

## Appendix FF

Order 58, rule 15

No. 1

**SUPREME COURT****Application for Leave and Notice of Appeal****For Office use**

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input type="checkbox"/> The Court of Appeal	<input checked="" type="checkbox"/> The High Court

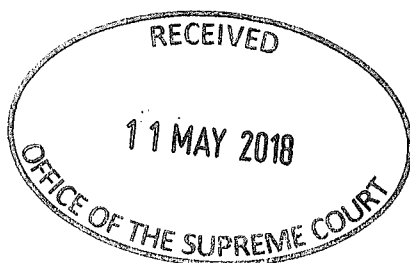
[Title and record number as per the High Court proceedings]

Data Protection Commissioner	V	Facebook Ireland Limited and Maximillian Schrems
High Court Record Nr	2016/4809P	Court of Appeal Record Nr
Date of filing	11 May 2018	
Name(s) of Applicant(s)/Appellant(s)	Facebook Ireland Limited	
Solicitors for Applicant(s)/Appellant(s)	Mason Hayes & Curran	
Name of Respondent(s)	Data Protection Commissioner Maximillian Schrems	
Respondent's solicitors	Philip Lee Ahern Rudden Quigley	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

**1. Decision that it is sought to appeal**

Name(s) of Judge(s)	Costello J
Date of order/ Judgment	3 October 2017; Revised judgment 12 April 2018; judgment of 2 May 2018 refusing a stay and making an order against Facebook as to the costs of the application for a stay.



## 2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Facebook Ireland Limited
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Original status	<input type="checkbox"/>	Plaintiff	<input checked="" type="checkbox"/>	Defendant
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

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If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
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How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

### 3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Data Protection Commissioner
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Original status	<input checked="" type="checkbox"/>	Plaintiff		Defendant		Is this party being served with this Notice of Application for leave?				
	<input type="checkbox"/>	Applicant						Respondent		
	<input type="checkbox"/>	Prosecutor								Notice Party
	<input type="checkbox"/>	Petitioner								
					Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>		

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Respondent's full name	Maximillian Schrems
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Original status	<input type="checkbox"/>	Plaintiff	<input checked="" type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?	
	<input type="checkbox"/>	Applicant		<input type="checkbox"/>		Respondent
	<input type="checkbox"/>	Prosecutor		<input type="checkbox"/>		Notice Party
	<input type="checkbox"/>	Petitioner		<input type="checkbox"/>		
	<input type="checkbox"/>			<input type="checkbox"/>		
		Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	

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Has this party agreed to service of documents or communication in these proceedings by any of the following means?

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Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

#### 4. Information about the decision that it is sought to appeal

##### A. Scope of intended appeal

1. In these proceedings the Data Protection Commissioner ("DPC") issued proceedings in the High Court in which she sought an order for reference for preliminary ruling from the High Court to the Court of Justice of the European Union ("CJEU"). The High Court handed down a judgment (3 October 2017, Revised judgment 12 April 2018) as well as a set of questions to be referred to the CJEU, and a Statement of Facts to accompany those questions. Facebook Ireland Limited ("Facebook") seeks to appeal certain aspects of the judgment of the High Court and certain aspects of the Statement of Facts, as well as the formulation of one of the questions. Facebook understands that, as of 4 May 2018, those questions have been transmitted from the High Court to the CJEU, Facebook's application for a stay pending appeal having been refused by the High Court.
2. Specifically, Facebook seeks to appeal the decision to make a reference for

preliminary ruling (Grounds 1 and 2), certain aspects of the findings of fact (Grounds 3, 4, 5, 6, 9), the High Court's legal findings based on those facts (Grounds 7 and 8) and the formulation of Question 1 in the reference (Ground 10).

3. Facebook also seeks to appeal the High Court's judgment of 2 May 2018 refusing a stay upon the transmission of the reference, the costs order made in conjunction with that decision, and the statements that were made in the course of that judgment, in particular surrounding the suggested failure of Facebook to give sufficient prominence to the imminent repeal of the Data Protection Directive. In the latter regard, it was a fact known to all parties, including the DPC, that the Data Protection Directive would be repealed on 25 May 2018. This was also specifically drawn to the Court's attention on Day 15, p.115 of the trial where counsel for Facebook confirmed that this issue went to mootness and where the Judge was made aware that Facebook's case was that if there were to be a reference, by the time it would be heard by the CJEU, that the GDPR would have come into effect rendering the reference moot.

#### **B. Concise summary of the facts found**

4. The DPC sought a reference to the CJEU in respect of the validity of three decisions of the Commission of the European Union (the "**Commission**") insofar as they apply to data transfers from the European Economic Area (the "**EEA**") to the United States ("**US**"). The decisions are:
  - (1) Commission Decision 2001/497/EC of 15 June 2001 on standard contractual clauses [**'SCCs'**] for the transfer of personal data to third countries, under Directive 95/46/EC [2001] OJ L181/19;
  - (2) Commission Decision 2004/915/EC of 27 December 2004 amending decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries (notified under document number C(2004)5271) [2004] OJ L385/74; and
  - (3) Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C (2010) 593) (Text with EEA relevance) [2010] OJ L39/5 (together the "**SCC Decisions**").
5. The SCC Decisions were made pursuant to Article 26 of Directive 95/46/EC (the "**Data Protection Directive**"). The DPC issued these proceedings in the course of investigating a (reformulated) complaint by Mr Schrems in respect of the transfer of data by Facebook to Facebook Inc. in the United States. The DPC's position was that she had well-founded concerns in respect of the adequacy of the protection afforded by the SCC Decisions for the data of European citizens transferred to the US. The hearing focused on the SCC Decision of 2010, which was the decision Facebook used to transfer the data of Mr. Schrems to the US. The High Court took the view that if it shared the well-founded concerns of the DPC, it had a duty to make a reference for preliminary ruling (§79 of the High Court judgment). The High Court concluded that it did share these concerns, and in the course of that decision it made a range of findings of fact and law. A number of these findings of fact are contested, and form the subject of certain of Facebook's grounds of appeal, as set out in Section 5 of this Notice of Appeal. These contested facts relate to the High Court's assessment of US law.
6. By way of overview, the facts as found by the High Court included those which follow.

