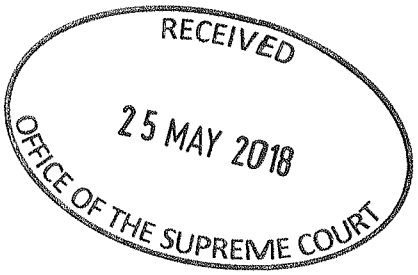
Appendix FF

No. 2



O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number		**S:AP:IE:2018:000068**

[Title and record number as per the High Court proceedings]

Data Protection Commissioner	**V**	**Facebook Ireland Limited and Maximillian Schrems**

Date of filing	
Name of respondent	**Data Protection Commissioner**
Respondent's solicitors	**Philip Lee**
Name of appellant	**Facebook Ireland Limited**
Appellant's solicitors	**Mason Hayes & Curran**

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Data Protection Commissioner

The respondent was served with the application for leave to appeal and notice of appeal on date
11 May 2018

The respondent intends :	
	to oppose the application for an extension of time to apply for leave to appeal
	not to oppose the application for an extension of time to apply for leave to appeal
✓	to oppose the application for leave to appeal
	not to oppose the application for leave to appeal
✓	to ask the Supreme Court to dismiss the appeal

✓	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	✓

Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	

How would you prefer us to communicate with you?

	Document Exchange		E-mail
	Post		Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
	Document Exchange	✓	E-mail
✓	Post		Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

Not applicable

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

The Data Protection Commissioner ("**the Commissioner**") does not take issue with the information provided by the Applicant ("**Facebook**"). It is noted that Facebook disputes certain findings of the High Court; the Commissioner takes no issue with these findings.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

~~*In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)*~~

~~* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance~~

~~* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court~~

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

1. In this Appeal, Facebook asks this Court to do three things:

   (1) The first is to prevent the CJEU from responding to questions referred by the High Court on 4 May 2018 on important issues of EU law;

   (2) The second is to prevail upon this Court to overturn findings of fact by the trial Judge;

   (3) The third is to agitate a claim of mootness due to the coming into force of the General Data Protection Regulation ("**GDPR**") which could have been (and was not) argued by Facebook in the High Court, and which (if it has any merit – which it does not) can be addressed by the CJEU (if it thinks it appropriate to do so).

2. None of these points—on any version of them—gives rise to a matter which is of general public importance or which must be determined by this Court in the interests of justice. The first is an untenable attempt to prevent the proper determination of significant issues of EU law. The second does not as presented properly disclose an issue of law at all. The third is not properly a ground of appeal, not having been argued in the Court below and is in any event a matter which had it any substance (which it does not) should be determined by the CJEU.

3. What this Court has previously described as the "*basic constitutional threshold of public importance or public interest*" has obviously not been satisfied in this case.

4. Article 34.5.4° of the Constitution is clear. In addition to demonstrating "***exceptional circumstances***" warranting a direct appeal from the High Court, Facebook must demonstrate, by way of "***precondition***" the presence of either or both of:

   (1) A matter of general public importance;

   (2) The interests of justice.

5. These preconditions are jurisdictional (see, e.g., *Island Ferries Teoranta v Galway County Council* [2015] IESCDET 1). The Court "***must*** *first be satisfied that the*

constitutional threshold for an appeal to this Court has been met. The Constitution itself requires as much. If the court is not so satisfied then the application ***must*** *be refused*" (*Flynn v Ó Donnabháin* [2015] IESCDET 52, §19) (emphasis added).

6. This Court has also held, in *Price Waterhouse Cooper v Quinn Insurance Limited (Under Administration)* [2017] IESC 73 (§10), that, in determining whether the precondition of public importance is satisfied:

> "*... it is necessary* ***first that the point be stateable, and second that it should normally have the capacity to be applicable to cases other than that under consideration***. *It is* ***possible that the subject matter of the case may itself be of public importance***. *These considerations are not exhaustive.*" (Emphasis added).

7. Meanwhile—and critically—it will not suffice to demonstrate that an appeal is in the interests of justice that there is a "*possibility of error in the court below*" (*PwC*, §§8—9).

8. Facebook has not satisfied any of the relevant preconditions.

9. The Commissioner does not agree with Facebook (§A1) that "*[t]he first issue* ***to be decided*** *by this Honourable Court concerns whether an appeal lies at all from a decision of the High Court to make a preliminary reference to the CJEU*" (emphasis added). This Court has already decided this issue. It has concluded in unequivocal terms that no such appeal lies. It follows that there is no issue of law arising here of "*fundamental public importance*". The law is clear and the issue has already been determined against Facebook.

10. For the avoidance of doubt and for reasons set out in the Commissioner's Grounds of Opposition below, the Commissioner does not accept that the substantive Grounds raised by Facebook raise any stateable points of appeal (*PwC*).

