

THE HIGH COURT

[2016 No. 263 MCA]

IN THE MATTER OF SECTION 902A TAXES CONSOLIDATION ACT, 1997 (AS AMENDED) AND

IN THE MATTER OF REGULATION S. I. 549 OF 2012

BETWEEN

FLORANCE CAREY

APPLICANT

AND

A COMPANY

RESPONDENT

JUDGEMENT delivered by Ms. Justice Murphy on the 16th day of January, 2019

1. The applicant is an officer of the Revenue Commissioners who has been duly authorised to bring the within application. The respondent is a third party company which holds information that is of interest to, and is being sought by, the Austrian tax authorities in connection with an ongoing tax investigation. The information is sought pursuant to Directive 2011/16 EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. The application is made pursuant to s. 902A of the Taxes Consolidation Act, 1997 (as amended) which section has been adapted by Statutory Instrument 549 of 2012 to give effect to the Directive.

2. Section 902A forms part of Chapter 4 of the Taxes Consolidation Act, 1997 which confers statutory powers on Revenue in the conduct of tax investigations. Both ss. 902 and 902A give Revenue power in certain specified circumstances to obtain relevant information that is in the possession of third parties. Prior to this s. 902A application, an authorised officer served a notice pursuant to s. 902 on the third party company seeking the names, addresses and, if available, the dates of birth of persons identified in a schedule furnished by the Austrian tax authorities. The third party company refused to comply with that notice, citing data protection and other concerns. This application is for an order directing the respondent company to furnish to the applicant the same names, addresses and, if available, the dates of birth of the persons identified as were sought in the s. 902 notice. The respondent seeks to resist the application on a number of legal grounds, one or more of which it claims, renders the initial order to produce the information served pursuant to s. 902 of the Taxes Consolidation Act and this application for a court order directing them to produce the said information, invalid and/or unlawful. For the reasons set forth in this judgment the court has concluded that it has no jurisdiction to determine the substantive issues sought to be raised by the company in an application pursuant to s. 902A. The substantive issues sought to be raised by the respondent can only be determined by way of judicial review or plenary proceedings.

Relevant law

3. At the root of this application is Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. The recitals relevant to this application are 1, 2, 6 to 9, 19 and 27. They state:-

(1) The Member States' need for mutual assistance in the field of taxation is growing rapidly in a globalised era. There is a tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalisation of financial instruments, which makes it difficult for Member States to assess taxes due properly. This increasing difficulty affects the functioning of taxation systems and entails double taxation, which itself incites tax fraud and tax evasion, while the powers of controls remain at national level. It thus jeopardises the functioning of the internal market.

(2) Therefore, a single Member State cannot manage its internal taxation system, especially as regards direct taxation, without receiving information from other Member States. In order to overcome the negative effects of this phenomenon, it is indispensable to develop new administrative cooperation between the Member States' tax administrations. There is a need for instruments likely to create confidence between Member States, by setting up the same rules, obligations and rights for all Member States.

(6) ... to this end, this new Directive is considered to be the proper instrument in terms of effective administrative cooperation.

(7) This Directive builds on the achievements of Directive 77/799/EEC but provides for clearer and more precise rules governing administrative cooperation between Member States where necessary, in order to establish, especially as regards the exchange of information, a wider scope of administrative cooperation between Member States....

(8) There should be more direct contact between Member States' local or national offices in charge of administrative cooperation, with communication between central liaison offices being the rule. The lack of direct contacts leads to inefficiency, under-use of the arrangements for administrative cooperation and delays in communication. Provision should therefore be made to bring about more direct contacts between services with a view to making cooperation more efficient and faster...

(9) Member States should exchange information concerning particular cases where requested by another Member State and should make the necessary enquiries to obtain such information. The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While Article 20 of this Directive contains procedural requirements, those provisions need to be interpreted liberally in order not to frustrate the effective exchange of information.

(19) The situations in which a requested Member State may refuse to provide information should be clearly defined and limited, taking into account certain private interests which should be protected as well as the public interest.

(27) All exchange of information referred to in this Directive is subject to the provisions implementing Directive 95/46/EC (Data Protection) 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 and to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December, 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. However, it is appropriate to consider limitations of certain rights and obligations laid down by Directive 95/46/EC in order to safeguard the interests referred to in Article 13(1)(e) of that Directive. Such limitations are necessary and proportionate in view of the potential loss of revenue for Member States and the crucial importance of information covered by this Directive for the effectiveness of the fight against fraud.

4. The Articles of the Directive underpinning this application are Articles 1, 5, 6, 7, 17, 18 20 and 25.

5. Article 1(1) of Directive 2011/16 provides as follows:-

"This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2."

Article 5 provides for the exchange of information on request and states:-

"At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries."

Article 6 of the Directive deals with administrative enquiries and provides at 6(1):-

"The requested authority shall arrange for the carrying out of any administrative enquiries necessary to obtain the information referred to in Article 5."

And at 6(3) it provides:-

"In order to obtain the requested information or to conduct the administrative enquiry requested, the requested authority shall follow the same procedures as it would when acting on its own initiative or at the request of another authority in its own Member State."

Article 7 generally provides for time limits and specifically provides at 7(4) that:-

"Within one month of receipt of the request, the requested authority shall notify the requesting authority of any deficiencies in the request and of the need for any additional background information..."

Article 7(6) provides:-

"Where the requested authority is not in possession of the requested information and is unable to respond to the request for information or refuses to do so on the grounds provided for in Article 17, it shall inform the requesting authority of the reasons thereof immediately and in any event within one month of receipt of the request."

Chapter 4 of the Directive which contains Articles 16, 17, 18, 19, 20, 21 and 22, deals with conditions governing administrative cooperation. Article 17 is headed "Limits" and provides at 17(1):-

"A requested authority in one Member State shall provide a requesting authority in another Member State with the information referred to in Article 5 provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives."

The third party company seeks in this application, to challenge the order requiring it to produce information, on the grounds that the requesting authority has not exhausted the usual sources of information which it could have used for obtaining the information requested.

Article 17(2) provides:-

"This Directive shall impose no obligation upon a requested Member State to carry out enquiries or to communicate information, if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purposes."

Article 17(3) provides:-

"The competent authority of a requested Member State may decline to provide information where the requesting Member State is unable, for legal reasons, to provide similar information."

Article 17(4) provides:-

"The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy."

Article 17(5) provides:-

"The requested authority shall inform the requesting authority of the grounds for refusing a request for information."

Article 18 of the Directive 2011/16 entitled "Obligations" states 18(1):-

"If information is requested by a Member State in accordance with this Directive, the requested Member State shall use its measures aimed at gathering information to obtain the requested information, even though that Member State may not need such information for its own tax purposes. That obligation is without prejudice to paragraphs 2, 3 and 4 of Article 17, the invocation of which shall in no case be construed as permitting a requested Member State to decline to

supply information solely because it has no domestic interest in such information."

At Article 18(2) the Directive provides:-

"In no case shall Article 17(2) and (4) be construed as permitting a requested authority of a Member State to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."

Article 20(1) of the Directive 2011/16 provides that requests for information and for administrative enquiries pursuant to Article 5, be sent using a standard form adopted by the Commission.

Article 20(2) states:-

"The standard form referred to in paragraph 1 shall include at least the following information to be provided by the requesting authority:

(a) the identity of the person under examination or investigation;

(b) the tax purpose for which the information is sought.

The requesting authority may, to the extent known and in line with international developments, provide the name and address of any person believed to be in possession of the requested information as well as any element that may facilitate the collection of information by the requested authority."

Article 22 of Directive 2011/16 provides in para. (1)(c):-

"Member States shall take all necessary measures to ensure the smooth operation of the administrative cooperation arrangements provided for in this Directive."

