 is being replaced; it's because of a concern that in light of the **Schrems** decision, which didn't concern Article 26, of course, 12:47 or the SCC decisions, but where the court condemned what it said were the language that unduly restricted the rights of supervisory authorities to intervene in Article *25* cases.

12:47

So you'll see here, and this is referenced in the recitals, the Commission looked again at Article 4 and took the view, whether rightly or wrongly - it's certainly disputable I think - took the view that the manner in which Article 4 was formulated might be seen 12:47 to be subject to the same criticism. In other words, that the power of the supervisory authority to intervene might be seen to be unduly restricted by the language of Article 4.

So what this decision does is to replace Article 4 with a very short provision which the court will see on the second page, which says: "*Whenever the competent authority*" -- it replaces Article 4 in two separate SCC decisions. Article 2 is the one that deals with the decision we've just been looking at. Article 4: 12:48

"*Whenever the competent authorities in Member States exercise their powers pursuant to Article 28(3)... leading to the suspension or definitive ban of data flows to third countries in order to protect individuals with regard to the processing of their personal data, the Member State concerned shall, without delay, inform the Commission, which will forward the information to the other Member States.*"

And it's clear that the intention of that is to not in any way to restrict or to have a provision in the SCC decision that appeared to restrict the powers of the supervisory authority under Article 28. So I don't believe that in fact the position changes significantly or at all. But what *is* clear is that this certainly does not restrict the power of supervisory authorities. And therefore, the point that I made by reference to Article 4, that it reflected a very important protection because the supervisory authority had that power is a fortiori as a result of this; it simply makes it clear that Article 28 is the source of the 12:48 12:49

power and nobody could suggest that what *was* in Article 4 of the SCC decision in 2010 was somehow a cutting down of the power, the general powers of the supervisory authority under Article 28 of the Directive. 12:49

Can I just ask you then to turn briefly to the legal submissions of the DPC? And they're in book 12 I think it is, Judge.

MS. JUSTICE COSTELLO: Yes. 12:50

MR. MAURICE COLLINS: If the court turns to internal page 40. This document, just as the draft decision of the Commissioner before it does, spends most of its efforts addressing the question of adequate protection. And then at paragraph 40 -- or, sorry, I beg your pardon, *page* 40, there are four paragraphs addressing the SCCs, one of which is no more than a quotation from the decision itself. 12:50

So paragraph 122 says: 12:50

"*Turning then to the SCCs themselves, which arose for consideration following this provisional assessment.*

123. Complaint is made by Digital Europe as to the brevity of the Commissioner's conclusions on the SCCs, although, the basis for this complaint is unclear given that the Commissioner's logic is compelling."

And then there is a quotation from, I think, either paragraph 61 or 62.

"*Furthermore, in practice, given the lack of knowledge noted above of unlawful processing, and in the absence of proof of same... the remedy contemplated by Clause 6 of SCC Decisions may not be available to a complainant like Mr. Schrems in any event, because the relevant data controller would unquestionably contend that it could not be shown that it had even breached the SCCs, such as to trigger a remedy under the SCCs.*"

I'm not sure what that's intended to mean. But what's clear is that this was not something that the Commissioner ever considered. The Commissioner *never* considered whether the remedies available under the SCCs themselves were adequate or not, and this is effectively a brief and ineffective retrofitting. 12:51

But then at 125 there's a paragraph which says: 12:52

"*In any event, there is a certain tension in the position adopted by Facebook Ireland, Digital Europe and BSA: Anxious to highlight the inadequacies of the systems of protections in the Member States, while claiming that remedies for breach of SCCs in national courts pursuant will address any concerns.*"

Well, that's, with respect, a debating point. It

certainly is true that the submissions of Facebook and the BSA, and to a lesser extent perhaps Digital Europe, *observed* that what was *complained of* in terms of accessing data in the United States and gaps in the judicial remedy system was also to be found or to be observed in Member States. But that doesn't take away from the point that the premise, the *premise* of the Directive and of the SCC decisions is that (A) there's an *adequate* remedy in the *EU* in respect -- or, sorry, there's an adequate protection in the *EU* for data and that there is an adequate remedy *in the EU* for any breach of the SCC. 12:52 12:53

And then --

MS. JUSTICE COSTELLO: Because if the Member States haven't so provided then they're in breach of their obligations under the Directive? 12:53

MR. MAURICE COLLINS: Absolutely. Absolutely. The panoply of protection is available by virtue of the provisions of the SCC that I've brought the court through. National law applies to the contract, there is access by virtue of the third party beneficiary clause, access by the data subject to remedies and then there's a provision providing for, as you'll have seen, at the election of the data subject, recourse to mediation or to the courts of the Member State of the data exporter. 12:53 12:53

So as I say, this is, I suppose, an attempt to at least

address this issue, but it's one that's far too late and far too inadequate to make any difference to the fact or to alter the fact that the court is asked to make -- to endorse the doubts expressed by the Commissioner, doubts about the validity of the SCC decisions, in circumstances where there was no consideration - none - *no* consideration given by the DPC as to what *were* the remedial -- what *were* the protections provided by the SCC decisions. The only reference to the SCC decisions in the decision are references to what the SCC decisions *don't* do, what they don't purport to do and what they can't do. 12:54 12:54

Then the next portion of the submission addresses the complaint made both by my client - you'll have seen this in our written submissions - and by Mr. Schrems, though obviously from perhaps rather different perspectives, of the failure to assess, inter alia, the effect of Article 4. And that's the point that's now addressed at 127: 12:55 12:55

"*Mr. Schrems takes issue with this approach, asserting - erroneously and without any basis in the Draft Decision itself - that the Commissioner has actually determined that the conditions supporting a suspension of data... pursuant to Article 4(1)... are satisfied.*"

Now, we don't accept that for a moment. And we've explained why in the written submissions.

"*Meanwhile, while emphasising their distance from Mr. Schrems on the facts of this case, BSA supports Mr. Schrems' more general reliance on Article 4(1), as evidencing the capacity of the SCC Decisions to address the problem identified by the Commissioner in the Draft Decision, and their consequential validity.*"

That's not *quite* a comprehensively accurate statement of our position. The point we're making is that Article 4 is one part of the mechanism or regime, combined with the remainder of the SCC decisions, combined with the clauses, combined with recourse to the supervisory authority, combined with recourse to the judicial authorities of the Member State that collectively - and it must be understood as a collective or cumulative regime - provide adequate safeguards within the meaning of Article 26. 12:56 12:56

MS. JUSTICE COSTELLO: And you use the word "adequate" there because you're dealing with 26(2), rather than "sufficient", which is 26(4)? 12:56

MR. MAURICE COLLINS: "Sufficient". I respectfully adopt and endorse what Mr. Cush said yesterday on this point, that it's wrong, a wrong approach to the interpretation of European law, Acts of the EU in *any* event to focus on this literal approach. But it's clear from internally in Article 26, in the *English* translation, that it effectively uses "adequate" and "sufficient" as synonyms and it's clear from the 12:57

translation -- or not the translations, from the other language versions that Mr. Cush referred to yesterday that in other languages the equivalent of "sufficient" has been used in Article 4(2).

12:57

So the question then, one which the Commissioner *never* asked herself, is: Well, is *this* sufficient? Is this sufficient or is it adequate? Not in the sense that she posed the question in her decision, but in the sense of saying 'Well, this is how the regime in respect of SCCs 12:58
operates, these are the incidents of it, these are the obligations that are imposed on exporters, these are the obligations that are imposed on *exporters*, these are the mechanisms whereby those obligations can be enforced or, in respect of breaches of those 12:58
obligations, compensation can be sought and obtained'.

Is that adequate? Is that sufficient? And the answer to the question is yes, we respectfully say. But it's not a question that the Commissioner ever asked herself, 12:58
it's not an analysis that she ever even *began*, still less did she come to a concluded view on it. And yet the court is asked to refer the question of the validity of the SCC decisions to the Court of Justice, where the only party to the proceedings that has doubts 12:59
about that - because Mr. Schrems doesn't and Facebook doesn't - where the only party that has doubts never *actually* considered the SCC decisions. It's quite astonishing.

And the answer to that isn't 'Well, the court can look at the evidence in the case and may have its own doubts about something else'. Because this isn't a question of aspects of adequacy or inadequacy in the United States, this is a much more fundamental and prior question, whether the Commissioner has actually conducted an investigation or an analysis of the SCC decisions and the SCC regime clauses - and bearing in mind, as Mr. Schrems forcefully emphasises in his written submissions, the primary complaint he makes is not in fact *at all* about the SCC decisions, still less about their validity, he makes a complaint that the data transfer agreements that Facebook are using don't comply with the SCC clauses. 12:59 12:59 13:00

So how *that* complaint - and it's characterised in the written submissions and his affidavit as the primary or principal or major or significant complaint - how that complaint can lead to a situation where a decision is taken, a draft decision is taken by the Commissioner that engages with the validity of the SCC decisions but without ever engaging with the SCC decisions and which manifestly looks to the decisions to do something which they were never intended to do and has doubts about their validity because of their failure to do that which they were never intended to do and which they couldn't do and asks the court then to share those doubts? In my respectful submission, they're simply the 13:00 13:00

first and fundamental premise that would have to be here before the court could do that, would be an investigation that actually - *actually* - looked at the SCC decisions.

MS. JUSTICE COSTELLO: Perhaps we'll take that up at two o'clock. 13:01

MR. MAURICE COLLINS: Yes. I'll be 10 minutes or 15 minutes at most.

(LUNCHEON ADJOURNMENT) 13:01

THE HEARING RESUMED AFTER THE LUNCHEON ADJOURNMENT AS FOLLOWS

MS. JUSTICE COSTELLO: Good afternoon.

REGISTRAR: In the matter of Data Protection Commissioner -v- Facebook Ireland and another. 14:02

MR. MAURICE COLLINS: May it please you, Judge. I'll be very brief in conclusion. There was just one aspect of the submissions of the Commissioner that I had intended to open, I opened some of it you will remember, but just to deal very briefly with what was said about Article 4. 14:02

It is internal page 41 and then into 42 and 43.

MS. JUSTICE COSTELLO: Yes. 14:03

MR. MAURICE COLLINS: I had read, I think, 127 and then at 128 there are a number of reasons here offered as to why Article 4 is essentially not relevant so far as the Commission is concerned. 128 says: 14:03

"*It is not open to Mr. Schrems to pursue these objections in circumstances in which they do not arise from the Draft Decision and from which Mr. Schrems already canvassed his objections to the court, notwithstanding the court made directions for the proceedings to continue.*" 14:03

Now that addresses or may be thought to address or intended to address an aspect of Mr. Schrems'

criticisms which was that there was no need for these proceedings at all and there was some debate about that at an earlier stage of the proceedings.