- (a) The High Court found that the principal legal basis for surveillance in the US was the Foreign Intelligence Surveillance Act (“FISA”), which authorised “traditional” FISA orders and surveillance pursuant to Section 702 FISA. (§165, HC Judgment) The High Court proceeded to make findings as to how FISA authorisation operates. (§166-171, HC Judgment) The High Court found that the second key legal authority for surveillance was Section 215 of the USA-PATRIOT Act, 2001 (50 USC s. 186) (§172) and that the central legal authority for collection of foreign intelligence outside of the US was Executive Order 12333. (§176) The Court found that the manner in which surveillance is actually conducted and data processed following acquisition is governed by Presidential Policy Directive 28.
  - (b) The High Court made findings in respect of two surveillance programmes operated under S 702 FISA, namely PRISM and Upstream. (§178-190) In this regard the High Court found that there is mass indiscriminate processing of data by the United States government agencies. (§190)
  - (c) The High Court made findings as to data protection in the US. (§191-194). The High Court found *inter alia* that “*the basic principle [in US law] is that surveillance is legal unless forbidden..*” (§192).
  - (d) The High Court made findings and conclusions regarding the individual remedies available under US law to EU citizens whose data is transferred to the US. (§195-221, §251-263).
  - (e) The High Court made findings in respect of the doctrine of standing in US law. (§222-238).
  - (f) The High Court made findings in respect of the safeguards and oversight of surveillance in US law (§239-250).
  - (g) The High Court decided, on the basis of its findings as to US law, that it shared the DPC’s concerns that laws and practices of the US do not respect the essence of the right to an effective remedy before an independent tribunal as guaranteed by Article 47 of the Charter, and in the alternative that if the essence of the right was not infringed there were well founded concerns that the limitations on the exercise of that right were not proportionate. (§299)
  - (h) The High Court found that the existence of the Privacy Shield Ombudsman did not alter that finding. (§300-311) It further found that Article 4 of the SCC Decisions did not address the concerns of the DPC. (§312-326)
  - (i) The High Court concluded that it shared the concerns of the DPC that the SCC Decisions are invalid. It proceeded to make an order for reference on a preliminary ruling to the CJEU.
7. Facebook contests the findings made at paragraphs (b) to (f) above, although with regard to paragraph (f) above, Facebook’s point of appeal is that it contends that insufficient findings were made regarding oversights and safeguards in the US, and that insufficient weight was accorded to these (Ground 9 of the Grounds of Appeal below). Facebook also brings an appeal in respect of the conclusions at paragraph (g) above regarding the essence of Article 47 of the Charter and proportionality.

## 5. Reasons why the Supreme Court should grant leave to appeal

### A. The jurisdiction of the Supreme Court in respect of the High Court's decision to make a preliminary reference.

1. The 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. This is a point of fundamental public importance, as well as a clear demonstration of the exceptional circumstances which require that the decision be appealed directly to the Supreme Court. Facebook contends that an appeal lies in respect of the decision to make a reference, in respect of the contents of the Statement of Facts forming the basis for that reference, and in respect of the underlying Judgment, which contains the factual assessment of US law which underpins the questions referred. Facebook also contends that an appeal lies in respect of the formulation of the Questions in the reference (specifically, Question One in this case). In particular, in the specific context of this case where the only relief sought in the High Court was the making of a reference and a judgment was delivered making binding findings of fact, it is contended that such an appeal lies.
2. A particular feature of this case is that the CJEU is being requested to pronounce on the validity of Commission Decisions on the basis of findings of fact with regard to the state of US law which are contained in the Judgment. Facebook respectfully contends that the Judgment contains significant errors with regard to US law (a position shared by the US Government which appeared as an *amicus curiae*) and that, if those errors are not corrected by way of an appeal prior to the CJEU answering the questions referred, the answers, if adverse to Facebook's position, will result in the immediate invalidation of the Commission Decisions or the standard contractual clauses used for the transfer of data from the EU to the US and for all intents and purposes the High Court will have no further role in the substantive aspects of the matter.
3. The invalidation of the Commission Decisions would not only affect Facebook but other commercial entities (throughout the EU) which presently rely on the Commission Decisions to transfer their data from the EU to the US and will have very significant ramifications for the US. The extent of the potential effect on these other entities is apparent from the submissions made by a number of Notice Parties, who are representing a very large number of commercial entities. Unlike the position which normally arises in the context of an appeal from the High Court to an appellate court there can be no stay on the CJEU's answers (or more particularly on the effect of those answers) and consequently Facebook and these other commercial entities would be very seriously damaged in the event that it transpired that the CJEU answered the questions on the basis of incorrect findings with regard to US law.
4. The leading case on the question of whether an appeal lies from a decision to refer a question for preliminary ruling is *Campus Oil v Minister for Industry and Energy* [1983] IR 82. It is respectfully submitted that *Campus Oil* does not apply to the within proceedings, and in the alternative that it was incorrectly decided.
5. *Campus Oil* decided that the decision to seek a preliminary reference simpliciter (made after the refusal of an interlocutory injunction and before the hearing of the substantive matter and the delivering of a judgment making binding findings of fact) was not a decision within the meaning of Article 34 of the Constitution, and that what is now Article 267 TFEU (then Article 177) precluded an appeal. Facebook submits that the decision of the High Court in these proceedings is a decision for the purposes of Article 34.5.4 of the Constitution and that *Campus Oil* is incorrect as a matter of EU law since same does not preclude the existence of national rules permitting an