11. Faced with the clear position of this Court on the unavailability of an appeal, Facebook attempts to suggest that a departure is warranted in "*the specific context of this case*" (§A1) and due to an allegedly "*particular feature of this case*" (§A2). In so doing, Facebook eschews any effort to demonstrate that the issues arising in the appeal have the capacity to be applicable in cases other than that under consideration (as *PwC* suggests is normally required).

12. Conflating its application for leave with its potential Grounds of Appeal—and also ignoring the caution in *PwC* that the possibility of error in the court below will not suffice to warrant an appeal—Facebook purports to rely (§§A2, A7) on alleged "*significant errors with regard to US law*" as a reason for the grant of leave. For the avoidance of any doubt, Facebook cannot rely on its disagreement with the High Court as a justification for an appeal, nor is a question of foreign law (a question of fact) such

as to satisfy the constitutional threshold.

13. With respect to *Campus Oil v Minister for Industry and Energy* [1983] 1 IR 82, Facebook's assertions (§A5) that it does not apply to the within proceedings and that it was wrongly decided are rejected.

14. Insofar as Facebook contends that the making of the reference by the High Court is a decision within the meaning of Article 34, it is observed that in *Campus Oil*, in concluding that there was no "*decision*" for the purpose of Article 34 in *Campus Oil*, the Supreme Court (Walsh J) was persuaded (87) by the fact that the High Court "*made no order having any legal effect upon the parties to the litigation*". Here too, no order has been made by the High Court having any legal effect upon the parties. Even Facebook acknowledges (§A7) that such legal effect will only arise "***[i]f** the CJEU's answers ... are adverse to Facebook"* (emphasis added). It is only the CJEU that can make an order having a legal effect upon the parties to these proceedings and it is only the CJEU that can declare the SCC Decisions invalid.

15. While Walsh J observed in *Campus Oil* that the making of a preliminary reference "*by its nature, is non-contentious*" (86) (A§8), he did so in the course of emphasising that the making of a reference involves "*an exercise of a **right***" on the part of the national judge (emphasis added). It is obvious that the exercise of this "***right***" is unaffected by whether or not the parties agree with its exercise (and indeed, it would not be uncommon for parties to dispute whether a reference should be made).

16. Insofar as Facebook contends, relying on Case C-210/06 *Cartesio* EU:C:2008:723, that *Campus Oil* is in conflict with EU law (§A9), it is clearly mistaken. In this regard, the Commissioner submits (in particular and without limitation):

    (1) In *Campus Oil*, Walsh J noted the discretion enjoyed by national courts as to the making of references, was "*unfettered*" observing that "*[i]t is not within the power of the Oireachtas, or of any rule-making authority, to give any national court the power to modify or to control the unqualified jurisdiction conferred upon the national judge by Article 177 of the Treaty*" (see 87). In *Cartesio*, the CJEU also invoked the discretion enjoyed by national courts as to the making of references, observing that "*national courts have the widest discretion*" (§88) and that:

        "*[i]t follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part...*".

    (2) In *Campus Oil*, Walsh J relied on Case 166/73 *Rheinmühlen-Düsseldorfv Einfuhr- und Vorratsstelle Getreide* EU:C:1974:3 in reaching his decision. In *Cartesio*, the

CJEU relied on *Rheinmühlen* in reaching its decision and cited it with approval.

(3) In *Campus Oil*, Walsh J recognised (86) the "*unqualified jurisdiction conferred upon the national judge*" by Article 267 of the Treaty on the Functioning of the European Union. In *Cartesio*, the CJEU confirmed (at §95) that "*the autonomous jurisdiction*" which Article 234 TFEU confers on the referring court to make a reference would be called into question if—by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings—the appellate court could prevent the referring court from exercising the right conferred on it by the EU Treaty.

(4) In *Campus Oil*, Walsh J acknowledged that other Member States may provide for appeals against the making of references (87) and decided the question "*in the context of Irish law only*". In *Cartesio*, the CJEU held that the existence of the preliminary reference procedure does not preclude the decision from remaining subject to the remedies normally available under national law (§93).

17. As such, there is no basis for contending that *Campus Oil* is in conflict with *Cartesio*; rather, a review of both cases reveals the remarkable prescience of Walsh J in *Campus Oil*.

18. Moreover, while, as in *Campus Oil*, the CJEU acknowledged in *Cartesio* the availability of national remedies, it clearly envisaged a very limited role for such remedies. In particular, the CJEU held that it is for the ***referring*** court alone—not the appellate court—to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it (§96). In other words, the most the appellate court can do is to serve a consultative or advisory function, providing its views to the lower court, which is the ultimate decision-maker on the utility of those views.

19. While other Member States may vest such a consultative or advisory jurisdiction in their appellate courts, such a jurisdiction is not known to our legal system (see, e.g., *McDonald v Bord na gCon* [1985] 1 IR 217, 231). A jurisdiction for this Court to opine on an Order for Reference made by a lower court (including for example, a tribunal of limited jurisdiction), which that lower court or tribunal could then assess and follow at its own discretion would be novel and unprecedented.

