THE HIGH COURT

THE COMMERCIAL COURT

[2018/10263P]

BETWEEN

RYANAIR D.A.C.

PLAINTIFF

AND

MINISTER FOR FINANCE, THE REVENUE COMMISSIONERS,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 28th day of June, 2019

1. In these proceedings, which were commenced by Plenary Summons issued on 23rd November, 2018, and which were admitted to the Commercial List on 7th December, 2018, the plaintiff seeks a series of declarations to the effect that s.127B of the Taxes Consolidation Act 1997 ("TCA 1997") is in breach of / incompatible with EU law, or alternatively, is unconstitutional.

2. By notice of motion dated 3rd December, 2018 the plaintiff seeks essentially two interlocutory orders:

> (a) An order temporarily restraining the operation/application of s.127B to the plaintiff (and/or other airlines) pending a reference to the Courts of Justice of the European Union (CJEU) and/or pending the determination of these proceedings;
>
> (b) the making of a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the CJEU in relation to the compatibility of s.127B with EU law.

While further injunctive reliefs are sought some of these were not pursued in argument and the essence of the injunctive relief sought is as described at (a) above. In particular the plaintiff did not pursue a mandatory interlocutory injunction exempting the plaintiff from the operation of s.127B. No argument that s.127B is unconstitutional was pursued at the interlocutory hearing.

3. The application was heard on affidavit over three days. The primary evidence on behalf of the plaintiff appears from affidavits sworn by the plaintiff's Chief Financial Officer, Neil Sorahan, on 28th November, 2018 (which confirms as correct the content of the Certificate of Anne Bateman, solicitor prepared for the plaintiff's application to enter the Commercial List), 13th December, 2018, 1st February, 2019 and 1st March, 2019, and an affidavit of the plaintiff's Director of HR Strategy Operations. Darrell Hughes sworn on 21st December, 2018 and 6th June, 2019, and the affidavit of Fintan Clancy, Solicitor in Arthur Cox and adviser to the plaintiff in relation to certain tax matters, sworn on 1st February, 2019. Replying affidavits on behalf of the defendants were sworn by Joanna O'Connor (solicitor with the CSSO) on 11th December, 2019 (opposing the application to admit the matter to the Commercial List), Joe Cullen, Head of Income Tax Policy Unit of the first named defendant on 18th January, 2019, and Áine Blackwell, Principal Officer of the Large Corporates Division, Revenue Commissioners, on 24th January, 2019, 6th March, 2019 and 12th June, 2019.

Test for interlocutory injunctive relief

4. Ultimately there was no dispute between the parties as to the test to be applied by the court in determining whether or not to grant an interlocutory injunction. In *Okunade v. Minister for Justice* [2012] 3 IR 152 Clarke J. modified the test in Campus Oil [1983] IR 88 in its application to judicial review proceedings, and in delivering the unanimous judgment of the Supreme Court he enunciated the following principles: -

"As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations: -

(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should: -

(i) give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge, not being implemented pending resolution of the proceedings;

but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) In addition, the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case.

5. In *Dowling v. The Minister for Finance* [2013] IESC 576, Clarke J., as he then was, indicated that the *Okunade* test should also be applied by the court when considering whether to grant interlocutory relief to restrain action being taken on foot of national legislation claimed to be contrary to EU law:

"88. In those circumstances, it seems to the court that, in considering whether, at an interim or interlocutory stage, to restrain action said to be justified by a national measure whose validity is challenged on the basis of European Union law, this Court should apply the test in *Okunade v. The Minister for Justice* [2012] IESC 49, [2012] 3 IR 152 but should also have regard to the question of whether it can properly be said that a party might be deprived of an effective remedy by the court's decision. In assessing the latter position the court should have regard to [Zuckerfabrik] and allied caselaw"

Clarke J. considered this test compliant with EU law in that it applied national procedural rules to the question, ensuring 'equivalence', and provided an effective remedy.

In *Dowling*, Clarke J. also compared the first limb of the *Campus Oil* test, which is to ask whether the plaintiff has shown "a fair issue to be tried", and the higher EU law test for interim measures under which the court must 'entertain serious doubts' about the validity of the measure. At para.90 Clarke J. emphasised that the higher threshold test which applies in cases where an injunction is sought disapplying an EU measure on the grounds that it was contrary to EU law *did* not apply where an injunction was sought disapplying a national measure on the same grounds. I adopt that position. This challenge concerns the validity of domestic legislation under EU law. Further I am satisfied that it does not concern an application for mandatory interlocutory relief such as would require the plaintiff to show a "serious question" or "strongly arguable" grounds. Accordingly, the first question is whether the plaintiff has established an arguable case.

6. The defendant also argues a preliminary point that the plaintiff lacks *locus standi* in respect of so much of its claim as it asserts that s.127B breaches the relevant aircrews' rights to equality, non-discrimination, and the right to free movement under EU law. The legal principles relevant to this issue will be considered later in this judgment.

Background to the applications

7. Section 127B deals specifically with the income tax treatment of flight crew engaged in international traffic, and it was inserted into the TCA 1997 by s.16 of the Finance Act 2011. It provides:

"(1) Income arising to any individual, whether resident in the State or not, from any employment exercised aboard an aircraft-

(a) that is operated in international traffic, and

(b) where the aircraft is so operated by an enterprise that has its place of effective management in the State,

shall be chargeable to tax under Schedule E.

(2) For the purposes of an arrangement to which this section and *section 826* applies, "international traffic" in relation to an aircraft, does not include an aircraft operated solely between places in another state."

8. This section is to be read in combination with s.985 of the Finance Act 2017 which requires an employer to deduct withholding tax (PAYE) from the payment of any "employments" listed in Schedule E. Section 984B of the TCA 1997 requires an employer who is required to make a deduction on account of PAYE to pay the amounts so required to be deducted to the Revenue Commissioners.

9. The plaintiff is a company registered in Ireland and it has its "place of effective management" in Ireland. In 2018 it operated 770,212 flights between 25 Member States, but only 6% of these involved departures from Ireland. Some 12% of flights were domestic, with most domestic routes occurring in Italy. Some 90% of its operating fleet are based outside of Ireland, working from 84 bases across 20 Member States. Between pilots and flight crew ("aircrew") the plaintiff has approximately 6513 employees, 472 of whom reside in Ireland with the vast majority residing elsewhere within the EU. Accordingly, by virtue of the above provisions the plaintiff is charged with deducting income tax under Schedule E in this jurisdiction in respect of aircrew earnings while aboard an aircraft operated in international traffic, whether they reside in Ireland or in another EU state, with two exceptions.

10. The two exceptions are the plaintiff's air crew working on international flights who reside in the Netherlands or the United Kingdom. In respect of the Netherlands a Double Taxation Agreement (DTA) concedes to the Netherlands (NL) the primary right to deduct income tax in respect of Ryanair's aircrew resident in that jurisdiction. In relation to the United Kingdom (UK), it is common case that the DTA between the State and the UK by implication confers on the UK the primary right to deduct income tax in respect of the plaintiff's air crew.

11. In respect of all other EU member states, insofar as those aircrew (whom the plaintiff describes as "non-IRL/UK/NL resident air-crew") have earnings from international flights, the plaintiff is legally required by s.127B to deduct income tax from their earnings and remit it to the second named defendant. This applies to the bulk of salary earned by over 4000 air crew on international flights. However, where such employment is exercised in an aircraft operated domestically i.e. solely between places in another state, the plaintiff does not deduct the income tax in respect of the earnings from such flights. Thus, for example, insofar as the plaintiff's aircrew resident in Italy or Spain operate on international flights, the plaintiff must under s.127B deduct income tax in respect of such emoluments and return it to the Irish Revenue Commissioners; but insofar as such aircrew have earnings from the plaintiff's flights operating internally to Italy or Spain respectively, s.127B does not apply and those earnings are subject to local Italian or Spanish tax as the case may be. According to the plaintiff this applies to approximately 12% of flights operated by the plaintiff, although Italian based pilots typically pay 40% of their income tax locally. Thus the deduction of income tax in respect of aircrew operating some international flights and some internal flights is currently split between Irish taxation for the former and the EU state of residence for the latter.