appeal. In that regard, Facebook makes the following points.

6. First, *Campus Oil* is authority for a very narrow proposition, insofar as domestic law was concerned. The issue before the court related to an order of the High Court “*confined to recording the decision of Murphy J to refer the two questions to the Court of Justice, to directing that the referral should not stay the further trial of the Plaintiff’s action, and to specifying on which the trial of the action was to be resumed.*” (see p.83) There was no judgment granting the relief sought in the proceedings or determining the facts in dispute in the proceedings.
7. By way of contrast, the High Court in this case has delivered a decision granting to the DPC in the proceedings what is in effect the very relief claimed by her and that decision is based on binding findings of fact with regard to the state of US law. It is those findings of fact on which the questions referred to CJEU are premised. There is, in effect, no further substantive relief to be granted to the DPC. It has been acknowledged, at least implicitly, during the course of the trial that this case is different from most other cases where References have been made because the answers of the CJEU to the questions referred will result in the High Court effectively having no further role in the matter save with regard to costs. If the CJEU’s answers, (on the basis of what are contended to be incorrect findings with regard to the state of US law) are adverse to Facebook it will follow as a matter of law that the SCCs cannot be used for the transfer of data from the EU to the US. That consequence will take immediate effect. There can and will be no stay on the consequences. The effect on Facebook will be immediate and very damaging. Irrespective of what the Supreme Court might ultimately decide if an appeal were made at that stage the damage would be suffered and the Supreme Court could not reverse or interfere with the answers provided by the CJEU.
8. Second, Walsh J. in *Campus Oil* referred at p.86 to the seeking of a preliminary Reference as being “... *by its nature, is non-contentious*”. That is of no application the instant proceedings where a Reference was the very matter – and indeed the only matter - in contest.
9. Third, Facebook submits that *Campus Oil* is in conflict with EU law. In Case C-210/06 *Cartesio* [2008] ECR I-9641 the CJEU considered the jurisdiction of superior domestic courts to hear an appeal in respect of a reference for preliminary ruling by a lower court. 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 of the judgment). It will then be for the High Court, following the judgment of the Supreme Court, to draw the proper inferences from that judgment delivered on the 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 or withdraw the making of the reference. (§95-96 of the judgment).
10. Facebook contends that *Cartesio* does not prevent a superior court from making a binding holding in respect of the Statement of Facts. Article 267 TFEU does not give the CJEU jurisdiction to consider the facts of the main proceedings. Thus Article 267 does not preclude an appellate court from considering these aspects of the main proceedings with binding effect, even in connection with an appeal against a lower court’s decision to make a preliminary reference. Accordingly the Supreme Court is entitled to issue a binding ruling in respect of the findings of US law.
11. Fourth, a refusal to permit an appeal against the reference would deprive Facebook of any effective remedy in respect of any errors in the High Court judgment including the reference. As noted, the only issue remaining after the CJEU answers the questions referred (assuming that the answers are adverse to Facebook) will be the

issue of costs.

12. Even if the Supreme Court should determine that a reference by the High Court is in principle appropriate, Facebook is concerned that there are significant errors in the judgment and in the Statement of Facts which would seriously prejudice Facebook's position and which could not be effectively addressed following the CJEU's determination of the issues of law contained in the questions referred to it.

**B. Reasons why the Supreme Court should grant a leapfrog appeal**

13. As *Campus Oil* is a decision of the Supreme Court, this matter could not be resolved by the Court of Appeal. Exceptional circumstances therefore exist necessitating a direct appeal to the Supreme Court.
14. Various of the questions proposed to be referred put in issue the legality of the Standard Contractual Clauses, pursuant to which Facebook and thousands of other companies, transfer data to non EU Member States, including but not limited to the US. Should the CJEU hold the SCCs to be unlawful, that decision will have very significant implications for data transfers from the EU, not just to the US but also to the rest of the world. The magnitude of the implications of any decision of the CJEU means that the question of an appeal against the decision to refer is one of very high public importance and the circumstances are exceptional.
15. Facebook respectfully considers, by reason of the foregoing, the nature of the case and the High Court judgment (summarised in Section 4 of this Notice of Appeal), that both constitutional criteria for a direct appeal to the Supreme Court – namely public importance and the interests of justice – are satisfied.