But what's clear, if the Commissioner is coming to this court and saying that she has doubts which she wants to court to endorse as well founded doubts about the SCC decisions, then, to use the language that Mr. McCullough used I think in his course of his submissions on Day 6, she can't *create* the necessity for a reference by ignoring or disregarding parts of the SCC decisions and saying 'well if you ignore these provisions, this is the position and there are doubts'. 14:03 14:04

So far from that being the appropriate approach, it's clear in our respectful submission that no assessment of the SCC decisions could properly have been undertaken without the Commissioner having regard, inter alia, to Article 4, and so far from assisting or supporting the assertion that it's necessary to make a reference, in fact the failure to have regard to Article 4 undermines the analysis that is relied on to suggest that there are doubts in the first place. 14:04 14:04

In 129 it addresses another aspect of Mr. Schrems' submissions to the effect that the conditions for exercising powers under Article 4(1) were satisfied. I respectfully agree with the Commissioner that that is not the case and it's not something that she has given 14:04

any consideration to. Then there's a reference to the fact that Article 4(1) was amended, and I brought you through that version, the change adopted in December 2016. There's a highly, a hyper technical point made in 131.1 that the Commissioner's concerns don't relate to requirements. 14:05

It's very difficult to understand because, as I understand it, the concerns are that there's accessing going on in respect of which there is no remedy, and so clearly, if the Commissioner is correct, that is something that would potentially come within Article 4(1). And then there's a suggestion that it wouldn't be appropriate by virtue of considerations of equal treatment to exercise powers under 4(1), but that can't be correct in my respectful submission. Article 4(1) is there for a reason, just as all the other provisions of the SCC decisions are there for a reason. 14:05 14:06

And the final --

MS. JUSTICE COSTELLO: So is it your client's view that it is permissible for a national authority, it doesn't have to be this national authority, in any of the Member States to make an order either suspending or prohibiting a data flow against one exporter of data? 14:06

MR. MAURICE COLLINS: There's no question about that, no question. And, not even that, in respect of, because any assessment would involve an assessment of a

particular contract and a particular circumstances of transfer pursuant to a particular contract. So it could be in respect of *a* particular contract, not just the same identity at the end of it but different contracts. 14:07

That's exactly the sort of power that is an aspect, and again I don't want to suggest that the court or that the Commissioner should have focussed exclusively on Article 4, but rather that this was part, this was an 14:07 important part of the overall protection régime that is contemplated by Article 26(2) and (4) as being adequate and for which the SCC decisions adopted pursuant to Article 26(2) and (4) make detailed provision. 14:07

And the final point that's made in respect of Article 4 is that it has been changed, but it is suggested that the change doesn't impact in any material way, which is, on the face of it, slightly odd because the wording of Article 4 is relied on in 131.1 as being a reason 14:07 why the Commissioner mightn't have considered it appropriate to rely on it, though in fact we know that she didn't address it at all; and then it is suggested that, even when those words relied on in 131.1 are removed, that it doesn't make any difference. 14:08

So in my respectful submission this is just illustrative of the fact that the springboard for this reference, or the springboard for the reference that

the court is invited to make, is one which is not premised on any adequate investigation of the SCC decisions and it is predicated rather on the mis-application of the concept of adequate protection in Article 25 to Article 26 and to the SCC decisions and to a conception of the role of the SCCs that effectively involves an importation into Article 26 of this requirement that is an integral feature of Article 25 but which is not a feature of any of the channels of transfer provided for in Article 26 and which in fact the absence of it is the premise for all of those permitted channels of transfer under Article 26. 14:08 14:09

And then that just brings me very briefly to the question of whether there should be a reference, and in truth I have addressed that question already, Judge. But it is, I suppose, as I said at the start of my submissions, unusual at least for the court to be invited to make a reference in respect of a dispute in which the requester for the reference is not a party or to which it is not a party and where the parties themselves are, from their own different perspectives, strongly of the view that no reference is required. 14:09 14:09 14:10

Mr. Schrems, and Mr. McCullough didn't shrink from any of these or resile from the position adopted in the written submissions when he made his oral submissions on Day 6, Mr. Schrems in the course of his written

submissions variously describes the application for a reference as hypothetical, unnecessary, at the very least premature, currently unnecessary, misconceived, and they are just paragraphs 15 and 64. He makes it clear that he has never raised objections or to challenges the validity of the SCC decisions, that's paragraph 17 of the written submissions. He says that the central point of his complaint was the non-conformity of the relevant clauses of the Facebook data transfer agreement with the SCC decisions and in particular the decision we've been looking at, decision 2010/87, that's paragraph 37 of his written submissions, he says that there's no need to determine whether the SCCs are valid, and again that the reference, the suggested reference is unnecessary, that's paragraph 53. Then I have referred already to paragraph 72 and 73 where he says positively to the court that the SCC decisions are *not* invalid, that they are *valid* by virtue, inter alia, of Article 4.

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Facebook has made its brief oral submissions and in its written submissions it equally says to the court that the dispute that it is a party to does not require engagement with the validity of the SCC decisions and does not warrant a reference to the court.

14:11

And the court then, I think, needs to look very long and hard to see whether in those circumstances a necessity for a reference arises. And the necessity,

and I think it is suggested to be a necessity, a necessity is said to arise by virtue of the court being invited to share the well founded fears of the Commissioner. Reliance is placed, as the court knows, on paragraph 65 of the **Schrems** decision and perhaps if we just look at that, I don't know if the court needs to look at it, but it's perfectly plain... 14:12

MS. JUSTICE COSTELLO: Is it Book 1 of the materials?

MR. MAURICE COLLINS: It could be, Judge, I am sorry.

MR. GALLAGHER: Book 2. 14:12

MS. JUSTICE COSTELLO: Thank you.

MR. MAURICE COLLINS: I am sorry, I just have it loose myself.

MS. JUSTICE COSTELLO: 65?

MR. MAURICE COLLINS: Yes. I suppose a notable feature of the Commissioner's approach to these proceedings is effectively to look at paragraph 65 as though it were a statutory provision. I don't mean that in any negative way, but that it's a blueprint and it is following this blueprint and it says to the court the situation that presents itself here is precisely that situation that was contemplated by the Court of Justice in paragraph 65. 14:12 14:13

MS. JUSTICE COSTELLO: Sorry, I have got the wrong book, let me just get the right book because that's the Irish version, the decision of Hogan J. 14:13

MR. MAURICE COLLINS: It may be just later on in that.

MS. JUSTICE COSTELLO: 36.

MR. MAURICE COLLINS: Sorry, it's in book 3 of 5,

I should have been able to tell you that, I am sorry for that, Judge,

MR. GALLAGHER: Sorry, Judge, my indices are different, it's in my book 2.

MS. JUSTICE COSTELLO: It doesn't matter, I should have remembered from the tablet. Yes, I have paragraph 65, Mr. Collins. 14:14

MR. MAURICE COLLINS: And perhaps I'll just read 64 just to put it in context:

14:14

"In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3), have access to judicial remedies enabling him to challenge such a decision adversely affecting before the national courts. Having regard to the case-law cited in paragraph 62 of the present judgment, those courts must stay proceedings and make a reference to the court on validity where they consider that one or more grounds for invalidity put forward by the parties, raised by them or of their own motion is well founded." 14:14 14:14

I think that's what the court was referring to in its conversation with Ms. Barrington yesterday. So that's the situation where a complaint is made and, where the complaint is rejected by the supervisory authority, there must be, and there is under the Data Protection

Acts an appeal to the circuit court, but there's also of course judicial review in this jurisdiction which was the route taken by Mr. Schrems in the first set of proceedings, in these proceedings.

14:15

And then in the converse situation, and this is where the DPC seeks to fit herself in.

MS. JUSTICE COSTELLO: Mm hmm.

MR. MAURICE COLLINS: "*Where the national supervisory authority considers that the objections advanced by the* 14:15 *person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to the processing of his personal data are well founded.*"

Can I just pause there. That seems to suggest that the 14:15 objections are objections that raise the validity of the EU instrument concerned. We're talking here about an adequacy decision but the principles apply equally to the SCC decisions. They are decisions in relation to the protection of data rights. The court is saying, 14:15 well if there are objections to the validity of that instrument and if the Data Protection Commissioner considers those objections to be well founded, she must bring them to court.

14:16

That's of course *not* the position that arose here, at least not in the sense that follows from the ordinary meaning of the words used there. Because Mr. Schrems says to the Commissioner and says to the court that he

never made a complaint directed to the validity of the SCC decisions and, rather, says to the court now that he does not assert their invalidity.

So the court, what is not happening here is the DPC bringing to court the concerns, or objections as the word is used in 65, that Mr. Schrems articulated to her. 14:16

Then the next sentence: "*It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded, i.e. the objections of the data subject that have been made to it and considered by it before the national court in order for them - sorry, the national courts in order for them, i.e. the national courts, if they share its doubts as to the validity of the Commissioner decision, to make a reference for preliminary ruling for the purposes of examination of the decision's validity.*" 14:17 14:17

Now, without adopting an overly technical approach to this, as I said the Commissioner has not brought doubts about the validity to the court, rather it has generated those doubts by virtue of its analysis of the complaint which doesn't accord with the nature and scope of the complaint. But, more importantly for the reasons that I have sought to articulate in the course 14:18

of the submissions, those concerns of the Commissioner, leaving aside for the fact that they are not shared by either of the parties to the complaint, are founded on an analysis that is simply incorrect, founded on an approach to the role of SCCs that is wholly wrong having regard to the distinction and clear distinctions between Articles 25 and 26, the circumstances in which they apply, the premises on which they operate, and on an analysis and investigation and Draft Decision, which is the foundation document so far as this court's jurisdiction is concerned, that's how it is put to you, it's the doubts expressed in the Draft Decision that the court is invited to endorse and indicate that it shares. 14:18 14:19

MS. JUSTICE COSTELLO: And do you say I'm confined to considering the doubts in that decision or, given that things have been expanded to some extent in this hearing, does the court have to consider the panoply of what's been engaged in? 14:19

MR. MAURICE COLLINS: Well, I'm not sure if that question can be satisfactorily answered in the abstract. Because one can imagine a situation where an issue is brought to court and there are other aspects of *that* issue amplified in the course of the hearing. But that's not the position here. Because there has been very significant evidence concerning the question of adequate protection. There's been very significant submissions concerning the question of adequate protection. But what hasn't changed is the fundamental 14:19 14:19

fact that the court is being asked to look at a decision which does not involve and which is not the product of any proper assessment of the SCC decisions and which is based, insofar as it expresses concerns about the SCC decisions, is based on a mis-application of the Article 25 standard of adequate protection to Article 26. And that's the only basis.