12. As a result of s.531 of the TCA 1997, together with associated legislation, employers are subject to the same withholding and payment obligation in respect of Universal Social Charge (USC), as applies to income tax. Chapter 4 Part 42 of the TCA 1997 applies to all "emoluments" that are subject to charge on Irish income tax (s.984 TCA). Accordingly, any amounts that are subject to Irish income tax pursuant to s.127B are also subject to the USC, and all references hereafter to income tax payable under s.127B should be read as including Irish USC payable under the TCA. In this respect the USC is not to be confused with Social Security / Social Insurance charges which, as will be seen, must be paid to the member state of residence of the aircrew.

13. As has been seen, whether or not s.127B applies to a particular member of aircrew depends on the DTA's between the State and the country of tax residence of the employee. In all instances other than the UK and NL the relevant DTA grants primary taxing rights to Ireland in respect of income of aircrew, whether resident in the State or elsewhere in the EU, arising from operating in international traffic. Section 127B is the method by which the State has given effect to this DTA taxing right and, where it applies, non-Irish resident aircrew pay income tax in the State – remarkably even though they may never have been physically in Ireland. Such employees also have an obligation to pay income tax in their country of residence but, depending on the particular DTA, double taxation is eliminated either by way of credit for tax paid, or exemption. These DTAs give a "secondary" right to tax to the other EU Member State (other than the UK or NL).

14. It is not contested that the plaintiff supported the introduction of s.127B in 2011. The plaintiff asserts, and it is not really contested, that s.127B was introduced to ensure that non-resident air crew earning income from Irish managed airlines would be liable to income tax, even where there was an exemption in their country of residence in respect of income earned working aboard an Irish managed airline operating in international traffic (e.g. Germany). Mr. Cullen avers on behalf of the defendants that similar provisions exist in a number of other EU Member States, including Romania and Slovakia, although Mr. Sorahan raises some issues with this in his replying affidavit (para.s 51-56).

15. Section 127B gave effect to taxation recommended by Article 15(3) of the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention on Income and Capital ("the OECD MTC"). Ireland is a party to the OECD MTC. It is not binding on member countries, but is an internationally agreed guideline. The Introduction states:

> (1) International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods. Its harmful effects on the exchange of goods and services and movements of capital, technology and persons are so well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries.
>
> (2) It has long been recognised among the member countries of the Organisation for Economic Co-operation and Development that it is desirable to clarify, standardise, and confirm the fiscal situation of taxpayers who are engaged in commercial, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation. These countries have also long recognised the need to improve administrative co-operation in tax matters, notably through exchange of information and assistance in collection of taxes, for the purpose of preventing tax evasion and avoidance.
>
> (3) These are the main purposes of the OECD Model Tax Convention on Income and on Capital, which provides a means of settling on a uniform basis the most common problems that arise in the field of international juridical double taxation. As recommended by the council of the OECD, member countries when concluding or revising bilateral conventions should conform to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained therein and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention.

16. Article 15.3, which it is common case prevailed from about 1992 until November 2017, provided:

> "(3) Notwithstanding the preceding provisions of this Article remuneration derived in respect of an employment exercise aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated".

Accordingly, s.127B *when enacted* was consistent with Article 15.3.

17. Article 5.1 and 5.2 of the Treaty on the Functioning of the European Union (TFEU) provide:

> "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the

> Member States in the Treaties to attain the objectives set out therein. Competencies not conferred upon the Union in the Treaties remain with the Member State."

The Treaties do not confer on the EU competency to regulate or harmonise direct taxation, including income tax. It follows that rules governing the jurisdictional scope of national income tax legislation, and different rates of income tax, fall to be addressed by each Member State. In their written Submissions the defendants cite authority for this in footnote 17:

> "That Member State [*sic*] have the competence to define the criteria for allocation of their powers of taxation, including by means of DTA, is well-established: see, for instance, Case C-307/97 *Saint Gobain*; Case C-336/96 *Gilly*; Case C-5130/03 *Van Hilten."*

18. While the plaintiff accepts that direct taxation falls within the competence of Member States of the EU, it asserts that Member States must exercise that competence in accordance with EU law, and in particular, avoid any overt or covert discrimination. Before outlining the manner in which the plaintiff asserts that s.127B is now in breach of EU law, it is appropriate to set out the "changes to the landscape" that have taken place since 2011 upon which the plaintiff places reliance and which the plaintiff asserts have changed its stance and prompted it to bring these proceedings.

19. Firstly the plaintiff asserts that the changes in tax law of other EU Member States mean that, were income of air crew on international flights not subject to a charge pursuant to s.127B, it would be subject to tax in those Member States and would not go untaxed. Mr. Cullen responds that he is unable to verify this as the changes and Member States concerned are not specified in the plaintiffs' affidavits. This is a point of contention to which I will return later.

20. Secondly, since the entry into force of Regulation (EU) of the European Parliament and Counsel 465/2012 on 28th June, 2012, unless covered by transitional arrangements, flight and cabin crew are required to pay social security contributions in the place where they commence and conclude their duties. This results from the insertion of an amendment into Regulation (EU) No. 883/2004, which was the EU measure that first introduced a "framework" to "coordinate" domestic social security legislation across the EU. Recital (1) provides that –

> "(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment."

Until amended in 2012 the Regulation did not apply to aircrew. As amended Article 11.5 now reads:

> "5. An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No.3922/91, is located."

For these purposes the –

> "concept of "home base" for flight crew and cabin crew members is defined as the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period, or a series of duty periods, and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned" (inserted by Article 1 of the 2012 Regulation as Recital (18b) in Annex III to Council Regulation (EEC) NO. 3922/91).

In the case of most of the plaintiff's aircrew this will be their normal country of residence.

21. Prior to 28th June 2012 aircrew subject to s.127B paid income tax *and* social security deductions such as PRSI in the State. As a result of the change in 2012 the plaintiff now pays the social security contributions in respect of its aircrew in the Member State where they reside/have their 'home base'. "Social security" is defined by Article 3 of the 2004 EC Regulation to include all domestic legislation concerning:

> (a) Sickness benefit;
>
> (b) Maternity and equivalent paternity benefits;
>
> (c) Invalidity benefits;
>
> (d) Old-age benefits;
>
> (e) Survivors' benefits;
>
> (f) Benefits in respect of accidents at work and occupational diseases;
>
> (g) Death grants;
>
> (h) Unemployment benefits;
>
> (i) Family benefits.

This is significant because Mr. Sorahan's uncontested evidence (albeit not expert) at this stage in the proceedings shows that the social security paid locally differs from country to country, and in certain eastern Members States it is multiples of the social insurance that would be payable in Ireland. Some of Mr. Sorahan's evidence of the effect of this differential will be referred to shortly.

22. Thirdly, Article 15(3) of the OECD MTC has been amended. On 28th September 2017, and 21st November, 2017, respectively the Committee on Fiscal Affairs and the OECD Council approved the 2017 Update to the OECD MTC, and Ireland has signed up to this change. The new Article 15(3) now recommends:

> "(3) Notwithstanding the preceding provisions of this Article remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft operated in international traffic, other than aboard a ship or traffic operated solely within the other Contracting State, *shall be taxable only in the first-mentioned State*." [Emphasis added.]

23. It will be noted that whereas the old Article 15.3 was permissive i.e. Ireland did not have to adopt s.127B, the new Article 15.3 uses the stronger word "shall" in recommending that such aircrew should now be taxable only in their country of residence. The plaintiff asserts that this new norm reflects the practice of the majority of OECD states, and non-OECD countries, and reflects the change from an era when airlines were often state owned, and employees were considered, in effect, state employees, before the single market of the EU gained prominence with airlines now having bases in many countries.

24. However, the new Article 15.3 must be read in the light of the OECD MTC Commentary which was adopted at the same time. The 2017 Commentary at para. 28 states:

> "For each Article in the Convention, there is a detailed Commentary that is intended to illustrate or interpret its provisions."

It goes on to observe that the Commentaries as drafted and agreed upon by experts are of "special importance in the development of international fiscal law", and can be of "great assistance in the application and interpretation of the Conventions and, in particular, in the settlement of any dispute". It adds, at para. 29.1:

> "The Commentaries are useful both in deciding day-to-day questions of detail and in resolving larger issues involving the policies and purposes behind various provisions. Tax officials give great weight to the guidance contained in the Commentaries."

