THE HIGH COURT
COMMERCIAL

Record No. 2016 / 4809P
(2016 No. 74 COM)

Between:

THE DATA PROTECTION COMMISSIONER

Plaintiff

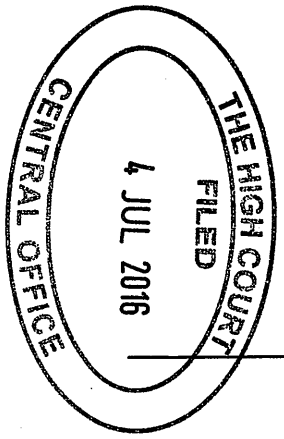
-and-

FACEBOOK IRELAND LIMITED

-and-

MAXIMILLIAN SCHREMS

Defendants



AFFIDAVIT OF JOHN V. O'DWYER

(Plaintiff's Application for a Reference to the Court of Justice of the European Union)

I, John V. O'Dwyer, of Canal House, Station Road, Portarlington, County Laois, aged eighteen years and upwards, hereby **MAKE OATH** and say as follows:

1. I am a Deputy Commissioner in the office of the Data Protection Commissioner ("**the Commissioner**"), the Plaintiff in the within proceedings.

2. The office of the Commissioner was established pursuant to the Data Protection Act 1988, and the Commissioner is charged with the enforcement and monitoring of compliance with the Data Protection Acts 1988-2003 ("**the Acts**").

3. The Commissioner is also the person designated as the national supervisory authority for the purpose of monitoring the application in Ireland of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("**the Directive**"). The Directive is the foundational European Union ("**EU**"/"**Union**") legal instrument on data protection.

4. I make this Affidavit from facts within my own knowledge save where otherwise appears, and where so appearing I say and believe the same to be true and accurate.

5. I make this Affidavit in support of the Commissioner's application for a reference to the Court of Justice of the European Union ("**the CJEU**") for a preliminary ruling on the issues arising in the within proceedings. The Commissioner makes this application pursuant to Article 267 of the Treaty on the Functioning of the European Union ("**TFEU**") and in the light of paragraph 65 of the ruling of the CJEU in Case C-362/14 *Schrems v Data Protection Commissioner*, 6 October 2015 ("**the CJEU Ruling**").

6. For the reasons set out below, I say and believe that the circumstances arising herein are appropriate for the making of a reference for a preliminary ruling and that it is only through the making of such a reference that the issues raised in the within proceedings can be resolved in accordance with the requirements of EU law.

7. I beg to refer herein to a book of documents ("**the Book**"), upon which marked with the letters and number "**JOD-Ref-1**" I have signed my name prior to the swearing hereof.

THE PARTIES

8. Turning then to the background to this application, the First Named Defendant ("**FB-I**") is a limited liability company, which operates an online social networking service, with a registered address at 4 Grand Canal Square, Grand Canal Harbour, Dublin 2.

9. The Second Named Defendant ("**Mr Schrems**"), as I will set out in further detail below, made a complaint regarding EU-US data transfers by FB-I, initially to the Commissioner's predecessor in June 2013 ("**the Complaint**"), and subsequently to the Commissioner in a reformulated version in December 2015 ("**the Reformulated Complaint**").

THE LEGAL FRAMEWORK

10. In terms of the relevant legal framework, it is appropriate to first set out the fundamental rights which provide an important context for the within proceedings, and then to identify the relevant legislative provisions which govern the work of Commissioner and the matters arising herein.

Charter of Fundamental Rights of the European Union

11. Article 7 of the Charter of Fundamental Rights of the European Union ("**the Charter**") provides that everyone has the right to respect for his or her private and family life,

home and communications.

12. Article 8 of the Charter confers the right of protection of personal data:

(1) Article 8(1) of the Charter provides that everyone has the right to the protection of personal data concerning him or her.

(2) Article 8(2) of the Charter provides that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law and that everyone has the right of access. Article 8(2) also provides that everyone has a right of access to data which has been collecting concerning him or her, and the right to have it rectified.

(3) Article 8(3) of the Charter provides that compliance with the rules in Article 8 shall be subject to control by independent authority.

13. Article 47 of the Charter provides, in particular, that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down by Article 47.

The Directive

14. The Directive, to which I have already referred above and pursuant to which the Office of the Commissioner operates, addresses the question of transfer of personal data outside the European Economic Area ("**the EEA**").

15. Article 25(1) of the Directive establishes a general rule prohibiting the transfer of personal data outside the EEA unless the country to which the data is transferred "*ensures an adequate level of protection*" for the data protection rights of those data subjects to whom the transferred data relates.

16. Article 25(2) of the Directive sets out the criteria by reference to which the adequacy of the level of protection available within a third country is to be assessed.

17. Articles 25(3), 25(4) and 25(5) of the Directive make provision for the situation in which the Commission of the European Union ("**the Commission**") makes a finding to the effect that a specified third country does not ensure an adequate level of protection for the data protection rights of data subjects.

18. Article 25(6) confers a power on the Commission to make a finding that a particular third country does indeed ensure an adequate level of protection, so that, in principle, personal data may be transferred from any EEA Member State to that third country. Where a decision containing such a finding is made, Article 25(6) of the Directive further provides that Member States are required to take the measures necessary to comply with the Commission's decision.