**6. Ground(s) of appeal which will be relied on if leave to appeal is granted**

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

**Ground One: The High Court finding in respect of the Privacy Shield Decision**

1. The learned High Court judge erred in making a reference to the CJEU in circumstances where 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').
2. The Privacy Shield Decision is a decision of the European Commission pursuant to Article 25 of the Data Protection Directive. It 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. The Privacy Shield Decision has two strands, as Facebook argued in the High Court. One pertains to the private sphere. The other pertains to the public sphere, and to the adequacy of protections in the context of government surveillance in particular, including in respect of the issue of redress. The learned High Court judge erred in not appreciating, and/or in disregarding, the relevance and significance of the public sphere strand to these proceedings.
3. The learned High Court judge found that the adequacy decision/finding, with regard to US law, was not binding on the Court, and determinative of the issue, on the basis that the Privacy Shield Decision was not an unconditional adequacy decision made pursuant to Article 25(2). She contrasted it with the adequacy decision in respect of the State of Israel of 31 January, 2011, Com. Decision 2011/6/EU (C (2011) 332). (§68-72, High Court Judgment).
4. This analysis failed to address the argument made by Facebook. Facebook's position

was not that the Privacy Shield was a general adequacy decision like that in respect of the State of Israel and certain other states, but rather that it was a decision of the Commission which contained within it a decision/finding of adequacy in respect of US law. Facebook argued that the High Court was bound by this latter finding in respect of US law, as was the DPC. The High Court fundamentally failed to address this argument and thus its findings in respect of the Privacy Shield cannot be sustained.

5. For example, Recital (124) in the Privacy Shield Decision states inter alia:

*(124) In this respect, the Commission takes note of the Court of Justice's judgment in the Schrems case according to which "legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification of erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The Commission's assessment has confirmed that such legal remedies are provided for in the United States, including through the introduction of the Ombudsperson mechanism. ...*

6. The learned Judge ignored or overlooked the reference here to the Commission's view that "*such legal remedies are provided for in the United States*". The Commission's decision/finding that such legal remedies are provided was arrived at, over a number of years with full access to US administration and the opportunity to conduct a detailed expert assessment on US law by the Commission unconstrained by the limitations inherent in adversarial proceedings.
7. In addition, an important part of Facebook's appeal with respect to this Ground concerns the fact that the DPC made no challenge to the compatibility of the Privacy Shield Decision with the Charter in these proceedings (and its validity was not and is not in issue), and no issue regarding the validity or authoritativeness of the statements regarding US law made in the Privacy Shield Decision arose in the proceedings. As a consequence 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.

**Ground Two: The failure of the learned High Court judge to consider the imminent repeal of the Directive 95/46/EC (the 'Directive')**

8. The SCCs, which are centrally at issue in these proceedings are based on Article 26 of the Data Protection Directive. On 25 May 2018 the Data Protection Directive will be repealed and replaced with the General Data Protection Regulation ('GDPR'). As such, the legal basis for Commission Decision 2010/87/EU providing for SCCs (the '**SCC Decision**') will no longer exist. Rather, any reference to the Directive is to be construed as a reference to the GDPR (see Article 94 of the GDPR). As a result, Article 46 GDPR will provide the new legal basis for the SCC Decision. This means the parent statute of the SCC Decision i.e. the Directive, will be replaced by a different parent statute, i.e. the GDPR, on 25 May 2018 with immediate effect.
9. Facebook raised this issue at hearing in the High Court, and submitted that the potential mootness of the issues by reason of the imminent enactment of the GDPR was a matter relevant to the question of whether any reference should be made. (Transcript, High Court hearing, Day 15, 3<sup>rd</sup> March 2017, p 114-116). It was submitted on behalf of Facebook inter alia that : "*... there is the practical consideration that by the time the court could pronounce any question the very Directive which is the subject of this is going to be replaced with new provisions ... it does go to mootness.*" The learned High Court judge did not address this matter in her Judgment, nor was it sufficiently dealt with in her judgment of 2 May 2018 refusing a stay, which also made certain observations which are not accepted. Moreover, all

parties, including the DPC, were aware that the GDPR would come into force on 25 May 2018 and that the Directive would be repealed.

10. Thus by the time the reference is considered by the CJEU, the present legality of the SCC Decision will require to be construed, not by reference to the Directive (as was done in considerable detail at the hearing and in the Judgment and Statement of Facts) but by the GDPR. The centrality of the Directive in this Reference may be immediately identified by looking at the questions referred. Out of 11 questions, six of them make direct reference to various Articles of the Directive. That presents an immediate difficulty for the CJEU.
11. The CJEU might of course decide to adjudicate upon the legality of the SCC Decision up to 25 May 2018 and provide answers on the basis that the Directive applies. However, such a response would be of limited utility to the referring Court in circumstances where what it requires is a response that will enable it to resolve the dispute identified by the DPC, i.e. the legality of the continuing transfer of Mr. Schrems's data pursuant to the GDPR.
12. The CJEU might alternatively, or in addition, wish to consider the legality of the SCCs by reference to the GDPR. However, the Reference has not been made having regard to the provisions of the GDPR. The well founded concerns of the Trial Judge were arrived at, inter alia, having regard to the legal structure underpinning the SCC Decision i.e. the Directive.
13. In those circumstances, Facebook submits that the learned High Court judge erred in failing to consider the fact that any question to be referred on the Directive would ultimately be moot. It is well established that the CJEU will not give a preliminary ruling in respect of a question which is merely hypothetical.
14. As such, the difference in the legal basis, for the transfer of data, between the Data Protection Directive and the GDPR is very significant, such that it would entirely alter the context and relevance of the questions being referred to the CJEU, and indeed some of the legal issues arising. In Facebook's submission, this is an issue that means the current reference is inappropriate.
15. 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 (Judgment of Costello J, 2 May 2018). Facebook does not accept this criticism as being valid. Facebook reiterates that this issue was raised at trial and that it is of vital importance to the question of whether a reference is appropriate or not.