Even if there was room for the court to have, insofar as it was relevant to the issues, other doubts about the question of adequate protection in the US, for the reasons I have sought to articulate that is not and cannot be the determining factor in respect of Article 26 and in respect of the validity of the SCC decisions. Nothing that the court has heard by way of submission or by way of evidence has addressed that question. We've seen the paucity of reference in the submissions of the DPC, even after the exchange of submissions by the other sides and their opportunity to review the submissions of all of the other parties.

So what the court ultimately, and with respect to all of the very great learning that the court has had provided to it by way of evidence and by way of submission, evidence both in orally and in writing, in my respectful submission this case boils down to a series of very simple propositions: What is said to be invalid that requires a reference? It's the SCC decisions; why is it said to be invalid, or why are

they said to be invalid? Because it is said there isn't Article 25 adequate protection in the United States and it is said the function, the function of SCCs is to address that inadequacy, an inadequacy that is identified by the Commissioner as being a lack of 14:22
effective remedies in the US, and if the court concludes, as I respectfully urge it to do, that in fact that's simply a wrong framework of analysis, leaving aside for a moment any question about the existence of adequate protection, but if the court 14:22
endorses the submission I have made that it is entirely wrong to apply the standard of adequate protection and then to expect any deficiencies to be addressed by SCCs, because that's not what SCCs are about, that's not what Article 26(2) and Article 26(4) is about, then 14:23
the foundation stone for this application for a reference is gone.

And that foundation stone isn't replaced by any additional evidence or additional submissions that the 14:23
court may have heard concerning the question of adequate protection in the US. Because my submissions, and in my respectful submission the *correct* application of Articles 26(2) and Article 26(4), don't depend at all on there being adequate protection in the US 14:23
because, as I have explained no doubt perhaps at too great a length, the premise of Article 26(2) and (4) is that a sufficient level of protection is provided, is capable of being provided through the use of SCCs in

conjunction with the remedies that are available from supervisory authorities and the remedies that SCCs and the SCC decisions make available in the Member States.

In my respectful submission once the court, if the court follows that line of analysis and endorses it, then it follows that there simply is nothing to refer because all of the doubts that are said to arise are fundamentally dependent on a wrong premise which is that you look to see whether there is adequate protection and, if there isn't, you try and see whether the gap can be filled and in this case you look to the SCCs to see whether they provide an effective remedy in the US, of course they don't; and so if the court is with me on that then I don't believe that question of 'does the court look at the evidence concerning other aspects of US practice and perhaps decide that there are other issues concerning the question of adequate protection beyond those identified in the Draft Decision', that's perhaps much more a matter where there is perhaps a spectrum of possibilities. 14:24 14:24 14:24 14:25

But here the fundamental core of the finding is premised on a wrong interpretation of the SCC decisions, a wrong conception of their role and their function and, if the court concludes that that absolutely case, then there is simply nothing to refer. Because that is the foundational premise on which it is said that the SCC decisions are invalid, as is clear 14:25

from Articles -- sorry, paragraphs 61, 62 and 64 of the Draft Decision.

May it please the court.

MS. JUSTICE COSTELLO: Thank you very much. 14:25

SUBMISSION BY MR. GALLAGHER:

MR. GALLAGHER: May it please you, Judge.

MS. JUSTICE COSTELLO: Mr. Gallagher. 14:25

MR. GALLAGHER: Judge, with your permission we're going to divide our submissions. Ms. Hyland is going to deal with the following matters: The SCCs, the detail of those, some criticisms of the decision and how it is treated, various aspects of this case, the Convention 14:26
law that we say is relevant, the contents of the laws of the Member States insofar as it is relevant to the case, and by that I mean it is relevant but obviously on an overview level she will deal with the contents, and some of the detail of the Privacy Shield and I'll 14:26
deal with the balance.

Judge, I adopt Mr. Cush's submissions in their entirety. And, so far as Mr. Collins is concerned, I adopt them in their entirety with the exception of 14:26
his metaphorical masochistic observer to whom he seemed strangely attached, but apart from that I adopt them in their entirety.

I do believe that on their own the submissions put

forward by both Mr. Cush and Mr. Collins determine the issue and should lead the court to refuse a reference. But there is much more, with the greatest of respect, about the decision and about the matters that have been argued now at some length before the court which justify a refusal to refer. 14:27

Judge, as I said when I made my opening statement, and this is my client's very sincere view, that we have or my client has the greatest of respect for the Data Protection Commissioner and her office and the work they do, and I'm sure that's a respect that is shared generally by the people she regulates and the data subjects on whose behalf she does so. But I do have to say that there are some very serious deficiencies in this decision which not only vitiate the decision but actually remove the very basis of criticism on which the decision is premised and the basis of criticism on which the matter has been presented to the court, according to Mr. Collins as effectively somebody just coming to the court, putting the matter before the court for the court to review, I don't think that's ultimately perhaps how the case has run. But, be that as it may, the submissions that are put before the court, both written and oral, don't address the deficiencies in the decision but perpetuate them and just refuse to engage with the essential issues in this case. 14:27 14:28 14:28 14:28

One of the matters that is of particular importance is

the role of the national security exception, a matter on which I do intend to spend some time this afternoon because of its importance, a matter dealt with in three pages in a very cursory way in the initial submissions and then by way of a speaking note of 33 pages. 14:29

The fact that it's now dealt with in more detail doesn't actually alter the position because it doesn't engage, even those additional submissions, with the problematic issue that arises for this decision. But 14:29
it is remarkable that something that is so critical to the Directive and so critical to this case is dealt with almost as an afterthought at the end of the submissions and then it doesn't actually engage with the issues of significant importance that we say are 14:30
straightforward on the basis of the case law but which deprive the decision of its validity and deprive the DPC --

MS. JUSTICE COSTELLO: By decision you mean Draft Decision? 14:30

MR. GALLAGHER: Excuse me, the Draft Decision, and also undermine all of the concerns that you have been engaged in for the last 15 days. It's really a bedrock point. 14:30

And, before I come to it, I do just want to draw attention to a number of deficiencies in the decision that either I or Ms. Hyland will deal with, and, perhaps not in the order in which I will address them,

but just to enumerate them. Firstly, there is no engagement as such with the SCCs, as Mr. Collins has urged on the court, that's a very significant failure when this is about the SCCs; there is no engagement at all with national security, another fundamental point as I mentioned; the Privacy Shield is mentioned in footnote 22 as something that is expressly excluded from consideration, another major and fundamental defect. 14:31

The comparator that is used in assessing adequacy is the wrong comparator which leads to a fundamentally wrong provisional conclusion. There is a failure to consider adequately the issue of the substantive US laws and of course, I suppose prior and logic to that criticism, is the fundamental failure that you have heard so much about in failing to distinguish between 25 and 26 and applying the 25 test in that consideration of the substantive US laws. 14:32

Even in terms of the decision-making process, and of course it is designated a Draft Decision, and there's a statement that it's subject to consideration of further submissions, those submissions were never invited. It may be thought that the court process provides that opportunity, but it is certainly of concern, as Ms. Barrington argued on behalf of the US government, that submissions sent in by the US government are not addressed at all, that Facebook, who sent in the 14:32

submission given by Prof. Swire to the Belgian privacy authority, whether they were considered is not clear, but certainly no opportunity was given to comment on Mr. Serwin's report and then the focus is on remedies which was not anticipated. And of course the matter was coming to court in the way it was set up, but you may remember, Judge, and perhaps it's not critical now but it's still of some importance, that when the matter was brought before the court in July it was on the basis of an affidavit by Mr. O'Dwyer seeking that the matter be referred without delay to the European court and that had some significant consequences. 14:33 14:33

Because the application was made just before the Privacy Shield was finalised and the continuing failure to consider the Privacy Shield was being maintained, although it was obvious that it was about to be published at that stage. But in Book 1, I think it's divide 12, I don't intend opening it, Mr. O'Dwyer said that: 14:34 14:34

"*The Defendant's suggestion that it will be necessary for pleadings to close and for documentation to be furnished or discovered in advance of the hearing of the application for a reference were not accepted.*" 14:34

That was at paragraph 111. And at 112 of that affidavit, he said:

"*The views reached by the Commissioner of the Draft*

Decision will be the heart of the application for reference. The Draft Decision is self-explanatory and speaks for itself. If the Defendants or any amici disagree with the Draft Decision or any part of it, they will have an opportunity to indicate their position to the court in the context of the application for the making of a reference. No other procedural steps such as further exchange of pleadings or discovery are required to enable this exchange to take place and it is the Commissioner's position that the application for reference should proceed immediately upon the determination of the various amici applications."

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14:35

Perhaps, that reads rather strangely now in the light of what has happened and, to the credit of the Commissioner, she agreed that there be pleadings and it has come in a proper way before the court, but it is indicative of an approach and an artificial urgency that I'm afraid has had consequences for her decision-making process and for the substantive decision.

14:35

It is true that obviously the Commissioner has a very responsible job and must be seen to deal with matters in an expeditious way but not at the cost of properly addressing the very important issues that do arise in this case, issues recognised by her and referred to by Mr. O'Dwyer at paragraph 107 of that affidavit where he

14:36

identified the consequences of invalidity. He said:

"*According to some studies, if services and cross-border data flows were to be disrupted as a consequence of discontinuity of binding corporate rules - you have heard reference to them, I will come back to them - model contract clauses and the Safe Harbour, the negative impact on EU GDP could reach -0.8% to -1.3% and EU services exports to the US would drop by minus 6.7% due to loss of competitiveness.*" 14:36 14:37

Quoting from a Commissioner document. So these are, as I said before and I don't want to overstress it, the law of course has to be applied, but they are of significance and it is significant when one comes to address some of the issues, including the balancing of rights, which was something that was never even considered but is fairly fundamental to any analysis of the issues that arise in this case, particularly in the context of the powers that she has under the SCCs as Mr. Collins drew attention to in Article 4. 14:37 14:37

That failure in turn is addressed in the submissions by a statement which is contradicted by the decision, namely that the essence of the rights are compromised and that no question of balancing could arise, notwithstanding the decision in its own terms demonstrates no finding that the essence of the rights were compromised and indeed the contrary. 14:37

There was, therefore, procedural defects that were of some significance, and there is also of course this --

MS. JUSTICE COSTELLO: Sorry, just pausing there.

