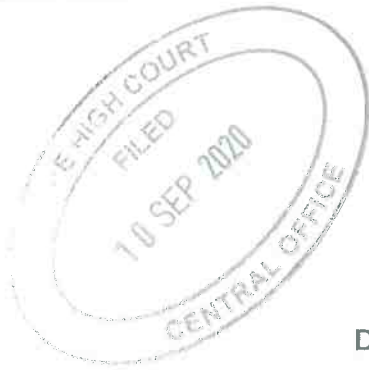


THE HIGH COURT
JUDICIAL REVIEW

Record No: 2020/ ⁶¹⁷ JR

Between:



FACEBOOK IRELAND LIMITED

Applicant

AND

DATA PROTECTION COMMISSION

Respondent

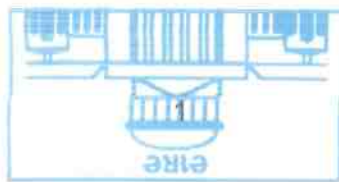
AFFIDAVIT OF YVONNE CUNNANE

I, **YVONNE CUNNANE**, solicitor, of 4 Grand Canal Square, Grand Canal Harbour, Dublin 4, aged eighteen years and upwards, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am Head of Data Protection and Privacy for Facebook Ireland Limited, a duly authorised representative of the Applicant in these proceedings, and I have read the Statement of Grounds. I make this Affidavit from facts within my own knowledge save where otherwise appears and where so appearing I believe same to be true and accurate. I make this Affidavit in order to ground the herein application for judicial review.
2. I beg to refer to the Statement Required to Ground an Application for Judicial Review herein and I make this affidavit for the purpose of verifying the facts relied upon therein. I duly verify the said facts and aver to the truth of the facts set out therein insofar as they are within my knowledge. So much of the statement that relates to my own acts and deeds is true and so much of it as relates to the acts and deeds of any and every other person I believe to be true.
3. The headings used in this affidavit are for convenience only.



274602430
B97570



4. The Respondent was established pursuant to the Data Protection Act 2018 (the 'Act'). For convenience, the expression 'DPC' is used herein to refer to the Respondent, as well as to the Respondent's immediate predecessor, namely the Data Protection Commissioner.
5. The within proceedings arise from the decision of the DPC to commence an own volition inquiry under Section 110 of the Act into transfers of data to Facebook, Inc. (the Applicant's data processor, located in the United States) and the delivery by the DPC to the Applicant on 28 August 2020 of a Preliminary Draft Decision (the 'Preliminary Draft Decision'). On the basis of the grounds pleaded in the Statement of Grounds, the Applicant contends that the DPC has acted *ultra vires* and unlawfully and seeks the reliefs specified in the Statement of Grounds.
6. This Affidavit does not purport to offer an exhaustive account of the relevant factual matters and further information in relation to the background to this matter is to be found in the Preliminary Draft Decision.

I. Background

7. In 2013 Mr Maximilian Schrems lodged a complaint with the DPC in respect of the Applicant's transfer of data to the United States. I beg to refer to a partially redacted copy of the original complaint upon marked with the letters and number "YC1" I have signed my name prior to the swearing hereof.
8. Mr Schrems issued judicial review proceedings in relation to the handling of that complaint which resulted in the judgment of Hogan J in *Schrems v Data Protection Commissioner* [2014] 3 IR 75, and a reference for preliminary ruling by the Court of Justice of the European Union ("CJEU").
9. The CJEU gave judgment in October 2015 in respect of that reference, in Case 362 / 14 *Schrems v Data Protection Commissioner*.
10. In November 2015 the DPC notified the Applicant that it intended to commence an investigation into the complaint of Mr Schrems. The focus of the investigation was the transfer of data to Facebook, Inc. by the Applicant and the legal bases for same. I beg to refer to a copy of the letter dated 3 November 2015 from the DPC to the

Applicant giving notice of that investigation upon which, marked with the letters and number “YC2”, I have signed my name prior to the swearing hereof.

11. Mr Schrems filed a reformulated complaint with the DPC dated 1 December 2015. I beg to refer to a partially redacted copy of that reformulated complaint upon which, marked with the letters and number “YC3”, I have signed my name prior to the swearing hereof.
12. I say that further letters were exchanged between the DPC and the Applicant in the context of that investigation. I beg to refer to copies of correspondence exchanged between 20 November 2015 to 26 May 2016 in this regard upon which, bundled together and marked with the letters and number “YC4”, I have signed my name prior to the swearing hereof.
13. In January 2016 the Applicant provided the DPC with a detailed legal submission addressing the legal bases for transfers of data from the Applicant to Facebook, Inc as at that date. I beg to refer to a copy of the said submission upon which, marked with the letters and number “YC5”, I have signed my name prior to the swearing hereof.
14. On 24 May 2016 the DPC issued a Draft Decision which stated that it had formed the view that that EU citizens whose data is transferred to the US 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.
15. The DPC was also of the view that Commission Decision 2010/87/EU of 5 February 2010 as amended by Commission Implementing Decision (EU) 2016/2297 (**‘the SCC Decision’**) in relation to the use of standard contractual clauses (**“SCCs”**) were likely to offend against Article 47 of the Charter insofar as they purported to legitimise the transfer of the personal data of EU citizens to the US notwithstanding what the DPC considered to be the absence of any possibility for any such citizen to pursue effective legal remedies in the US.
16. The DPC decided, therefore, to bring proceedings before the Irish courts, seeking a reference for preliminary ruling by the CJEU on the question of whether the SCC Decisions were valid as a matter of EU law.