25. In the Commentary on the new Art. 15.3, para. 9 states that:

> "…the principle of exclusive taxation in the State of residence of the employee was incorporated in the paragraph through a change made in 2017. The purpose of that amendment was to provide a clearer and administratively simpler rule concerning the taxation of the remuneration of these crews".

It is easy to understand this comment in the context of the administrative complexity involved for the plaintiff and for aircrew where taxation occurs across two jurisdictions, and the current desire of aircrew to be taxed in their state of residence.

26. However, later in paras. 9.6 and 9.7 it is noted that some States may prefer to allow taxation of the remuneration of such crew both by the State of the enterprise that operates the ship/aircraft and the State of residence of the employee, and modified versions of Art.15.3 are suggested in sub-paras. 9.6 and 9.7. Thus the alternative suggested in para. 9.7 adopts essentially the same wording as Article 15.3 with the addition of the following sentence:

> "Where, however, the ship or aircraft is operated by an enterprise of the other Contracting State such remuneration may also be taxed in the other State."

27. Mr. Cullen in his replying affidavit dated 18th January, 2019 at para. 10 refers to the OECD MTC, saying:-

> "I say that when the OECD MTC is amended this has no impact on Ireland's existing DTA's unless and until the relevant DTA is amended or replaced through subsequent bilateral negotiations, or its operation is modified through the ratification of a multi-lateral instrument such as the multi-lateral Convention to Implement Tax Treaty Related Measures to prevent BEPS. I say that Ireland is a fully committed OECD member and the approach adopted by Ireland in concluding or revising DTA's has been and continues to be fully consistent with that commitment".

28. Notwithstanding this statement, in the passage of some eighteen months since the primary amendment of Article 15.3 created a new taxation norm there is no evidence that Ireland has addressed any change to its DTA's or s.127B or conducted bilateral negotiations to move to taxation of EU aircrew in their state of residence. This is also in spite of the clearly expressed view in negotiations in 2018 – later expressed in collective agreements which are referred to below - of the plaintiff's aircrew trade unions/representatives of their desire to move to local taxation

Mr. Cullen at para. 25 of his affidavit rejects that s.127B -

> "…is in any way contrary to OECD principles or requirements. I say that an amendment was made to Article 15 of the OECD MTC in 2017 which has the effect of providing for restricting taxing rights in respect of an employment exercised aboard an aircraft operated in international traffic, to the State of residence of the taxpayer. However, as I have already observed above, the OECD MTC is not binding but rather constitutes guidance to which OECD contracting states may have regard when concluding or amending their DTA's. Further submissions will be made in this regard by Counsel at the hearing of this application."

29. Counsel did indeed rely on the Commentary, and alternative version of Article 15.3 to which I have made reference above. However, at para. 9.9 the reason for the alternative Art.15.3 is elaborated as being to -

> "…help to address the situation of employees who work extensively aboard ships or aircraft operated in international traffic and who may find it advantageous to establish their residence in States that levy no or little tax on the employment income derived from such work performed outside their territory."

30. Without making any final determination of the issue, I find that it is strongly arguable from reading Commentary 9.9 that the alternative version of Article 15.3 is designed to enable such a loophole as existed in respect of German aircrew prior to 2011 to be avoided. However, on the plaintiff's evidence – which admittedly did not include any affidavit from an expert in German taxation law - this risk of non-taxation has already been removed. It is therefore arguable, if the plaintiff is correct, that the Commentaries do not provide a justification for the maintenance of s.127B post-November, 2017. It is also noteworthy that, while I permitted Counsel for the defendants to argue on the basis of the Commentaries (which he handed in to court), they were not referenced or relied upon by Mr. Cullen in his replying affidavit, and their content is not referenced or relied upon as a justification for the continuation of s.127B in the Defence, and in particular the Commentaries are not relied upon in para.51 where the defendant pleads s.127B as "objectively justified" on certain grounds.

31. Fourthly the plaintiff pleads that several EU Member States have refined, or are about to refine, their domestic systems for social security and/or income tax, transferring the burden of employer social security contributions to employees (e.g. Romania as of 1 January 2018 and Lithuania from 1 January 2019). In Lithuania, employers are obliged to increase salaries to compensate employees for these new payments but, the combined effect of these new rules and s. 127B, causes a marked increase on the effective tax rate

of the relevant aircrew.

32. Fifthly, in 2018 the plaintiff entered into negotiations with employee representative organisations and has entered into a number of agreements under which it is committed to employing non-resident aircrew under local contracts of employment, paying them locally, and deducting tax locally. Ms Bateman's Certificate puts it thus: –

> "3. Ryanair is currently transitioning to employing those non—resident aircrew under local contracts of employment and will cease to employ these aircrew under Irish contracts of employment. The transition commences in January 2019 and as before, they will be resident in Ryanair bases throughout the EU outside of Ireland and the UK and will continue to pay (or commence to pay, if currently covered by the transitional arrangements under EU Regulation 465/2012) social security contributions locally, in accordance with EU law. However, in contrast with the situation under the previous Irish contracts, they will now be paid locally (via local payrolls) and be subject to local employment law. This shift to local contracts for non—resident aircrew reflects a general, well recognised shift in the industry in that it is now largely the option preferred by non—resident aircrew and generally sought by unions. It should be emphasised Ryanair is under intense pressure to make this shift to local contracts from aircrew unions, in particular, as well as the media, Ministers in other Member States and EU Commissioners, as demonstrated in correspondence received from EU commissioners and Ministers in other Member States…
>
> 4. In keeping with the spirit of this shift to local contracts and, in some cases in accordance with the terms of Ryanair's agreements with relevant unions or offers thereto as of January 2019, Ryanair will deduct tax locally at the local payroll and pay it to the local tax collection authorities. In order to ensure that it would not have to subject those salaries to two income deductions, one under the local system and another under s. 127B, Ryanair sought from the Revenue Commissioners a release from its obligations to deduct tax and USC under the PAYE system and/or an exclusion order in respect of the aforementioned 1100 employees based in Italy. Ryanair also sought confirmation from the Minister that it could adopt this new practice, notwithstanding s. 127B. The Defendants did not provide the relevant release, exclusion order or confirmation and these proceedings issued, as detailed further below."

33. Mr Hughes in his affidavit sworn on 21 December 2018 avers that he is "deeply involved in the negotiations with unions", and he exhibits the plaintiff's collective labour agreements ("CLA") with unions representing cabin crew and/or pilots in Belgium, Germany and Italy, and unions representing cabin crew in Portugal and Sweden, and a union representing pilots in Spain. These broadly reflect what Ms Bateman says in her Certificate. Mr Hughes avers that "Ryanair has expressly agreed terms for moves to local taxation in two countries so far, being Italy and Germany. Where the other agreements contain terms requiring a move to local law, we anticipate having to then discuss and agree terms for a consequent move to local taxation with the relevant unions, and our discussions with unions are ongoing in this regard."

Germany
34. The "CLA Proposal" agreed between the plaintiff and the German cabin crew on 6 November 2018 includes the following: –

> "4. Local Law
>
> • By latest 1 Feb 2019, German labour law will apply to all direct Ryanair cabin crew employees at German bases.
>
> • There will be no break in service and no changes to current gross salaries (other than the increases specified above).
>
> • If German tax legislation applies, Ryanair and [the union] will work on the pay structure to use tax advantages (e.g. shift allowance).
>
> • Payment into German or other Euro bank accounts by 1 January 2019.
>
> • Payment of German social insurance contributions during unpaid leave. Unpaid leave will be allocated on a voluntary basis in the first instance."

The "Cornerstone Agreement" agreed between the plaintiff and German pilot representatives on 30 November 2018 provides, *inter alia*: –

> • German Tax; effective from 1 April 2019 with Ryanair assuming risk and liability arising from claims by the Irish Revenue relating to the changeover and from the changeover date.
>
> • German Bank Accounts; payment into German or SEPA bank accounts by 1 Jan 2019."