MR. GALLAGHER: Yes. 14:38

MS. JUSTICE COSTELLO: What am I to take from that in terms of, I mean is that water under the bridge or is it still relevant to my decision?

MR. GALLAGHER: I think it's relevant to your decision in terms of looking -- I mean one of the points we make 14:38 in support of Mr. Collins on this, there is a procedure, Judge, in the Act provided for by the Directive which allows a complaint to be made to the Data Protection Commissioner, the Data Protection Commissioner to deal with that complaint and consider 14:38 it. This is part of that process.

MS. JUSTICE COSTELLO: Hmm.

MR. GALLAGHER: So if you were to conclude that there were inadequate procedures, as we would urge, that would be a reason that we say would result in the court 14:39 asking the Data Protection Commissioner to reconsider this matter. But the court doesn't, we say, have a freestanding jurisdiction, this is part of a process that's carefully calibrated on a European law and statutory basis and one adheres to that régime that's 14:39 set up. The importance of the role of the Data Protection Commissioner is identified in Article 28 and reflected in -- I may have said section 11, it's section 10 of the Data Protection Act -- and I'll come

back to that, if I may, but at the moment I am just highlighting those. And even if it had no effect in the normal procedural way, it does demonstrate an approach, and as I say we can understand the anxiety to deal with the matter efficiently, but unfortunately here there were significant errors of approach that may at least be partly explained by a failure to allow what one would normally expect in a process of this nature and the importance of it. 14:39

I mean one of the things we learned in the hearing here which we were never aware of, and it was in cross-examination of Mr. Serwin, that Mr. Serwin provided evidence to, or that we never saw, we saw a few days prior to our statements going in, that's when that was given to us, and he had no expertise in the area of national security which is the very area the decision is concentrated on, is premised on. He had no experience in the area at all. 14:40

And, Judge, there was then, when it came to examining that issue, a failure to adopted the sort of holistic approach which is clearly mandated by **Schrems**, by Article 25(2) itself. You can't just single out an aspect, even though it be an important aspect, of a legal system's remedies and say I'll look at that and if that's inadequate that's the end of it. Mr. Collins described it as the first test and a threshold first test, but there's no basis on any of the authorities 14:40 14:41

for that approach.

And of course even in the context of Article 47, were it to apply, and we say the Charter doesn't apply, in the context of the ECHR, in any context an analysis of 14:41
the sufficiency of the remedies requires that one look not only at the substantive provisions, but what I think has been referred to as the systemic protections in the legal scheme as being very, very important, not just by reason of the analogy drawn by 14:42
Prof. Swire with the car, you'd prefer to have it properly engineered rather than to rely on a judicial remedy, but because there is pronouncement after pronouncement in the cases and in the expert reports, of which there are many - and by 'expert' I mean 14:42
independently of this court - of the importance of these processes to any evaluation of the remedies and of the adequacy. That was never engaged with, it was never looked at and it continues to be dismissed. 14:42

And that is surprising because now, at any rate, the DPC has the Privacy Shield and, unless the Commission got it entirely wrong, it addresses in great detail in the Privacy Shield the significance of those, and that is consistent with the case law as I will demonstrate. 14:43

Judge, I just want to say one thing about the Privacy Shield before I come back to it. There is no challenge to the Privacy Shield in this case. There is nothing

in the pleadings which challenge it, and I drew your attention to that. There is nothing in the submissions which challenge it. It is mentioned twice in paragraphs 110 and 112, the latter being with reference to the Ombudsman, but no challenge to the Privacy Shield and the case wasn't opened on the basis and we don't accept that they can cast any criticism on that decision. 14:43

I say that because fundamentally and as a matter of natural justice, if you were challenging it you would have to do it properly, different considerations and perhaps evidence might be relevant, and also fundamentally because of course, Judge, as you say, that sometimes collateral issues arise that may need determination, but certainly not a collateral issue that involves challenging the validity of a formal Commission decision that not only is treated as binding in terms of Article 31 unless there is an evaluation of it and a basis for casting doubt on its validity, which was never done by the DPC here and which is not an issue as I say in this case; but also because of the presumption of validity of decisions mentioned in the **Schrems** case and a fundamental principle of European law that the decision is binding until declared invalid. 14:43 14:44 14:44

But the idea that by some side wind that, in an effort to undermine or to demonstrate the alleged inadequacy

of the remedies in the US, that some sort of evidence casts doubt on a process or could legitimately be allowed to cast doubt on a process, that in its own terms began in 2014, in fact much earlier because the communications to parliament casting concerns or declaring concerns about the Safe Harbour were in 2013, that led to the process that began in early 2014 and lasted for over two years and continued up to July, as Ms. Barrington explained yesterday, with additional assurances provided following the publication of the Draft Decision in February, review by all of the bodies and open to all of the bodies to review, including the Article 29 Working Party, and subsequent changes being made. 14:45 14:45

So it's neither permissible as a matter of Irish law, it's not permissible as a matter of European law to now seek to support, and no attempt has been made to do so to date, the decision on the basis of any invalidity of the Privacy Shield. 14:46 14:46

But the Privacy Shield is, as I say, fundamental. Because in the same way as Mr. Collins urged you cannot exclude a very relevant and central consideration from your decision-making process by concluding that it doesn't address a matter without actually considering the significance of the matter and properly understanding that significance, which was done with the SCCs, in the same way one cannot say that you will 14:46

not consider a decision of the Commission that is binding on you. It's not just binding on the court, it's binding on all of the organs. So it's like a court or a tribunal saying we're faced with a problem, here we've an issue before us and in the terms and parameters which we are setting we have a concern or a doubt or we hold in a particular way and I am footnoting for you that we're not actually taking into account something that we would all have to accept is of fundamental relevance, but we would rather decide it on the hypothesis of non-application and non-relevance and then start a process that has significant consequences, consequences for the court having to hear this matter over to many days and enormous consequences for all those who rely on the SCCs and the uncertainty and doubt, a doubt or, sorry, the uncertainty and doubt that would be created by a reference, the consequences of which were acknowledged in paragraph 107 of Mr. O'Dwyer's affidavit, any casting of doubt on this fundamental mechanism of commerce that is provided for in the Directive.

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In our respectful experience this is without precedent. The court is being asked to share doubts, doubts that have been arrived at by excluding a decision that is binding. In the same way as in **Schrems** the court said you are not bound by the decision, you can look at it and if you have your doubts you can put them forward; it certainly follows as a matter, as a corollary, that

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if you have not examined and expressed no doubts, you are bound.

All of this could have been avoided, and that of course is assuming and making the very large assumption that 14:49
the test posited is the correct one, but when you choose the adequacy test, with the greatest of respect how could any decision maker say 'I will actually ignore the assessment carried out by the experts'. In the submissions the Commissioner says that her decision 14:49
is entitled to deference, the court should give it deference. We say it's not because it is premised on US law on which she has no expertise. But that rings very hollow when no deference has been shown to the Adequacy Decision, a decision involving, on any view, 14:50
an enormously careful assessment engaging at the highest level with the United States and perhaps unique in historical terms because here is another nation engaging with and disclosing details of its foreign surveillance, that the Member States have chosen not to 14:50
do, making changes to what is a fundamental aspect of sovereignty and seeking to address in good faith concerns that were raised initially by the Commission and then shared by the court, in the limited extent to which there is reference to these matters in the 14:50
decisions, it's not the basis of the decision as we know, and dealing and then finding that somebody who was looking at the adequacy of US law, charged with the very serious job of discharging the Article 28

functions says 'I won't look at that, I will not consider that'. That, in and of itself, is fatal.

This is the expertise demonstrated by the Commission who have negotiated a number of or assessed a number of countries for the adequacy of their laws, but, even more important, the Directive imposes both the obligation and the privilege on the Commission to make that assessment. And if there were to be any doubt on the Commission's assessment, the presumption of the rule of law, the presumption of validity, proper decision making and respect for the position of the Commission would require that that decision be examined and evaluated, not that Mr. Serwin be contacted who has no expertise in this area at all and asked to prepare a 20 page memorandum on remedies and to ignore everything else and then say 'I have a doubt'. 14:51 14:51 14:52

If that's the way this carefully calibrated and controlled system is to operate, then it is susceptible to being very seriously undermined. In a sense it's the obverse of precluding an examination of the validity that arose in **Schrems**. This is undermining the whole process that is carefully set out by one lawyer, no expertise in national surveillance, providing comments which, on any view, were incomplete. The significance and consequence of that I'll deal with when I am looking at whether there was any basis for doubts, but on any view were incomplete, and that now 14:52 14:52

has become the basis on which we have spent so much time before this court. As a matter of principle it's wrong, instinctively it's wrong, but, more fundamentally, as a matter of law, it is fundamentally wrong. 14:53

And, Judge, that has a consequence. Apart from the substantive invalidation of the provisional doubts expressed by the Commissioner, it does mean that these proceedings should not have been brought and certainly 14:53 should go no further on established authority. I did mention in my opening the **Lofinmakin** case and I now want to refer you to that case.

Judge, I'm very conscious, I am afraid - sorry 14:54 I haven't discussed with my Friends - that you are constantly being handed in documents you must be very careful to manage. I don't intend, I think perhaps, to hand in any more documents, I'm sure something will occur that I will have, but I don't intend to at the 14:54 moment. I was going to hand in a folder that you - oh, sorry, best intentions.

MS. JUSTICE COSTELLO: Best laid plans.

MR. GALLAGHER: I will hand it in on Tuesday. It may assist you if the parties actually track what is being 14:54 handed in to you and give you an index, that may be of assistance. You may have your own system that's better, but if we can help you in that regard.

MS. JUSTICE COSTELLO: I would describe it as ad hoc at

best.

MR. GALLAGHER: Well, it may be helpful.

MS. JUSTICE COSTELLO: Yes.

MR. GALLAGHER: Just because you have been handed in with so many. I do apologise for this, but I will remedy this on Tuesday. 14:54

MS. JUSTICE COSTELLO: I have yet to be involved in a case where nothing has been handed in.

MR. GALLAGHER: Well, I think that is I am afraid so. Thanks. 14:55

MS. JUSTICE COSTELLO: But by all means keep the flow.