Article 25 of the Directive deals with the issue of data protection and provides:-

"All exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. However, Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1), Articles 12 and 21 of Directive 95/46/EC to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of that Directive." (Emphasis added)

Article 13(1) of that Directive 95/46/EC states:-

"Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

...

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters."

Transposition into Irish Law

6. The Directive was transposed into Irish law by S.I. 549 of 2012 entitled "European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012."

7. Regulation 1 provides that the regulations may be cited as the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012. Regulation 2 provides that the regulations come into operation on the 1st January, 2013. Regulation 3 is the definition section and provides at 3(2):-

"A word or expression that is used in these Regulations and that is also used in the Council Directive has, unless the contrary intention appears, the same meaning in these Regulations as it has in the Council Directive."

At Regulation 3(3) the regulations provide:-

"A word or expression that is used in these Regulations and that is also used in the Act of 1997 has, subject to paragraph (2), and unless the contrary intention appears, the same meaning in these Regulations as it has in the Act of 1997."

Regulation 4 provides that "the Revenue Commissioners are the competent authority in the State for the purposes of the Council Directive." It further provides that the Revenue Commissioners shall comply with the requirements imposed by the Council Directive on competent authorities in a Member State. Regulation 5 deals with the taxes to which the regulations apply. Regulation 6 provides at 6(1):-

"Subject to paragraphs (2) to (4), the requested authority shall, at the request of the requesting authority, disclose to the requesting authority any information which is permitted to be disclosed by virtue of the Council Directive."

Subsections 2, 3 and 4 set certain limitations on the information to be provided which limitation accords in broad outline with the limits defined in Article 17(3) and (4) and Article 16 of the Directive.

Regulation 12 permits the appointment of officers of the Revenue Commissioners as authorised officers for the purposes of the regulations. Regulation 13 provides a power for the Revenue Commissioners to delegate to any of their officers any of the functions to be performed by the Revenue Commissioners under the Council Directive in relation to the exchange of information.

Regulation 14 in effect transposes Article 6 of the Directive dealing with administrative enquiries and, in particular, Article 6(3)

provides for the steps to be taken to obtain the requested information. By adapting certain provisions of the Taxes Consolidation Act, 1997 (the Act) including ss. 902 and 902A the regulation provides for the making of administrative enquiries to obtain information requested pursuant to the Directive. It does this by adapting the relevant provisions of the Act to provide that references in relevant sections to tax, includes references to foreign tax, and further by providing that references in the relevant sections of the Taxes Consolidation Act to "liability" in relation to a person, includes references to liability to foreign tax. It also provides for the purposes of transposing the Directive, that any provision of the Taxes Consolidation Acts (referring to s. 1078(1) of the Act, 1977) is a reference to "any provision of a law of a territory, other than the State in accordance with which foreign tax is charged or collected." Accordingly for the purposes of this application it appears to the court that s. 902A reads as follows:-

"(1) In this section –

"the Acts" are references to any provision of the law of a territory, other than the State in accordance with which foreign tax is charged or collected;

"judge" means a judge of the High Court;

"a taxpayer" means any person including a person whose identity is not known to the authorised officer, and a group or class of persons whose individual identities are not so known.

(2) An authorised officer may make an application to a judge for an order requiring a person to do either or both of the following, namely –

(a) to deliver to the authorised officer or to make available for inspection by the authorised officer, such books, records or other documents as are in the person's power, possession or procurement and as contain, or may (in the authorised officer's opinion formed on reasonable grounds) contain, information relevant to a liability to foreign tax in relation to a taxpayer;

(b) to furnish to the authorised officer such information, explanations and particulars as the authorised officer may reasonably require, being information, explanations and particulars that are relevant to any such liability to foreign tax,

and which are specified in the application.

(2A) In making an application under subsection (2), an authorised officer may request the judge to provide that any order made under subsection (4) shall be subject to a condition that, save for the purposes of complying with the order, the existence of or any details of the order shall not be disclosed (whether directly or indirectly) to any person.

(3) An authorised officer shall not make an application under subsection (2), whether or not it includes a request to be made under subsection (2A), without the consent in writing of a Revenue Commissioner, and without being satisfied –

(a) that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons, may have failed or may fail to comply with any provision of the law of a territory, other than the State, in accordance with which foreign tax is charged or collected,

(b) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of foreign tax (having regard to the amount of a liability to foreign tax in relation to the taxpayer, or where the taxpayer is a group or class of persons, the amount of a liability to foreign tax in relation to all or any one of those persons, that arises or might arise from such failure),

(ba) that in a case where the application includes a request made under subsection (2A), there are reasonable grounds for suspecting that a disclosure, referred to in subsection (2A) would lead to serious prejudice to the proper assessment or collection of foreign tax, and

(c) that the information –

(i) which is likely to be contained in the books, records or other documents to which the application relates, or

(ii) which is likely to arise from the information, explanations and particulars to which the application relates,

is relevant to the proper assessment or collection of foreign tax.

(4) Where the judge, to whom an application is made under subsection (2), is satisfied that there are reasonable grounds for the application being made, that judge may, subject to such conditions as he or she may consider proper and specify in the order, make an order requiring the person to whom the application relates –

(a) to deliver to the authorised officer, or to make available for inspection by the authorised officer, such books, records or other documents, and

(b) to furnish to the authorised officer such information, explanations and particulars,

as may be specified in the order.

(5) The persons who may be treated as a taxpayer for the purposes of this section include a company which has been

dissolved and an individual who has died.

(6) Nothing in this section shall be construed as requiring any person to disclose to an authorised officer –

(a) information with respect to which a claim to legal professional privilege could be maintained in legal proceedings,

(b) information of a confidential medical nature, or

(c) professional advice of a confidential nature given to a client (other than advice given as part of a dishonest, fraudulent or criminal purpose).

(6A) Where in compliance with an order made under subsection (4), a person makes available for inspection by an authorised officer, books, records or other documents, the person shall afford the authorised officer reasonable assistance including information, explanations and particulars, in relation to the use of all the electronic or other automatic means, if any, by which the books, records or other documents, in so far as they are in a non-legible form, are capable of being reproduced in a legible form, and any data or equipment or any associated apparatus or material.

(6B) Where in compliance with an order made under subsection (4), a person makes books, records or other documents available for inspection by the authorised officer, the authorised officer may make extracts from or copies of all or any part of the books, records or other documents.

(7) Every hearing of an application for an order under this section and of any appeal in connection with that application shall be held in camera."

The third party company has asserted a right to challenge the making of an order under s. 902A(4) on the grounds *inter alia* that the information sought is a "fishing expedition" as defined by Recital 9 in the Directive; that there is no evidence that the usual sources of information have been exhausted by the Austrian authorities as required by 17(1) of the Directive; that the reasonable grounds test in s. 902A has not been met; and that the request does not comply with the Data Protection Directive 95/46/EC. In the course of the hearing, the applicant conceded that a third party against whom an order for information is sought and against whom a penalty for non-compliance is liable to be imposed, has an entitlement to challenge the validity of the order, but only on the limited ground that the information sought has no "foreseeable relevance" to the administration and enforcement of the domestic laws of the requesting Austrian state.

The Berlioz case

8. The rights of third parties to challenge an order directing them to provide information pursuant to the Directive was considered by the European Court of Justice in a judgment delivered in May, 2017, shortly before the hearing of this application in *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* (Case C-682/15) [ECLI:EU:C:2017:373].

9. Berlioz is a joint stock company governed by Luxembourg law, which received dividends paid to it by a France subsidiary, Cofima, a simplified joint stock company governed by French law. Cofima had claimed an exemption from withholding tax in relation to the dividends paid to the Luxembourg company. The French Tax Administration were doubtful as to whether the exemption claimed by Cofima complied with the conditions laid down by French law. Accordingly, they sent the Luxembourg Tax Administration a request for information concerning Berlioz pursuant to Directive 2011/16.