In a short supplemental Affidavit sworn by Mr. Hughes on 6 June, 2019 he updates the court in respect of the 1 April 2019 deadline, stating –

> "…this required the participation of the German tax authorities which has yet to be completed. It is now proposed to address the issue by paying (backdated to 1 April 2019) an additional sum to Ryanair's German pilots as a way of compensating them for the differential between German-based tax deductions and Irish-based tax deductions. The foregoing is not fully satisfactory to German pilots who still wish to be formally and actually German-tax-based and who continue to press for this status, but it is an attempt to ameliorate the impact of s.127B retrospectively, for 1 April 2019."

Italy – cabin crew
35. In respect of Italian-based cabin crew the CLA with unions dated 6 December 2018 covering the period 1 November 2018 – 31 December 2021 is governed by Italian law and Italian courts have jurisdiction.

- Clause 1.2 stipulates –

> "All existing directly employed cabin crew will transition to Italian employment law no later than 31 January 2019 and all crew will move to Italian social insurance (where applicable) no later than this date as individual crew will no longer be able to avail of Irish social insurance due to this change in employment circumstances under EU regulation

465/12.… It is accepted that Ryanair cannot administer both an Irish and Italian employment structure. Following this change [the unions] agree not to pursue any claims (cost increasing or otherwise) for any difference between Irish and Italian benefits, tax or social insurance as a consequence of moving to Italian employment law."

- Clause 1.3 provides: –

"… In this regard Ryanair agrees to implement a full Italian payroll no later than 30 September 2019 with a new pay structure that removes Irish taxing rights and international sectors, similar to other Italian airlines operating from Italian bases."

- It is agreed that "The Collective Labour Agreements will also cover;

1.12 Italian payslips (similar to other Italian airlines) introduced by 30 September 2019 and salary transfers to Italian or EU bank accounts by 1 January 2019 subject to a new HR system being operational."

Italy – pilots

36. The plaintiff's initial CLA dated 14 August 2018 with the Italian pilot's union, and the subsequently agreed CLA, cover 1 August 2018 to 31 December 2021, and fall to be implemented in two phases. In respect of Phase 1, to be implemented by 31 March 2019, clause 1.3.1 provides *inter alia* –

"If 127B of the 2011 Irish Finance Act applies at year end (2018), phase 2 of the agreement will not be required and full Italian taxation rights on international flights will be effective from the following month when 127B ceases to have effect."

Clause 1.3.2 deals with Phase 2, the period 1 April 2019 – 30 September 2019, and provides, *inter alia*: –

"During phase 2 Italian tax will be applied to pilots' earnings (subject to any double taxation agreements) when section 127B ceases to have effect or when a new AOC structure which is managed and controlled from outside of Ireland comes into effect. The taxation structure agreed in phases 1 and 2 will continue for the duration of the deal until December 2021 but must at all times comply with the Italian tax code and any amendments to same including any rulings by the Italian tax authorities."

The agreement dated 28 November 2018, with the union representing cabin crew located in Portugal, agrees that "by the latest on 31 January 2019, the employment contracts Ryanair directly employed cabin crew referred to in article 1 will be governed by Portuguese labour law."

Spain

37. The agreement dated 24 October 2018 with a union representing Spanish-based pilots provides that their members will be "directly employed Spanish based pilots", that "Spanish labour law will apply to all Ryanair employed pilots based in Spain on conclusion of a CLA with [the union] but no later than January 31, 2019", and that: –

"the interim period from the signing of this agreement until January 31, 2019 will be used to make an orderly transition for all directly employed Ryanair Pilots operating habitually in Spain to Spanish labour law. Both Ryanair and [the union] agree to meet to resolve any differences in this period…"

38. While there is considerable variation between the terminology used in these CLAs, for the purposes of these interlocutory proceedings there is ample evidence that the plaintiff has entered into serious commitments with their non-– Irish/UK/NL resident aircrew to transition within the timeframes indicated to local contracts of employment, payment of earnings locally and local deduction of income tax as well as payment of social insurances.

39. It is not disputed that s.127B has no effect on aircrew working for airlines that do not have their place of effective management in Ireland, such as the plaintiff's main Irish competitor Aer Lingus which does not currently have foreign bases anywhere other than in the UK.

40. The plaintiff claims, that in practical terms, s. 127B singles out aircrew resident outside Ireland, the UK and NL, but working aboard Irish managed airlines other than Aer Lingus (this would include Norwegian Airlines, Cityjet and Ryanair) "for unusual and mostly disadvantageous tax treatment, vis-à-vis their objectively comparable counterparts across the EU ("Non—IRL/UK/NL Aircrew working for Irish managed airlines")" (Para. 11 of the Statement of Claim).

41. Mr Sorahan deposes at paragraph 21 of his affidavit sworn on 28 November 2018 that: –

"…This unusual and unequal treatment manifests itself in various ways, as particularised in paragraph 11 of the Statement of Claim but, most notably, it renders this group of individuals unable to avail of tax reliefs or incentives where they are based, subjects them to complicated tax processes such as the requirement to make two tax returns and, further, renders them subject to very high effective and marginal tax rates."

He illustrates this (at para 24) by reference to the effect of s. 127B on Italian aircrew: –

"- Currently Ryanair employed aircrew based in Italy are subject to Irish tax on their employment income related to international flight duties under s.127B and local Italian tax on income related [to] their domestic flight duties;

- Ryanair has committed to moving crew to Italian income tax only, by 1 September 2019;

- Under local Italian taxation, an employed captain and first officer earning gross salaries of €150,000 and €75,000 respectively would have a net take home pay of approximately €110,000 and €60,000 respectively. In comparison, a captain and a first officer on the same gross salaries and subject to s.127Bwould have net take home pay of €79,000 and €47,000 which is approximately €32,000 and €13,000 lower, respectively, than pilots on equivalent salaries but subject to local tax only;

- In practice, Ryanair employed pilots operate a mix of international and domestic routes with most earning the bulk of their salary in international routes (see paragraph 11(c) of the Statement of Claim. However, Italian based pilots typically

operate approximately 60% international and 40 % domestic operations which has the impact of subjecting 60% of total pay to Irish tax and 40% to Italian local tax;

- The net pay differential for captains and first officers (operating a 60%/40% international domestic split) earning the same gross salaries are €14,000 and €3,500 respectively;

- In order to offer an equivalent net salary, Ryanair would be required to increase the salaries of such captains and first officers by €31,000 and €7,000 respectively, which would cost Ryanair €35,000 per captain and €8,000 per first officer when employer social insurance costs are factored in;

- Given Ryanair has approximately 470 employed pilots based in Italy (286 captains and 184 pilots), such a re-grossing exercise would place Ryanair at a competitive cost disadvantage over an airline whose Italian based pilots were subject to local taxation only."

42. At para 27 Mr Sorahan refers to letters sent by the plaintiff to the Revenue Commissioners on 9th and 13th November 2018 requesting (unsuccessfully) to be released from the obligation to make deductions under s. 127B in respect of 1100 employees the subject of recent CLAs in which the plaintiff had made commitments to transition to local contracts of employment from January 2019 onwards. He then addresses the consequences for the plaintiff's employees and for the plaintiff –

"27…. In accordance with the terms of Ryanair's agreements with relevant unions or offers thereto, Ryanair will deduct income tax on those salaries and pay it to the local tax collection authorities, as per local law.

28. However, if Ryanair was also to deduct Irish income tax and USC from those salaries and pay it to the Revenue Commissioners, the relevant aircrew would be left with very little in net pay, as a percentage of the gross salary. By way of example and a reference to tables 1, 2, and 3 at para. 15 of the Statement of Claim, aircrew in the following jurisdictions (some of whom were included on the list of aircrew in respect of whom Ryanair sought an exclusion order/release) would receive the following amounts in net pay, if two sets of income tax were applied: –

	Hungary	**Italy**	**Poland**	**Lithuania (from 01/01/19)**
Illustrative gross salary	€150,000	€150,000	€150,000	€193,300*
Income tax payable (IRL)	€58,800	€58,800	€58,800	€79,600
Income tax payable (local)	€22,500	€26,700	€31,800	€42,700
Social insurance payable (local)	€27,800	€11,900	€20,000	€30,600
Total payable in income tax and social insurance	**€109,100**	**€97,400**	**€110,600**	**€152,900**
Net pay	**€40,900**	**€52,600**	**€39,400**	**€40,400**
Marginal rate of tax and social insurance	**82%**	**83%**	**85%**	**88%**
Effective rate of tax and social insurance	**3%**	**65%**	**74%**	**73%**

Note: the figures in these three tables are approximate, rounded to the nearest hundred and may be subject to change in accordance with local laws.