17. The Applicant participated fully in the High Court proceedings which ensued, as did Mr Schrems. Costello J handed down her judgment in the High Court proceedings on 3 October 2017 (*DPC v Facebook and Schrems* [2017] IEHC 545). Subsequent to Costello J handing down her decision, the Applicant and the United States Government – an *amicus curiae* – made submissions that certain factual aspects of the judgment in respect of US law should be revised. Costello J handed down a revised judgment in April 2018.
18. Costello J decided to make a reference for preliminary ruling, in which she posed a series of questions to the CJEU, including a question as to the validity of the SCC Decisions.
19. The Applicant appealed the judgment of Costello J, and leave was granted in respect of a direct appeal to the Supreme Court. The Applicant applied for a stay on the transmission of the order for reference, pending appeal. This application was refused by Costello J (*DPC v Facebook and Schrems* [2018] IEHC 236).
20. The Supreme Court handed down judgment on 31 May 2019 (*DPC v Facebook and Schrems* [2019] IESC 46), in which it refused the Applicant's appeal.
21. The CJEU proceeded to consider the reference for preliminary ruling, and ultimately handed down its judgment on 16 July 2020 in Case C-311 / 18 *Data Protection Commissioner v. Facebook Ireland Limited and Schrems* (the “**Judgment**”).

II. The Preliminary Draft Decision

22. I say that on 25 May 2018 Regulation (EU) 2016/679, GDPR came into force across Europe. In Ireland, the Act came into effect on 24 May 2018 so as to give effect to GDPR. Section 110 of the Act recognises inquiries are a mechanism introduced by the Act – as part of “Chapter 2, Enforcement of Data Protection Regulation” – and the provision recognises the ability of the DPC to conduct inquiries into suspected infringement of relevant enactment of GDPR.
23. Without any forewarning, on 28 August 2020, the Applicant received a letter from the DPC notifying it that, on the basis of its consideration of the Judgment, the DPC had decided to commence an own-volition inquiry under Section 110 of the Act. I beg to refer to that letter upon which, marked with the letters and number “YC6”, I have

signed my name prior to the swearing hereof. Enclosed with that letter was the Preliminary Draft Decision. I beg to refer to the Preliminary Draft Decision when produced. This document has not exhibited due to its confidential nature and with a view to protecting the integrity of both the Inquiry and the Inquiry process. Extracts from the Preliminary Draft Decision have been referred to below only to the extent necessary to ground the application for the reliefs sought in the Statement of Grounds, in contemplation of the DPC's comments on confidentiality in the correspondence exhibited at YC7 below.

24. §1.2 of the Preliminary Draft Decision stated that the inquiry would consider the following two issues:

“(1) Whether FB-I is acting lawfully, and in particular, compatibly with Article 46(1) of the General Data Protection Regulation¹ (“GDPR”), in making transfers (“the Data Transfers”) of personal data relating to individuals who are in the European Union/ European Economic Area who visit, access, use or otherwise interact with products and services provided by Facebook Ireland Limited, each of whom is a “data subject” for the purposes of GDPR Article 4(1) (“Users”) to Facebook Inc (“Facebook”) pursuant to standard contractual clauses (“SCCs”) based on the clauses set out in the Annex to Commission Decision 2010/87/EU² (“the SCC Decision”), following the judgment of the Court of Justice of the European Union (“the CJEU”), delivered on 16 July 2020, in Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems EU:C:2020:559 (“the Judgment”); and

(2) Whether and / or which corrective power should be exercised by the Commission pursuant to GDPR Article 58(2) in the event that the conclusion is reached that FB-I is acting unlawfully and infringing GDPR Article 46(1).”

25. §1.3 of the Preliminary Draft Decision set out the background and basis for the Inquiry and stated that in it *“the sole decision-maker of the Commission”* would present her *“...preliminary view on the issues arising, prior to the formulation of any draft decision for the purpose of GDPR Article 60.”*

26. In summary, the Preliminary Draft Decision comes to a *“preliminary view”* that (§1.12):

“(1) The Data Transfers are made in circumstances which fail to guarantee a level of protection to data subjects that is essentially equivalent to that provided by EU law, and in particular, by the GDPR read in light of the Charter of Fundamental Rights of the European Union (“the Charter”), and, accordingly, in making the Data Transfers, FB-I is infringing Article GDPR 46(1); and

(2) I am therefore considering proposing that the Data Transfers should be suspended, pursuant to the Commission’s powers under GDPR Article 58(2)(j).”