(SAME HANDED TO THE COURT)

MR. GALLAGHER: Thank you, Judge. This is a recent Supreme Court decision, 2013, on this question of mootness, but two aspects of mootness, mootness in the sense of when there's no live controversy anymore, we say there's not here, but mootness also in the fundamental sense that you cannot hypothesise facts, you cannot create an artificial factual situation and say to the court 'just resolve this', there have to be real facts and a real basis. 14:55 14:55

This was a decision involving immigration. You will see that it related to a deportation order and the issue arose as to whether the proceedings were moot were reasons we needn't delay on. But if you go to 279 of the decision there's a reference to the of the cited case, **Borowski -v- Canada**, which Denham CJ, with whom all of the court agree, says: 14:56

"*That an appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision.*" 14:56

And then the conclusion is contained in 281, she shows why it was moot in that case. Murray J and Fennelly J agreed with the Chief Justice and Fennelly J also agreed with McKechnie J. 14:56

At page 290 of his judgment at paragraph 59 he explains, perhaps in terms which are redolent of Thomas J's concurring judgment in **Spokeo**: 14:57

"*The rule by which a court will decline to hear and determine an issue on the grounds of mootness is firmly based on the deep rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical. This policy stems from and is directly related to the system of law within which our courts discharge their essential function of administering justice. Apart from any special jurisdiction conferred by statute, by the Constitution, or resulting from our membership of the European Union, the system in question is fully adversarial. Consequently, there must exist some issue(s), embedded within a factual or* 14:57 14:57

evidential framework, the determination of which is/are necessary so as to resolve the conflict or dispute which necessitated proceedings in the first instance. It has therefore always been recognised that without such a concrete formation, the courts typically will decline to intervene."

And over the page, 291 at paragraph 64 - I won't delay in 63, just go straight to 64: "*The use by Laurence Tribe of the phrase 'live controversy' is to be understood as indicating that such controversy must be found within a set of tangible as opposed to imagined facts: it must have a definite setting and not be one based on conjecture."*

And the conjecture here is that you exclude the Privacy Shield and that some reference is made to the CJEU on the basis of some evidence in this case relating to the issue, in this case the SCCs, that excludes the Privacy Shield which of course is fundamental.

The force of that argument is accentuated when one considers the following matters. Firstly, it has to be reviewed in July. I think in truth there is some suggestion that the review may last over August or September and one can never predict, but it is subject to review.

MS. JUSTICE COSTELLO: This is the Privacy Shield?

MR. GALLAGHER: The Privacy Shield, and any issues that

arise and that concerns were expressed about would be dealt with in that review. I might allow the stenographer to change.

And that review will take place, the court can safely assume, with the level of expertise, intensity and knowledge that the Commission will have built up not only from the previous negotiations, but from its expertise in this area, assisted by the Working Party, which has indicated *it* would review how the Privacy Shield has worked, to see whether the finding of adequacy obviously can be maintained, and it will engage at a level with the US where concerns can be raised and clarifications obtained in a manner that can never be done in adversarial proceedings, but is done in the way the Directive envisages, not through some test or partial test of some partial system of the foreign legal -- or some part of the system of foreign law where a court is asked in that context to form some view, make findings of fact in relation to matters which obviously engage the expertise of the Commission and the country involved at a very high level and with enormous resources. 15:00 15:00 15:00 15:01

That's how it's envisaged it will be tested. It may well be said, of course, if there was no review then clearly, as arose in **Schrems**, the court isn't precluded from doing it, I'm not suggesting that. But if one is looking here at a decision that doesn't take it into 15:01

account and *then* appreciates that it must, in any event, be reviewed - and, for example, the case was replete with concerns expressed by experts, moreso obviously on the Mr. Schrems side and the DPC's side as to what the new administration might or might not do - firstly, a matter that one would've thought is a matter of sensitivity that a court in a foreign jurisdiction is not going to engage in making any predictions of -- 15:02

MS. JUSTICE COSTELLO: You don't need to make observations in that regard. But I -- 15:02

MR. GALLAGHER: No, I appreciate that. And that goes without saying. But in a sense it shows an unreality. I mean, the latest pronouncement is in the State of the Union address - and I'll be handing this in - is that the President emphasised the importance of the Privacy Shield and how critical it was. 15:02

So to be asked to predict when the PCLOB will be staffed or anything like that, those are matters that are not actually suitable to the adversarial system, but are suitable to the type of review. 15:02

There *is* another matter and Mr. Collins - Michael - fairly indicated to you that there is a new Directive, the EDPR -- GDPR and -- 15:03

MS. JUSTICE COSTELLO: I think it's a regulation, isn't it?

MR. GALLAGHER: No, it's a new Directive -- it's a regulation. Sorry, it *is* a regulation, you're right,

that comes in in May of 2018. And that is going to replace the Directive and deals with matters in much more detail. And I suppose there's the practical consideration that by the time that the court could pronounce on any question, the very Directive which is the subject of this is going to be replaced with provisions, some of which are similar, but also there are *significant* differences in the areas that are relevant to this court. 15:03

So that, we say, is a threshold --

MS. JUSTICE COSTELLO: Sorry, you're saying that goes to mootness, the fact that there is a regulation and --

MR. GALLAGHER: It does go to mootness. Exactly.

MS. JUSTICE COSTELLO: And what you're saying is by the time, if there were to be a reference, by the time it would be heard by the CJEU, the regulation will have come into effect? 15:03

MR. GALLAGHER: Exactly. So two things will have changed certainly by the time the CJEU will consider this issue if you referred adequacy in the context of Article 25. It'll have been replaced by a new assessment. And that is certain. And then, even if the CJEU heard the matter very quickly - and there are other cases, two other cases, Mr. Collins again drew your attention to where issues with regard to the Privacy Shield *have* been raised that are prior in time to this - so the prospect of this being determined prior to the Directive which is the basis of the 15:03 15:04

concerns being replaced certainly are not high, I'll put it no further than that.

So we say the very decision-making process that excludes a consideration of something fundamental, it's not just a procedural matter, but results in a substantive failure that in and of itself means that the court should reject this application, that the court can't properly deal with this application and that in a sense the most important factor in *any* assessment of adequacy is there, it hasn't been challenged and it concludes that the system is adequate. That's a very important and, as I say, threshold point and, we would say, determines this case. 15:04 15:05 15:05

Judge, I do then want to go on to say why we think that the failure to address the national security grounds is so fundamental. At paragraph six of the submissions, the Commissioner's submissions, she says the draft decision explains three things. And I don't think it's necessary to open it, but I'll just quote: 15:05

"*The Commissioner had examined whether, in the context of alleged interferences with data privacy rights on national security grounds, US law provides adequate protection.*"

So it's on national security grounds, that's what we're

concerned with, nothing else.

"*(2) The Commissioner had concluded as a result of this examination... that there are well-founded objections that, notwithstanding recent amendments in US law, it remains the case (as it was at the time of the Schrems Ruling) that a legal remedy compatible with Article 47 of the Charter is not available in the US to EU citizens whose data is transferred to the US where it may be at risk of being accessed and processed by US State agencies in a manner incompatible with Articles 7 and 8 of the Charter.*

(3) The Commissioner had also concluded that, subject to consideration of further submissions, the SCC Decisions did not answer the well-founded objections she had identified."

I just want to concentrate on the first two at this stage; as I said, the national security grounds and then the remarkable second proposition that it remains the case, as it was at the time of **Schrems**, that a legal ruling compatible with Article 47 was not available *notwithstanding recent amendments in US law*. So recent amendments are looked at, but only pro tanto, only to a limited extent and the most fundamental amendment addressing adequacy, the Privacy Shield and the undertakings and commitments provided therein, are just not looked at at all. 15:07 15:07

So they *acknowledge* the relevance of that but they're not looked at. And they do make the mistake, as Mr. Collins pointed out, that it remains the case as it was at the time of **Schrems** that a legal remedy compatible with Article 47 was not available. That was not the *basis* of the decision in **Schrems**. And then it talks about the protection being *incompatible* with Articles 7/8 of the Charter. So it does beg the question as to the applicability of the Charter. And the Directive was there to implement the Charter rights and involves considering whether those rights are being respected by the US system. 15:07 15:08

Then when you come to look at the Directive, you see a problem with that. But before you even get to the Directive, as I mentioned in my opening submissions and I won't repeat, but just draw your attention to them -- I will be looking at book 13, the first book of -- 13, the agreed European materials, if it's convenient to get it. 15:08 15:08

MS. JUSTICE COSTELLO: I have it. Thank you.

MR. GALLAGHER: Thank you. The Charter itself, as you know, in its terms does not extend the scope of European law. And if you look at Article 51 - it's the very first divide, is the Charter and Article 51, 406, the second last page -- 15:09

MS. JUSTICE COSTELLO: I have it. Thank you.

MR. GALLAGHER: "*The provisions of this Charter are*

addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

Then 2:

"*The Charter does not extend the field of application of Union law beyond the powers of the Union... any new power or task for the Union, or modify powers and tasks as defined* [therein]."

And that brings you, as you know, to the Union, which we looked at, which is the third divide, three, the TEU. And in the third page, Article 4, the exclusion 15:10
in respect of, in 2, not just national -- sorry, it shall respect "*State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*"

And I drew your attention to 5(2) and if I could now draw your attention to 6(1), which, in it its second

paragraph, repeats that the provisions of the Charter shall not extend in any way the competences of the Union.

MS. JUSTICE COSTELLO: Sorry, I go from five -- I go one, two, three, four and then over the page I'm into Article 19. 15:11

MR. GALLAGHER: Oh, I'm terribly sorry.

MS. JUSTICE COSTELLO: Is it on the tablet?

MR. GALLAGHER: It's on the tablet, yes. And in fact the tablet -- no, the wrong Treaty is opened on the tablet, I think the TFEU. It's the TEU, the Treaty of the European Union. But it'll be on it, I'm sure, in a moment, thanks. Thank you very much. It's now on the tablet, I hope it's on yours. And you'll see Article 6 at the top of the page - and we'll have to remedy that deficiency in your book. And you'll see in the second paragraph: "*The provisions of the Charter shall not exceed in any way the*" -- sorry, "*shall not extend in any way the*" -- 15:11 15:12

MS. JUSTICE COSTELLO: Sorry, you're way ahead of me. I'm still opening my tablet. 15:12

MR. GALLAGHER: Oh, I'm terribly sorry.

MS. JUSTICE COSTELLO: Which book is it in, in the tablet? Which is it, A-what?

UN-NAMED SPEAKER: A13. 15:12

MR. GALLAGHER: If you put it on to "Receiving", hopefully it will come through to you.

MS. JUSTICE COSTELLO: I haven't got that far yet, it's still opening. I'm on "Receiving" now, thank you.