19. As well as providing for findings that a particular third country ensures adequate protection, the Directive also makes provision for a number of derogations from the general prohibition on transfers out of the EEA, so that, subject to the conditions laid down in the Directive, such transfers may be undertaken even if it is accepted that the third country to which data is to be transferred does not ensure an adequate level of protection.

20. Article 26(1) sets out six specific circumstances in which data transfers to a third country may be permissible even though the third country in question does not ensure an adequate level of protection. For example, Article 26(1)(a) provides that no issue will arise if *"the data subject has unambiguously given his consent"* to the proposed transfer.

21. Article 26(2) provides that, without prejudice to Article 26(1), a Member State may authorise a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights.

22. Article 26(2) specifically states that such safeguards may in particular result from *"appropriate contractual clauses"*.

23. Article 26(4) of the Directive in turn provides that, in accordance with the procedure referred to in Article 31(2) thereof, the Commission may decide *"that certain contractual clauses offer sufficient safeguards as required by"* Article 26(2). Where the Commission makes a decision in such terms, Member States are bound to *"take the necessary measures to comply with the Commission's decision."*

24. The consequence of Article 26(4) is that, where the particular form of contractual clauses identified by the Commission as providing sufficient safeguards for the protection of individuals' data protection rights are incorporated into contracts

regulating the terms of transfer of personal data to data controllers (or data processors) established in a third country, such transfers are, in principle, permissible, even if the third country in question does not ensure an adequate level of protection.

The SCC Decisions

25. To date, the Commission has approved four sets of standard contractual clauses that have been approved by the Commission as fulfilling the requirements of Article 26(4) of the Directive ("**the SCC Decisions**"). These are:

    (1) Commission Decision 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC [2001] OJ L181/19;

    (2) Commission Decision 2002/16/EC of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC (Text with EEA relevance) (notified under document number C(2001) 4540);

    (3) 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

    (4) 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.

26. Commission Decision 2010/87/EU repealed Commission 2002/16/EC, which is no longer in force. There are therefore three SCC Decisions currently in force, and it is these three SCC Decisions that are the focus of these proceedings.

27. The Commissioner is bound by the SCC Decisions, pursuant to both Union law and national law.

The Safe Harbour Decision

28. It is also of critical relevance to the background to the within proceedings that on 26 July 2000, the Commission adopted Decision 2000/520/EC of 26 July 2000 pursuant

to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the United States ("**US**") Department of Commerce ("**the Safe Harbour Decision**"), establishing the so-called "*safe harbour*" arrangements for EU-US data transfers.

29. While the Safe Harbour Decision did not identify the US as a third country recognised as ensuring "*an adequate level of protection*" for the purposes of Article 25(6) of the Directive, it nonetheless provided that EU-US transfers were permissible under its terms, provided the entity to whom the data was being transferred self-certified that it complied with:

    (1) The safe harbour privacy principles; and,

    (2) A set of "*frequently asked questions*", both published by the US Department of Commerce and incorporated into the Safe Harbour Decision at Annexes 1 and 2 thereof.

The 2003 Act

30. The data transfer rules established under the Directive were transposed into national law by means of the Data Protection (Amendment) Act, 2003 ("the 2003 Act").

31. The following provisions of the 2003 Act are of particular importance in the present context:

    (1) Section 11(2) of the Acts provides that, where a finding has been made by the Commission to the effect that a third country ensures adequate protection for the data privacy rights of data subjects, that finding is binding in any proceedings under the Acts.

    (2) Section 11(4)(c) of the Acts provides that, where the Commission has adopted a decision approving particular standard contractual clauses as fulfilling the requirements of Article 26(4) of the Directive, the Commissioner shall comply with that decision.

32. I say also that Section 11 of the 2013 Act includes sub-sections (7) to (12), inclusively, which vest in the Commissioner the power to serve a notice prohibiting the transfer of personal data from the State to any place outside the State, subject to a right of appeal to the Circuit Court in favour of any party (or parties) to whom any such notice is directed.

THE FACTUAL BACKGROUND

EU-US Data Transfers

33. Over time, the Safe Harbour Decision became an important mechanism by which certain data controllers established in the EU sought to legitimise data transfers to the US.

34. Further, in recent years, the importance of transfers pursuant to the Safe Harbour Decision increased substantially, reflecting exponential growth in the volume of EU-US data transfers generated by large-scale technology companies operating on a global basis.

The Snowden Document Disclosure

35. Separately from these developments, in or about June 2013, Edward Snowden, a contractor engaged through a third party to undertake work for the US National Security Agency ("**NSA**"), disclosed documents said to reveal the existence of one or more programmes operated by the NSA under which internet and telecommunications systems operated by some of the world's largest technology companies, including, by way of example, Microsoft, Apple, Facebook, and others, were the subject of surveillance programmes.

36. The Snowden document disclosure received widespread media coverage and was very widely publicised.

The Complaint

37. Shortly after the Snowden document disclosure, on or about 25 June 2013, Mr Schrems filed the Complaint to which I have already referred above with the Office of the Commissioner. I beg to refer to a copy of the Complaint which can be found at **Tab #1** of the Book.