27. The above views, if adopted, are likely to have significant adverse effects upon the Applicant, its business and on the many millions of individuals and businesses who use its services. Elements of these effects are set out further below in the section of this Affidavit dealing with the application for a stay.
28. Since the delivery of the Preliminary Draft Decision, correspondence has been engaged between Mason Hayes and Curran, the solicitors for the Applicant, and the DPC in relation to various issues. I beg to refer to copies of that correspondence upon which pinned together and marked with the letters and number “YC7” I have signed my name prior to the swearing hereof.
29. Among other things, it will be apparent from the said correspondence that the DPC has afforded the Applicant a period of just 3 weeks from 28 August 2020 to make submissions upon the Preliminary Draft Decision. It will also be apparent that an extension of time was sought, including by reference to the particularly unusual circumstances of the matter and the severe impact the DPC’s proposed approach could have, but was not granted.
30. I say and believe that a period of 3 weeks to respond to issues of the complexity raised in the Preliminary Draft Decision is manifestly inadequate, particularly in view of its complexity and of the seriousness of its potential adverse consequences, and supports a concern that the DPC has formed a view in relation to the subject matter of the Preliminary Draft Decision and does not expect the Applicant to be in a position to persuade it through submissions to take a different view. The Applicant also considers that the affording of a period of merely three weeks to make

submissions in respect of a matter of such breadth and importance amounts to a breach of fair procedures, as set out in the Statement of Grounds.

31. The Applicant's concerns in this regard have been compounded since it became aware on 9 September 2020 that, by letter dated 31 August 2020 sent by the DPC to Mr Schrems, the DPC stated that it anticipated that a draft decision would be submitted to the procedure under Article 60 of the GDPR within 21 days of the receipt of submissions from the Applicant. This had not been disclosed to the Applicant (see §9.3 and §9.7 of the Preliminary Draft Decision and the DPC's letter to the Applicant dated 31 August) and it is apparent that the DPC intends to reach a final decision and move to the Article 60 procedure without affording the Applicant any further opportunity to make submissions. I beg to refer to a copy of that letter and the reply from the solicitors for Mr Schrems dated 7 September 2020 upon which pinned together and marked with the letters and number "YC8" I have signed my name prior to the swearing hereof.

III. Factual Basis for Grounds of Challenge

i. Failure to conduct an Inquiry prior to reaching the Preliminary Draft Decision

32. The first that the Applicant heard of the current inquiry was on receipt of the Preliminary Draft Decision on 28 August 2020. The DPC did not make contact with the Applicant for the purposes of gathering information subsequent to the Judgment, and prior to the delivery of the Preliminary Draft Decision (which constitutes the commencement of the inquiry as well as the DPC's preliminary draft decisions on alleged GDPR infringement and proposed corrective measures).

33. I say that the sources set out at §1.14 to §1.25 – upon which the Preliminary Draft Decision is based – confirm that the DPC did not obtain any additional information directly from the Applicant beyond that which it already held, prior to the Judgment.

34. I further say that it can be observed that some of the material that is relied upon is out of date and incomplete in regard to the matters to be considered by the inquiry. The affidavits referred to, which were prepared in the context of the High Court proceedings initiated by the DPC, which raised slightly different issues, are almost four years old. This is acknowledged at §1.25 of the Preliminary Draft Decision.

35. I say that, while the Applicant has been provided with the opportunity to make what the DPC refers to as “*targeted*” submissions on the Preliminary Draft Decision, this is very different to being engaged in an investigative process whereby the DPC seeks to gather information on relevant issues. This is all the more the case in instances such as the present matter, where any such information provided would be gathered and prepared in light of the specific findings of the CJEU pertinent to the matter.
36. Although it may be a matter for submission in due course, I am advised that the approach adopted fails to accord with a proper interpretation of the Act, including section 110 thereof and that, accordingly, the purported inquiry procedure adopted is *ultra vires*. I am advised that this is in addition to the relevant matters constituting a breach of the Applicant’s right to fair procedures in any inquiry, which is also a ground upon which judicial review is sought.
37. In its letter of 3 September 2020 to Mason Hayes and Curran, the DPC stated that “...that inquiry may take such form as the Commission thinks fit.” While this reflects the language of section 110, I am advised that this fails to recognise that any statutory provision conferring a discretion (here regarding the form and progression of the inquiry) must be exercised fairly, properly, proportionately and in accordance with certain requirements. I am also advised that the Act must be read as a whole.
38. For the purposes of comparison, it is helpful to consider the letters sent by the DPC to the Applicant in the context of its investigation of Mr Schrems’ complaint in 2015-2016, as exhibited at YC4. These letters contain numerous detailed questions, designed to elicit information from the Applicant.