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

### **Preamble to the Grounds of Appeal which follow**

16. The learned High Court judge's findings as to US law and practice in the field of national security are of crucial importance to the within proceedings, essential to their fair and proper disposal, and central to any reference to the CJEU. These findings will form the factual backdrop to the CJEU's analysis of the legal questions before it. It is vital, therefore, that these facts are accurate.
17. The result of the CJEU's 2015 judgment in the *Schrems* case, and the significant implications it has had, illustrate the importance of the factual assessment as to US law which is before the CJEU, and the importance of this being correct, accurate and complete in every relevant respect. This is particularly so given the procedures

provided in Irish law for making determinations with regard to the content of foreign law and the limitations inherent in such procedures. The learned judge acknowledged that *“the judgment does not purport to be a comprehensive or definitive statement of the law of practice of the United States in relation to these matters.”* However in circumstances where the adequacy of the protections under that law are critical to the answers to the questions contained in the Reference, errors with regard to the state of US law in this context could have enormous adverse effects.

**Ground Three: The High Court finding in respect of “mass indiscriminate processing”**

18. The learned High Court judge erroneously concluded that the United States (‘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. (§190, High Court judgment). Furthermore, in the Statement of Facts, the learned High Court judge reiterates that there is such “*mass indiscriminate processing.*” (Statement of Facts, §33)
19. This description of the processing undertaking by the US Government was central to the CJEU’s reasoning and conclusions in its *Schrems* judgment. However, the statement in the High Court’s judgment does not accurately or properly reflect the various protections and limitations at play, or the fact that only limited information is actually assessed.
20. These statements do not accurately distinguish between the searching of communications passing through the internet backbone, and the targeting of a very small proportion of those communications, which are subsequently acquired and analysed. This latter targeting is not properly described as ‘mass indiscriminate processing of data.’ In particular, it is in no way ‘indiscriminate’.
21. The EU Commission in its Privacy Shield Decision did not describe the US as being engaged in mass or indiscriminate processing. To the contrary, the Commission’s Decision, which it is repeated was not the subject of challenge by any of the parties, considered that even “*searches*” of data (searching being referred to by the learned Judge at §188 and §189) was “*targeted*” and therefore not “*mass indiscriminate*” as the learned Judge chose to characterise it (see Recital 81 of the Privacy Shield Decision. See also e.g. Recital 109 re collection).
22. The learned High Court judge’s conclusion on this point contradicts her acceptance, one paragraph earlier in the judgment (§189), that because any searching which occurred was for targeted communications. It was therefore not indiscriminate.
23. Given the importance of this finding to the CJEU’s assessment of the issues raised by the questions referred the adverse consequences if the finding is incorrect are enormous.

**Ground Four: The learned High Court judge’s finding that surveillance is legal unless forbidden**

24. The learned High Court judge made a fundamental error in her account of the legal framework underpinning US law on surveillance. At §192 of the judgment, the High Court concluded: “*The basic principle is that surveillance is legal unless forbidden and there is no requirement ever to give notice in relation to surveillance.*” This finding is entirely inaccurate. In fact, it is implicitly contradicted by the statement within the same paragraph to the effect that “[*electronic surveillance*] is regulated by the Constitution, statute, decisions of the courts, Executive orders, proclamations and presidential directives.”
25. This is a particularly damaging finding in the context of the assessment of the

protections and remedies afforded by US law.

26. It is also a finding which Facebook respectfully submits 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.
27. Furthermore, the finding finds no support in, and indeed is in tension with, the Commission's Privacy Shield Decision.
28. Far from surveillance being "*legal unless forbidden*" the foundational principle under US law is that action by the federal government is only lawful when done under specific legal authority. The entire case proceeded on the basis that the US Government's right to access data was constrained by relevant statutory and legal provisions.