38. The Complaint contended that, in light of the Snowden document disclosure, the transfer of personal data relating to FB-I to its US parent, Facebook Inc, was unlawful under both national and EU data protection law.

39. In particular, it was asserted in the Complaint that the Safe Harbour Decision could not be said to legitimise EU-US data transfers in circumstances in which, in particular:

    (1) Data privacy rights are protected in express terms under the Charter;

(2) Under a programme called "PRISM", and on the back of the data transfers effected under the safe harbour arrangements, the NSA was in a position to secure generalised access to European subscribers' data in a manner incompatible with subscribers' charter-protected data privacy rights; and

(3) The safe harbour arrangements offered no meaningful protection for the data privacy rights of Facebook's European subscribers, leaving such subscribers without any means of vindicating their rights in the US, or obtaining redress in relation to damage suffered as a result of the NSA's actions.

40. In practical terms, therefore, the Complaint sought to mount a full-frontal challenge to the Safe Harbour Decision.

41. On receipt of the Complaint, the Commissioner took the view that, in circumstances in which the Commission had adopted the Safe Harbour Decision establishing and/or endorsing the safe harbour arrangements, the Commissioner was bound to accept that decision as binding upon him in light of Article 25(6) of the Directive and Section 11(2) of the Acts. Accordingly, the Commissioner declined to investigate the Complaint, deeming it unsustainable in law.

The Commencement of the Judicial Review Proceedings

42. The Commissioner's position was challenged by Mr Schrems by way of judicial review proceedings commenced on 21 October 2013 ("**the Judicial Review Proceedings**").

43. In the Judicial Review Proceedings, orders were sought that would quash the Commissioner's refusal to investigate and direct the Commissioner to investigate and decide the Complaint on its merits.

The Commission's Response to the Snowden Document Disclosure

44. Around this time, in response to concerns expressed by the Commission arising from the Snowden document disclosure, the US agreed to participate in an *ad hoc* EU/US Working Group established in July 2013 to facilitate a fact-finding exercise by the Commission under which the Commission would be afforded an opportunity to seek clarifications on the scope of the programmes revealed by Mr Snowden, the volume of data collected, the existence of judicial and administrative oversight mechanisms and their availability to individuals in the EU, and the different levels of protection and procedural safeguards that apply to persons resident in the US and EU respectively.

45. On 27 November 2013, the Commission published a report setting out the findings of the EU Co-Chairs of the ad hoc EU/US Working Group. I beg to refer to a copy of the said report, which can be found at **Tab #2** of the Book.

46. In particular, the report noted that, in the course of the Working Group's discussions, the US had confirmed the existence of the PRISM programme, identifying it as a programme authorised and/or operated under Section 702 of the Foreign Intelligence Surveillance Act 1978 ("**FISA**").

47. More specifically, the US was recorded as having confirmed that, on the basis of Section 702 of FISA, electronically stored data, including content data, was collected *"by means of directives addressed to the main US internet service providers and technology companies providing online services, including, according to classified documents disclosed in the press but not confirmed by the US, Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Apple, Skype and YouTube."*

48. At paragraph 2.1.1 of the report, it was stated that:

> *"The US also confirmed that Section 702 provides the legal basis for so-called 'upstream collection'; this is understood to be the interception of Internet communications by the NSA as they transit through the US 3 (e.g. through cables, at transmission points). Section 702 does not require the government to identify particular targets or give the Foreign Intelligence Surveillance Court (hereafter 'FISC') a rationale for individual targeting. Section 702 states that a specific warrant for each target is not necessary."*

49. It was added that:

> *"The US stated that no blanket or bulk collection of data is carried out under Section 702, because collection of data takes place only for a specified foreign intelligence purpose. The actual scope of this limitation remains unclear as the concept of foreign intelligence has only been explained in the abstract terms set out hereafter and it remains unclear for exactly which purposes foreign intelligence is collected."*

50. Under the heading "*Summary of Main Findings*", as can be seen therefrom, the report stated as follows:

"(1) *Under US law, a number of legal bases allow large-scale collection and processing, for foreign intelligence purposes, including counter-terrorism, of personal data that has been transferred to the US or is processed by US companies. The US has confirmed the existence and the main elements of certain aspects of these programmes, under which data collection and processing is done with a basis in US law that lays down specific conditions and safeguards. Other elements remain unclear, including the number of EU citizens affected by these surveillance programmes and the geographical scope of surveillance programmes under Section 702.*

(2) *There are differences in the safeguards applicable to EU data subjects compared to US data subjects, namely:*

i. *Collection of data pertaining to US persons is, in principle, not authorised under Section 702. Where it is authorised, data of US persons is considered to be 'foreign intelligence' only if necessary to the specified purpose. This necessity requirement does not apply to data of EU citizens which is considered to be 'foreign intelligence' if it relates to the purposes pursued. This results in lower threshold being applied for the collection of personal data of EU citizens.*

ii. *The targeting and minimisation procedures approved by FISC under Section 702 are aimed at reducing the collection, retention and dissemination of personal data of or concerning US persons. These procedures do not impose specific requirements or restrictions with regard to the collection, processing or retention of personal data of individuals in the EU, even when they have no connection with terrorism, crime or any other unlawful or dangerous activity. Oversight of the surveillance programmes aims primarily at protecting US persons.*

iii. *Under both Section 215 and Section 702, US persons benefit from constitutional protections (respectively, First and Fourth Amendments) that do not apply to EU citizens not residing in the US.*