I've got there. Thanks.

MR. GALLAGHER: Thanks. Do you have Article 6?

MS. JUSTICE COSTELLO: I do, thank you very much. Sorry about that.

MR. GALLAGHER: No, I do apologise. And 1 is a recognition of the "*rights, freedoms and principles set out in the Charter.*" The other is: "*The provisions of the Charter shall not extend in any way the competences of the Union as defined*" therein. 15:12

15:12

And that is obviously of significance. Then if you go to the TFEU in divide two. And I hope you do have Article 16 of the TFEU, which is a Treaty right - mirroring, of course, the Charter rights 7 and 8 with which you're familiar. But Article 16; everyone has the right to protection of personal data concerning them. And in 2: 15:13

"*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law...*"

And so as to avoid having to come back to this, Judge, can I draw your attention to Title V, which is page 73, and Article 67? And it deals with the area of --

MS. JUSTICE COSTELLO: Is this TFEU?

MR. GALLAGHER: Same Treaty, TFEU. So to avoid having to --

MS. JUSTICE COSTELLO: I go on to, Article 74 is my next page. Let's try and get it on "Receiving". 15:14

MR. GALLAGHER: It's on the tablet, 67.

MS. JUSTICE COSTELLO: Yes, thank you.

MR. GALLAGHER: And "*Area of Freedom, Security and Justice*". And you'll remember that was part of the Treaty on the Union prior to the Lisbon Treaty and it 15:14 was dealt with by way of framework directives, now it's part of the Treaty on the Functioning of the European Union and the criminal law has come within the scope of the TFEU and is now something dealt with at a Community level. 15:15

You'll see the various provisions that deal with criminal law and providing for measures on criminal law, including defining offences - Article 74; administrative cooperation - Article 75; identifying 15:15 objectives regarding preventing and combating terrorism and related activities; as you know, judicial co-operation on civil matters in 81; and criminal matters, 82 - the latter, sorry, being the one that's relevant to the point I'm making - police co-operation 15:15 etc.

So this is now firmly within the competences of the Union, whereas previously it wasn't, prior to the

changes effected by the Lisbon Treaties. That's of some significance, because in the Directive, as you know, originally criminal law was an area that was treated as being excluded in the context of the data Directive -- Data Protection Directive. 15:16

If I can go to divide four - and you're familiar with all of the provisions of this. I just draw attention, if I may, to Article 3(2) again, that the Directive "*shall not apply to the processing of personal data: In the course of an activity which falls outside the scope of Community law, such as those provided for by* [those Titles] *of the Treaty on European Union*" - which are the criminal area - "*and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.*"

That was the area of exclusion, as you know. And that then --

MS. JUSTICE COSTELLO: Do you equate state security there with national security?

MR. GALLAGHER: Yes, Judge, that's what it is. And then if you go to Article 13, you'll see that: 15:17

"*Member States may adopt legislative measures to restrict the scope of the obligations and rights*

provided for in Articles 6(1), 10" - those are the lawfulness of processing of the data and the notification provisions etc., right of access, Article 12. And those can be excluded, or restricted I should say, "*when such a restriction constitutes a necessary measures to safeguard:*
(a) national security."

So the activity of the state in processing for national security purposes is completely outside the scope of the Directive, that's outside the scope of Union law. Here we're talking about the providers, the controllers, who are not the state but the various private entities that control and process data. And Article 13 provides that the controller can be relieved of various obligations or the application of those obligations can be restricted to safeguard national security. And I'd ask you to bear that provision in mind, because it *is* the subject of consideration, and its equivalent provision, in some of the legal authorities that are of some significance in understanding the extent of this national security exclusion.

15:17 15:18 15:18 15:18

So as I say, you have the situation where the state itself, in what it processes - so whether it's Germany, the UK, Ireland or whatever - its processing of data for national security purposes is not within the scope of EU law, it's not within the scope of the Directive.

15:19

Where you have the cases, the **Digital Rights**, you have the communications providers, the service providers, they are *within* the scope of the Directive, but the obligations that are imposed on them can be restricted for national security purposes. And that was one of the matters that was agitated in **Digital Rights** and in **Watson**; it related to obligations imposed on, I'll call them the providers, the service providers, in the context of national security. 15:19

So where you're looking and focusing on the providers, the provision for restriction of the application of the obligations is governed by Article 13. And one of its requirements is that the restriction be necessary for that purpose. So it has to be necessary to safeguard national security. 15:19 15:20

MS. JUSTICE COSTELLO: So that would be if Ireland imposed some form of restrictions on Facebook Ireland here?

MR. GALLAGHER: Exactly, Judge. And, for example, you do have restrictions in all of the countries, so they can be relieved of obligations that would otherwise arise in respect of notification etc., where the security apparatus of the state obtains data from them and processes that data. So the processing by the state is excluded and obligations which would otherwise arise or be imposed on the providers in making the data available pursuant to the lawful authority, those obligations can be restricted where that is necessary 15:20 15:20

to safeguard national security and the other matters that are there.

So that, as you will see, is an issue that the CJEU has canvassed and interpreted in quite a number of 15:21
decisions as to the extent to which those obligations can be restricted on that ground. But they are two separate, albeit related aspects of the Directive, and it's important to bear that in mind. And that is necessary, because as I indicated to you in my opening 15:21
submissions, the Directive, as you will know, requires to be implemented in national law. And it's the national law of the relevant Member State that is referred to throughout. And that is what is the applicable law in the SCCs, as you saw, it is the law 15:22
of the Member State - in this case, Ireland.

And that's why, at a very fundamental level, when one talks about the rights at EU level, as the DPC does and suggests that our emphasis on national security and the 15:22
position in Member States is wrong, those submissions are based on a fundamentally mistaken premise. The data protection law that applies is that of Ireland - conditioned, of course, by the requirements of the Directive and requiring to meet that, but it's 15:22
nevertheless Irish law, and we have the 1998 Act, as amended.

Of course when you're talking about national security,

because that is excluded from the Directive, you're talking about Member States' laws. What do the laws of Member States provide in connection with the processing for national security purposes and what do they provide in terms of remedies? Because the Directive doesn't 15:23
apply to that. So when you're looking at the remedies and the obligations and the notifications that are required by the Directive, they don't apply to Member States processing the data for national security purposes. And that, of course, is fundamental and 15:23
makes it essential that if you're carrying out an adequacy test, you have to appreciate and take account of the fact that you're comparing adequacy in the context of national surveillance law, as acknowledged in the decision and in paragraph six of their 15:24
submissions and, therefore, you need to be looking at what is the position in Europe *in that sphere*. Because that is the -- if the adequacy test were correct, which we say it's not, that is the comparator. And I'll explain how that works and fits in with the decisions 15:24
shortly.

But you're not comparing the national security sphere with the rights that arise, I'll call it in the private sphere, as against the providers or the obligations the 15:24
providers have. You're comparing national security because that is the relevant law which governs in the Member State that is permitting the export and referred to in Article 25. And if you're looking at adequacy,

you must take account of that and that must be your comparator.

And that, of course, is fundamentally missing from the decision. You can read the decision very carefully and many times, as I'm sure we all have and while you're told it's about national surveillance, there's no even acknowledgment that actually national surveillance is dealt with differently, it is outside the scope of the Directive, it doesn't carry with it all of the rights which apply to a private processor. And of course, that's fairly fundamental. Because one of these rights on which so much time was spent was the alleged absence of notification. And you're talking about you have a comprehensive law you were told, it's not fragmentary you were told. But all that's not fragmentary is the Directive. But the Directive doesn't apply to national security. 15:25 15:25 15:26 15:26

So how such a basic error could've been made is somewhat surprising. To say that Europe has a comprehensive law, as it does and as Prof. Richards talked about, but when you're looking at how national intelligence processing is done in Europe, the Directive doesn't apply, so that comprehensive law doesn't apply to it. And what we have spent all those days looking at is how the processing is done in the US by the national intelligence. 15:26 15:27

Of course, there's one fundamental difference, which is not adverted to either; we have had a view and a perspective and an insight into the operation of US national intelligence that, on the basis of the undisputed evidence, is *wholly* lacking in Europe, with one exception that Ms. Hyland will deal with, the Investigatory, I think, Powers Act 2016, recent legislation enacted in the UK, which for the first time gave a statutory footing to all of the powers that were exercised by GCHQ and national intelligence. It's a comprehensive piece of legislation. 15:27 15:27

But you'll see from the FRA -- and I should've said to you this morning, Judge, apart from Prof. Robertson, the FRA has, of course, an independent status, it proves itself, it's part of the, as Prof. Robertson explained, it is -- 15:28

MS. JUSTICE COSTELLO: You see, I haven't read his affidavit.

MR. GALLAGHER: Oh, yes. Sorry. 15:28

MS. JUSTICE COSTELLO: Because I was awaiting...

MR. GALLAGHER: I'm sorry, of course you haven't. The second affidavit explains that the FRA is a Community body tasked with the very job for Parliament and for the Community of examining these issues - Fundamental Rights Agency - and its report is relied upon by the institutions in their assessment. 15:28

You'll see at paragraph 67 of that report when I come

to it that it talks about German intelligence, BND, and a case in 2014 in which somebody brought an action seeking to get relief in respect of -- they thought they were being surveilled. And I think the evidence was that 32 million people were targeted and I think they found a limited number of what they regarded as relevant pieces of information. And the court threw it out on the basis that the person couldn't establish standing and establish that they were the subject of surveillance. We'll come to that. 15:29

But that report, the Council of Europe which Prof. Swire refers to in his report, though not in his oral evidence, and the Ian Brown report establish beyond yea or nay that whether it's best in the class, as Prof. Swire says and as Prof. Brown agrees and as Prof. Robertson says, it is certainly as good as any system that exists elsewhere. 15:29

And in a sense we've been through this artificial process of dissecting the legislation and saying 'Hmm, that definition is a bit broad. Might be another protection here. We'd prefer to have something else'. But that hasn't been done *anywhere* in Europe. We don't even *know* what the legislative basis is. You have none of that. You have a dissection of the laws of the United States. You're asked to give some authoritative ruling, at least sufficient for a reference, on a system that has been held up to scrutiny by way of a 15:30 15:30

comparative exercise - because that's what adequacy is - without the comparator, which is extraordinary. It's not referred to in the decision, it's not referred to in the submissions, it hasn't been referred to in 16 days. 15:30

So you are in the exclusive position of being asked to pronounce on a system that, apart from being fully investigated by the Commission, is being held up to a level of scrutiny without *any* suggestion that there is 15:31 *anything* comparative within Europe. So you are being asked to say that data, there are doubts about sending data *out* of Europe, that it's at risk of being surveilled by the national intelligence of the US, without looking at whether that is a *disimprovement* of 15:31 the rights, without looking at the basis of the comparator, nothing.