10. The Luxembourg taxation authorities were satisfied that the French tax authorities were checking Cofima's tax affairs and needed information in order to be able to make a ruling on the application of withholding taxes on dividends paid by Cofima to Berlioz. The Luxembourg director of the Direct Tax Administration directed Berlioz pursuant to Luxembourg law, to communicate certain information to him. Berlioz communicated certain information sought, but declined to supply other information. The information withheld related to the names and addresses of its members, the amount of capital held by each member and the percentage of share capital held by each member. They did so on the ground that the information sought was not foreseeably relevant within the meaning of Directive 2011/16 and in particular Article 1(1) and Article 5 thereof.

11. The director of the Direct Tax Administration imposed an administrative fine of €250,000 on Berlioz for its failure to provide the information, as was authorised by Luxembourg law. Berlioz challenged that decision in a Luxembourg Administrative Tribunal and asked the court to determine whether the information order issued by the director of the Direct Tax Administration was well-founded. The Administrative Tribunal reduced the fine to €150,000 but refused to rule on the validity of the information order. Berlioz lodged an appeal to the Administrative Court in Luxembourg. That court queried whether a person who may be the subject of an administrative penalty had a right to an effective remedy pursuant to Article 47 of the Charter in circumstances where they cannot examine or test the validity of the information order underpinning the penalty imposed on him.

12. Six questions were raised by the Administrative Court for the opinion of the European Court of Justice. The first question related to whether or not, in imposing a penalty for failure to respond to a request for information, the Luxembourg Court was implementing European law and the court answered that question in the affirmative.

In its second question the referring Luxembourg Court asked whether Article 47 of the European Charter of Fundamental Rights must be interpreted as meaning that a relevant person, on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16, is entitled to challenge the legality of that decision. The court also answered that question in the affirmative.

In dealing with that issue it was argued before the court by several governments that Directive 2011/16 does not confer any rights on individuals and that it covered only the exchange of information between tax administrations and confers rights only on them. It was also argued that a relevant person such as Berlioz, who is the subject of a request for information, could not claim on the basis of Article 47 of the Charter that it had a right to an effective remedy. Reliance was placed on an earlier court decision *Sabou* (C-276/12), EU:C:2013:678) in which the European Court held that the precursor of Directive 2011/16 being Directive 77/799 did not confer specific rights on the taxpayer to participate in the procedure for the exchange of information between tax authorities and, in particular, that that Directive did not impose any obligation for those tax authorities to give the taxpayer a hearing.

However, the court distinguished its Sabou decision at para. 48 of its decision, stating:-

"However, that does not mean that a relevant person in Berlioz's situation cannot defend his case before a tribunal in accordance with Article 47 of the Charter in the context of the application of Directive 2011/16."

The court went on to state at para. 49 of its judgment:-

"The court has consistently held that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter."

At para. 50 the court stated as follows:-

"In the present case, the dispute in the main proceedings concerns a measure penalising a relevant person for failing to comply with a decision directing it to provide the requested authority with information to enable that authority to respond to a request made by the requesting authority on the basis, in particular of Directive 2011/16. Since that penalty was based on a national provision which implements EU law within the meaning of Article 51(1) of the Charter, it follows that the provisions of the Charter, in particular Article 47 thereof, are applicable to the facts of the dispute in the main proceedings."

13. At para. 51 of its judgment the court stated as follows:-

"As regards, specifically, the requirement of a right guaranteed by EU Law within the meaning of Article 47 of the Charter, it should be borne in mind that, according to settled case-law, protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU Law."

The court concluded therefore that the protection afforded by EU law may be invoked by a relevant person, such as Berlioz in respect of a measure adversely affecting him, such as the information order and the penalty at issue in the main proceedings, so that a relevant person can rely on a right guaranteed by EU law within the meaning of Article 47 of the Charter, giving him a right to an effective remedy.

The court concluded at para. 59 of its judgment that Article 47 of the Charter must be interpreted as meaning that a relevant person, on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16, is entitled to challenge the legality of that decision. This court notes that to date, no penalty has been imposed on the respondent company for its failure to supply information sought by Revenue.

14. The court next considered whether Article 1(1) and Article 5 of the Directive 2011/16 must be interpreted as meaning that the "foreseeable relevance" of the information requested by one Member State from another Member State is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with that request and thus a condition of the legality of the information order addressed by that Member State to a relevant person.

15. The court concluded from an examination of Article 1(1) and Article 5 of Directive 2011/16 that "foreseeable relevance" was a necessary characteristic of the requested information and that, if the requested information lacks that characteristic, then there is no obligation imposed on the requested authority pursuant to Article 5.

16. The court went on to determine by whom and how that characteristic of "foreseeable relevance" is to be assessed and how a challenge to reasonable foreseeability might be maintained. The court, having referenced Recital 9, concluded that it is for the requesting authority in the context of its investigation to determine the information that it considers it needs, having regard to national law, in order, as Recital 1 of Directive 2011/16 states, properly to assess the taxes due. The court concluded at para. 70-71 of its judgment:-

"70. It is therefore for that authority, which is in charge of the investigation from which the request for information arises, to assess, according to the circumstances of the case, the foreseeable relevance of the requested information to that investigation on the basis of the progress made in the proceedings and, in accordance with Article 17(1) of Directive 2011/16, after having exhausted the usual sources of information which it has been able to use in the circumstances."

71. Although the requesting authority has a discretion in that regard, it cannot request information that is of no relevance to the investigation concerned."

At para. 73 of the judgment the European Court of Justice confirmed that the relevant person from whom information is being sought must be entitled to rely in court on the non-compliance of that request for information with Article 5 of Directive 2011/16 and on the consequential illegality of the information order.

17. "Foreseeable relevance" of the information requested by one Member State to another Member State is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with that request, and thus is a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order.

18. The next issue examined by the court in its judgment related to the jurisdiction of the national court and the extent of the obligation on the requested authority to examine the validity of a request for information issued by a requesting authority. The questions are posed at para. 75 of the court's judgment as follows:-

"By its third and fifth questions, which it is appropriate to examine together, the referring court asks, first, whether Article 47 of the Charter must be interpreted as meaning that, in the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order issued by that authority.... pursuant to Directive 2011/16, the national court has unlimited jurisdiction to review the legality of that information order. Secondly, it asks whether Article 1(1) and Article 5 of Directive 2011/16 and Article 47 of the Charter must be interpreted as precluding the requested authority's examination of the validity of a request for

information issued by the requesting authority from being limited to the procedural regularity of such a request, and as requiring the national court, in such an action, to verify that the condition of foreseeable relevance has been satisfied in all its aspects, including in the light of Article 17 of Directive 2011/16."

Having regard to its earlier finding that it is for the requesting authority to assess the "foreseeable relevance" of that which it seeks, and to determine the information it considers it needs having regard to national law, the court found that the scope of the requested authority's review is limited. At para. 77 the court stated:-

"In view of the system of cooperation between tax authorities established by Directive 2011/16, which, as is apparent from recitals 2, 6 and 8 of Directive 2011/16, is founded on rules intended to create confidence between Member States, ensuring that cooperation is efficient and fast, the requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation."

The court goes on to point out:-

"The requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State, and it cannot be expected to have such knowledge. In any event, the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority."