ii. Departure from procedure indicated by the DPC, including in its 2018 Annual Report

39. I beg to refer to a copy of the DPC’s Annual Report for the year 25 May 2018 to 31 December 2018 upon which marked with the letters and number “YC9” I have signed my name prior to the swearing hereof (the ‘**2018 Annual Report**’).
40. In the said 2018 Annual Report, the DPC set out in high level terms the stages of a statutory inquiry. The 12 stages indicated therein are as follows:

1. *Commencement/notification phase;*

2. *Information gathering phase;*
3. *Draft inquiry report preparation phase;*
4. *Submissions phase (draft inquiry report);*
5. *DPC draft decision-making phase (infringement);*
6. *Notification of DPC draft decision & commencement of GDPR co-operation phase;*
7. *Concerned DPA objections phase – if applicable;*
8. *EDPB dispute Resolution Phase – if applicable;*
9. *DPC final determination (infringement) phase;*
10. *Notification of final decision (infringement) phase;*
11. *Decision-making phase (corrective power) – if applicable;*
12. *Court confirmation phase – if applicable (administrative fine only).*

41. The same 12 stages are set out in a further document disseminated by the DPC, entitled '*Statutory Inquiries*'. I beg to refer to a copy of the said document upon which marked with the letters and number "YC10" I have signed my name prior to the swearing hereof.

42. I say that it appears that this process has not been followed in the inquiry that is currently underway. It appears that the DPC has abandoned stages 1, 2, 3 and 4 of the procedure and / or conflated stages 1, 2, 3, 4, 5 and 11.

43. I say that this divergence from the procedure set out is prejudicial and unfair to the Applicant. In particular, the Applicant has been deprived of the information gathering phase, and a reasonable opportunity to answer specific questions posed by the DPC, and to provide relevant information to the DPC which would have assisted in reaching the draft decision.

44. The DPC's letter of 3 September 2020 has stated, inter alia, that "... *the Commission has not adopted a 'published approach' comprising a fixed set of procedures which are in turn applied, rigidly and uniformly, in all statutory inquiries ...*". However, that, of itself, does not explain why the procedure set out in the documents exhibited above (and adopted in previous inquiries) has not been followed at all here, and the Applicant is unclear as to the reasons for the DPC's approach in this regard.

iii. Premature judgment

45. Although it may be more appropriately a matter for submission in due course, I am advised that the issuing by the DPC of the Preliminary Draft Decision would give rise to an apprehension on the part of a reasonable person that the DPC has prejudged or prematurely judged the relevant questions arising for assessment.
46. In that respect, I am advised that such a perception arises when the Preliminary Draft Decision is taken as a whole. Without prejudice to that position, the Applicant will rely in particular on §5.16, §7.59 and §7.61-7.63 of the Preliminary Draft Decision.
47. While I accept that the Preliminary Draft Decision does state on various occasions that submissions will be considered from the Applicant, the DPC, as noted above, afforded a period of just three weeks within which the Applicant could make such submissions, and refused to extend that time period. I am advised that this would give rise to an apprehension on the part of a reasonable person that the DPC will give little weight to those submissions and that they will not dislodge, or be capable of dislodging, the view which has already been arrived at.
48. This apprehension would be reinforced by the contents of the letter dated 31 August 2020 sent by the DPC to Maximilian Schrems (exhibited at YC8) in which it stated that it anticipated that a draft decision would be submitted to the procedure under Article 60 of the GDPR within 21 days of the receipt of submissions from the Applicant. This indicates that the DPC had already formed the view that this would be the appropriate manner in which to proceed, that little consideration will be given to the submissions made by the Applicant and that there is nothing that the Applicant can say by way of submissions which will lead to any other outcome.
49. Furthermore, in circumstances where the DPC had, in its letter of 31 August, informed Mr. Schrems that the Applicant had been afforded a period of 3 weeks to make submissions and indicated to Mr. Schrems its intention to invoke the Article 60 procedure within 3 weeks of receipt of those submissions, there is a reasonable apprehension that the DPC had fettered its discretion and did not give any or any adequate consideration to the request made by the Applicant for an extension of time to make submissions, thereby breaching the Applicant's right to fair procedures.

iv. Conducting of the entire investigative and adjudicative process by a single person and / or involvement of that person in the entire process

50. It appears from the Preliminary Draft Decision that the process envisages a single person, namely the sole member of the Commission, conducting the investigative and adjudicative stages of the inquiry.