So of course there may be statutory -- or, sorry, of course in the area of national surveillance a state is 15:31 going to determine what is the scope of its laws, what does *it* consider is relevant - it's not a matter for this court or any other court to say 'I'd like a tighter definition in FISA of foreign information', or 'I'd like a tighter definition in the EO12333', 15:32 assuming it were relevant - which we say it's not - 'of foreign information'. That's no function of the courts, as the Treaties recognise, as the laws have consistently recognised, as the European Court of Human

Rights has recognised. But as I say, those are matters that have been canvassed in great detail. And I'll come back to that later.

But that fundamental failure to engage either in the decision or indeed before this court is a fatal flaw in the case put forward by the Data Protection Commissioner. 15:32

There's no doubt that the Directive applies to the transfer, that's clear from Article 25 - the providers are *subject* to the Directive. But you don't just stop with the transfer - the Data Protection Commissioner didn't; she assumed the data is in the US and looked at what would happen to it in the US and said it didn't comply with Articles 7 and 8 and 47. We say the Charter doesn't apply, but let's for the moment assume its application - and there are certainly some statements in the decisions that suggest it *may* apply; we, with respect, think that's a wrong analysis and certainly not valid - but for the sake of the argument here, let's assume the Charter has some limited application. 15:32 15:33 15:33

I do just make it clear, reserve our position, because we don't accept that, if this were ever to go to Europe it's something we would say *hasn't* been properly addressed in at least some of the cases and would have to be looked at, including in **Schrems**. 15:33

But just let's assume for the moment. What is the protection that 7 and 8 give you in a national security context? You haven't been told. Well, even if you don't look at the laws of the Member States - it's 15:34
suggested that you have to look at the ideal - well, it does behove you to look at the Convention and what *it* says. And of course, while national security is not excluded from the Convention like it is from EU law, how the European Court of Human Rights deals with it is 15:34
instructive.

It deals with it largely in terms of defining the scope of national security powers -- sorry, of the national security area and the extent to which it can encroach 15:35
in other areas. But it's very much on the boundaries. You don't get a substantive analysis of saying 'Well, I think the US should have *this* tighter definition' or 'It should only be looking at this', or perhaps it should exclude MCTs etc. etc. or should have different 15:35
targeting procedures. There's none of that. There is a recognition that different rules apply in national security, that obligations to notify are inconsistent with the very purpose of national security, that the scope for any challenge is, accordingly, limited. So 15:35
it is at a high level. And as you know, the European Court of Human Rights allows a margin of appreciation; that's where it has jurisdiction, which the European courts don't.

But you have been invited to make pronouncements even of a provision, because you find facts before it goes to the European Court, on a system which, to our knowledge - and I'm happy to be corrected - perhaps *unhappy* to be corrected, but I like to think we're correct - has never been done by *any* other court and would involve the court in making judgments as to what was appropriate for what is the fundamental attribute of sovereignty, your national security, and second-guess whether particular targeting procedures should be different or, as I said, whether you should exclude certain types of information. 15:36 15:36

Take the MCTs, for example, which are a very small fraction of Upstream, as the PCLOB report shows and as I'll give you the reference, Upstream itself being less than 10% of the Section 702 programme. And the finding by the PCLOB that the reason MCTs are caught is because, on the basis of the present technology, if that didn't happen, the effectiveness of the targeting on the "to" and "from" connectors would be seriously undermined, with a significant impact on the efficiency of national intelligence. Those are not matters that the courts second-guess or even *review*. But all of these matters, as they were questions and Ms. Gorski gave evidence about the MCTs and this is bad and Mr. O'Dwyer made submissions on it, all by way of suggesting that there's something wrong that the court 15:36 15:37 15:37

has an opportunity to redress. Whatever remedy there is, it doesn't extend to that.

And then, if I may say so with the greatest of respect to Mr. O'Dwyer, the *extraordinary* submission, made almost as an afterthought, by an amici that there is no remedy with regard to the substance of the laws that authorise, so that if a law authorises something, there's no right to have that challenged. That's not any part of the DPC's decision, it's not any part of the case - she proceeded on the basis the laws were there and the right to challenge was where the laws weren't obeyed. But that the court is somehow to pronounce or review whether these laws are valid or that they should be different or more confined - that's really what it's saying - that's not done. And as Ms. Barrington pointed out, the suggestion that somebody with no connection with the US can invoke its Constitution and should be able to is very surprising, not a right that is generally recognised, a big issue about it in this jurisdiction, as you know, and certainly on any view, non-citizens with no connection with the jurisdiction do not have the constitutional rights of citizens. Similarly, in EU law, citizenship of the Union gives you rights that non-citizenship doesn't. That's well recognised. But all of these immensely complex and very sensitive areas the court is being invited to intrude in an exercise which the court should only do if it was absolutely necessary - and

15:38 15:38 15:38 15:39 15:39

it's not here - by reason of the Privacy Shield.

So the national security exemption, which is fundamental, is *not* saying that the court has no role, or the Directive has no role in respect of the transfers - that was never said, it *can't* be said - it is to say that it is a vital dimension of examining the legality of the transfers where what you're examining is the processing in the foreign state and the remedies that arise in respect of such processing. 15:39 15:40

It is said in the DPC's submissions 'Ah, well, the exemption only applies to EU Member States, so it doesn't apply to foreign Member States'. Of course, that's a misunderstanding. *Of course* a foreign state couldn't come into the jurisdiction and issue a lawful demand to a provider in Ireland that the provider would have to comply with. The Directive might have something to say about that. But what *we* are saying is once it goes to the US and you're looking at the remedies that arise in respect of processing, there is no *basis* for the Directive to apply, the Charter doesn't apply - it doesn't apply extra-territorially; it applies at the act of processing which involves making available and, in any event, the Article 25, but its application is very confined in the way in which I have indicated to you. So that major dimension is not addressed at all. That in itself would be fatal, but 15:40 15:40 15:41

when you look at the substance and the consequences, it undermines this adequacy.

Can I just say to you, just let's look for a moment - and Ms. Hyland *will* be looking at the Privacy Shield - but just to illustrate this point as to how it was approached by the Commission, which one assumes has some idea as to how you deal with these matters. I should say that two extraordinary submissions are made in the speaking note, so-called. One was that by making this argument, *we ourselves* are impugning the Privacy Shield. Now, I don't know how that arises. We are *not*, we *rely* on the Privacy Shield. But it's actually, we say, not inconsistent with the Privacy Shield. And even if it *were*, it would be a fallback, an alternative argument. But we do *rely* on the Privacy Shield. 15:41 15:42 15:42

Then it's said if you were to hold with us this would mean that the Data Protection Commissioner is in contempt of court, because Judge Hogan sent the matter back for the Data Protection Commissioner to deal with. It's an extraordinary proposition. These matters were never argued before him. The idea that the Data Protection Commissioner would be in contempt of court for not doing something that the court says that she can't do and that there's no jurisdiction to do or has to be done in a particular way is a novel proposition, but it is an indication of the concern belatedly 15:42 15:43

expressed about this national security exemption and the failure to deal with it.

So I did indicate to you in opening that the Privacy Shield dealt with initially what I call the private sphere and the privacy principles and all of the rights that apply -- 15:43

MS. JUSTICE COSTELLO: I've just forgotten where I'll find that again.

MR. GALLAGHER: Oh, I'm sorry. It's in the same book and it's divide 13. 15:43

MS. JUSTICE COSTELLO: Thank you.

MR. GALLAGHER: And the privacy principles part of it begins on page four. And those principles are identified and the enforcement mechanisms that are applied if you sign up to the Privacy Shield. And that continues, Judge, right on to page -- would you excuse me a moment, I'll just get my glasses, sorry. That continues on to page 13, paragraph 64. So the first paragraphs deal with that. And you'll see recital 61 on page 12: 15:44 15:44

"*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 laid down in Directive 95/46.*"

So when you're looking at the private sphere, that's the comparator, that it's compared with that. And then it deals differently with the public sphere, "*Access and Use of Personal Data Transferred Under the EU-US Privacy Shield by US public authorities*". And 64:

"*As follows from Annex... adherence to the Principles is limited to the extent necessary to meet national security, public interest or law enforcement requirements.*

(65) The Commission has assessed the limitations and safeguards available in US law as regards access and use of personal data transferred under the EU-US Privacy Shield by US public authorities for national security, law enforcement and other public interest purposes."

I should say that there are allowed other public interest purposes, it's not just national security. The focus here has been on national security, but they are equally in a different category. Then it says:

"*In addition, the US government, through its Office of the... (ODNI), has provided the Commission with detailed representations and commitments that are contained in Annex VI to this decision.*"

Then it refers to the letters signed. And then it goes

on four lines from the bottom:

"*Finally, a representation from the US Department of Justice, contained in Annex VII to this decision,* describes the limitations and safeguards applicable to access and use of data *by public authorities for law enforcement and other public interest purposes. In order to enhance transparency*..."

Then in 67: 15:46

"*The Commission's analysis shows that US law contains a number of limitations on the access and use of personal data transferred under the EU-US Privacy Shield for national security purposes as well as oversight and redress mechanisms that provide* sufficient safeguards *for those data to be effectively protected against unlawful interference and the risk of abuse.*"

So it looks at this, it looks at it on a different 15:47
basis from the private sphere, it takes into account at 65 limitations and safeguards applicable to access and use of data, which makes, of course, very relevant all of those systemic safeguards so-called.