That said, the court did hold that the requested authority has an obligation to verify whether the information sought "is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority." The court identified the provisions of the Directive which indicate the limited process of verification that a requested authority should undertake. The court referred to Recital 9 of the Directive and Article 20(2). Based on those provisions the court held that the requested authority needs to be provided with the identity of the person under examination or investigation; the tax purpose for which information is sought; the contact details of any person believed to be in possession of the requested information; and anything that may facilitate the collection of information by the requested authority. In addition, the requesting authority must provide an adequate statement of reasons explaining the purpose of the information sought in the context of the tax procedure underway in respect of the taxpayer identified in the request for information. Article 7(4) of the Directive itself suggests that a verification procedure is necessary because it provides for the requested authority to notify the requesting authority of any deficiency in the request and of the need for any additional background information. The court concluded at para. 82:-

"The review to be carried out by the requested authority is not limited, therefore, to a brief and formal verification of the regularity of the request for information... but must also enable that authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information and to the requirements of the tax investigation concerned." (Emphasis added)

19. On the issue of the jurisdiction of a national court hearing an action brought by a relevant person against a penalty imposed on him, the court commented that "that review may not only relate to the proportionality of that penalty and lead, where appropriate, to its being varied, but may also concern the legality of that information order." The court went on at para. 84 to state:-

"If the judicial review guaranteed by Article 47 of the Charter is to be effective, the reasons given by the requesting authority must put the national court in a position in which it may carry out the review of the legality of the request for information."

The standard and extent of the review to be conducted by the national court is limited. The national courts must respect the fact that it is for the requesting authority which is in charge of the investigation from which the request for information arises, to assess according to the circumstances of the case the "foreseeable relevance" of the requested information. The role of the national courts is merely to verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not manifestly devoid of any foreseeable relevance, having regard on the one hand to the taxpayer concerned and to any third party who has been asked to provide the information and, on the other hand, to the tax purpose being pursued. This is clearly a very low threshold. Unless the requested information is manifestly devoid of any foreseeable relevance it is lawful. The European Court of Justice then briefly referred to Article 17 of the Directive 2011/16 which imposes limits on the communication of information requested by the authority of a Member State. This topic had been considered far more extensively by the Advocate General in his opinion delivered in January, 2017 where he in effect, concluded that the limits imposed by Article 17 were not justiciable at the suit of a relevant person but rather were intended as limits which could be relied on by the tax authorities of Member States *inter se*. In answering the question as to whether reviews to be carried out by national courts must cover compliance with the provisions of Article 17 of Directive 2011/16, the court stated:-

"It must be noted that those provisions which, as far as some of them are concerned, could be taken into account in determining the legality of a request for information to the relevant person, do not have any bearing on a review of the foreseeable relevance of that information."

20. Since *Berlioz* in its claim, did not place reliance on the limits set out in Article 17 the statement of the court at para. 88 of its judgment, to the effect that some of the provisions of Article 17 *could* be taken into account in determining the legality of a request for information to the relevant person, appears to the court to be *obiter*. The statement was, however, the subject of much argument during the course of this application.

21. The provisions of Article 17 are laid out in para. 5 of this judgment. The applicant argued that Article 17(1), which requires a requested state to "provide a requesting authority...with the information referred to in Article 5 provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested..." creates an obligation on the requesting authority to satisfy the requested authority that it has exhausted all normal means of acquiring the information before an obligation can be put on a third party to provide that information. The applicant argued that the purpose of this provision is to prevent oppressive requests being made as between Member States, giving a requested state the right to refuse information where that information could be obtained by the requesting authority itself by using its usual sources. The applicant argued that 17(1) is not justiciable at the suit of the third party from whom the information is requested. The applicant relies on the finding of the Advocate General in *Berlioz* at para. 106 where he states:

"In principle, the requested authority is required to respond to the request for information and the limit set out in Article 17 of that Directive are merely possibilities left to the discretion of the requested authority not to communicate

information”.

Alternatively, the applicant suggests that even if Article 17(1) is viewed as a condition of legality any such condition has been complied with in that the Austrian authorities have used all “usual” sources of information and they are not under an obligation to develop new methods of investigation suggested by the respondent by the company.

The company on the other hand argued that the remark of the court in *Berlioz* at para. 88 that the provisions of Article 17 “which, as far as some of them are concerned, could be taken into account in determining the legality of a request for information to the relevant person” indicates that more than one of the five provisions contained in Article 17 could give rise to a challenge to the validity/legality of an information request and it argues that the Austrian authorities should be obliged to conduct appropriate... searches before requiring it to provide the information requested...

22. The fact is that the European Court of Justice has not yet provided any guidance as to which of the provisions of Article 17 *could* be relied on in challenging the legality of a request for information. The court observes that Article 17(2) and 17(4) certainly appear to provide a basis upon which a third party might challenge the legality of an order. For reasons set out hereafter the court has concluded that it has no jurisdiction to determine that issue on an application pursuant to s. 902A.

23. The last issue which was dealt with by the court in *Berlioz* related to the nature of the evidence which could be placed before the national court when reviewing the legality of a request for information. That section of the judgment was not relied on by either party in the course of this application, but interestingly provides that the court, if necessary, can seek additional information in order to rule out, from its own perspective, the possibility that the requested information manifestly has no “foreseeable relevance”. This appears to the court to echo the provisions of the framework decision on European Arrest Warrants.

Background

24.

25. There is no dispute as to the factual background underpinning this application. [*The factual background to the application was set out extensively...*]The applicant is a principal officer in the international tax division of the Revenue Commissioners. Her responsibilities include ensuring compliance with Ireland’s obligations on the exchange of information with other Member States of the EU, including under Council Directive 2011/16/EU on administrative cooperation in the field of taxation (the Directive). The applicant is a competent authority within the meaning of the Directive and is an authorised officer within the meaning of s. 902A.

26. On the 6th March, 2015 the Austrian competent authority, within the meaning of the Directive, submitted a request for information pursuant to the Directive to the Irish competent authority. This appears to have given rise to some correspondence between the Austrian competent authority and the Irish competent authority which is not before the court but which resulted in an amended request for information which was produced on 29th June, 2015... Because their investigations are ongoing the Austrian Revenue are unable to say with precision the level of income tax at risk in relation to specific taxpayers. The applicant has averred that there are reasonable grounds for suspecting that failure by the taxpayers to comply with Austrian tax law is likely to have led or to lead to serious prejudices to the proper assessment or collection of Austrian tax...

27. Having satisfied themselves that the information sought by the Austrian competent authority is foreseeably relevant (in accordance with the test laid down in Article 1(1) and Article 5 of the Directive) Revenue, as competent authority, wrote to the company on 16th July, 2015... Upon receipt of the letter from Revenue various concerns were raised by accountants and lawyers acting for the company.

28. Ernst and Young on behalf of the company replied to the request for information of 16th July, 2015 on 6th August, 2015, stating that they had a number of concerns in terms of the validity of the request. They raised concerns in relation to data protection and further concerns in relation to compliance with Article 17 of the Directive. It appears from the correspondence that Revenue had a meeting with Ernst and Young acting on behalf of the company, on 14th September, 2015. On 14th October, 2015 Ernst and Young sought further clarification in respect of the request. Specifically, they wanted to know whether the Austrian Tax Authority had exhausted the usual sources of information which it could have used to obtain the information and asked for specific confirmation of:

1. The procedures and enquiries that the Austrian Tax Authority had undertaken in meeting this requirement; and
2. How have the Irish Revenue satisfied itself that this requirement has been met.

29. In addition they asked for confirmation that reasonable grounds existed within the meaning of s. 902A of the Taxes Consolidation Act for suspecting that a taxpayer may have failed or may fail to comply with a tax provision.

30. On 22nd October, 2015 Revenue wrote to the Austrian tax authorities seeking further information setting out six specific requests related to compliance with the Directive. On the same day Revenue wrote to the company asserting that the request for information was a valid request, and further confirming that the Austrian authorities had complied with Article 17(1) of the Directive. There was a further meeting between Revenue and the company on 9th November, 2015 to discuss the company’s concerns. On the 20th November, 2015 the Austrian tax authorities replied to the queries raised by the Revenue in their letter of 22nd October, 2015. On 16th December, 2015 Revenue again wrote to the Austrian tax authorities seeking further clarification. On 12th January, 2016 the Austrian tax authorities wrote to Revenue answering the queries raised. On 14th January, 2016 the company wrote to Revenue outlining its position in relation to the request and maintaining its objections. First of all, it maintained that the request being made by the Austrian authorities in this instance was likely to contravene privacy laws. In addition, they maintained a right to challenge the request pursuant to Article 17(1)... They asserted that the enquiry was a “fishing expedition”...