51. §1.3 of the Preliminary Draft Decision indicates that it was produced by one individual described as “*the sole decision-maker of the Commission*”. There is no indication in the Preliminary Draft Decision that any other person will be involved in adjudication at a later stage of the process.

52. This represents a further departure from the process set out in the Annual Report and the Statutory Inquiries guidance document exhibited above. Both documents refer to separate roles of a DPC investigator (referred to by the DPC as the ‘inquiry team’ in other inquiries) and DPC decision maker, which in my experience has also been the DPC’s practice in previous inquiries.

53. I say that the fact that one person is responsible for the entire process is also relevant to the Applicant’s concerns, in respect of the inadequacy of the investigative process engaged in and / or independence of the ultimate decision-making process.

v. Proposed single decision to also cover corrective measures, instead of the separate decisions mandated by the Act

54. I believe and am advised that the procedure which the Preliminary Draft Decision indicates that the DPC will follow is contrary to that envisaged in the Act in a further respect. §9.6 of the Preliminary Draft Decision states:

“The Draft Decision will set out the provisional view of the DPC as to:

(1) whether or not an infringement has occurred/is occurring; and,

(2) any envisaged action (including the possible exercise of corrective powers) that might be taken in the event that the DPC determines an infringement has occurred/is occurring.”

55. I am advised that the Act requires that two separate decisions be made, one as to the infringement and a separate decision as to the corrective power. Although it may be more appropriately a matter for submission, I would refer to section 111 in this regard. By contrast, the Preliminary Draft Decision contemplates a unitary decision in respect of both infringement and corrective power, which I am advised does not conform to the requirements of the Act, or with fair procedures.

vi. Two ongoing Regulatory Investigations

56. As detailed above in the 'Background' section, the DPC commenced an investigation into the complaint of Mr Schrems in November 2015. Mr Schrems reformulated that complaint in December 2015.

57. The investigation into that complaint has not concluded. In the Preliminary Draft Decision, the DPC characterises this prior inquiry as "*ongoing*" (§1.13). As such, there are two regulatory inquiries being conducted into the Applicant simultaneously. While the scope of the prior inquiry was wider than the new inquiry, insofar as the subject matter of the current inquiry is concerned, there are two regulatory investigations ongoing into substantially the same issues.

58. It should be noted that, in the letter from Mr. Schrems' solicitors dated 7 September, replying to the letter from the DPC to Mr. Schrems dated 31 August, complaint has been made about the DPC conducting a second inquiry rather than concluding the inquiry into his complaint. He has asserted that it constitutes a breach of an undertaking given to the High Court, there is no rational reason for undertaking the new inquiry, that it will cause delay, that it breaches his right to be heard, that it is a resilement from previous positions adopted by the DPC, and that the scope of the new inquiry is insufficient and irrational. He sought confirmation, by close of business on 9 September, that the DPC would not proceed with the new inquiry but would rather deal with all issues within the context of its investigation of his complaint, failing which an application would be made to restrain the DPC from proceeding with the new inquiry. I am not aware what, if any response, has been made by the DPC to the request for this confirmation.

59. I am advised that no adequate or sufficient reasons have been provided to the Applicant for the commencement of the new inquiry while the prior investigation is ongoing. Furthermore, the Applicant has never been informed as to the procedure

that will be followed in respect of the remainder of the prior investigation. For example, the Applicant has not been informed of how long the apparent pause in that investigation can be expected to last.

60. The Applicant devoted significant resources to engaging with the prior investigation. It is now left in a position of uncertainty as to the outcome of those efforts.

vii. EDPB

61. In the aftermath of the CJEU delivering the Judgment, the DPC released a statement on 16 July 2020 which commented on the Judgment and concluded by noting “we [the DPC] *look forward to developing a common position with our European colleagues to give meaningful and practical effect to today’s judgment*”. I beg to refer to a print-out of same upon which marked with the letters and number “**YC11**” I have signed my name prior to the swearing hereof.

62. On 24 July 2020, in the aftermath of the Judgment, the European Data Protection Board (“**EDPB**”) published an FAQ document on its website in response to the CJEU issuing the Judgment. . I beg to refer to a copy of the FAQ document upon marked with the letters and number “**YC12**” I have signed my name prior to the swearing hereof. This document summarised the EDPB’s response and states:

“The EDPB is currently analysing the Court’s judgment to determine the kind of supplementary measures that could be provided in addition to SCCs or BCRs, whether legal, technical or organisational measures, to transfer data to third countries where SCCs or BCRs will not provide the sufficient level of guarantees on their own. The EDPB is looking further into what these supplementary measures could consist of and will provide more guidance”

63. On 4 September 2020 the EDPB announced that it had established a taskforce to examine complaints filed by Mr Schrems’ privacy rights group “NOYB” with various national supervisory authorities in the aftermath of the Judgment, together with a second taskforce to prepare recommendations to assist controllers and processors with their duty to identify and implement appropriate supplementary measures to ensure adequate protection when transferring data to third countries. I beg to refer to a copy of the press release published by the EDPB on 4 September 2020, upon

marked with the letters and number “YC13” I have signed my name prior to the swearing hereof.