**Ground Five – The learned High Court judge's finding on the doctrine of Standing in US Law**

29. In US law the doctrine of standing is a constitutional requirement, emanating from Art III of the Constitution, that a plaintiff must demonstrate an injury in fact that has been caused by the defendant and that can be redressed by a favourable decision. The standing doctrine requires that the injury alleged must be both actual or imminent, and concrete and particularised.
30. The effect of the standing doctrine on a plaintiff varies at different stages in litigation. At the initial stage, the motion to dismiss, the plaintiff's allegations are assumed to be true so long as they are plausible. At the summary judgment stage, which takes place after the discovery process, the plaintiff must prove those allegations.
31. The learned High Court judge made a number of important errors in her analysis of the doctrine of standing. Standing is essential to an understanding of the judicial remedies available in US law. The adequacy of remedies was central to the case of the DPC, and standing will be crucial to any analysis by the CJEU.
32. The learned High Court judge erred in failing to appreciate, or have regard to, the distinction between the standing requirements at the motion-to-dismiss stage and at the summary judgment stage of litigation, despite referencing these stages at §262 of her judgment, as well as the importance of those distinctions in the context of the availability of remedies. In particular Facebook contends that the standing requirements of the motion to dismiss stage, which is determined by reference to the facts as pleaded, can be readily met. If met, then a litigant obtains the right to seek discovery which in turn can play a very important role in meeting the standing requirement at summary judgment stage. Accordingly to confuse these two stages results in mischaracterisation of the extent to which the standing requirement interferes with the availability of remedies.
33. The learned High Court judge erred with respect to her consideration of *Wikimedia Foundation v NSA* (4<sup>th</sup> Cir. 15-2560) including in failing to appreciate and/or refer to the fact that Wikimedia's claim survived a standing challenge whereas those of the other plaintiffs did not, and/or in failing to appreciate and/or refer to the important distinctions between the claims of *Wikimedia* and the unsuccessful plaintiffs.
34. The learned High Court judge erred in describing the experts who gave evidence before her as having agreed that standing was "*notoriously indeterminate*" (§232 of the Judgment) when there was, in fact, only agreement that it was "*to a large degree indeterminate.*" (Report of Experts Meeting, p 34). This was not a mere matter of semantics but (i) was reflective of other fundamental errors with respect to the standing doctrine and its legal implications which she regarded as being of great importance in relation to the availability of legal remedies under US law, and (ii)

unduly and excessively emphasised the obstacle posed by standing to the grant of remedies by courts in the United States.

**Ground Six – The learned High Court judge’s findings with respect to remedies and consideration of other issues such as safeguards**

35. The learned High Court judge erred in failing to appreciate the importance of, or in minimising the importance of, the Administrative Procedure Act (‘APA’) in the context of the availability of remedies in US law.
36. Under the judicial review provisions of the APA, “*any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action*”, is entitled to seek judicial review. This includes the possibility to ask a US court to “*hold unlawful and set aside agency action, findings, and conclusions found to be [...] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*”. Injunctive and/or declaratory relief can be provided.
37. Along with other remedies under US law, such as the Electronic Communications Privacy Act, the APA is open to all individuals irrespective of their nationality, subject to any applicable conditions (as the Privacy Shield Decision noted at Recital 130).
38. The learned High Court judge also failed to appreciate the important role played by the APA in various decisions of the US courts in providing a remedy to a person whose data privacy is breached.
39. For example, it was the APA, and not any of the causes of action discussed in the DPC Draft Decision, that provided the basis for the Second Circuit’s invalidation of the bulk phone records program in *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015).
40. In assessing the extent and efficacy of data protection in the US the learned High Court judge failed to take into account the relevant rules, practices and safeguards of governmental agencies who are conferred with statutory power to obtain data, and in particular failed to recognise the significance of those rules, practices and safeguards.
41. The learned High Court judge erred in her general conclusions with respect to the US system, including at §259 that: “*... despite the number of possible causes of action, it cannot be said that US law provides the right of every person to a judicial remedy for any breach of his data privacy by its intelligence agencies. On the contrary, the individual remedies are few and far between and certainly not complete or comprehensive.*”
42. As well as being incorrect, this determination was at variance with that of the Commission in the Privacy Shield Decision which noted, for example, at Recital 130, inter alia that: “*... U.S. law provides for a number of judicial redress avenues for individuals, against a public authority or one of its officials, where these authorities process personal data.*”
43. The learned High Court judge considered the availability of this remedy as being of little relevance because it had not been mentioned by General Counsel Robert Litt, Office of the Director of National Robert Litt in his letter of 22 February 2016 contained at Annex VI to the Privacy Shield Decision. This statement is inaccurate because the APA is, in fact, referred to throughout the Privacy Shield decision itself. (In particular § 113, 130 and 131)

**Ground Seven – The learned High Court Judge’s finding on the essence of the right protected by Article 47 of the Charter.**

44. 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.

45. This entails the consequence that no proportionality test applies and that there is a breach of EU law no matter how important the countervailing public interest considerations are. It is therefore a finding of utmost seriousness, which Facebook considers was in no way supported, adequately or at all, by the concerns and arguments set out by the DPC.
46. The learned High Court judge's error in this respect stemmed from her errors regarding the state of US law (or, further and in the alternative, rule/practice/safeguards in the US) and in particular, those errors referred to above.
47. The learned High Court judge applied the incorrect legal test in assessing whether the essence of a right, and in particular the essence of Article 47 of the Charter, was infringed. For example, it is not the case that there was no remedy at all for an affected EU citizen in the US.
48. Further or in the alternative, while the learned High Court judge recited the submissions of both sides on this issue, she erred in not setting out adequate reasons for her conclusion that the essence of Article 47 of the Charter was not respected. In this regard, the learned High Court Judge's sole statement of reasons for the very serious finding that a sovereign State did not respect the essence of the right to a judicial remedy in Article 47 of the Charter was contained in a single sentence in §298 of the Judgment.
49. On a related point, Facebook also respectfully submits that it is not clear what test, if any, the learned High Court judge applied in assessing and determining that the essence of the right under Article 47 of the Charter was infringed, and submits that this gave rise to further error.
50. Further the learned High Court Judge in determining that the essence of the right was infringed failed to take account of the protections provided by the SCCs and in particular the rights of action conferred by it against non-government actors and the significant protection provided by those provisions.
51. Indeed, the learned Judge herself later noted at §311 that there were good reasons why notice of surveillance would not be given. Despite this, the relevant aspects of the Judgment concerning the essence of the right did not accord sufficient weight to the fact that the whole purpose of surveillance would be undermined if people were notified of it.
52. The learned Judge's conclusion that there was a well-founded concern that the very essence of Article 47 of the Charter is infringed in the US is furthermore not possible to reconcile with the Privacy Shield Decision, including, but not limited to:
  - (a) Recital 124 thereof, referred to above,
  - (b) Recital 115 which states, inter alia: "*...individuals, including EU data subjects, therefore have a number of avenues of redress when they have been the subject of unlawful (electronic) surveillance for national security purposes, ...*". (see also Recital 111),
  - (c) Article 4(3) thereof which it is submitted is directly premised on the essence of