*From 2019, employers are required by the Lithuania Law on Social Security to change employment agreements and "gross-up" the current employee's salary by multiplying it by 1.289.

29. It is clear that if those deductions were applied, Ryanair would be faced with industrial action and/or resignations by the affected aircrew. Ryanair suffered recent industrial action in summer 2018 which had a deleterious impact on all affected parties, including employees, the travelling public (who rely on the stability of Ryanair and whose travel plans were regrettably disrupted), Ryanair. By extension, Ryanair would suffer severe and irreparable damage to its reputation generally but, in particular, to its reputation with aircrew and to its reputation amongst consumers.

30. Second, even if Ryanair bore the brunt of the double income tax payment by paying the relevant amounts to the Revenue Commissioners on behalf of all Non-IRL/UK aircrew, that would require it to pay approximately €5 million per month to the Revenue Commissioners. If these monthly amounts were payable by Ryanair on any kind of sustained basis, Ryanair's costs would increase by approximately €60m per annum and, unless it re-commenced making the deductions of its aircrew, it would result in these increases being passed to consumers by increasing the cost of its flights. Ryanair would be forced to choose between damaging its reputation with its aircrew by re-commencing deductions and risking industrial unrest, or damaging its reputation amongst consumers who rely on it to deliver as a low-cost carrier.

31. Third, even if Ryanair paid tax twice on the relevant salaries, once to the local tax collection authorities and once to

the Revenue Commissioners, it would send a negative message to aircrew across the EU (whether Non-IRL/UK aircrew employed by Ryanair, aircrew desirous of moving between bases while working for Irish airlines including Ryanair and would-be employees of Irish airlines, including Ryanair), and affect aircrews' choice of employment.

32. This would render employment with Ryanair inherently less desirable than employment with other airlines to which s.127B did not apply, in practice or in fact. Not only would aircrew know that Ryanair employees were subject to an unusual tax regime, ineligible for local tax incentives or reliefs and required to navigate the cumbersome dual taxation processes in Ireland and their state of residence, they would also know that Ryanair was taking remedial steps to lessen the impact of s.127B but that those steps might become commercially unviable, forcing Ryanair to take different, as yet unknown, remedial measures involving aircrew or, worst of all, to recommence deductions from salaries for payment to the Revenue Commissioners or close bases, etc.

33. The foregoing would invariably cause NON_IRL/UK Ryanair employed aircrew, those considering moving to bases where s.127B applied and those seeking to become employees of Ryanair to think twice about their employment, or would-be employment, with Ryanair. This would cause Ryanair to suffer serious and irreparable harm, in particular vis-á-vis its reputation as an employer of the aircrew upon which it relies to operate its business."

The plaintiffs' claims based on discriminatory treatment of its aircrew and income tax disadvantage

43. The plaintiff claims that its non-Irish/UK/NL resident aircrew are, directly or indirectly, treated differently and compare unfavourably to their objectively comparable counterparts by virtue of s.127B:

(a) income tax from international flights is not paid in their country of residence.

(b) this has a negative impact on aircrew desirous of moving between bases in the EU, and on would-be employees.

(c) such aircrew miss out on local tax allowances, reliefs or incentives, such as the Italian *diaria* travel allowance. In Poland social security contributions are tax deductible against local income tax, but this cannot be availed of by the plaintiff's aircrew resident there.

(d) As appears from Table 1 the incidence of significantly higher social insurance taxes in other EU member states (said to compensate for lower local income tax) results in much lower net pay compared to the plaintiffs' Irish resident aircrew. By contrast in the Statement of Claim Table 2 sets out the position if income tax was paid locally, and it can be seen that net pay would be considerably higher.

	Ireland	**Hungary**	**Italy**	**Poland**	**Lithuania (from 01/01/19)**	**Romania**
Illustrative gross salary	€150,000	€150,000	€150,000	€150,000	€193,300*	€150,000
Income tax payable (local)	€58,800	€22,500	€26,700	€31,800	€42,700	€15,000
Social insurance payable (local)	€6,000	€27,800	€11,900	€20,000	€30,600	€52,500
Total payable in income tax (local) and social insurance (local	€64,800	€50,300	€38,600	€51,800	€73,300	€67,500
Net pay	**€85,200**	**€99,700**	**€111,400**	**€98,200**	**€120,000**	**€82,500**
Marginal rate of tax and social insurance	**52%**	**34%**	**35%**	**37%**	**40%**	**45%**
Effective rate of tax and social insurance	**43%**	**34%**	**26%**	**35%**	**38%**	**45%**

(e) In some countries the effective tax rate is very high with severe impact e.g. in Romania where, when the burden of employer contributions was transferred to employees in January 2018 the effective tax rate applicable to aircrew increased from 49% to approximately 70%.

(f) while the plaintiff files the Irish tax returns, aircrew must file tax returns locally, they must return income derived from local flights, and complicated calculations are required to prevent double taxation.

(g) the taxation does not comply with the international norm of payment of tax where the income is earned or the person resides.

44. The plaintiff therefore argues that s.127B is contrary to the general rights of equality of treatment of workers, and non-discrimination on grounds of nationality, enshrined in the following provisions of EU law:

"Article 45 (TFEU)

1. Freedom of movement of workers shall be secured within the Union .

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) To accept offers of employment actually made;

(b) To move freely within the territory of Member States for this purpose;

(c) To stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) To remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service."

"Article 18 (TFEU)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

See also Article 7(1) of EU Regulation 492/2011 which states:

"Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States."

Article 24(1) of Directive 2004/38 states:

"1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence."

45. The plaintiff asserts that it has an arguable case that s.127B discriminates against its EU aircrew on grounds of nationality because, in contrast to their objectively comparable counterparts across the EU, in particular Ireland, the UK and the Netherlands, and purely because the plaintiff manages their work from Ireland-

(a) the aircrew have less favourable combined effective tax treatment and social insurance rates;

(b) the aircrew are subject to an "atomised" as opposed to "holistic" effective tax rate that splits the payment of tax between Ireland and the state of residence, where they also pay social insurance, and they may be ineligible for local tax/social insurance allowances;

(c) the aircrew local circumstances go unaccounted for;

(d) the aircrew are unable to avail of the advantage of lower level PRSI in Ireland;

(e) the aircrew may be ineligible for local tax incentives for aircrew such as the diaria in Italy;

(f) the section is likely to act as a disincentive to would-be aircrew working for Irish managed airlines;

(g) aircrew must pay income tax in a country other than the one in which they start and end their work day, and in a country in which they are not resident or domiciled and with which they have no real personal connection or rights to benefits such as the right to vote, a path to citizenship etc.

(h) the section causes or permits such aircrew to be subject to a "tax grab" by Ireland that is contrary to "established international norms".

(i) the section is an obstacle to the freedom of movement to work from another EU country of the plaintiff's aircrew residing in Ireland/UK/NL – they would be less likely to accept a transfer to another of the plaintiff's bases because of the less favourable effective tax treatment.

(j) non-Irish but UK/NL resident aircrew working for the plaintiff on international flights, who are directly comparable to Non IRL/UK/NL residents, are shielded from s.127B and the latter group are discriminated against.

Controversially, it was also claimed that under s.825A TCA (as substituted by s.11 of the Finance Act, 2010) Irish resident aircrew in "employment which is held – (a) outside the State", but who are present in the State for at least one day per week, qualify for certain relief, whereas non-IRL/UK/NL resident aircrew would not qualify, thus giving rise to different and discriminatory treatment.

However, whilst not closing off further argument at trial, having considered some argument on this provision I have serious doubts that it applies to the plaintiff's aircrew, whether resident in the State or elsewhere in the EU, because their "employment" is held in the State even though their work takes them outside the State. S.825A seems intended to apply, classically, to a person resident in Ireland who is employed in the UK/Northern Ireland and pays their tax there but returns 'home' at weekends.