(3) *Moreover, under US surveillance programmes, different levels of data protection safeguards apply to different types of data (meta-data vs. content data) and different stages of data processing (initial acquisition vs. further processing/analysis).*

(4) *A lack of clarity remains as to the use of other available legal bases, the existence of other surveillance programmes as well as limitative conditions applicable to these programmes. This is especially relevant regarding Executive Order 12333.*

(5) *Since the orders of the FISC are classified and companies are required to maintain secrecy with regard to the assistance they are required to provide, there are no avenues, judicial or administrative, for either EU or US data subjects to be informed of whether their personal data is being collected or further processed. There are no opportunities for individuals to obtain access, rectification or erasure of data, or administrative or judicial redress."*

51. On the same date, the Commission published a separate document titled "*Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU*" (COM (2013) 847 Final). I beg to refer to a copy of the said Communication which can be found at **Tab #3** of the Book.

52. In that document, and drawing on the findings of the ad hoc EU/US Working Group, the Commission noted (at paragraph 7.2) (under the heading "*Limitations and redress possibilities*") that:

> *"... safeguards that are provided under US law are mostly available to US citizens or legal residents. Moreover, there are no opportunities for either EU or US data subjects to obtain access,*

rectification or erasure of data, or administrative or judicial redress with regard to collection and further processing of their personal data taking place under the US surveillance programmes."

53. The document proceeded to make 13 specific recommendations in relation to changes the Commission considered would need to be made to the safe harbour arrangements in the context of ongoing negotiations with the US.

Hearing of the Judicial Review Proceedings in the High Court

54. Meanwhile, the Judicial Review Proceedings had been continuing and the hearing commenced in the High Court on 29 April 2014.

55. Judgment was delivered by this Honourable Court (Mr Justice Hogan) on 18 June 2014. I beg to refer to a copy of the said Judgment when produced.

56. Mr Justice Hogan held that it would be appropriate to refer a number of questions to the CJEU so that the CJEU could, in turn determine, in particular, whether the Commissioner was bound, absolutely, by the Safe Harbour Decision having regard to Articles 7, 8 and 47 of the Charter, the provisions of Article 25(6) of the Directive notwithstanding.

57. The Court considered this approach to be necessary and appropriate in circumstances in which the Complaint was really a complaint concerning the terms of the Safe Harbour Decision rather than the manner in which the Commissioner had applied it.

58. In particular, Mr Justice Hogan observed as follows in his formal request for a preliminary ruling that:

" ... no issue was ever raised in these proceedings concerning the actions of Facebook Ireland/Facebook, as such ... [so that] ... the real question was whether the Commissioner was bound by the earlier findings to this effect by the European Commission in the Safe Harbour Decision. In other words, this was really a complaint concerning the terms of that decision rather than the manner in which the Commissioner had applied it ...."

59. I beg to refer to a copy of Mr Justice Hogan's Request for a Preliminary Ruling under Article 267 TFEU, dated 17 July 2014, which can be found at **Tab #4** of the Book exhibited to the within Affidavit.

The CJEU Ruling

60. The hearing in respect of the preliminary ruling took place on 23 September 2015 and as I have already stated above, the CJEU Ruling was delivered on 6 October 2015. I beg to refer to a copy of the said CJEU Ruling when produced.

61. In the CJEU Ruling, the CJEU held, in particular, as follows:

(1) While noting that the CJEU alone has jurisdiction to declare an EU act invalid, and that, until such time as the Safe Harbour Decision was declared invalid by the CJEU, the Commissioner was not at liberty to adopt any measure contrary to its terms, the CJEU nonetheless found that, as a matter of EU law, the Safe Harbour Decision did not preclude the conduct of an investigation into EU-US data transfers by the Commissioner so that the Commissioner ought properly to have investigated Mr Schrems' complaint with all due diligence.

(2) By failing to afford EU citizens any possibility of pursuing effective legal remedies in the US in connection with any alleged contravention of their rights under Articles 7 and/or 8 of the Charter, the Safe Harbour Decision was in breach of Article 47 of the Charter and therefore invalid.

62. The CJEU addressed this issue in the following terms, which are useful to set out:

> *"90.... the foregoing analysis of Decision 2000/520 is borne out by the Commission's own assessment of the situation resulting from the implementation of that decision. Particularly in points 2 and 3.2 of Communication COM(2013) 846 final and in points 7.1, 7.2 and 8 of Communication COM(2013) 847 final, the content of which is set out in paragraphs 13 to 16 and paragraphs 22, 23 and 25 of the present judgment respectively, the Commission found that the United States authorities were able to access the personal data transferred from the Member States to the United States and process it in a way incompatible, in particular, with the purposes for which it was transferred, beyond what was strictly necessary and proportionate to the protection of national security. Also, the Commission noted that the data subjects had no administrative or judicial means of redress enabling, in particular, the data relating to them to be accessed and, as the case may be, rectified or erased.*

...

95. ... 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 or 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 first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law."