Article 47 being protected through its statement that:

*“The Member States and the Commission shall inform each other of any indications that the interferences by U.S. public authorities responsible for national security, law enforcement or other public interests with the right of individuals to the protection of their personal data go beyond what is strictly necessary, and/or that there is no effective legal protection against such interferences.”*

53. Among the learned High Court Judge’s other errors in arriving at her conclusion regarding the essence of the right included referring to the DPC’s selective quotation from the work of Professor Brown. In fact, as Facebook submitted, including in its written submissions, Professor Brown considered that protection in the US was higher than in the EU, noting for example: *“much clearer rules on the authorization and limits on the collection, use, sharing, and oversight of data relating to foreign nationals than the equivalent laws of almost all EU Member States.”*

**Ground Eight – The learned High Court Judge’s finding on the proportionality of any interference with the right protected by Article 47 of the Charter.**

54. The learned High Court judge erred in concluding, in the alternative, that “*even if*” the essence of Article 47 is respected, that there are well founded concerns that the limitations on the Article 47 right are not proportionate and necessary pursuant to Article 52(1) of the Charter. She identified her reasons for this decision as being those that had been identified by the DPC and summarized by her in the Judgment. However, the DPC did not take account of the matters identified below.
55. The learned High Court Judge’s error in this respect once again stemmed from her errors regarding the state of US law (or, further and in the alternative, the rules/practice/safeguards in the US) in particular, those errors referred to above in the Grounds of Appeal herein. Having erred with respect to the relevant US remedies, rules, safeguards and/or practice, it followed that she did not engage in a proper or adequate balancing exercise.
56. The learned High Court judge erred in failing to have regard, or any adequate regard, to the public interest in security and/or combatting terrorism and/or Member States’ interest in the security of their citizens. The proportionality or disproportionality of any interference with Article 47 would have to be assessed by reference to those interests. However, this factual assessment was not undertaken, with the result that the uncontested evidence with regard to the importance of these interests was not taken into account and there are no findings of fact which findings are essential or highly relevant to the questions referred on this issue.
57. The learned High Court judge erred in failing to have regard, or any adequate regard, to other Charter rights which would render any limitation upon, or interference with, Article 47 proportionate. These included the right to life (Article 2 of the Charter), the right to freedom of expression (Article 11 of the Charter), the freedom to conduct a business (Article 16 of the Charter). If necessary, Facebook also relies in this regard upon rights under the European Convention on Human Rights.
58. The learned High Court judge erred in failing to have regard, or any adequate regard, to the public interest in economic activity, trade, global inter-connectivity and/or

similar interests. The learned High Court judge also did not have regard to the Treaty status of the interests and concerns, including a “*highly competitive social market economy*” and the promotion of “*scientific and technological advances*” (Article 3(3) TEU), the EU’s interactions with the wider world (Article 3(5) TEU), the EU’s commitment to enhanced free trade (Article 206 TFEU) and/or the EU’s position with respect to the WTO/GATT.

59. The learned High Court judge further erred in failing to apply the proportionality test required by the European Convention on Human Rights in respect of interferences with rights, whereby interference with rights can be justified if they are necessary in a democratic society. Facebook respectfully submits that there was no proper application of this test, and no consideration of whether any restrictions on rights which may have actually arisen, went beyond what was necessary in a democratic society.

**Ground Nine – The learned High Court Judge’s failure to consider relevant evidence**

60. There was a significant volume of uncontradicted evidence as referred to above which was entirely ignored by the learned High Court judge.
61. This evidence was essential to the Court’s assessment of the practices which protect data, the vital security interests involved, and the range of important Charter rights engaged in connection with the transfer of data.
62. In particular, this evidence was directly relevant to the countervailing rights and interests which must be considered in the assessment of the proportionality of restrictions on Charter or Convention rights in the context of surveillance.
63. Dr. Meltzer gave uncontradicted evidence on the economic significance of transatlantic data transfer. Professor Clarke gave uncontradicted evidence on the necessity for electronic surveillance in the fight against terrorism, the transnational nature of this surveillance, and the need for international cooperation. Mr. Ratzel gave uncontradicted evidence on necessity for and operation of national security surveillance in the European Union. Mr. DeLong gave uncontradicted evidence on the purpose and value of signals intelligence to the US and to the EU and the practices and standards protecting the privacy of data subjects.
64. The Judgment makes no reference to any evidence provided by these experts, which error fundamentally undermined the Judge’s conclusions as to fact, and the legal conclusions she reached based on those facts.
65. If a reference is made to the CJEU it is essential that it have access to this factual evidence which is directly relevant to the proportionality assessment in respect of the restriction of Charter rights.