46. The plaintiff next asserts an arguable case that s.127B is contrary to the right of free movement enshrined by Articles 20 and 21 TFEU, supported by the EC (Free Movement of Persons) Regulations, 2006 to 2015 as amended:

> "Article 20
>
> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
>
> (a) the right to move and reside freely within the territory of the Member States;"
>
> "Article 21
>
> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

The plaintiff also pleads breach of the following provisions of the Charter of Fundamental Rights of the European Union ("the Charter"): Article 15 (Freedom to choose an occupation and right to engage in work); Article 20 (Equality before the law); Article 21 (Non-discrimination); Article 31 (Fair and just working conditions); Article 34 (Social security and social assistance); Article 35 (Healthcare); and Article 45 (Freedom of Movement and Residence).

47. It is argued that while aircrew enjoy the right to move and freely reside in other member states, s.127B effectively restricts these rights of free movement aircrew to an Irish/UK/Netherlands EU base because such aircrew would be subject to higher effective income tax and treatment of their tax/social security otherwise than in accordance with international norms if they moved to another EU member state – contrary to Articles 20 and 21 of TFEU, and Article 45 of the Charter. It is pleaded that this deprives aircrew to pursue their chosen occupation (Art.15.1 of the Charter), and their freedom to seek employment (Art.15.2 of the Charter); that the disparity between treatment of aircrew singles out non-Irish/UK/Netherlands aircrew for unequal treatment (Art.20 of Charter); that s.127B gives rise to discrimination on ground of nationality (Art.21 of Charter); and deprives such aircrew of protection under Art.34 by precluding combined analysis and assessment of the tax and social insurance contributions within one state where both are inextricably linked.

Locus standi

48. The plaintiff does not purport to pursue claims 'on behalf of' its aircrew in respect of their treatment under s.127B. However, the defendants make a preliminary objection that the plaintiff has no *locus standi* to pursue claims based on the treatment of such aircrew because none of them are parties, and none have contributed any affidavit evidence. Counsel submits that the rules governing procedures before domestic courts in proceedings concerning claims based on EU law, are in principle, governed by national law, subject only to the principles of effectiveness and equivalence, citing Clarke CJ. and O'Malley J. in *Grace v. An Bord Pleanala* [2017] IESC 10. Counsel next relies on *Cahill v. Sutton* [1980] IR 269 where a plaintiff who claimed for personal injury more than three years after it was suffered challenged the constitutionality of s.11(2)(b) of the Statute of Limitations 1957. In her appeal she based her challenge on that fact that the Act did not contain any exception in favour of an injured person who did not become aware of the relevant facts on which to base a claim until after the expiration of the three-year period; however, on the facts this would not have applied to her. Henchy J. stated, at p.283:

> "While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice *as a general rule*. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented." [Emphasis added].

49. Counsel for the plaintiff accepted this as a "*general rule*" but referred to Henchy J. at p.385 where he contemplates exceptions:

> "This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal *locus standi* on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked. For example, while the challenger may lack the personal standing normally required, those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights. In such a case the court might decide to ignore the want of normal personal standing on the part of the litigant before it. Likewise, the absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest, particularly in cases where, because of the nature of the subject matter it is difficult to segregate those affected from those not affected by the challenged provision."

50. In this passage in the present context "EU law" should be read in for the Constitution. Counsel argued that the plaintiff has "common interest" with the affected aircrew who are its employees, and can therefore rely on their circumstance in being subject to taxation under s.127B.

51. The plaintiff also relied on the judgment of the CJEU in *Caves Krier Freres Sarl v Directeur de l'Administration de l'emploi* Case C-379/11. In 2008 Caves Krier, a Luxembourg company, recruited Ms Schmit-Krier, then 52 years of age, on a permanent contract. She

was a Luxembourg national who lived with her husband in Germany – close to the border – and she had spent her entire working life in Luxembourg. Caves Krier then submitted to the respondent (ADEM) an application for a subsidy in respect of recruitment of older unemployed and long-term unemployed persons under the Luxembourg Labour Code – which was rejected as Ms. Schmit-Krier had not been registered as job seeker with ADEM. Caves Krier brought an action seeking annulment of that decision on the basis that Ms. Schmit-Krier (who was not a party) was registered as a job-seeker in Germany, had worked in Luxembourg all her life, and had only registered in Germany as a job-seeker because she and her spouse moved their domicile there. They argued breach of Article 21 TFEU (citizens right to move freely and reside) and Article 45 TFEU (freedom of movement of workers). While the refusal of the subsidy did not prevent Caves Krier hiring Ms. Schmit-Krier, it did have "…the effect of making the terms of recruitment less favourable than the recruitment of a job seeker over 45 years and registered with ADEM." (para. 20). The court considered the case engaged Article 45, and that it did not need to consider Article 21.

52. At para.28 the court addressed whether *Caves Krier* could rely on the rights conferred on citizens by Article 45:

> "While it is established that the rights to freedom of movement laid down under that article benefit workers, including those seeking employment, there is nothing in the wording of that article to indicate that those rights may not be relied upon by others. In order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers (see Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraphs 19 and 20, and Case C-208/05 ITC *Innovative Technology Center* [2007] ECR I-181, paragraphs 22 and 23)."

More recently in *Essent Energie Productie BV v Minister van Sociale Zaken en Werkgelegenheid* Case C-91/13, the Opinion of Advocate General Bot delivered 8 May 2014 relied on this passage from *Cave Kriers* where it is stated:

> "75. The relatively flexible case-law which the Court has developed concerning the persons entitled to rely on the rules of the FEU Treaty on the freedom of movement for workers seems to me to support a broad approach to the possibility of relying on Articles 56 TFEU and 57 TFEU.
>
> 76. With regard to the freedom of movement for workers, the Court therefore considered that, '[w]hile it is established that the rights to freedom of movement laid down under [Article 45 TFEU] benefit workers …, there is nothing in the wording of that article to indicate that those rights may not be relied upon by others'. It therefore ruled that 'Article 45 TFEU may be relied on not only by workers themselves, but also by their employers. In order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers'."

53. Counsel for the defendants sought to distinguish *Cave Kriers* on the basis that it concerned the refusal to that company of the subsidy in respect of one specific jobseeker, whereas in the present case the obligations to pay income tax under s.127B rest with the plaintiffs' employees, not the plaintiff, and the plaintiff has not identified any specific employee affected.

54. Notwithstanding that these arguments may have some validity, I am satisfied, at least to the level required for the purposes of the claim for interlocutory relief, that it is arguable that the plaintiff has *locus standi* to mount the claims that it does based on alleged breach of the rights of its employees (or 'would-be' employees) under EU law. Such arguability is made out based on the room for a 'common interest' exception to the procedural rule suggested by Henchy J. in *Cahill*. It also follows from the decision of the CJEU in *Cave Krier*, particularly as the plaintiff does have the legal obligation to make the deductions and pay the income tax due to the Revenue Commissioners under s.127B (the combined effect of s.985 of the FA, 2017, and s.984B of TCA, 1997 – see paragraph 8 of this judgment). Such *locus standi* applies at this interlocutory stage to the claims variously particularised in respect of the aircrews under different provisions of EU law, because all of them are directed at establishing the invalidity of s.127B. Beyond this it would be inappropriate to express any views as to the strength or otherwise of the arguments on either side on this issue.

Evidentially, has the plaintiff established an arguable case in respect the treatment of aircrew under s.127B?

55. Whether it is formulated as an 'arguable case', or a 'fair question to be tried', there is an onus on the party seeking an interlocutory injunction to adduce, on a *prima facie* basis, evidence on which the court can act. The case does not have to be made out 'on the balance of probabilities', but there should be evidence upon which the plaintiff can make the factual and legal arguments that could justify interlocutory intervention. I am not satisfied that the plaintiff has adduced sufficient evidence to ground such claims as it makes based on the disadvantage to aircrew.