64. The Chair of the EDPB stated in the said press release in relation to the latter taskforce:

“The EDPB is well aware that the Schrems II ruling gives controllers an important responsibility. In addition to the statement and the FAQ we put out shortly following the judgment, we will prepare recommendations to support controllers and processors regarding their duty in identifying and implementing appropriate supplementary measures of a legal, technical and organizational nature to meet the essential equivalence standard when transferring personal data to third countries.”

65. I say that the Chair of the EDPB further recognised the complexity of the task at hand in commenting in the said press release as follows:

“However, the implications of the judgment are wide-ranging, and the contexts of data transfers to third countries very diverse. Therefore, there cannot be a one-size-fits-all, quick fix solution. Each organisation will need to evaluate its own data processing operations and transfers and take appropriate measures.”

66. I say and believe that it would be preferable, and indeed would accord with proper process, for the EDPB to examine the use of the SCCs in the light of the views and guidance expressed by the CJEU in the Judgment, prior to the DPC’s inquiry. The purpose of the EDPB is to ensure consistent application of the GDPR. The task force will be able to take a global view of reliance on the SCCs across a diversity of organisations, and provide guidance as to how those organisations can appropriately protect data subject rights when using the SCCs to transfer data to third countries.

67. I say that the DPC is a member of the EDPB and that it is therefore highly likely that she is and was aware of the establishment of the said taskforce.

68. Moreover, Mason Hayes and Curran’s letter of 1 September 2020 stated, *inter alia* that the Applicant: “... like all other data exporters currently relying on SCCs, still awaits further regulatory guidance on this issue following the Judgment (which it had

understood to be forthcoming).” The said statement footnoted to the FAQ document exhibited at YC12.

69. The DPC’s letter of 3 September 2020 responded: *“Accordingly, the Commission does not consider the timing of publication of guidelines by the EDPB to be of relevance in the present context.”* Reasons were set out for that view. However, I am advised that the above statement indicates a failure by the DPC to take into account a relevant consideration. This approach appears to be at odds with the DPC’s previous comments following the Judgment

viii. *Equality of Treatment*

70. I am not aware of any similar inquiry being conducted into transatlantic data transfers on the part of other companies under the DPC’s jurisdiction. If it is the case that no such inquiries are under way, I say that this gives rise to an apprehension that the Applicant has not been treated equally. I recognise that the DPC may subsequently confirm that that is not the position, and may provide further detail, but at the moment I say that the Applicant apprehends that it is the position.

71. I say that the SCCs are used by very many other companies to transfer data to the US. In view of the fact that the DPC’s concerns about the protection of personal data pertain primarily to aspects of US law, these concerns are likely to arise in respect of data transferred by many companies to the US.

72. In circumstances where all such companies are effectively contending with (at least substantially) the same challenges, I believe and am advised that it is neither fair nor appropriate that the Applicant should be the only entity subjected to investigation, and to face the possible suspension of data transfers to the US.

73. Furthermore, I believe the competitors of the Applicant, under the jurisdiction of the DPC, are engaged in transfers of EU citizens’ data to the US. Given it is unclear to the Applicant how it could continue to provide its services at all in the event of a complete suspension of the transfer of users’ data to the US, as appears to be what the DPC proposes, if the Applicant alone is being investigated, and subjected to such a suspension of data transfers to the US, this would be liable to create a serious distortion of competition

ix. Breach of fair procedures

74. I believe and am advised that the process which has been adopted by the DPC is not in accordance with the Applicant's rights to fair procedures. Examples are set out throughout this Statement of Grounds, and include the following matters.
75. I say and believe and am advised that the affording of a period of merely three weeks within which to make submissions in respect of matters of such breadth and importance, particularly in view of the seriousness of the potential adverse consequences, as those set out in the Preliminary Draft Decision amounts to an unfair and disproportionate procedure. I say and believe that neither the fact that the Judgment was handed down on 16 July 2020, nor the prior litigation or interactions regarding Mr. Schrems' complaint prior to then, mean that the Applicant is or was able to properly respond to the Preliminary Draft Decision within the period allotted. I say that given the length of the Preliminary Draft Decision to be addressed in the submissions, the multiple complex and novel issues to be dealt with therein, the need to update evidence referred to from 2015 and 2016 and the need to make detailed submissions on appropriateness / impact of remedy alongside the issue of breach a three week timeframe to prepare these submissions is wholly insufficient.
76. I believe and am advised that the departure from the procedure set out in the 2018 Annual Report and in the guidance exhibited above also gives rise to a breach of fair procedures. Had that procedure been followed, as in other inquiries, the Applicant would have had considerably greater time, notice and opportunity to marshal its case, provide accurate factual information and make submissions in relation to the inquiry. As noted above, the Applicant has been deprived of the information gathering phase, conducted by a different person to the ultimate decision-maker, and the opportunity it would have entailed to provide relevant information and answer any specific questions posed by the DPC in light of the Judgment.
77. The Applicant's concerns in relation to the fairness of the procedures adopted and the refusal to grant an extension of time within which to make submissions have been heightened by the contents of the letter dated 31 August 2020 sent by the DPC to Mr. Schrems in which the DPC stated that it anticipated that a draft decision would be submitted to the procedure under Article 60 of the GDPR within 21 days of the receipt of submissions from the Applicant. This had not been disclosed to the Applicant and it is apparent that the DPC intends to reach a final decision, one which