31. With regard to whether the [*information provided was*] sufficient to satisfy the identity requirement under Article 20(2)(a), they questioned the scope of the request, which they contended would lead to tax authorities in Austria and other Member States viewing the Directive as a mechanism by which they can engage in general fishing exercises in relation to personal data of [*the company’s*] users, without those users being suspected of a tax offence or being under any investigation.

32. On 21st January, 2016 Revenue wrote to the company answering the queries raised and stating that “*in summary, Revenue consider that the request from the Austrian tax authorities is a valid request and thus the Revenue Commissioners are obliged to provide the information requested under the provisions of Directive 2011/16/EU and S.I. No. 549.*”

33. The letter gave the company seven days within which to supply the information which had first been requested on the 16th July, 2015 and advised that, in default, a notice would be served under s. 902 of the Taxes Consolidation Act, 1997 on [*the company*], in

order to obtain the information requested. On the 5th February, 2016 Ernst & Young on behalf of the company replied to Revenue, and having referred to previous correspondence and discussions stated:-

"My client has asked me to inform you that because of their concerns that voluntary compliance with this particular request by the Austrian authorities would place them in breach of their data privacy obligations, they are unable to provide the information you have requested. I refer you to our previous correspondence for further details."

34. On the 11th February, 2016 the applicant issued a notice pursuant to s. 902 TCA to the respondent. The notice is headed:-

"Notice under s. 902 Taxes Consolidation Act, 1997 (as applied by Regulations 12 and 14 of the European Union (Administrative Cooperation in the Field of Taxation) (Regulations 2012) and Council Directive 2011/16/EU."

The notice is dated 11th February, 2016 and is directed to the company secretary.... The body of the notice states:-

"I, Florance Carey, being an officer of the Revenue Commissioners authorised by them to exercise the powers conferred by section 902 of the Taxes Consolidation Act, 1997 (as applied by Regulations 12 and 14 of the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012) hereinafter referred to as "the Regulations", hereby give you notice that I require you within 31 days from the date of service of this notice:

To furnish me in writing such information, explanations and particulars, as set out in the Schedule hereunder (which forms part of this notice) and which information, explanations and particulars are relevant to the establishment of a liability to foreign tax (within the meaning of Regulation 14 of "the Regulations") of the persons... listed in the Schedule hereto.

Failure or refusal to comply with this notice will render you liable to penalties. Furthermore, it is an offence to knowingly or wilfully falsify, conceal, destroy or otherwise dispose of any books, records, or other documents required to be delivered or made available for inspection under the said section 902. If there are particular circumstances making it impossible or impracticable for you to comply with this notice within the time given, please advise me accordingly in writing as soon as possible."

The notice is signed by the applicant, Florance Carey, in her capacity as an authorised officer of the International Tax Division of the Revenue Commissioners.

35. The notice further states that it is served as part of Ireland's obligations pursuant to Directive 2011/16/EU on administrative cooperation in the field of taxation and that these obligations can involve obtaining access to information and records held by third parties.

36. It is interesting to note that s. 902(2) provides:-

"Notwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under statute or otherwise, and subject to this section, an authorised officer may for the purpose of enquiring into a liability in relation to a person (in this section referred to as "the taxpayer") serve on any other person a notice in writing requiring that other person, within such period as may be specified in the notice, not being less than 30 days from the date of the service of the notice, to do either or both of the following, namely -

(a) to deliver to, or make available for inspection by, the authorised officer, such books, records or other documents as are in the other person's power, possession or procurement and as contain, or may (in the authorised officer's opinion formed on reasonable grounds) contain, information relevant to a liability in relation to the taxpayer,

(b) to furnish to the authorised officer, in writing or otherwise, such information, explanations and particulars as the authorised officer may reasonably require, being information, explanations and particulars that are relevant to any such liability,

and which are specified in the notice." (Emphasis added)

It seems clear from this provision that a third party is precluded from raising data protection concerns as a barrier to providing information sought by Revenue. The court notes that the section provides for a modest penalty of €4,000 for failure to comply with the notice. No penalty was ever sought to be imposed on the company and to that extent their position is different from that of Berlioz on whom a penalty of €250,000 was imposed.

37. In any event on the 16th March, 2016 [the company] wrote to the applicant again citing its objections to producing the information based on data protection grounds and on this occasion on Article 17(3) of the Directive which provides that *"the competent authority of a requested Member State may decline to provide information where the requesting Member State is unable, for legal reasons, to provide similar information"*, and on the further ground that the request for information was a *"fishing expedition"*. On this occasion no reliance was placed on the provisions of Article 17(1) of the Directive.

38. For reasons which did not emerge during the course of the hearing the Irish Revenue authorities did not invoke the provisions of s. 902(2) which, as we have seen, provides that *"notwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under statute or otherwise"*, the information sought, must be furnished. It is equally clear that it was open to [the company] at that juncture, to challenge the validity of the information order, either by means of judicial review or plenary action, seeking declarations as to the invalidity of the request and *inter alia* an interlocutory injunction staying the request for information pending the determination of the action. The *Berlioz* decision which post-dates the s. 902 order, helpfully sets out the standard of review to be undertaken by a national court when considering the validity of a request for information. As we have seen earlier, the role of the national courts is merely to verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not manifestly devoid of any foreseeable relevance, having regard on the one hand to the taxpayer concerned and to any third party who has been asked to provide the information and, on the other hand, to the tax purpose being pursued. This is clearly a very low threshold. The company neither sought judicial review nor issued plenary proceedings.

39. By letter dated the 23rd March, 2016, the applicant afforded the respondent a further period of 21 days from the 23rd March to

furnish the information specified in the notice. The letter indicated that if the information was not provided within that time, an application would be made to the High Court pursuant to s. 902A of the Taxes Consolidation Act, 1997. By letter dated the 15th April, 2016, the respondent made a twofold request of the applicant as authorised officer. First, it requested that it be put on notice of any application pursuant to s. 902A together with grounding documents and be given an opportunity to respond. Second, it requested that all necessary care would be taken to ensure the confidentiality of the respondent in the proceedings.

40. At para. 35 of her grounding affidavit the applicant avers:-

"I can confirm that Revenue had and has no objection to those requests and has addressed the concerns identified in the letter of 15th April appropriately. In particular I confirm my intention to make application to have the within application anonymised in order to ensure the confidentiality of the respondent."

This in the court's view is where this process began to go wrong. Having shown what seems to the court, to be an unusual level of deference to the company in and about the request for information, including acting as a conduit between the company and the Austrian Revenue authorities in seeking repeated clarification from them, the applicant agreed to put the company on notice of its s. 902A application and to give it a right to respond to that application. The question for the court is not whether or not Revenue has an objection to putting the respondent on notice of its application pursuant to s. 902A together with a right of reply, but whether Revenue has any power to do so in law. By putting the company on notice of its application and by acceding to its request for a right to respond Revenue has purported to confer on the company the right to have a judicial review conducted in camera. In this state justice is administered in public and any right to have justice administered otherwise than in public must be specifically authorised by law. There is nothing in s. 902A which permits or authorises the putting of a third party from whom information is sought, on notice of the application. The court also notes that there is nothing in the Superior Court Rules, and in particular O. 68, which deals with Revenue matters, providing for a contested application pursuant to s. 902A. The court deals further with this matter below when considering the jurisdiction conferred by s. 902A.