56. Central to the plaintiff's claim is that its aircrew resident in the EU, outside of IRL/UK/NL, suffer financial discrimination because of the high rate of income tax deducted under s.127B, combined with the locally paid high rates of social insurance, and inability to avail, or benefit fully, from local allowances or reliefs. The principal evidence upon which it relies appears in Mr. Sorahan's affidavits. In his first affidavit sworn on 28th November, 2018 he makes a series of general statements about the section and tax treatment of the aircrew, with some detail given only in para.24 in respect of the aircrew in Italy, which attempts to quantify how much better off a captain or first officer would be if they were taxed only in Italy. At para.28 he addresses how much worse off aircrew will be if, pursuant to the agreements reached with their unions, the plaintiff was, in addition to making s.127B deductions, also paying income tax locally. He avers "By way of example and by reference to tables 1, 2 and 3 at para.15 of the Statement of Claim", and sets out the position in tabular form for Hungary, Italy, Poland and Lithuania. Somewhat surprisingly he does not replicate or aver to the accuracy of the Tables 1, 2 or 3 in the Statement of Claim, setting out effective and marginal tax for these countries (and Romania), alongside the comparative position for aircrew residing in Ireland.

57. In Mr. Cullen's replying affidavit he takes issue with the level of evidence adduced on behalf of the plaintiff, averring at para.3:

> "…. I would emphasise that the legal and factual matters raised in the Statement of Claim are complex and manifold and are not dealt with in detail in the Affidavits of Mr. Sorahan and/or Mr. Hughes. As such I do not propose to deal with all matters raised therein (nor would that be possible due to their breadth), but will confine myself to an outline to which further detail will be added in due course in the Defendant's pleadings and following the discovery process and exchange of any relevant experts' reports. I say and believe that, as I observe below, this illustrates that the Plaintiff's application for a preliminary reference at this juncture, before the case has been fully pleaded and relevant facts have been found, is inappropriate and premature."

He makes comments in a similar vein in para.s 32 and 33, averring "….that many vital aspects of the Plaintiff's case remain entirely unclear but, even on its face, the Plaintiff's allegations are seriously flawed and unfounded."

58. In response Mr. Sorahan swore a replying affidavit on 1st February, 2019, and Mr. Fintan Clancy, a partner in Arthur Cox (Head of

the Tax Group in that firm) who advises the plaintiff on 'certain tax matters' also swore an affidavit. Mr. Sorahan at para. 9 of his said affidavit refers to his involvement in the preparation of the Statement of Claim and avers that "to the best of my knowledge, the facts set out [therein] are accurate". Apart from this he does not depose further to the legislative basis or factual detail to ground the claims relating to the tax treatment that is illustrated in the Tables in the Statement of Claim, or the specific effect that DTAs on payment of local income tax (although he does provide specific information on Romania and Slovakia in response to Mr. Cullen's averment that provisions similar to s.127B exist in those jurisdictions).

52. The closest Mr. Sorahan comes to specifics is a reference in para. 64 to an updated Table provided to the defendants by way of Replies to Particulars sent 1st February, 2019 at Appendix 3 which consists of a summary of the effects of s.127B on two illustrative sample plaintiff employees, Pilot A (single aged 35) and Pilot B (married with two children aged 35), both with the same basic salary and pension contribution and both living in rented accommodation and driving 20 km to work, which he avers are "properly representative of a typical Ryanair employee", which he exhibits at "2NS6". He avers that this was prepared by the plaintiff's Tax Manager, Raymond Kelliher, "with input from Ryanair's financial or legal advisors in each of the Member States mentioned therein (apart from Ireland, the UK, Poland, and Spain where Ryanair was able to itself produce the figures)". The Table summarises the approximate tax position for the two sample employees across 20 jurisdictions in which the plaintiff operates, and sets out in adjacent columns for each jurisdiction the Irish income tax deducted under s.127B in their State of residence, and a "full local payroll (i.e. applying income tax and social insurance in the person's State of residence)." The following are illustrative examples from this Table in respect of Pilot A, covering Ireland, Hungary, Italy and the UK:

Pilot A							
	Hungary	**Hungary**	**Italy**	**Italy**	**Ireland**	**UK**	**UK**
	s.127B	**Local**	**s.127B**	**Local**	**LT Compare**	**s.127B**	**Local**
Gross Salary	145,361	145,361	145,361	145,361	187,370	145,361	145,361
Income Tax	53,085	23,004	53,085	39,516	73,249	53,085	45,744
Social Insurance	28,372	28,372	15,543	15,543	7,495	7,108	7,108
EE Pension Contribution (Tax Free)	8,000	8,000	8,000	8,000	8,000	8,000	8,000
Net Pay	55,905	85,985	68,733	82,302	98,626	77,168	84,509
Marginal rate of tax	67%	34%	61%	28%		50%	42%
Effective rate of tax (income tax + SI)	56%	35%	47%	38%	43%	41%	36%

59. While it is readily understood why the plaintiff's affidavits resort to reference back to the Statement of Claim and Particulars, and tabular presentation, in order to cover the breadth of differences between tax treatment of aircrew across so many States, there are real difficulties with the evidence as presented. Moreover, the evidence in Mr. Clancy's affidavit does not bridge the gaps.

60. The following evidential deficiencies emerge:

a) The principal difficulty is that there is no expert evidence presented, otherwise than obliquely or by hearsay, from taxation experts in the non-Irish/UK/NL Member States in which aircrew reside. While hearsay evidence may be admissible, where the informant is disclosed, in support of an application for interlocutory relief, in my view this is inappropriate in a case such as the present where the plaintiff makes complex claims that are dependent on tax and social insurance treatment in other States, and on the detail of matters such as tax bands/rates, allowances – which will be dependent on marital status or number of children - and reliefs e.g. deductions for travel.

b) Pension contributions in the Table at exhibit "2NS6" are entered at €8000 across the board described as "EC Pension Contribution (Tax Free)", but the samples do not address an employee who contributes more.

c) There is no reference to the legislative tax provisions in other States that would result in figures presented as resulting in better net pay if aircrew were only taxed locally (assuming s.127B to be invalid).

d) The court is also left without detail or expert comment as to the practical effect of the DTAs on the local tax.

e) Taking the Appendix 3 Table as the height of the evidence, it is also notable that it covers only pilots and does not deal with other officers or cabin crew.

f) It is easy to agree with Mr. Cullen's comment that the plaintiff's claims are "complex and manifold and are not dealt with in detail", and in some respects are "unclear". One aspect that became increasingly unclear at the hearing was the question of where income tax in respect of aircrew would be paid in the event that the court granted an interlocutory injunction. Although the plaintiff has reached various agreements with aircrew trade unions to move to local taxation, there was no expert evidence as to whether, in light of the DTAs giving Ireland the primary right to deduct and remit tax in respect of income earned in international airspace, there would be an automatic obligation to remit income tax to the Member State of residence pending trial, or quite how that other Member State's secondary right to tax the aircrew would be exercised. For example, there was simply no evidence to indicate what was the effect in German law of the private law agreements reached between the plaintiff and its German resident aircrew to move to payment of income tax locally from 1st April, 2019. Counsel for the plaintiffs did not seem to contend that the DTAs would have this automatic effect, and no evidence addressed the question of whether, in default of deduction and payment to the Irish Revenue Commissioners, the tax law of Italy, Germany or any other relevant Member State would have any automatic application. In fact, the position was so vague that in the Affidavit sworn by Mr. Hughes on 6th June, 2019 he disclosed that "the required participation of the German tax authorities …has yet to be completed", and as a result the plaintiff is paying an "additional sum to Ryanair's German pilots as a way of compensating them for the differential between German-based tax deductions and Irish-based tax deductions." This serves to emphasise the risk, in the absence of evidence to persuade the court otherwise, that were an interlocutory injunction to be granted the aircrew might not be legally obliged to pay tax locally.

Having said this counsel for the plaintiff was at pains to point out the plaintiff would, if an injunction was refused, continue to comply with its obligations to deduct and remit income tax under s.127B in respect of aircrew to whom it still applied.

g) There was evidence of a general nature that the plaintiff's aircrew will from time to time move from one European base to another to provide experienced personnel in the setting up, and operation, of a new base. However there was no evidence presented to show that particular aircrew had exercised their right of free movement/right to reside anywhere in the EU, either to obtain work with the plaintiff or to change their country of residence while working for the plaintiff, or, for instance, that having moved to reside in Ireland they now wished to return to reside in their Member State but were deterred from doing so because of the tax disadvantage that would result from s.127B, or that they had moved residence to Ireland to benefit from local taxation. Absent such evidence it is hard to see how the plaintiff can assert that Article 45 is engaged.