20. As such, even if Facebook is correct (§10) that EU law does not prevent a superior court from making a binding holding in respect of the Statement of Facts, national constitutional law is clear that this Court does not have jurisdiction to grant advisory opinions of the sort permitted by EU law.

21. Finally, insofar as it seeks to distinguish this case from that of *Campus* Oil, a review of

the allegedly "*particular*" features invoked by Facebook only demonstrates that they are commonplace:

(1) While novelty is claimed for the fact that the CJEU will be asked to pronounce on "*the validity of Commission Decisions on the basis of findings of fact with regard to the state of US law*" (§A2), no such novelty arises. ***Any*** reference relating to the validity of ***any*** EU measure will result in a pronouncement on validity made on the basis of findings of fact. It would be surprising if it were otherwise, given that the referring court is under an obligation to set out its finding of facts in the Order for Reference (see Rules of Procedure of the Court of Justice, Article 94). That the findings here happen to relate to the law of the United States ("**US**") makes no difference.

(2) While Facebook emphasises (§A2) that, upon the CJEU's determination of validity, the High Court will have "*no further role in the substantive aspects of the matter*", again, this is not unusual where the reference is focused solely on the validity of an EU measure (and as occurred previously in this jurisdiction, for example, in Case C-370/12 *Pringle v Government of Ireland* EU:C:2012:756; Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* EU:C:2014:238).

(3) While it is accepted that in this case, the only relief sought by the Commissioner was the making of the reference (§§A1, 7), this provides no distinction of principle between this case and any other case in which a reference is sought.

(4) While Facebook observes (§A3) that invalidation of the Commission Decisions would affect other commercial entitles, again no exceptionality arises; the invalidation of any measure of EU law may have the potential to affect a large number of persons (whether legal or natural and whether commercial or not).

22. Facebook also contends (§A12) that, in the absence of an appeal, Facebook will be deprived "*of any effective remedy in respect of any errors in the High Court judgment including the reference*". Aside from the fact that in this regard Facebook again relies on its substantive Grounds to advance its case for leave, and aside from the fact that this is an attempt to prevail upon this Court to correct errors of fact not law, it must be recalled that the procedure leading to the High Court's findings of fact involved the following:

(1) Consideration by the High Court of the multiple expert reports identified in the Order;

(2) Examination and cross-examination of 5 experts on US law;

(3) Consideration of two agreed reports of experts on US law arising from two meetings between the said experts;

(4) Written submissions of 3 parties and 4 *amici curiae*;

(5) Oral submissions from 3 parties and 4 *amici curiae*;

(6) 21 days of hearing;

(7) Delivery of the judgment of the High Court on 3 October 2018;

(8) An unusual (perhaps even unique) post-Judgment 4-day hearing in respect of both the questions to be referred and the findings of fact in the Judgment;

(9) A full opportunity of which both Facebook and the US Government availed themselves to alert the Court to alleged "*errors*" in the Judgment and additional findings that the Court was encouraged to make; and

(10) An acceptance on the part of the Court of a limited number of the submissions of Facebook and the US Government were valid, with consequential amendments to the Judgment.

23. Facebook will also have a full opportunity to present its case to the CJEU.

24. In all the circumstances, it is simply not accepted that a refusal to permit an appeal against the reference would deprive Facebook of an effective remedy.

25. In all the circumstances, it is respectfully submitted that leave to appeal ought not be granted.

**delete where inapplicable*

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

GENERAL GROUNDS OF OPPOSITION

1. While each Ground of Appeal is considered individually below, by way of preliminary Ground of Opposition, the Commissioner submits that Facebook's Grounds of Appeal fall into the following (self-evidently unmeritorious) categories:

   (1) ***Questions which cannot be determined by this Court***, and which must ultimately be determined by either:

      (a)The CJEU (Grounds 1 and 7); or

      (b)The High Court (Grounds 8 and 10 and the Stay Grounds);

   (2) ***A question that was not argued before the High Court*** (Ground 2) (and which in

any event should be determined by the CJEU);

(3) ***Questions of fact***, which can only be overturned upon meeting the exacting threshold identified in *Hay v O'Grady* [1992] 1 IR 210 and *Wright v AIB Finance and Leasing Ltd* [2013] IESC 55 (Grounds 3—6) (a difficult task in light of the unusually extensive procedures followed by the High Court in reaching its findings of facts as set out above); and finally,

(4) ***An entirely superfluous complaint*** that it is essential that the CJEU should have access to factual evidence that has already been furnished to the CJEU with the Order for Reference (Ground 9).

2. These Grounds are further undermined variously by estoppel, imprecise use of language, misreading of the Judgment and inadequate particularisation.