63. In particular, the CJEU Ruling recorded (at paragraph 87) the CJEU's finding that:

> *" ... to establish the existence of an interference with the fundamental right to respect for private life, it does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have suffered any adverse consequences on account of that interference (judgment in Digital Rights Ireland and Others, C 293/12 and C 594/12, EU:C:2014:238, paragraph 33 and the case-law cited)."*

64. Very significantly for the purposes of these proceedings, the CJEU also made rulings relating to the obligations of national supervisory authorities, including the Commissioner, and national courts (at paragraphs 63—65), as follows:

(1) Where a person whose personal data has been or could be transferred to a third country, which has been the subject of a Commission decision pursuant to Article 25(6) of the Directive, lodges with a national supervisory authority a claim concerning the protection of his rights and freedoms in regard to the processing of that data, and contests, in bringing the claim, the compatibility of that decision with the protection of the privacy and of the fundamental rights and freedoms of individuals, it is incumbent upon the national supervisory authority to examine the claim with all due diligence.

(2) In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of the Directive, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts. The national courts must stay proceedings and make a reference to the CJEU for a preliminary ruling on validity where they consider that one or more grounds for invalidity put forward by the parties or, as the case may be, raised by them of their own motion are well-founded.

65. Paragraph 65 of the CJEU Ruling is particularly important, and useful to cite in full. In this paragraph, the CJEU observed as follows:

> *"In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to the processing of his personal data are well- founded, that authority must, in accordance with the third indent of the first subparagraph of Article 28(3) of the Directive 95/46, read in the light in particular of Article 8(3) of the Charter, be able to engage in legal proceedings.* ***It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well- founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity***" (Emphasis added).

66. This paragraph of the CJEU Ruling is obviously of significance in the context of this application for a reference for a preliminary ruling.

Order of the High Court

67. After the CJEU Ruling, the Judicial Review Proceedings came back before the High Court, and on or about 20 October 2015, an Order was made quashing the Commissioner's refusal to investigate the Complaint and remitting the Complaint back to the Commissioner for investigation.

The Reformulated Complaint

68. Immediately after the Order of the High Court had been handed down, the task fell to the Commissioner to open an investigation into the Complaint, which was done.

69. Given that there was by now no doubt that EU/US transfers of FB-I subscriber data could no longer be undertaken pursuant to the Safe Harbour Decision, the investigation sought to establish whether the transfer of personal data relating to its EU subscribers by FB-I to Facebook Inc is lawful.

70. To that end, the Commissioner sought to examine, by reference to the Complaint as it relates to interferences on national security grounds with citizen's data privacy rights:

    (1) Whether, by reference to the adequacy criteria identified in Article 25(2) of the Directive, the US ensures adequate protection for the data protection rights of EU citizens; and,

    (2) If and to the extent that the US does not ensure adequate protection, whether it is open to FB-I to rely on one or more of the derogations provided for in Article 26 of the Directive to legitimise the transfer of subscribers' personal data to the US, if indeed, such transfers continue to take place.

71. By letter dated 21 October 2015, Mr Schrems wrote to the Commissioner requesting access to certain materials and notifying the Commissioner that he intended to submit an updated or reformulated complaint.

72. This office issued a reply on 27 October 2015. In circumstances where the Safe Harbour Decision was now defunct, so that the Commissioner's investigation would need to focus on such derogations (if any) as might be invoked by FB-I to legitimise data transfers to Facebook Inc following the CJEU Ruling, the reply invited Mr Schrems to submit his updated or reformulated complaint as soon as practicable. .

73. FB-I was notified of the commencement of the Commissioner's investigation by letter dated 3 November 2015.

74. On or about 1 December 2015, Mr Schrems submitted the Reformulated Complaint, to which I have already referred above. As Mr Schrems had secured access in the interim to one or more of the data processing agreements to which FB-I and Facebook Inc are party, the Reformulated Complaint referred to the nature and extent of those parties'

reliance on the SCC Decisions. In particular, the Reformulated Complaint contended as follows:

> *"[FB-1] has not proven that [its] alternative agreement was authorized by the DPC under Section 10(4)(ix) DPA. Even if it would be, such an authorization would be invalid and void in the light of the judgments C-362/14 and Schrems –v- the Data Protection Commissioner and therefore irrelevant in this procedure.*
>
> ...
>
> *Even if the current and all previous agreements between '[FB-I] and 'Facebook Inc' would not suffer from the countless formal insufficiencies above and would be binding for the DPC (which it is not), [FB-I] could still not rely on them in the given situation of factual 'mass surveillance' and applicable US laws that violate Art 7, 8 and 47 of the CFR (as the CJEU has held) and the Irish Constitution (as the Irish High Court has held)."*

75. In substance, therefore, the Reformulated Complaint raised objections to the validity of the mechanisms pursuant to which FB-I made data transfers to Facebook Inc, namely, the SCC Decisions.

76. I beg to refer to a copy of said correspondence between the Commissioner and Mr Schrems and FB-I, which can be found at **Tab #5** of the Book.

The Investigation

77. In practical terms, the Commissioner's investigation into the Reformulated Complaint has proceeded in two distinct strands, running in parallel.

78. Strand 1 has comprised a factual investigation focused on establishing whether FB-I has continued to transfer subscribers' personal data to the US subsequent to the CJEU Ruling of 6 October 2015. If and to the extent that it does, the Commissioner's investigation has also sought to examine the legal bases upon which such transfers are effected.