41. The s. 902A application was launched by means of an originating notice of motion which was made returnable in the first instance for the 17th October, 2016. In her grounding affidavit the applicant sets out what she perceives to be her duties upon receipt of a request for information under Directive 2011/16/EU. She states that she is concerned to be satisfied that:-

- 1. The information sought by the requesting authority is foreseeably relevant to the administration and enforcement of the domestic tax law of the requesting authority;*
- 2. The requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives;*
- 3. That the carrying out of enquiries for the purposes of exchange of information, or the exercise of powers to that end, is lawful as a matter of Irish law;*
- 4. That the provision of the information would not lead to the disclosure of a commercial, industrial or professional secret or of a commercial process or that the disclosure of the information would not be contrary to public policy;*
- 5. That the requesting authority undertakes to preserve the confidentiality of the information sought and to use the same for the purposes delimited by the Directive;*
- 6. That the requesting authority is in a position to provide similar information in the event that it is requested of it.*

She then sets out at paras. 14, 15 and 16 the provisions of s. 902A which contain preconditions for the making of an application under the section, namely that she had the prior consent in writing of a Revenue Commissioner and that she is satisfied -

(a) that there are reasonable grounds for suspecting that the taxpayer...may have failed or may fail to comply with any provision of [the tax laws of Austria],

(b) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of [Austrian] tax (having regard to the amount of a liability [to Austrian tax] in relation to the taxpayer...that arises or might arise from such failure),

(ba) ... and

(c) that the information -

(i.) which is likely to be contained in the books, records or other documents to which the application relates, or

(ii.) which is likely to arise from the information, explanations and particulars to which the application relates,

is relevant to the proper assessment or collection of [Austrian] tax.

42. The affidavit then sets out the steps taken by the applicant in considering the request for information from the Austrian tax authorities. She confirms at para. 17 that, upon receipt of a request for information, she and her colleagues carefully examine each request received to satisfy themselves as to compliance with the Directive, and enquire as appropriate and seek further information or clarification of a requesting authority where necessary. She states that she also places reliance on the confirmations received from a requesting authority which are supported with factual and legal detail where required. She states that she is satisfied that the company holds the requisite information, namely the names, addresses and dates of birth of the ...individuals... and indeed, it has not been suggested at any point during these proceedings that [the company] does not hold such information. At para. 25 she sets out the basis of the "foreseeable relevance" of the information sought.... She confirms that having received the request for information she engaged further with the relevant Austrian authority. From the information furnished to her she is satisfied that this is an open ongoing investigation in which the Austrian Revenue has formed the view that there is widespread non-declaration and non-payment of Austrian income tax.... Based on the information which she has received from the Austrian tax authorities she states that the test under s. 902A is met in that there are reasonable grounds to suspect that the information sought is relevant to a liability to Austrian

tax and she exhibits the correspondence already referred to. She sets out the steps taken by her to respond to concerns raised by the respondent during their extensive interaction following the initial letter requesting information of 16th July, 2015. In summary she states:-

"I have carefully considered the Request for Information in this case. Since the request is, in my view, a valid request that is to say, is made in accordance with the Directive, I have formed the view that I am obliged to use the powers conferred on me as an authorised officer to compel the production of the requested information and I do so in this application. For reasons identified above, I therefore beg this Honourable Court the reliefs sought in the notice of motion herein."

43. The company filed what it described as a statement of opposition. It outlined its responsibilities under the Data Protection Acts, 1988 and 2003 and its concern to ensure that any data transmitted to the Irish Revenue Commissioners or the Austrian Tax Authority is fully in keeping with its obligations under Irish law. It asserted that, before making an order, the court would have to be satisfied in respect of each ...separate request that the relevant requirements of Directive 2011/16 and s. 902A of the Taxes Consolidation Act, 1997 have been satisfied. It cited and relied on the prohibition in Recital 9 that "*Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.*" It asserts that compliance with Article 17(1) requires that the requesting authority has "*exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives*", and it argues that that is a condition of the legality of the request for information.

44. The company disputes that the applicant has any reasonable grounds for suspecting that all or any of the ...separately identified applicants in respect of which her application is made, have failed or may fail to comply with any provision of Austrian tax law. The respondent contends that the Austrian authorities have failed to "*prove*" non-compliance ...by any of the ...individuals ...and it challenges much of the information supplied by the Austrian tax authorities to the Irish tax authorities. It contends that Article 17(1) of the Directive under the heading "*Limits*" has not been complied with and that failure to comply with same renders the request invalid. It suggests that the information sought in the request for information could be obtained by ...alternative means.... The company also cites and relies on Article 20(2) as requiring the naming of the individuals in respect of whom information is sought. It suggests that the reasonable grounds test provided for under s. 902A has not been met and it suggests that, in order to succeed on her application in respect of any one of the ...individuals, the applicant must have reasonable grounds for suspecting that the individual in question may have failed or may fail to comply with the provisions of the Act. They also question the hearsay nature of the information provided by the Austrian authorities to the Irish authorities.

45. In summary the respondent, in its statement of opposition and replying affidavit, seeks to challenge the validity of the information order on the grounds that it breaches the Data Protection Acts 1988 and 2003; that there are deficiencies in the information supplied by the Austrian authorities, sufficient to ground a reasonable suspicion of non-compliance by that authority with Article 17(1) of the Directive; that the request for information is in fact a "*fishing expedition*", and that the reasonable grounds test provided for under s. 902A has not been met... .

46. In response, the applicant Florance Carey, filed a further affidavit in which she sets out *inter alia* the response of the Austrian authorities to the assertion that they have not exhausted all the usual sources of information. She points out that the Directive would be unworkable if the requesting authority had to have independent verification of each piece of information supplied to them by the Austrian authorities. She confirms that she has no basis for questioning the accuracy of the information furnished to her and that she had interrogated that information and satisfied herself that it is information on the basis of which she should exercise the powers vested in her by s. 902A. At para. 10 of that affidavit she states "*the information has been provided by the representatives of a sovereign member state in apparent accordance with the provisions of the Directive. On its face the information provided to me is logically probative and coherent.*"

47. The affidavit also sets out legal restrictions on the Austrian authorities in relation to ...searches, and she exhibits the detailed response of the relevant official in the Austrian tax authority which confirms that the Austrian Tax Authority has conducted searches so far as this is in line with Austrian legislation and its usual way of administration.

48. Ms. Carey, the applicant, filed a further affidavit on this issue of "*exhaustion of the usual sources of information*" in which she exhibits extracts from the Austrian tax code, to the effect, that the Austrian Tax Authority has a delegated authority to make regulations governing *inter alia* the conduct of tax inspections...

The hearing

49. This application was heard over four days between the 5th and the 28th July, 2017. During the course of the hearing a number of draft issue papers were produced by the parties, which of itself suggests a lack of clarity, or at the least uncertainty, as to the power of the court in respect of the various issues raised. At the conclusion of the hearing the court requested that the parties agree a final issue paper and make further submissions particularly in light of the Berioz case which had been decided shortly before the hearing of the application. These were furnished to the court in November, 2017. The final agreed issue paper reads as follows:-

(i.) *Are the Austrian Authorities required to have exhausted the usual sources of information as referred to in Article 17(1) of Directive 2011/16 as a precondition to the legality of the request and, if so, is the meeting of that standard a matter which must be proven by the Applicant or the Respondent?*

(ii.) *If Article 17(1) is a ground of challenge, is the test one of manifest non compliance or some other test?*

(iii.) *In the context of the Respondent's suggestion that the Austrian Request is a 'fishing expedition', is the requirement that information not be devoid of foreseeable relevance to the administration and enforcement of the Requesting State's tax laws a matter that must be established by the Applicant in this application, or merely a matter of Defence and, in either event, has that test been satisfied here?*

(iv.) *Must an Applicant under section 902A prove that the Request is compliant with the Data Protection Directive, and if so must it prove (a) that the information sought is foreseeably relevant within the meaning of Article 1(1) and (b) that that (sic) the Austrian authorities have exhausted the usual sources within the meaning of Article 17(1) in order to establish compliance with the Data Protection Directive?*

(v.) *Having regard to the foregoing matters, is the Applicant entitled, pursuant to the provisions of the Mutual Assistance Directive, the Data Protection Directive and SI 549/2012 to bring an application pursuant to section 902A in respect of information relevant to an alleged liability to Austrian tax and transmit any data obtained on foot of such*

application to the Austrian Tax Authority?