A. GROUNDS OF APPEAL PERTAINING TO WHETHER ANY PRELIMINARY REFERENCE FALLS TO BE MADE AT ALL

Ground 1

3. With respect to Ground 1, it is denied that the learned High Court judge erred in making a reference to the CJEU in circumstances in which the Court was bound by the decision/finding on US law in respect of the adequacy of protections in the context of governmental surveillance contained in Commission Decision 2016/1250 ("**the Privacy Shield Decision**"). It is denied that the Court was so bound, and the errors alleged in Ground 1 (at §§1—7) are denied as if set out herein and traversed seriatim.

4. Without prejudice to the foregoing, Facebook is mistaken in its assertion that the Privacy Shield Decision contains a decision/finding as to the adequacy of US law in respect of the protection of personal data transferred from the EU to the US (§2) for the following reasons (in particular, and without limitation):

(1) The Privacy Shield does not contain a free-standing endorsement of the adequacy of US law.

(2) Rather, as its title announces, it is a Commission Implementing Decision "*on the adequacy of the* ***protection provided by the EU-U.S. Privacy Shield***" (emphasis added).

(3) In other words, the Privacy Shield does not opine on the adequacy of law generally; it opines on the Privacy Shield, applicable to those transferring data under the Privacy Shield, and not applicable to regimes which do not have all of the features of the Privacy Shield, such as the SCC Decisions.

5. It is accepted (§7) that the Commissioner made no challenge to the compatibility of the Privacy Shield Decision with the Charter. Privacy Shield was adopted after the issuing of

the proceedings. Given, however, that Facebook invoked the Privacy Shield Decision by way of defence to the case made by the Commissioner (see Facebook Defence, §84(k)), the High Court was inevitably required—at Facebook's instigation—to consider the Privacy Shield Decision.

6. In any event, the High Court would have been fully entitled to raise a concern about the Privacy Shield Decision of its own motion. In this regard, Facebook's contention (§7) that the mere fact that the Commissioner "*made no challenge to the compatibility of the Privacy Shield Decision*" means that "*the Decision's statements with regard to US law, including remedies are valid and the requirements for transfers of data to the US are met*" is a non-sequitur. The validity of the Privacy Shield Decision falls to be determined objectively by the CJEU; it does not turn on whether or not the Commissioner has challenged its validity.

7. It is also inaccurate to suggest that "***no issue*** *regarding the validity or authoritativeness of the statements regarding US law made in the Privacy Shield Decision arose in the proceedings*" (§7) (emphasis added). The Commissioner took issue with the compliance with Article 47 of the Charter of Fundamental Rights of the European Union ("**the Charter**") of the Ombudsperson (see, e.g., Commissioner's Written Submissions, §§110-113; Day 19, p 78).

8. In all the circumstances, the Commissioner submits that the High Court's analysis of the Privacy Shield Decision was unassailable and Ground 1 should be dismissed.

Ground 2

9. Facebook's Ground 2 is as startling as it is unfounded.

10. Pursuant to its Ground 2, Facebook would have this Court rule on an issue that was neither argued before the High Court nor determined by it.

11. Facebook asserts that it "*raised this issue at hearing in the High Court*" (§9).

12. This is a surprising assertion given that:

    (1) The only reference made (and identified as having been made) by Facebook is what the High Court fairly described (Stay Judgment, §30) as an "*oblique passing*" reference on Day 15 (pp 114—116), in an exchange lasting from 15:03—15:05, namely, 2 minutes of a 21-day hearing;

    (2) No reference is to be found elsewhere in Facebook's Defence or in its legal or oral submissions;

    (3) Facebook neither reverted to nor developed this passing reference;

    (4) Facebook did not—as might have been expected had it been asking the High Court

to rule on the issue—draw the Court's attention to the relevant provisions of Directive 95/46/EC ("**the Directive**") and the GDPR;

(5) Facebook did not—despite ample opportunity to do so during the hearing and during the 4-day hearing before the High Court on the reference questions and findings of fact and notwithstanding that it now suggests (§14) that the GDPR will "*entirely alter the context and relevance of the questions being referred to the CJEU*"—ever suggest that the issue of mootness ought to form part of the High Court's consideration;

(6) Nor, as the High Court correctly observed (Stay Judgment, §32) did Facebook—through the course of multiple adjournments—ever alert the Court to the fact that "*there was a clock ticking down*".

13. In the premises, Facebook's criticism of the High Court (§9) on the basis that it "*did not address this matter*" is audacious.

14. Moreover, with particular respect to §15, it is incorrect to state that Facebook was criticised by the High Court for raising this issue in the course of Facebook's application for a stay on the order of the High Court *simpliciter*. In fact, Facebook was justifiably criticised for raising this issue in the course of its application for a stay in circumstances in which it failed to raise the issue at the multiple opportunities previously made available to it to raise the issue.

15. Facebook is therefore estopped from advancing Ground 2.

16. Without prejudice to the foregoing, Facebook's assertion that the reference is rendered moot by the coming into force of the GDPR is wholly misconceived given (in particular and without limitation) the following:

(1) Article 46(5) of the GDPR, which expressly provides that decisions adopted on the basis of Article 26(4) of the Directive (as are the SCC Decisions) will remain in force until amended or repealed;

(2) Articles 45, 46 and 49 of the GDPR, which are equivalent to Articles 25 and 26 of the Directive (pursuant to which the SCC Decisions were adopted); and

(3) Article 94(2) of the GDPR, which provides that references to the repealed Directive shall be construed as references to the GDPR.