has potentially very serious consequences, and move to the Article 60 procedure without affording the Applicant any further opportunity to make submissions.

x. Breach of the duty to give reasons

78. There are a range of issues in respect of which I am advised that the Applicant has not been provided with sufficient reasons by the DPC. These issues include:

- (a) Why a new inquiry is being commenced while the prior investigation into Mr. Schrems' complaint is ongoing;
- (b) Why, as appears at the present time may be the position, a section 110 inquiry into transatlantic data transfers has been opened into the Applicant alone;
- (c) Why the DPC does not propose to await further statements or guidance from the EDPB;
- (d) Why the procedure set out in the 2018 Annual Report (and previously followed by the DPC in other inquiries) has not been, and is not being, followed;
- (e) Why a decision dealing with corrective measures is not proposed to be made separately;
- (f) Why only 3 weeks was afforded for the Applicant to make submissions and why an extension of time for the Applicant to make submissions has been refused given the potentially serious consequences at stake; and
- (g) Why there was an undisclosed intention on the part of the DPC to invoke the Article 60 procedure within 3 weeks of the making of submissions by the Applicant.

79. Certain of these issues have been raised with the DPC in the correspondence exhibited above.

xi. Failure to take into account relevant considerations

80. I believe and am advised that there have been failures on the part of the DPC to take into account relevant considerations. Examples are set out throughout the Statement of Grounds, and same include:

- (a) the failure to have proper regard to the role and importance of the EDPB, including the upcoming guidance from it;
- (b) the failure to have regard to the procedure previously set out (and adopted) by the DPC, including in the 2018 Annual Report;
- (c) the failure to have proper regard to the potential adverse effects on the Applicant and its users when considering whether to extend the time for the making of submissions;
- (d) the failure to have regard to provisions of US law not mentioned in the CJEU's Judgment; and
- (e) the failure to have regard to the fundamental rights and interests of the Applicant and others.

IV. Effect of Suspension of Data Transfers

81. Mason Hayes and Curran's letter of 1 September referred to "... *the potential for significant disruption to our client's business that a suspension of data transfers may cause, ...*". It further stated:

"You will also appreciate that, should the final decision reached within the Inquiry reflect the views and conclusions that are set out in the Preliminary Draft Decision, this is likely to have very significant implications for FIL (including potentially its ability to provide its services relied on by millions of individuals and businesses across Europe). This is also likely to be the case for many other data exporters in the event that this rationale is applied more broadly."

82. This was not disputed in the replying correspondence from the DPC two days later.

83. As set out in the Statement of Grounds, the views of the DPC has expressed in the Preliminary Draft Decision, in particular regarding corrective measures, if adopted, would significant adverse effects upon the Applicant, its business and its users. Indeed, in the event that the Applicant were subject to a complete suspension of the transfer of users' data to the US, as appears to be what the DPC proposes, it is not clear to the Applicant how, in those circumstances, it could continue to provide the Facebook and Instagram services in the EU.
84. I say and believe that the consequences of this are likely to be significant and wide-ranging, to the Applicant, and to the millions of individuals and businesses who use its services in Europe. By way of illustration, the Applicant's Facebook service alone has approximately 410 million monthly active users in Europe. These users comprise, inter alia, individual consumers, businesses of all sizes, charitable organisations, politicians and other public figures. The Facebook service, and services like it, are an important tool for freedom of expression and as a medium to access, consume and share information (fundamental rights enshrined in the Charter).
85. The economic impact of depriving EU users of such services is also likely to be significant. The Applicant estimates that around 25 million businesses use its services in the European region, as at January 2020. In a recent survey commissioned by the Applicant of 7,700 businesses around Europe, surveyed businesses said that using Facebook apps helped them generate sales corresponding to an estimated EUR 208 billion in 2019. For its own part, Facebook, Inc. (of which the Applicant is a wholly-owned subsidiary) generates advertising revenues in the European in the order of multiple billions of Euro. I beg to refer to a copy of the said survey commissioned by the Applicant upon marked with the letters and number "YC14" I have signed my name prior to the swearing hereof.
86. As such, the suspension of data transfers pursuant to the SCCs would have very serious consequences for the Applicant, and ultimately for many other organisations.