(vi.) Having regard to the provisions of section 902A TCA 1997, and the provisions of the Mutual Assistance Directive, is the Applicant entitled to present the within application as an application in respect of a group or class of persons?

(vii.) Having regard to all of the foregoing, what is the test to be applied by the court in its consideration of an application under section 902A, TCA 1997 and has that test been met here?

50. It seems to the court that it should answer the last issue (vii) first because that in the court's view, disposes of all of the other issues without unfortunately, resolving them. The questions posed on the agreed issue paper very much resemble a consultative case stated, in which the court is being asked to resolve complex issues of law as to the onus and burden of proof in respect of various issues raised by the respondent on the construction of Directive 2011/16 and the Data Protection Directive and S.I. 549 of 2012. These are certainly issues of substance in respect of which the court enquired during the course of the hearing as to why they were not being litigated by way of judicial review. The answer given was to the effect that the company probably did not want the publicity. In effect, what the parties are attempting to do by means of an application pursuant to s. 902A is to get the benefit of what is essentially a judicial review/consultative case stated, heard in camera. That, in the court's view, is not permissible under the terms of s. 902A.

Jurisdiction of the court under s. 902A

51. In hearing this application, the court only has such power as is conferred on it by s. 902A of the Taxes Consolidation Act, 1997 (as amended). The power of the court is limited to considering the specific matters set out in the section and the court has no power to determine matters of law or fact which fall outside the specific provisions of the section. The jurisdiction conferred on the court by the section is a supervisory one designed to ensure that Revenue authorities do not act capriciously, arbitrarily, or in a manner that is oppressive in the conduct of tax investigations. The section is part of a suite of investigative powers granted to Revenue by the legislature to assist it in the conduct of investigations of tax affairs. The section creates a civil process which mirrors the warrant procedures created by many criminal statutes in respect of arrest and search warrants. All that the court is concerned with is to establish whether the authorised officer applying for an order directing a third party to produce information is satisfied that there are "reasonable grounds" for suspecting the matter set out at (a) to (c) of s. 902A(3):-

(a) that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons, may have failed or may fail to comply with any provision of the law of a territory, other than the State, in accordance with which foreign tax is charged or collected,

(b) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of foreign tax (having regard to the amount of a liability to foreign tax in relation to the taxpayer, or where the taxpayer is a group or class of persons, the amount of a liability to foreign tax in relation to all or any one of those persons, that arises or might arise from such failure),

(c) that the information –

(i) which is likely to be contained in the books, records or other documents to which the application relates, or

(ii) which is likely to arise from the information, explanations and particulars to which the application relates,

is relevant to the proper assessment or collection of foreign tax.

52. In exercising its jurisdiction under the section the court has no power to determine substantive issues of fact or law and certainly not those which the parties have invited the court to determine on this application. The court considers that its powers under s. 902A are analogous to the powers conferred on courts in criminal matters on the issuing of search warrants or arrest warrants. On that basis the court finds Walsh on *Criminal Procedure* (2nd ed., Round Hall, 2016) at para. 10-185 to be illustrative and helpful. Dealing with the issue of admissible evidence on an application for a warrant he states:-

"The determination of an application for a search warrant (order requiring the person to whom the application relates to furnish to the authorised officer such information) is a ministerial act as distinct from an exercise of judicial power. The District Court judge or peace commissioner (in this case the High Court) does not adjudicate on any lis between the parties when deciding whether to issue their warrant (order). Accordingly, he is not bound by the strict rules of evidence which apply to a criminal trial. He is entitled to rely on material, such as hearsay, when deciding whether the statutory preconditions for the issue of a warrant have been satisfied and whether he should exercise his discretion to issue the warrant."

The court considers that this a correct statement of the law which applies mutatis mutandis to this application. In an application such as this, the court is not determining the rights of any party and has no power to do so. The court is limited to deciding whether or not an order should issue based on the terms of the section and in doing so is entitled to have regard to hearsay evidence. This section is part of the investigative armoury conferred by the legislature on Revenue and cannot be used for any other purpose.

53. It is notable that the section does not provide for the application to be made on notice to any party. That is what one would expect in a warrant type procedure. The section does however, provide in s. 902A(7) for an appeal against any order made. This indicates to the court that the section envisages an *ex parte* application being made by an authorised officer and that in the event of an order being made under s. 902A(4) the party subject to that order is given a right of appeal. The section confers no right or power on Revenue or the authorised officer to put any party on notice of the application. It seems to the court that it is precisely because the third party against whom an order may be made has no right of audience on the application, that the section provides that the hearing shall be in camera. There would be no basis for departing from the general rule that justice shall be administered in public if the third party from whom information was sought was given a right of audience under the section.

54. The court notes that in the only reported case on the operation of this section, *An Inspector of Taxes v. A Firm of Solicitors* [2013] 2 ILRM 1 the third party against whom an order was sought was in fact, put on notice of the application and was allowed to address the court. In doing so he was limited to addressing the court in relation to the provisions of the section. That case was unusual in that the application commenced in open court and was listed under the actual names of the parties. It appears that it was only at the conclusion of the hearing that the provision of subs. 7 was adverted to, and by agreement of the parties the matter was

retrospectively anonymized.

55. In the event of an appeal under subs. 7 a third party would, under the section, be at liberty to argue that there had been no prior consent of a Revenue Commissioner as required by subs. 3; that there were no reasonable grounds for suspecting that a taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons may have failed or may fail to comply with any provision of the law of a territory, other than the State, in accordance with which foreign tax is charged or collected; that there was no evidence that any such failure was likely to have led or to lead to serious prejudice to the proper assessment or collection of foreign tax; or that the information sought was not relevant to the proper assessment or collection of foreign tax. Further or alternatively, under the section a third party could argue that the relevant information was privileged on one of the three grounds set out in s. 902A(6). An appeal would not lie on any other basis.

Threshold

56. Assuming that all of the other conditions of the section are complied with (and the court is satisfied in this case, that they are), the threshold necessary to trigger the court's power to make an order pursuant to s. 902A(4) is that the court has evidence that the relevant authorised officer is satisfied: a) that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons, may have failed or may fail to comply with any provision of the law of a territory, other than the State, in accordance with which foreign tax is charged or collected (s. 902A as adapted by Regulation 14 of S.I. No. 549/2012); b) that the failure is likely to have led or to lead to serious prejudice; and c) that the information sought is relevant to the proper assessment or collection of foreign tax.

57. This, as remarked by Moriarty J. in *Inspector of Taxes v. A Firm of Solicitors*, is a low threshold. Again the test of "reasonableness" appears more frequently in criminal jurisprudence than in civil cases and considerable assistance can be derived from criminal case law as to what amounts to "reasonable grounds" to suspect. Walsh on *Criminal Procedure* (2nd ed., Round Hall, 2016) at p. 162 explores this issue. At para. 4-89 he states:

"It is firmly established that the reasonable suspicion relates entirely to what was known to the arresting member at the time he effected the arrest. As Lord Hope explained in the House of Lords in O'Hara v. Chief Constable of the Royal Ulster Constabulary, with respect to a power of arrest on reasonable suspicion of terrorism there is both a subjective and an objective dimension to the assessment of whether that information satisfies the reasonable suspicion standard on the facts of an individual case:

'in part it is a subjective test because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also, it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.'" (Emphasis added)

58. The first prerequisite, is that the arresting member harbours a genuine suspicion in his own mind. Translated to s. 902A, this requires that the authorised officer be satisfied "that there are reasonable grounds for suspecting that the tax payer... may have failed or may fail to comply" with any provision of Austrian law. The court has ample evidence that the authorised officer is so satisfied. The second requirement is that the satisfaction must be based on reasonable grounds. This is an objective test in the sense that a reasonable individual acting without passion or prejudice, and proceeding on the basis of the information known to them would fairly have suspected the person concerned may have failed or may fail to comply with any provisions of Austrian income tax laws. This element of the test has also been satisfied based on the evidence of the applicant.