17. It will be a matter for the CJEU—***and only the CJEU***—to assess the impact of the GDPR in the circumstances arising here.

18. It follows that Ground 2 should be dismissed.

B. GROUNDS OF APPEAL PERTAINING TO THE CONTENT OF THE REFERENCE FOR PRELIMINARY RULING, INCLUDING THE STATEMENT OF FACTS

General

19. By way of preliminary comment in relation to Facebook's appeal against the High Court's findings of fact, while the importance of being "*correct, accurate and complete in every relevant respect*" is not disputed, it is not accepted (§17) that there are "*limitations inherent*" in the procedures for determining the content of foreign law.

20. As has already been set out above, the High Court's findings of facts on US law were reached after a lengthy, involved, multiparty procedure.

21. It is therefore entirely unclear on what basis Facebook now complains that the procedures for determining the content of foreign law have "*inherent*" "*limitations*".

Ground 3

22. As to Ground 3, it is denied that the High Court judge erroneously concluded that US government agencies engage in "*mass indiscriminate processing*" of personal data pursuant to the PRISM and Upstream programmes operated under s 702 of the Foreign Intelligence Surveillance Act. The errors alleged in Ground 3 (§§18—23) are denied as if set out individually herein and traversed seriatim.

23. Without prejudice to the foregoing, Ground 3 is premised on a seemingly deliberate conflation of language:

    (1) Facebook makes much (§20) of a purported distinction between "*the **searching** of communications passing through the internet backbone*" and "*the **targeting** of a very small proportion of those communications*", carefully stating that the "*latter **targeting** is not properly described as 'mass indiscriminate processing of data'*";

    (2) Tellingly, Facebook does not suggest (§20) that the "***searching***" of communications passing through the internet backbone is not properly described as "*mass indiscriminate **processing** of data*";

    (3) Facebook also does not address the fact that the High Court reached its conclusion as to "*mass indiscriminate **processing***" specifically by reference to the broad definition of "*processing*" in the Directive (see Judgment, §190) (the breadth of which definition Facebook also does not dispute).

24. It also follows from this that (contrary to Grounds of Appeal, §22), there is no conflict between the Court's finding of "*mass indiscriminate **processing***" and its finding (at §189) that "*the search is for targeted communications*".

25. Without prejudice to this, the Court's conclusion of "*mass indiscriminate processing*" is entirely sustainable, in particular, given the evidence of Ms Ashley Gorksi, who described Upstream as involving "*the mass copying and searching of internet connections*" (Gorski Report, §25 and Day 4, pp 95, 96, 99, 100, 109, 137).

26. The Commissioner also objects to Facebook's entirely vague and unparticularised criticism (at §19) that the Judgment "*does not accurately or properly reflect the various protections and limitations at play*", without any identification of these alleged protections and limitations.

27. In all the circumstances, Ground 3 should be dismissed.

Ground 4

28. As to Ground 4, it is denied that the learned High Court judge made a fundamental error in her account of the legal framework underpinning US law on surveillance and the errors alleged in Ground 4 (at §§24—28) are denied as if set out individually herein and traversed seriatim.

29. Without prejudice to the foregoing, it is important to note that the High Court actually amended §192 of the Judgment following submissions made by Facebook and the US Government by including an additional two sentences. This paragraph now reads (with additions highlighted in bold and underlined):

> "*The basic principle is that surveillance is legal unless forbidden and there is no requirement to ever give notice in relation to surveillance.* ***This case is concerned with electronic surveillance conducted by government agencies and individuals. This surveillance is regulated by the Constitution, statute, decisions of the courts, Executive orders, proclamations and presidential directives***."

30. The Court's finding that "*surveillance is legal unless forbidden*" derives express support from Professor Richards, who observed (Report, §34) that:

> "*... the general principle under which American law operates is that surveillance is legal unless forbidden*".

31. Professor Richards was not cross-examined on this statement.

32. There is also no inconsistency (contrary to Facebook's claim at §24) between the first sentence and the remaining sentences of §192 of the Judgment. As with Ground 3, Facebook conflates concepts. It is entirely possible for surveillance to be ***regulated*** as a matter of fact by the Constitution, statute and decisions of the courts and so on, without same being ***required*** for the surveillance to be lawful.

33. Furthermore, taking the examples of "*Executive orders*" and "*presidential directives*",

these instruments support the Court's conclusion that "*surveillance is legal unless forbidden*". These are not legal instruments, but, as Ms Gorski (Day 4, p 29) noted:

> "*Not all of the regime is set forth in* ***statutory law****. For example Executive Order 12333 is an order issued by the executive branch that can be amended or revoked at will.* ***Likewise Presidential Policy Directive 28 is a directive set forth by the executive branch that can be amended or revoked at will.***" (Emphasis added).