V. Stay

87. As set out above, the Applicant is subject to an ongoing procedure which it considers to be in breach of fair procedures and otherwise unlawful for the reasons set out in the Statement of Grounds.
88. Furthermore, the DPC has afforded the Applicant a period of just 3 weeks from 28 August 2020 to make submissions upon the Preliminary Draft Decision and has refused to grant any extension of time. I say and believe that a period of 3 weeks to respond to issues of the complexity raised in the Preliminary Draft Decision is manifestly inadequate, particularly given the potentially serious consequences at stake, and supports the concern that the DPC has formed a view in relation to the subject matter of the Preliminary Draft Decision and does not expect the Applicant to be in a position to persuade it through submissions to take a different view.
89. The Applicant reasonably apprehended - from the refusal of any extension of the three week period afforded to it for the making of submissions - that the DPC intended to move forward at pace with the inquiry. This has been confirmed by the contents of the letter of 31 August 2020 from the DPC to Mr Schrems in which it stated that it anticipated that a draft decision would be submitted to the procedure under Article 60 of the GDPR within 21 days of the receipt of submissions from the Applicant. It is apparent that the DPC intends to do this without affording any further opportunity to the Applicant to make additional submissions. I am advised that that is, in itself, an argument inclining in favour of the grant of a stay.
90. I have set out under the previous heading above elements of the significant prejudice to which the Applicant is exposed arising out of this inquiry. By contrast, I am advised that it is not evident that any prejudice either to the DPC or to the inquiry would result out of the staying of the inquiry pending the determination of the within judicial review.
91. While it is to be apprehended that the DPC would respond that the rights of data subjects are engaged by the present inquiry, which the Applicant fully accepts, I am advised that any such contention must be viewed against the wider backdrop. This includes the time that has passed regarding Mr. Schrems' complaints, the approach adopted by the EDPB, and the issue of whether the DPC has initiated inquiries into transfers of EU citizens' data to the US by any other companies.

92. I believe and am advised that the present judicial review proceedings raise important issues regarding the approach being adopted by the DPC.
93. From the Applicant's perspective, the Inquiry and the corrective action that may be directed are of the utmost importance. There is an extremely serious risk from the perspective of the Applicant's business in the event that the views set out in the Preliminary Draft Decision (which the Applicant contends have not been lawfully arrived at) are ultimately adopted. In the event that the Applicant were subject to a complete prohibition on the transfer of user data to the United States, as appears to be what the DPC proposes, it is not clear to the Applicant how, in such circumstances, it could continue to provide inter alia the Facebook and Instagram services in the EU. The consequences of this would be very significant for the reasons outlined in paragraphs 80 to 85 above.
94. Furthermore, if the DPC continues with the inquiry prior to the hearing of the within judicial review proceedings, I believe and am advised that the proceedings will be rendered moot, and that the Applicant will have been deprived of an effective judicial remedy in such circumstances.
95. It should be noted that there is a right to appeal under the Act, including the right to appeal legally binding decisions of the DPC, in particular under section 150(5) of the Act. Although it can be a matter for submission in due course, the Applicant does not consider that this right is sufficient to protect it against the prejudice it risks suffering, and the concerns which are set out in its Statement of Grounds.
96. In all the circumstances, I believe and am advised that the balance of justice manifestly favours the granting of a stay pending the determination of these judicial review proceedings.

VI. Conclusion

97. In the premises, I pray this Honourable Court for the reliefs set out in the Statement of Grounds herein.

SWORN before me... Lisa Mc Kenna

a Practising Solicitor / Commissioner for Oaths
by the said **YVONNE CUNNANE**

(1) who is known to me

~~(2) who has been identified to me by~~

~~_____ who is personally~~

~~known to me. I Lisa Mc Kenna hereby~~

certify that the Deponent is personally known to
me.

~~(3) who has identified herself to me by~~

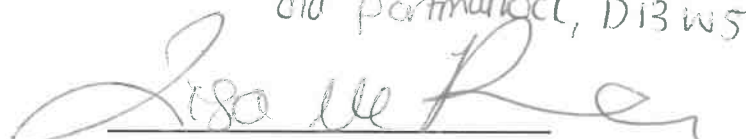
~~reference to passport / drivers licence bearing~~

~~serial number _____.~~

This 10 day of September 2020

at Hillside Cottage, in the City of Dublin
old Portmanock, D13 W599


YVONNE CUNNANE


PRACTISING SOLICITOR / COMMISSIONER
FOR OATHS

Lisa McKenna
Practising Solicitor
McKenna & Co Solicitors
Dublin

Filed this _____ day of September 2020 by Mason Hayes & Curran LLP, Solicitors for the Applicants.