15:47

Then if you go to 76, it says -- 75 refers to EO12333 and PPD-28. And then 76:

"*Although not phrased in those legal terms, these*

principles capture the essence of the principles of necessity and proportionality. Targeted collection is clearly prioritised, while bulk collection is limited to (exceptional) situations where targeted collection is not possible for technical or operational reasons. Even where bulk collection *cannot be avoided, further 'use' of such data through access is* strictly limited *to specific, legitimate national security purposes.*"

So I should've in fact drawn your attention to 75, which specifically refers in the second last line to representations of the ODNI, the limitations and safeguards set out therein. 15:48

So what it's looking at here is 'Let's look in this sphere at the limitations and safeguards; what *are* the procedures?' - the procedures to which Prof. Swire spoke, which his evidence dealt with in detail and which the evidence of Mr. DeLong deals with in even greater detail. And I won't refer you to all the detail, but I will refer you to his evidence, which is of great significance. 15:48

Now, you don't see that issue addressed here. In fact you are told that *none* of that was relevant - the oversight is *irrelevant*, there's not *one* aspect. But the *Commission* thought it was relevant, the Commission charged with *upholding* EU law. And one would've thought that if you said the Commission got it wrong, 15:48

as it does from time to time, one would explain why. Well, that has *never* been explained, it's just been ignored. And in fact for two years the Commission *and* the US Government have been engaging in a vain attempt to agree something that is of no relevance, absolutely no relevance - something the Working Party thought was of relevance, something the Member States that voted to approve the Privacy Shield thought was relevant. But the Data Protection Commissioner says it's of *no* relevance, you don't have to look at that at all, there was a shortcut that could get you to just looking at the remedies, which they say are few and have difficulties, and you ignore the rest. 15:49 15:49

Then in 78: "*It follows from the available information, including the representations*" -- excuse me, 77: 15:50

"*As a directive issued by the President as the Chief Executive, these requirements bind the entire Intelligence Community and have been further implemented through agency rules and procedures that transpose the general principles into specific directions for day-to-day operations. Moreover, while Congress is itself not bound by PPD-28, it has also taken steps to ensure that collection and access of personal data in the United States are* targeted *rather than carried out 'on a generalised basis'.*

(78) It follows from the available information,

including *the representations received from the US government, that once the data has been transferred to organisations located in the United States and self-certified... US intelligence agencies may* only *seek personal data where their request complies with... (FISA) or is made by the... (FBI) based on a so-called... (NSL). Several legal bases exist under FISA that may be used to collect (and subsequently process) the personal data of EU data subjects transferred under the EU-US Privacy Shield.*"

And it deals with those provisions. And at 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 of* anyone, *including ordinary European citizens'. As regards personal data collected within the United States, this statement is supported by* empirical *evidence which shows that access requests through NSL and under FISA, both individually and together, only concern a relatively small number of targets when compared to the overall flow... on the internet.*"

Then 88, Judge:

"*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 from the Union to the United States under the... Shield to what is strictly necessary to achieve the legitimate objective..."

And that strictly necessary requirement is, as you saw in Article 13 in a different context - it's actually in Article 4 of the SCCs decisions, it's one we're familiar with as a proportionality principle in European law and at the ECHR - that was the assessment carried out. A different assessment than looking at the remedies that are available in the private sphere. 15:52

Over the page at 90, a very important paragraph: 15:52

"*In the Commission's assessment, this conforms with the standard set out by the Court... in... Schrems..., according to which legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must impose 'minimum safeguards' and 'is not limited to what is strictly necessary where it authorises, on a generalised basis, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid*

down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail'. Neither will there be unlimited collection and storage of data of all persons without any limitations, nor unlimited access."

Those were questions you rightly raised yesterday and I'll come back to them, the PCLOB. This is different from what the court understood, as it will be clear from just some paragraphs in the **Schrems** decision, in **Schrems** and was *being* addressed. 15:53

"*Moreover, the representations provided to the Commission, including the assurance that US signals intelligence activities touch only a* fraction *of the communications traversing the internet, exclude that there would be access 'on a generalised basis' to the content of electronic communications.*"

As I say, there was some vague suggestion that you couldn't rely or mightn't have been able to rely on these assurances. As I say, that would be not for this court to decide, not for this court to adjudicate on. It's a surprising proposition, there is a mechanism for dealing with it if it ever happened, but as Ms. Barrington said, it would undermine a fundamental 15:54

comity of nations and of the US and the EU and the idea that some adjudication should be made as part of fact finding that was premised on a concern in that regard is completely wrong.

15:54

Prof. Richards talked about the fragility of matters that are not enshrined in law that are administrative. They're fragile to the extent that they're not part of a statute. They have very great significance - and the significance he appears to have overlooked - enforced as they are with all of the evidence you have in that regard and subject to this monitoring and which is the proper way to assess adequacy.

15:55

Then:

15:55

"*Effective legal protection.*
The Commission has assessed both the oversight" --

MS. JUSTICE COSTELLO: Sorry, just in relation to Privacy Shield, did the Commission make any distinctions between legislation and Executive Orders or PPDs, do you recall?

15:55

MR. GALLAGHER: They did. They drew attention to the fact that EO12333 was there. The PPD, contrary to what was put by Mr. McCullough to Prof. Vladeck, PPD-28 covers *all* intelligence agencies - that's clear from the Bob Litt letter, page one. And they dealt, as you'll see in paragraph 75, Judge, with the issue --

15:55

"*These limitations are particularly relevant to personal data transferred under the EU-US Privacy Shield, in particular in case collection of personal data were to take place outside the United States, including during their transit on the transatlantic cables from the Union to the United States. As confirmed by the US authorities in the representations of the ODNI, the limitations and safeguards set out therein – including those of PPD-28 – apply to such collection.*"

And they refer to 12333 later and --

MS. JUSTICE COSTELLO: And a more specific question - sorry to interrupt you.

MR. GALLAGHER: No, not at all. 15:56

MS. JUSTICE COSTELLO: It was the implication that because, well, it wasn't legislation, it could easily be changed.

MR. GALLAGHER: Yes.

MS. JUSTICE COSTELLO: Is that (A) discussed and (B) a concern in the Commission's -- 15:56

MR. GALLAGHER: I'm afraid to be categorical, because I've read it many times, but it's so easy to miss something. I don't think it was put in those terms. It was assessed as limitations, because much play was put on the extent of the limitations and the procedures, including the targeting procedures, which as you know are *provided* for in legislation but not *enshrined* in legislation. That was considered 15:57

sufficient as part of the systemic safeguards. But of course, the Commission, with all their expert lawyers, know that they're not the same. But this is done on the basis of trust, that if there are material changes, they are communicated. 15:57

So yes, of course they're of a different category. The fact they exist is of great importance. And the oversight, I think, is partly there for the fact they're not enshrined, presumably, in legislation, but 15:57 also because things develop. But in the same way, something could be enshrined in legislation in *many* countries and repealed *tomorrow*. It's a bit harder to repeal admittedly, I think, in the US, given the system of checks and balances than it would be here. But 15:57 here, with a government with a majority, there would be no difficulty in rushing a piece of legislation through. So I think the way I would --

MS. JUSTICE COSTELLO: Well, I don't think we'll go down that route just for the moment. 15:58

MR. GALLAGHER: No, we won't. I think the answer is *of course* any lawyer would say it's not the same as legislation. But the Commission fully saw the distinction and noted what was enshrined in legislation and what wasn't and was very much happy to accept that. 15:58 And indeed the next section is "Oversight".

MS. JUSTICE COSTELLO: Yes.

MR. GALLAGHER: And as you know, it goes through all of the oversight. So there are many mechanisms by which

changes can be brought to the attention of the Commission. And if you go to 122 -- oh, sorry, that's the Ombudsman, I don't need to go to that. So in that section, it deals in 111 with individual redress.

MS. JUSTICE COSTELLO: Yes. 15:58

MR. GALLAGHER: Then it goes onto the Ombudsman. So it looks at the redress, having looked at the oversight. And then the conclusions in relation to adequacy arrived at at 136 on page 32.

MS. JUSTICE COSTELLO: I have overshot. 36, yes. 15:59

MR. GALLAGHER: 136, 137, 138. And 140 I think is of some importance:

"*Finally, on the basis of the available information about the US legal order, including the representations and commitments from the US government, the Commission considers that any interference by US public authorities with the fundamental rights of the persons whose data are transferred from the Union to the United States under the Privacy Shield for national security, law enforcement or other public interest purposes, and the ensuing restrictions imposed on self-certified organisations with respect to their adherence to the Principles, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that there exists effective legal protection...*"

So when you're looking at the public sphere, you look

at whether the legal system and the protections, that are not grounded in law, but all of the systemic protections are such as to ensure that the intervention, if I can call it, is limited to what is strictly necessary. And if it does, then that complies with the Charter, if that applies, or with the ECHR if it doesn't apply. Because one of the things that the Commission mention, or the court mentions, of course, in the **Anderson** case, where it's looking at the overlap between the ECHR and the Charter, is that every Member State, the ECHR applies. It applies unusually in Ireland, as you know, not directly, but in nearly every other state it's actually part of the law. 16:00 16:00

So whether you apply the ECHR or whether you apply the Charter - I would have some issue with the application of the Charter, but allowing it for the purpose of the simple point I want to make - the test is: Is it strictly necessary for the purpose? And if it is, that then meets the comparison in Europe, which is it's strictly necessary for that purpose of national security. So that is your comparator, that is your end point, that is your adequacy, not an identification of a few sections that provide remedies and say 'I don't like the look of those remedies, they're not complete as I would like them to be and, therefore, I have doubts'. 16:00 16:01 16:01

So the whole process was wrong, the substantive

analysis was wrong, the conclusion was wrong, it cannot be sustained. And if she *had* looked at the Privacy Shield in time, without rushing this to court, then that would've been obvious and would've required an entirely different analysis that would've avoided burdening this court with that and the CJEU. But the idea that it would go to the CJEU on a basis that you would record - *record*, in the reference - that the DPC's doubts, which you share, were arrived at without considering the Privacy Shield - I mean, just think of that and one would see how wrong the basis for this, these proceedings is. 16:02 16:02

So I might leave it there, Judge. Thanks.

MS. JUSTICE COSTELLO: Yes, certainly. Just so that I can touch base with McGovern J. in relation to the list and things, have we a day and a half more for yourself and Ms. Hyland? 16:02

MR. GALLAGHER: I think so, Judge. A day and a half to two days. We'll try to keep it to a day and a half, if that's... 16:02

MS. JUSTICE COSTELLO: Mr. McCullough, have you any idea? I'm not limiting anybody, it's not that sort of case.

MR. McCULLOUGH: We're going to be less than a day, Judge. But it may be more than two hours. 16:03

MR. MURRAY: Well, it's hard to know until we hear what --

MS. JUSTICE COSTELLO: I understand, yes. It's

probably the rest of the week, I would say.

MR. MURRAY: Oh, I think so, Judge, yes. But I'll come back, as it were; when I've heard at least Mr. Gallagher's and Ms. Hyland's submissions, we'll be in a position. There is a possibility of Mr. Collins coming back to do the reply, so I may just need to address you on the logistics of that next week. 16:03

MR. GALLAGHER: Lazarus-like.

THE HEARING WAS THEN ADJOURNED UNTIL TUESDAY, 7TH MARCH AT 11:00 16:03

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