34. In light of this evidence of Ms Gorski—who analysed the US Government's entitlement to access data by reference to particular statutory/legal provisions—the basis for Facebook's sweeping statement (§26) that the High Court's finding was contradicted by the "*evidence of all experts at the trial who analysed the US Government's entitlement to access data by reference to particular statutory/legal provisions*" is unclear.

35. Also in light of this evidence of Ms Gorski, it is difficult to comprehend on what basis Facebook asserts that "*the foundational principle under US law is that action by the federal government is only lawful when done under specific legal authority*" (§28) or that "*[t]he entire case proceeded on the basis that the US Government's right to access data was constrained by relevant statutory and legal provisions*" (28).

36. It is also denied that the Court's finding finds no support in and is in tension with the Commission's Privacy Shield Decision (see §27). In this regard, the Commissioner will rely, in particular and without limitation, on the fact that the letter of Mr Robert Litt to the EU Commission (Annex VI to the Privacy Shield Decision) ("**the Litt Letter**") states that "*[a] mosaic of laws and* ***policies*** *governs US signals intelligence collection*" (emphasis added).

37. For the sake of completeness, the High Court's conclusion that "*there is no requirement ever to give notice in relation to surveillance*" was also entirely supported by the evidence.

38. In all the circumstances, Ground 4 should be dismissed.

Ground 5

39. As to Ground 5, it is denied that the High Court erred in its understanding of the doctrine of standing and the errors alleged in Ground 5 (§§29—34) are denied as if set out individually herein and traversed seriatim.

40. Without prejudice to the foregoing, first, the Commissioner objects to the inadequate particularisation of this Ground. At §31, reference is made to an alleged "*number of important errors*" in the High Court's analysis of the doctrine of standing, which errors are not identified. Reference is made at §34 to "*other fundamental errors with respect to the standing doctrine*". The Commissioner will object to any attempted reliance on

"*errors*" not identified in Facebook's Grounds of Appeal.

41. Second, it is denied—contrary to the suggestion at §32—that the Court failed to appreciate or have regard to the distinction between the standing requirements at the motion-to-dismiss stage and at the summary stage of litigation, and, in particular, the Court discussed the distinction in detail at §§226—229.

42. Third, the distinction is in any event not as stark as is suggested by Facebook (§32). Nor is the survival of Wikimedia's challenge as significant as Facebook suggests (§33). In this regard, the Commission will rely, in particular, on the evidence of Ms Gorski in the Report of the Second Experts Meeting, and her comment on the *Wikimedia* case in the following terms:

> "*Despite the breadth of Upstream surveillance, the Fourth Circuit rejected as implausible the standing claims of eight organizations that engage in substantial quantities of international communications as an essential part of their work, including sensitive communications with and about individuals likely targeted by the NSA for surveillance.*"

43. Fourth, Facebook's complaint (§34)—that the High Court erred (§232) in finding that the experts agreed that the standing requirement was "*notoriously indeterminate*" when the Joint Expert Report limited the expert agreement to a statement that the standing requirement was "*to a large degree indeterminate*"—is premised on a misconceived assumption that the High Court was bound to only use the express terms of the Report of the Experts Meeting, notwithstanding that it heard the oral evidence and cross-examination of all of the experts attending that meeting. In this regard, Professor Richards himself stated that all of the experts were in agreement "*that standing doctrine is notoriously indeterminate*" (Day 8, p 98), while Ms Gorski referred to the "*phenomenon of indeterminacy*" and to the fact that "*the standing doctrine is to a large degree indeterminate*" (Day 4, p 11).

44. There is in any event no inconsistency in the use of language between the Expert Report and the Court; contrary to its protest, Facebook's case does actually turn on semantics.

45. Fifth, for the sake of completeness, insofar as Facebook seeks to imply in Ground 5 that standing only arises as an obstacle at the summary stage, this implication is rejected and is unsupported by the evidence.

46. Overall, it is denied that the High Court "*unduly and excessively emphasised the obstacle posed by standing to the grant of remedies by courts in the United States*" (§34).

47. In all the circumstances, Ground 5 should be dismissed.

Ground 6

48. As to Ground 6, it is denied that the High Court erred in failing to appreciate the importance or in minimising the importance of the Administrative Procedure Act ("**APA**") in the context of the availability of remedies in US law. It is denied that the High Court did so fail to appreciate and that it did so minimise. The errors alleged in Ground 6 (§§35—43) are denied as if set out individually herein and traversed seriatim.

49. Without prejudice to the foregoing, the High Court's assessment of the relevance of the APA was entirely lawful and supported by the evidence, in particular, given that:

    (1) As the High Court observed (at §219), the APA was not even mentioned by Professor Swire (Facebook's expert) in his evidence, undermining the position now advanced by Facebook as to "*the important role played by the APA*" (§38);

    (2) As the High Court observed (also at §219), the APA was not mentioned in the Litt Letter;

    (3) As the High Court found (§220)—and there is no dispute on this—the APA is precluded "*if a plaintiff has a remedy under an alternative statutory provision*" (§220);

    (4) As the High Court found (§221), the scope of "*final agency action*" such as to engage the APA is unclear.