79. Separately, Strand 2 has sought to examine whether, by reference to the Reformulated Complaint—as it relates to alleged interferences with citizens' data privacy rights on national security grounds and having regard to the adequacy criteria identified in

Article 25(2) of the Directive—the US ensures adequate protection for the data protection rights of EU citizens.

80. For the sake of completeness, I add that, during the course of the Commissioner's investigation, the Commissioner's Office was contacted by the United States government and was furnished with documentation that had previously been supplied by the US government to the Commission, in support of what is known as the Privacy Shield Framework.

81. The Privacy Shield Framework is an agreement which has been reached between the Commission and the US Department of Commerce for transatlantic exchanges of personal data for commercial purposes, and which, if implemented, is intended to protect the fundamental rights of EU citizens where their data is transferred to the US. The Privacy Shield Framework is the result of around two years of negotiations between the Commission and the US Department of Commerce. A revised draft decision implementing the Privacy Shield Framework is currently progressing through the Union legislative process.

The Draft Decision

82. On or about 25 May 2016, the Commissioner issued a draft decision in the investigation ("**the Draft Decision**"). I beg to refer to a copy of the Draft Decision which can be found at **Tab #6** of the Book.

83. The Draft Decision explained, in particular, as follows:

(1) The decision was issued in "draft" format to preserve the right of Mr Schrems and/or FB-I to make such further submissions as they may wish to make in relation to its terms, and to allow the Commissioner to give full consideration to such submissions in due course.

(2) The investigation of the Reformulated Complaint conducted by the Commissioner had been conducted on the basis of two strands, which had proceeded in parallel, as I have just stated above.

(3) Strand 1 comprised a factual investigation which focused on establishing whether FB-I has continued to transfer subscribers' personal data to the US subsequent to the CJEU Ruling and, to the extent that it does, Strand 1 of the investigation also sought to examine the legal bases on which such transfers are effected.

(4) Strand 2 sought to examine whether, by reference to the adequacy criteria identified in Article 25(2) of the Directive, the US ensures adequate protection for the data protection rights of EU citizens.

(5) The Commissioner had formed the view that she could not conclude her investigation without obtaining a ruling of the CJEU on the validity of the SCC Decisions.

84. With respect to Strand 1, the Draft Decision explained that in the course of exchanges between FB-I and the Commissioner in relation to Strand 1, FB-I had acknowledged that it continues to transfer personal data relating to Facebook subscribers resident in the EU to Facebook Inc. FB-I had further acknowledged that it makes these transfers, in large part, on the basis of its contention that—by means of the deployment of the form of standard contractual clauses set out in the Annexes to the SCC Decisions—the company ensures adequate safeguards for the purposes of Article 26(2) of the Directive with respect to the protection of the privacy and fundamental rights and freedoms of EU-resident subscribers to the Facebook platform and as regards the exercise by such subscribers of their corresponding rights.

85. With respect to Strand 2, the Draft Decision explained that:

(1) The Commissioner had examined whether, in the context of alleged interferences with data privacy rights on national security grounds, US law provides adequate protection for the data protection rights of EU citizens and, if not, whether the SCC Decisions offer adequate safeguards with respect to the data protection rights of EU citizens.

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

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

86. Therefore, as the Draft Decision explained, in circumstances in which

a) it was the Commissioner's intention to join Mr Schrems and FB-I to the proceedings;

b) the Commissioner was presently bound to comply with the terms of the SCC Decisions as a matter of both national law, in particular, pursuant to Section 11(4)(c) of the 2003 Act and EU law, in particular, pursuant to Article 26(4) of the Directive;

c) the Commissioner's investigation to date had resulted in her having concluded, subject to further submissions, that there are well-founded objections to the SCC Decisions and doubts as to their compatibility with Article 47 of the Charter; and

d) the Commissioner considered that she could not conclude her investigation without obtaining a ruling of the CJEU on the validity of the SCC Decisions,

the Commissioner believed that it was appropriate that she would commence proceedings forthwith so that the substance of the Reformulated Complaint, and the view reached by the Commissioner in relation to that portion of that complaint, could be examined and determined by a court of competent jurisdiction at the earliest possible opportunity.

87. In addition, the Draft Decision explained that the Commissioner had engaged in an extensive review of the remedies provided in US law which are relevant to data protection, and set out in detail why, in her view, these remedies were inadequate. The Draft Decision also pointed out that the Commissioner had sought independent expert advice on US law to assist her in her consideration of US law. Reference was also made to the submissions received from the US government to which I already referred above.

88. I do not propose to repeat the entirety of the legal analysis set out in the Draft Decision herein, but I do rely on the entirety of the analysis set out in the Draft Decision to support the Commissioner's conclusion in this regard.

89. Overall, as can be seen from the Draft Decision, while it was stated that the Commissioner's investigation was ongoing, the Commissioner's ultimate conclusion (which is of course provisional and subject to any submissions FB-I and/or Mr Schrems may make in due course) is that the objections advanced by Mr Schrems in the

Reformulated Complaint to the validity of the SCC Decisions, having regard to the protection of Mr Schrems' rights and freedoms in regard to the processing of his personal data, are well-founded.