**Ground Ten: Inclusion of reference to question 1 to “Law Enforcement and the Conduct of Foreign Affairs”**

66. Subject to the points of appeal above, Facebook does not take issue with the content of the questions referred save that Question 1 refers to “*Law enforcement and the conduct of foreign affairs of the third country*” when no evidence was directed to those issues and when they were not the subject of any substantive consideration or analysis in the judgment. Facebook therefore contends that even if the Supreme Court decides that a reference is necessary an amendment should, consistent with the *Cartesio* principle, be made to question 1.

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

67. The High Court erred in not staying the Reference, either till the determination of this Appeal or in the alternative until this Honourable Court made a decision on the application for leave to appeal.
68. The High Court was incorrect in concluding that Facebook had no arguable case to the effect that an appeal lies to the Supreme Court. In this respect Facebook relies upon the grounds set out above in respect of the right of appeal to this Honourable Court.
69. The High Court erred in refusing to distinguish *Campus Oil* on the ground that the sole relief in these proceedings is a reference from the High Court to the Court of Justice to allow the Court of Justice to rule on the validity of the SCC decisions and that same does not alter the exercise or jurisdiction upon which the court was engaged.
70. Further, the High Court failed to give sufficient weight to the decision of the CJEU in *Cartesio* and its impact upon the decision in *Campus Oil*.
71. Separately, for the reasons set out in this Notice of Appeal, neither *Cartesio* nor the *Campus Oil* decision applies to that part of the appeal on errors of US law.
72. The High Court was incorrect in concluding in substance that the existence of a Supreme Court decision against the proposition sought to be argued by a party must inevitably mean that no arguable case exists for the purpose of a stay, having regard to the entitlement of the Supreme Court to revisit its own judgments in particular circumstances.
73. The Trial Judge erred in concluding that the balance of justice did not favour the grant of a stay, and in particular failed to take into account adequately that without a stay, Facebook's appeal may be rendered moot and that a stay accords with the balance of justice. Further, the Trial Judge erred in her analysis of the risk of injustice to the DPC.
74. Insofar as the findings on the mootness point are concerned, reference is made to the points made above in this Notice of Appeal (see paragraphs 8 to 15).
75. The Trial Judge erred in holding that any aspect of Facebook's conduct in these proceedings constituted grounds for refusal of a stay. Furthermore, it was never argued by any party to the proceedings that Facebook's conduct should have any bearing on its application for a stay.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Mason Hayes and Curran

## 7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2017] IEHC 545

References to Law Report in which any relevant judgment is reported

N/A

## 8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

1. An Order directing and/or requesting the High Court to inform the registry of the CJEU that the Supreme Court is hearing an appeal from the High Court's judgment and the High Court's findings as to US law.
2. In the alternative, Facebook requests that the Supreme Court inform the registry of the CJEU that the Supreme Court is hearing an appeal from the High Court's judgment and the High Court's findings as to US law.
3. Such interlocutory orders or reliefs by way of stay or otherwise (or by way of request to the CJEU for same) as may be appropriate to ensure that the Supreme Court has an opportunity to determine the appeal prior to the preliminary reference being determined by the CJEU.
4. An Order and/or declaration, consistent with the *Cartesio* judgment, to the effect that the Supreme Court is of the view that the High Court should withdraw or amend the reference.
5. In the alternative, an Order and/or declaration to the effect that the High Court's findings as to US law (or such of those findings as to the Supreme Court shall seem fit) were in error.
6. An Order amending, or directing amendment of the Statement of Facts and/or overruling the High Court judgment or such part or parts thereof as to this Honourable Court shall seem fit.
7. If necessary, a declaration (consistent with the *Cartesio* judgment) that the Supreme Court considers that the High Court is bound by the Privacy Shield Decision or alternatively that the Supreme Court considers that there are adequate safeguards (for purpose of Article 26 of the Data Protection Directive, or otherwise) as to the level of protection available in the US to EU citizens whose data is transferred to the US.
8. Such further or other Order as to this Honourable Court shall seem fit.
9. The costs of, and incidental to, these proceedings.

What order are you seeking if successful?

Order being appealed: set aside ☒ vary/substitute ☒

Original order: set aside ☐ restore ☐ vary/substitute ☐

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

N/A

**Are you asking the Supreme Court to:**

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

If Yes, please give details below:

If necessary, Facebook submits that *Campus Oil v Minister for Industry and Energy (No. 1)* [1983] IR 82 was incorrectly decided for the reasons set out above.

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

If Yes, please give details below:

Facebook's primary position is that it does not seek a preliminary reference to the CJEU. However, Facebook reserves the right to contend that, if there is to be a preliminary reference to the CJEU, or if the High Court's reference is not recalled, it may be necessary for the Supreme Court to make its own reference to the CJEU accompanied by different findings as to US law.

Will you request a priority hearing? ☒ Yes ☐ No

If Yes, please give reasons below:

Facebook's appeal seeks to appeal against the High Court's reference and the content thereof. The High Court has refused a stay pending determination of any appeal to the Supreme Court. It is therefore submitted that there is an urgency involved. In addition the consequences at play are very serious, for the reasons already set out above.

Signed:

*Oliver Monaghan Maso Hayes + Curran*  
(Solicitor for) the applicant/appellant

**Please submit your completed form to:**

The Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

**together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.**

**This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.**