50. Further and without prejudice to the foregoing:

    (1) §37 is incomplete and has the potential to mislead. For the avoidance of any doubt, it is ***not*** the case that ***all*** remedies under US law are "*open to all individuals irrespective of their nationality*";

    (2) §40 is inadequately particularised and does not appear to even relate to the APA at all. In particular, Facebook has failed to explain its reference to "*relevant rules, practices and safeguards*";

    (3) §41 is also inadequately particularised and, again, does not even appear to relate to the APA at all. Indeed, this paragraph appears to involve a general attack on the entirety of the factual findings of the High Court. The Commissioner will strenuously object to Facebook advancing any appeal by reference to errors other than those that have been adequately particularised in the Grounds.

51. In all the circumstances, Ground 6 should be dismissed.

Ground 7

52. Ground 7 is premised on a confusing and manifest misstatement of the Judgment.

53. At §44, Facebook asserts that "*the learned High Court judge erred* ***in finding*** *that the laws and practices of the US did not respect the essence of the right to an effective remedy under Article 47 of the Charter*" (emphasis added). Similar references to such an alleged finding are made at §§49—50.

54. There is no such finding in the Judgment. Rather, at §298—on which Facebook bases Ground 7—the High Court found as follows:

> "*To my mind* ***the arguments*** *of the DPC that the laws—and indeed the practices—of the United States do not respect the essence of the right to an effective remedy before an independent tribunal as guaranteed by Article 47 of the Charter, which applies to the data of all EU data subjects transferred to the United States* ***are well-founded***". (Emphasis added).

55. This is reinforced by the fact that the issue of compatibility of US law with Article 47 of the Charter has been referred to the CJEU. Question 5 is formulated as follows:

> "*Given the facts found by the High Court in relation to US law, if personal data is transferred from the EU to the US under the SCC decision:*
>
> *a) Does the level of protection afforded by the US respect the essence of the individual's right to a judicial remedy for breach of his or her data privacy rights guaranteed by Article 47 of the Charter?*"

56. Indeed, Facebook itself acknowledges that the High Court made no such finding, referring in Section 4, §B6(g), to the fact that the High Court "***shared the DPC's concerns*** *that laws and practices of the US do not respect the essence of the right to an effective remedy*".

57. The High Court did not therefore err in finding that the laws and practices of the US did not respect the essence of the right to an effective remedy under Article 47 of the Charter; the High Court did not so find.

58. In any event, the errors alleged in Ground 7 (§§44—53) are denied as if set out individually herein and traversed seriatim.

59. Had the High Court found "*the laws and practices of the US did not respect the essence of the right to an effective remedy under Article 47 of the Charter*", such a finding would have been wholly justified in light of evidence before the Court, including, in particular (and without limitation), the combination of:

    (1) The absence in US law of a requirement for notice; and

    (2) The onerous standing requirements.

60. Without prejudice to the foregoing:

(1) It is not accepted (contrary to §47) that whether or not the essence of Article 47 of the Charter is not respected requires that "*there was **no remedy** at all for an affected EU citizen in the US*";

(2) It is denied (§48) that the High Court did not give adequate reasons for its conclusion that the Commissioner's arguments are well-founded; the reasons are clear from the Judgment;

(3) As to §51, it is denied that it is a "***fact***" that "*the whole purpose of surveillance would be undermined if people were notified of it*" (emphasis added). In this regard, the Commissioner relies, in particular, on the evidence of Ms Gorski as to delayed notice (Day 4, p 23);

(4) As to §53, it is not accepted that the learned High Court judge engaged in "*selective quotation*"; the writing of a judgment would become impossible if the Court were not permitted to identify specific elements of evidence on which to rely. In any event, Facebook itself selectively fails to record that Professor Brown also reaches the following conclusion as to the requirements of the European Convention on Human Rights (p 17):

> "*Persons who have been subjected to surveillance should be informed of this as soon as this is possible without endangering national security or criminal investigations so they can exercise their right to an effective remedy at least ex post facto*".

61. There is no dispute that a requirement to notify persons subjected to surveillance as soon as possible is not imposed by US law (Professor Swire, Day 11, p 142).

62. In all the circumstances, Ground 7 should be dismissed.

Ground 8

63. As to Ground 8, it is denied that the High Court erred in concluding that even if the essence of Article 47 was respected, there are well-founded concerns that the limitation on the Article 47 right are not proportionate and necessary pursuant to Article 52(1) of the Charter. The errors alleged in Ground 8 (§§54—59) are denied as if set out individually herein and traversed seriatim.