90. In particular, the Commissioner has concluded, subject to consideration of further submissions, that there are well-founded objections that there are both specific and general deficiencies in the remedial mechanisms available under US law for those EU citizens whose data is transferred to the US.

91. From a specific perspective, the remedies provided by US law are fragmented, and subject to limitations that impact on their effectiveness to a material extent.

92. Further, the available remedies arise only in particular factual circumstances, and are not sufficiently broad in scope to guarantee a remedy in every situation in which there has been an interference with the personal data of an EU data subject contrary to Articles 7 and 8 of the Charter. To that extent, the remedies are not complete.

93. From a more general perspective, the "*standing*" admissibility requirements of the US federal courts operate as a constraint on all forms of relief available. This constraint runs counter to the requirement of paragraph 87 of the CJEU Ruling, which makes it clear that an interference with the fundamental right to private life does not depend on "*whether the persons concerned have suffered any adverse consequences on account of that interference*".

94. For the reasons set out in the Draft Decision, it appears that there is therefore a well-founded objection that there is an absence of an effective remedy in US law compatible with the requirements of Article 47 of the Charter for an EU citizen whose data is transferred to the US where it may be at risk of being accessed and processed by US State agencies for national security purposes in a manner incompatible with Articles 7 and 8 of the Charter.

95. I say further that the safeguards purportedly constituted by the standard contractual clauses set out in the Annexes to the SCC Decisions do not appear to address this well-founded objection that there is an absence of a remedy compatible with Article 47 of the Charter.

96. The standard contractual clauses approved by the SCC Decisions do no more than establish a right in contract, in favour of data subjects, to a remedy against either or both of the data exporter and importer. The SCC Decisions are not binding on any US government agency or other US public body; nor do they purport to be so binding. The

SCC Decisions make no provision whatsoever for a right in favour of data subjects to access an effective remedy in the event that their data is (or may be) the subject of interference by a US public authority, whether acting on national security grounds, or otherwise.

97. Overall, therefore, as the Commissioner has explained in detail in the Draft Decision, while the investigation remains ongoing, the Commissioner has formed the view that a legal remedy compatible with Article 47 of the Charter may not be available in the US to EU citizens whose data is transferred to the US where it may be at risk of being accessed and processed by US State agencies for national security purposes in a manner incompatible with Articles 7 and 8 of the Charter.

Correspondence Following the Draft Decision

98. I say that following the Draft Decision, the Commissioner received correspondence from solicitors acting on behalf of Mr Schrems and FB-I respectively, regarding the Draft Decision and the Commissioner's decision to issue proceedings. The Commissioner's solicitors responded to this correspondence on 31 May 2016. I beg to refer to copies of the said correspondence upon which can be found at **Tab #7** of the Book exhibited to this Affidavit.

99. In particular, and as can be seen from the correspondence, FB-I raised a concern that proceedings ought not to be issued in advance of the Commissioner receiving submissions from FB-I on the interplay between Article 47 and US law. In her response, the Commissioner rejected this contention, observing, in particular, that no decision with binding effects for FB-I had been taken, that FB-I would have an opportunity to comment on the interplay between Article 47 and US law in the proceedings, and that FB-I would also have an opportunity to comment after a ruling in the event that a preliminary reference is made.

100. Further, it was observed in the Commissioner's letter that the CJEU Ruling made it clear that where there are legitimate doubts regarding the validity of a Union measure, it is appropriate to make a reference and to seek the assistance of the CJEU, and that the Commissioner was seeking to comply with the letter and spirit of the CJEU Ruling and adopting what she believed to be the fairest and most efficient means of obtaining a ruling of the CJEU on the issues arising. In all the circumstances therefore, the Commissioner did not accept that there had been any failure to afford FB-I fair procedures.

REASONS FOR SEEKING A REFERENCE

Legal Requirement

101. Having reached her conclusions regarding the inadequacy of the remedies available in the US in the particular context under scrutiny, and the inability of the SCC Decisions to address that inadequacy, the Commissioner further considered that the SCC Decisions are likely to offend against Article 47 of the Charter insofar as they purport to legitimise the transfer of the personal data of EU citizens to the US notwithstanding the absence of any possibility for any such citizen to pursue effective legal remedies in the US.

102. As a matter of EU law, of course, the validity of the SCC Decisions cannot be determined by the Commissioner, nor, indeed, by the national courts of this jurisdiction.

103. The Commissioner therefore requires access to procedural mechanisms that will facilitate the seeking of ruling from the CJEU at the earliest possible juncture, as set out in the CJEU Ruling (and in particular, paragraph 65 thereof, which I extracted above).

Factors Favouring a Reference at the Earliest Possible Juncture

104. In addition to the fact that a reference to the CJEU is necessary as a matter of law to resolve the issues in dispute in the proceedings, I say that, from

the Commissioner's perspective and from the perspective of the public interest, and as was set out in the Certificate for Entry into the Commercial List, it is imperative that the matters in dispute in these proceedings are resolved as quickly as possible.

105. In the first instance, given that the Commissioner's concerns relate to fulfilment of the fundamental rights of EU data subjects, it is necessary that the legal situation is clarified with the utmost expedition. A situation in which there is doubt over whether or not the fundamental rights of EU data-subjects are at risk by its very nature requires prompt consideration.