59. At para. 4.93 on p. 164 Walsh points out:-

"It should be emphasised that the 'reasonable suspicion' standard does not set a high threshold. In Shaaban Bin Hussein v. Chong Fook Kam [1970] A.C. 9442, for example, Lord Devlin explained that reasonable suspicion connotes a lower standard than a prima facie case. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. In a typical investigation, suspicion would be developed into a reasonable suspicion and from there to a prima facie case. Critically, all that is necessary is a reasonable suspicion that the person in question might be guilty of the offence concerned. This is a significantly lower standard than a reasonable suspicion that he is guilty. In Castorina v. Chief Constable of Surrey (1988) N.L.J 180, for example, the English Court of Appeal had to consider whether a constable had the necessary reasonable suspicion to effect an arrest under a provision of the Police and Criminal Evidence Act, 1984. The constable was investigating a burglary at the plaintiff's former workplace. The burglary appeared to have been an "inside job" and the managing director told the constable that the plaintiff had been sacked recently and might therefore bear a grudge against the business. On the basis of these facts the constable visited the plaintiff at her home and arrested her, despite the fact that he had established that she was of previous good character. The trial judge concluded that the arrest was unlawful as the constable lacked a reasonable suspicion. The judge took the view that an ordinary cautious person would have sought more information from the suspect before arresting her. The English Court of Appeal, however, overturned this decision on the basis that the facts supporting a reasonable suspicion did not have to be such that they would lead an ordinary cautious person to believe that the suspect was guilty. It was sufficient if they could lead a reasonable person to suspect that he might be guilty. In this case, the Court concluded, the facts were sufficient to support this belief and there was no obligation on the constable to make further enquiries before effecting the arrest." (Emphasis added)

This decision on the nature of reasonable grounds to suspect was endorsed by the High Court and the Supreme Court in this jurisdiction in *DPP (Walsh) v. Cash* [2008] 1 ILRM 443. Walsh also refers to the case of *Cummings v. Chief Constable of the Northumbria Police* [2003] EWCA Civ 1844 in which "the Court of Appeal for England and Wales upheld the arrests of six people where the arresting constable knew that one of them had committed the offence, but not which one. All six were working together in a control room for speed traffic cameras. One of them had erased the film which recorded a specific offence. The Court of Appeal proceeded on the basis that it was not necessary for the constable to have reasonable grounds to suspect that each of the six was guilty. It was sufficient that he had reasonable grounds to suspect that each might be guilty."

Walsh notes at 4-96 as follows:-

"It is also worth noting that it is not necessary for the reasonable suspicion to arise from personal observation or investigation on the part of the arresting member (in this case authorised officer). It can be satisfied by information received from a third party source, even where it transpires subsequently that the information was wrong. Moreover,

the question whether the third party source had reasonable grounds for the suspicion is irrelevant. The issue is what information was in the mind of the arresting member (in this case authorised officer) and whether that information would trigger the necessary suspicion in the mind of a reasonable person."

60. Thus the court holds that the authorised officer in this application is perfectly entitled to rely on the information provided to her by the Austrian tax authorities and that, in fact, is what the Directive 2011/16 envisages. The applicant is not under any obligation to "prove" that each of the ...persons identified ...has in fact evaded tax; it is sufficient that she have reasonable grounds to suspect that they may have done so. This application is merely a step in an investigative process being undertaken by the Austrian authorities which may or may not in due course lead to a *prima facie* case that one or more of the ...identified individuals have evaded their income tax liability to the Austrian authorities.

61. As is clear from the facts set out above the authorised officer has, at the behest of the company, interrogated the Austrian authorities extensively on all of the objections raised by the company. In the court's view she was under no obligation to do so but, having done so, the strength of her application for an order pursuant to s. 902A(4) is fortified beyond question.

62. The court is satisfied that the provisions of s. 902A have been complied with such as to trigger the court's power to make an order directing the company to provide the information sought. In particular, on the basis of the evidence, it has been established that the applicant has the consent in writing of a Revenue Commissioner. It has also been established that she is satisfied:-

- that the information sought by the requesting authority is foreseeably relevant to the administration and enforcement of the domestic tax law of the requesting authority;
- that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives;
- that the carrying out of enquiries for the purposes of exchange of information, or the exercise of powers to that end, is lawful as a matter of Irish law;
- that the provision of the information would not lead to the disclosure of a commercial, industrial or professional secret or of a commercial process or that the disclosure of the information would not be contrary to public policy;
- that the requesting authority undertakes to preserve the confidentiality of the information sought and to use the same for the purposes delimited by the Directive;
- that the requesting authority is in a position to provide similar information in the event that it is requested of it;
- that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons..., all or any one of those persons, may have failed or may fail to comply with any provisions of Austrian tax;
- that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax (having regard to the amount of a liability in relation to the taxpayer, or where the taxpayer is a group or class of persons, the amount of a liability in relation to all or any one of those persons, that arises or might arise from such failure); and
- that the information which is likely to arise from the information, explanations and particulars to which the application relates is relevant to the proper assessment or collection of foreign tax such as to trigger s. 902A(4).

The court's discretion

63. Section 902A(4) provides:-

"Where the judge, ... is satisfied that there are reasonable grounds for the application being made, that judge may, subject to such conditions as he or she may consider proper and specify in the order, make an order requiring the person to whom the application relates—

(a) to deliver to the authorised officer, or to make available for inspection by the authorised officer, such books, records or other documents, and

(b) to furnish to the authorised officer such information, explanations and particulars,

as may be specified in the order." (Emphasis added)

It is clear from the terms of s. 902A(4) that the exercise of the court's power to order the production of information is discretionary and can be made subject to conditions. Neither party made any submissions of substance to the court on the exercise by the court of its discretion. The court considers that on the facts of this application it should exercise its discretion to make an order pursuant to s. 902A(4) directing the respondent to furnish to the applicant the names, addresses and, if available, the dates of birth of the persons identified as were sought in the s. 902 notice.

Conditions

64. While the court holds that section 902A confers no power, authority or entitlement on Revenue to bring its application on notice to the third party, nor does it confer on the court the power to determine substantive issues of law or fact, the reality is that Revenue actively facilitated the company in this misguided use of s. 902A. It allowed the company to transform an investigative warrant type procedure into a full blown *lis*. The court cannot unhear the arguments it has heard over a number of days. And while the court has no power to determine most of the issues raised by the respondent, in the context of a s. 902A application, the court considers that it would in all the circumstances be unfair, were the company to be deprived of its opportunity to make those arguments in the proper forum, *i.e.* in open court by means of judicial review or plenary proceedings. In any such proceedings the company would of course carry the burden of proof on each issue to the standard of balance of probability. The court therefore,

proposes to make the order sought by the applicant but in the unusual circumstances of this case it will hear the parties further on any conditions which should be attached to the court's order. The court has it in mind, if it can lawfully do so, attaching conditions which would afford the company the opportunity, should it wish, to challenge in the proper forum the validity of the information order.

ADDENDUM

65. Subsequent to judgment the parties brought to the court's attention the provisions of Order 84B of the Rules of the Superior Courts. The provisions of that Order may have a bearing on the court's judgment in relation to the *ex parte* nature of a s. 902A application. In the court's view, its findings in relation to the nature and extent of its jurisdiction in an application pursuant to s. 902A are unaffected.