64. Ground 8 is another Ground of Appeal that is inadequately particularised by Facebook and includes vague reference (§55) to the Court's "*errors regarding the state of US law (or, further and in the alternative, the rules/practice/safeguards in the US)*". Without prejudice to the Commissioner's objection as to lack of particularisation, such errors are denied.

65. Further and without prejudice to the foregoing:

(1) As to §56, it is denied that the High Court failed to have regard or any adequate regard to the public interest in security. In this regard, the Commissioner will rely, in particular, on Judgment, §§5, 44, 46 and 47.

(2) As to §57, it is denied that the High Court failed to have regard or any adequate regard to other Charter rights. In this regard, the Commissioner will rely, in particular, on Judgment, §44 and 47.

(3) As to §58, it is denied that the High Court failed to have regard or any adequate regard to economic activity. In this regard, the Commissioner will rely, in particular, on Judgment, §§45, 46 and 47.

(4) As to §59, it is denied that the High Court erred in failing to apply the proportionality test required by the European Convention on Human Rights ("**the Convention**"). Aside from the lack of explanation for Facebook's reliance on the Convention as opposed to the Charter, the Court's correct application of the proportionality test is apparent from the Judgment.

66. In all the circumstances, Ground 8 should be dismissed.

Ground 9

67. As to Ground 9, it is denied that there was a significant volume of uncontradicted evidence that was entirely ignored by the learned High Court judge. The errors alleged in Ground 9 (§§60—65) are denied as if set out individually and traversed seriatim.

68. Ground 9 again suffers from inadequate particularisation, with the evidence being vaguely identified (§60) as "*referred to above*". The Commissioner relies on its Grounds of Opposition to Ground 8 in response to Facebook's contention that the High Court had no regard to the evidence cited at §62.

69. It also appears that, in fact, Ground 9 is merely a mechanism to ensure that the CJEU has "*access to this factual evidence*", which Facebook describes as "*essential*" (§65). On the agreement of the parties, this evidence has been submitted, with the Order for Reference, to the CJEU.

70. There is therefore no question but that the CJEU will have access to this factual evidence and accordingly, the very premise of Ground 9 falls away.

71. In all the circumstances, Ground 9 should be dismissed.

Ground 10

72. As to Ground 10, it is apparent that these words—"*law enforcement and the conduct of foreign affairs of the third country*"—are integral to the surveillance provisions used by the US. In particular, as is set out in the Judgment (at §166), included within the

"*significant purposes*" of collection of data for the purpose of the Foreign Intelligence Surveillance Act is "*the conduct of the foreign affairs of the United States*".

73. Insofar as Facebook suggests (§66) that this Court should make an amendment to the Order for Reference by reference to *Cartesio*, this proposition is misconceived; as has already been outlined above, *Cartesio* does not permit this Court to amend the Order for Reference. That is a prerogative exclusively of the referring court.

74. In all the circumstances, Ground 10 should be dismissed.

C. GROUNDS OF APPEAL RELATED TO REFUSAL OF STAY/POSTPONEMENT

75. As to Facebook's Grounds of Appeal relating to the Stay Judgment, it is denied that the High Court erred in not staying the Reference, either until the determination of Facebook's Appeal or until this Court made a decision on the application for leave to appeal. The errors alleged at §§66—75 are denied as if set out individually herein and traversed seriatim.

76. With respect to the High Court's conclusion that Facebook had not advanced an arguable case (§§68—72), the Commissioner relies on her opposition to the grant of leave to appeal, as already set out above.

77. It is denied that the High Court erred in concluding that the balance of justice did not favour the grant of a stay (§73), in particular, given the ongoing potential prejudice to the data protection rights of data subjects.

78. With respect to §§74—75, the Commissioner relies on her opposition to Ground 2, as set out above.

79. In all the circumstances, Facebook's Grounds of Appeal in respect of the Stay Judgment—as with all its other Grounds of Appeal—should be dismissed.

CONCLUSION

80. The Commissioner also reserves her entitlement to oppose the Grounds of Appeal on Grounds other than those identified herein. In particular (and without limitation), the Commissioner relies on all of her submissions before the High Court, both oral and written.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

CATHERINE DONNELLY BL

BRIAN MURRAY SC

MICHAEL M COLLINS SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

Not applicable

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? ☐ Yes ☑ No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union? ☑ Yes ☐ No

If Yes, please give details below:

A reference has already been made to the CJEU. As such, the Commissioner takes the view that a further reference is unnecessary. However, insofar as this Court decides to accept this appeal and any additional issues arise, the Commissioner may ask this Court to make a further reference to the CJEU.

Will you request a priority hearing? ☑ Yes ☐ No

If Yes, please give reasons below:

If this Court decides to accept this appeal, in light of the fact that a reference has already been made to the CJEU, the Commissioner would be anxious for the matters arising to be resolved expeditiously.

Signed:_____

(Solicitor for) the respondent (Notice Party)

Please submit your completed form to:

The Office of the Registrar to the Supreme Court

The Four Courts

Inns Quay

Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.