106. Second, the within proceedings are of far-reaching and significant concern. At present, FB-I is relying on the SCC Decisions to make data transfers to the US pursuant to the SCC Decisions. However, FB-I is obviously not the only entity relying on the SCC Decisions to legitimise EU-US data transfers. FB-I has come to the Commissioner's attention due to the Complaint and the Reformulated Complaint, but there are

necessarily countless other entities in Ireland and across the EU which are also relying on the SCC Decisions for the purpose of making EU-US data transfers.

107. Third, in particular, the outcome of the within proceedings has the potential to have significant economic and commercial consequences for a range of companies and individuals across the EU. In this regard, I note a communication of the European Commission, entitled "*Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU*" (COM (2013) 847 Final, of 27 November 2013. At footnote 6, on page 3 of that document, the following statement is made:

> "*According to some studies, if services and cross-border data flows were to be disrupted as a consequence of discontinuity of binding corporate rules, model contract clauses and the Safe Harbour, the negative impact on EU GDP could reach -0.8% to -1.3% and EU services exports to the US would drop by -6.7% due to loss of competitiveness. See: "The Economic Importance of Getting Data Protection Right*", a study by the European Centre for International Political Economy for the US Chamber of Commerce, March 2013."

108. I beg to refer to a copy of this Communication which can be found at **Tab #3** of the Book.

109. Thus, aside from the fundamental rights at stake and the large range of entities and individuals affected, there is in addition a significant economic and commercial importance attached to these proceedings and it is necessary for the Plaintiff's application for a reference for a preliminary ruling to be determined as expeditiously as possible.

110. In this regard, it is also important to note that the within proceedings were issued on 31 May 2016. Since that date, it has not been possible to advance the Commissioner's application for a reference for a preliminary ruling, due, in part, to the fact that numerous entities have applied to this Honourable Court to be joined as amici. The applications of these various entities will be heard in the Commercial List of this Honourable Court on 7 July 2016. Once those applications are determined, and the relevant amici curiae identified, it will be appropriate to proceed immediately to the hearing of the Plaintiff's application for a reference and it is for that reason that this application is now being issued.

111. Further in this respect, the Commissioner has been concerned by suggestions made by the Defendants—and even by certain potential amici, notwithstanding that it is my understanding that amici have no entitlement to dictate the progress of the proceedings—that it will be necessary for pleadings to close and for documentation to be furnished or discovered in advance of the hearing of this application for a reference. The Commissioner does not accept these suggestions.

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

113. In short, there is widespread reliance on the SCC Decisions to legitimise what are now commonplace EU-US data transfers, in a wide variety of contexts, from business to employment to social media. Given the Commissioner's concerns regarding the validity of the SCC Decisions, given the fundamental rights at stake, and given how critical data transfers conducted pursuant to the SCC Decisions have become to commercial and social life in general, it would self-evidently be highly undesirable for uncertainty to persist regarding the validity of the SCC Decisions for any length of time.

114. These proceedings have the potential to affect a very substantial number of entities and a huge number of data subjects across the EU and they have the potential to affect a large range of commercial transactions and social activities. It is imperative that clarity is obtained on the validity of the SCC Decisions as soon as possible.

115. There is therefore a pressing urgency to these proceedings, and in light of that urgency, I say that a reference is required at the earliest possible juncture.

116. Overall therefore, having regard to the nature of the rights engaged herein, the sequence of events that led to the investigation, the objections to the SCC Decisions which the Commissioner considers, subject to further submissions, to be well-founded and the fact that she considers that she cannot conclude her investigation without obtaining a ruling of the CJEU on the validity of the SCC Decisions, I say that this application for a reference for a preliminary ruling ought to be granted.

PRAYER FOR RELIEF

117. In all the circumstances, I ask this Honourable Court to grant the relief sought in the Notion of Motion herein.

John V. O'Dwyer

SWORN by the said **JOHN V. O'DWYER**

~~(a) who is personally known to me; or,~~

(b) who has been personally identified to me by DAMIEN YOUNG who is personally known to me and who has certified to me his/her personal knowledge of the Deponent; or

~~(c) the identity of the Deponent has been~~ established by me by reference to a

containing a photograph of the ~~Deponent~~

on this the 1st day of July, 2016 at Wilton Park House Wilton Place Dublin 2 in the ~~County~~ / City of Dublin before me a Practising Solicitor

Anne Marie

PRACTISING SOLICITOR

I hereby certify that the Deponent is personally known to me.

Damien Young.

Filed on the day of July 2016 on behalf of the Data Protection Commissioner by Philip Lee, 7/8 Wilton Terrace, Dublin 2, Solicitors for the Plaintiff.

THE HIGH COURT
COMMERCIAL

Record No. 2016 / 4809P
(2016 No. 74 COM)

Between:

THE DATA PROTECTION COMMISSIONER

Plaintiff

-and-

FACEBOOK IRELAND LIMITED

-and-

MAXIMILLIAN SCHREMS

Defendants

AFFIDAVIT OF JOHN V. O'DWYER

(Plaintiff's Application for a Reference to the Court of Justice of the European Union)

Philip Lee
Solicitors
7-8 Wilton Terrace,
Dublin 2