61. This evidential deficit probably reflects the fact that, thus far, the plaintiff has pursued this claim based on the financial discrimination of aircrew by way of a general approach and without reference to identified or real samples of aircrew resident in Ireland/UK/Netherlands, on the one hand, and aircrew resident elsewhere in the EU, on the other. In this sense the claims made at this stage are hypothetical, although there can be little doubt but that evidence to support such claims exists. Had the plaintiff joined in relevant aircrew as plaintiffs or used the actual detail of relevant aircrew, for example of local tax reliefs that aircrew cannot avail of because of s.127B, to present the case, perhaps there would have been accompanying affidavits from relevant taxation experts in each State to support the case made, and evidence of adverse effect on the freedom to move, reside and work anywhere within the Union.

62. The requirement that the claim based on financial discrimination of aircrew be supported by appropriate evidence is particularly important where the court is being asked effectively to suspend domestic legislation pending trial, albeit that in theory any order the court might make would not apply to the other two operators who might be affected. This is not to elevate the test for granting an interlocutory injunction to that of a 'serious question to be tried' such as might be required if a mandatory injunction was sought, but rather to emphasise the need for clear evidence where a tax provision would affect not just the plaintiff but also the plaintiff's aircrew (who are not parties to the proceedings), and other operators and their aircrew. Nor is this a case where the court is deciding disputed questions of fact that fall to be dealt with at the trial. The plaintiff has not adduced *prima facie* evidence sufficient to enable the court to grant an injunction based on infringement of the EU rights of its aircrew.

Legally, has the plaintiff established an arguable case in respect of the treatment of aircrew under s.127B?
63. As the evidential basis for interlocutory relief has not been laid, it is not strictly necessary to consider this aspect. However, in deference to Mr. Sorahan's evidence recounted above, and the written and oral submissions of counsel it is addressed briefly. The essence of the legal case made is that s.127B indirectly discriminates on grounds on nationality and breaches the rights to freely move, reside and work within the EU, contrary to Articles 18, 20, 21 and 45

TFEU, and the subsidiary EU and domestic legislation set out earlier in this judgment.

64. The principle of non-discrimination requires that persons in objectively comparable situations be treated equally. The plaintiff asks the court to compare the treatment under s.127B of its non-Irish/UK/Netherlands resident aircrew with aircrew resident in Ireland/UK/Netherlands – whether employed by the plaintiff or other operators. While accepting that non-resident taxpayers and resident taxpayers are not always objectively comparable, the plaintiff argues that it is otherwise where the non-resident taxpayer receives most of his or her income in the State of taxation such that the latter is the State in which personal and family circumstances of the non-resident ought to be taken into account.

65. While counsel for the plaintiff conceded that there was no EU case directly in point in respect of s.127B or any similar provision, he relied principally on the 'Schumacker doctrine'. In *Schumacker*, Case C-279/93, Mr. Schumacker, a married man with children, resident in and a national of Belgium, derived over 90% of his income in Germany but was subjected to a higher effective deduction of tax in Germany because he was not able to avail of married person 'splitting' in mitigation of tax or other family circumstances giving rise to reliefs and rebates for similar taxpayers residing in Germany. The CJEU answered the first question by finding that Article 48 of the Treaty (reserving matters of taxation to member States) must be interpreted as limiting the right to lay down conditions concerning liability to tax and would not allow a Member State to treat a national of another Member State employed in the territory of the first State in the exercise of his right of freedom of movement less favourably that one of its own nationals. The court then stated the following in answering questions 2 and 3:

"26 The Court has consistently held that the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (Case 153/73 Sotgiu v Deutsche Bundespost [1974] ECR 153, paragraph 11).

27 It is true that the rules at issue in the main proceedings apply irrespective of the nationality of the taxpayer concerned.

28 However, national rules of that kind, under which a distinction is drawn on the basis of residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within national territory, are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners.

29 In those circumstances, tax benefits granted only to residents of a Member State may constitute indirect discrimination by reason of nationality.

30 It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

31 In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.

32 Income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident' s personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode. Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation

and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence.

33 The situation of a resident is different in so far as the major part of his income is normally concentrated in the State of residence. Moreover, that State generally has available all the information needed to assess the taxpayer' s overall ability to pay, taking account of his personal and family circumstances.

34 Consequently, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation.

35 Accordingly, Article 48 of the Treaty does not in principle preclude the application of rules of a Member State under which a non-resident working as an employed person in that Member State is taxed more heavily on his income than a resident in the same employment.

36 The position is different, however, in a case such as this one where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.

37 There is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer' s personal and family circumstances.

38 In the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.

39 The further question arises whether there is any justification for such discrimination.

40 The view has been advanced, by those Member States which have submitted observations, that discriminatory treatment ° regarding the taking into account of personal and family circumstances and the availability of "splitting" ° was justified by the need for consistent application of tax regimes to non-residents. That justification, based on the need for cohesion of the tax system, was upheld by the Court in Case C-204/90 Bachmann v Belgium [1992] ECR I-249, paragraph 28). According to those Member States, there is a link between the taking into account of personal and family circumstances and the right to tax worldwide income. Since the taking into account of those circumstances is a matter for the Member State of residence, which is alone entitled to tax worldwide income, they contend that the State on whose territory the non-resident works does not have to take account of his personal and family circumstances since otherwise the personal and family circumstances of the non-resident would be taken into account twice and he would enjoy the corresponding tax benefits in both States."

Addressing the argument that it was justified by the need for consistent application of tax regimes to non-residents, the Court held –

"41 That argument cannot be upheld. In a situation such as that in the main proceedings, the State of residence cannot take account of the taxpayer' s personal and family circumstances because the tax payable there is insufficient to enable it to do so. Where that is the case, the Community principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits should be granted to him."

66. Counsel for the plaintiff argued that the second limb in para. 30, quoted above in italics, applies to the present case, and that the application of the same rule, viz.s.127B, to different situations, gives rise to indirect discrimination against non-Irish/UK/Netherlands resident aircrew, who for the most part are not Irish nationals, when compared to Irish aircrew resident in Ireland working for an airline effectively managed and controlled in Ireland.

67. Counsel also referred to the reliance by the Court (para.32) on the OECD MTC recognising that in principle taxation is a matter for the State of residence where personal and family circumstances will be taken into account – something that under the OECD MTC Counsel submits now applies to aircrew earning most of their income in international airspace.

68. *Schumacker* was followed by the CJEU in Asshcher Case C-107/94 where the Court said:

"41 In relation to direct taxes, the situations of residents and of non-residents in a given State are not generally comparable, since there are objective differences between them both from the point of view of the source of the income and from that of their ability to pay tax or the possibility of taking account of their personal and family circumstances (Wielockx, paragraph 18, citing Schumacker, paragraph 31 et seq.).

42 However, in the case of a tax advantage which is not available to a non-resident, a difference in treatment as between the two categories of taxpayer may constitute discrimination within the meaning of the Treaty where there is no objective difference between the situations of the two such as to justify different treatment in that regard (Schumacker, paragraphs 36, 37 and 38).

…

45 In the present case, the difference in treatment is constituted by the fact that tax on income in the first band is charged at a rate of 25% on non-residents who receive less than 90% of their worldwide income in the Netherlands, but at 13% on those residing and pursuing the same economic activity in the Netherlands even if they receive less than 90% of their worldwide income there.

46 According to the Netherlands Government, the higher rate of tax is intended to offset the fact that certain non-residents escape the progressive nature of the tax because their tax obligations are confined to income received in the Netherlands."

Counsel emphasised that in the present case the defendants have offered no explanation or justification for s.127B, or what is

asserted to be its discriminatory effect.

69. Counsel also opened the decision of the CJEU in the reference in *Kiekback*, Case C-9/14, in which a German national lived in Germany and in the relevant year (2005) worked the first three months in the Netherlands and then left to work in the U.S.A. Although the CJEU upheld the entitlement of Dutch law to deny the claimant deduction of dwelling expenses incurred during part of a year, the judgment is replete with references to and clearly follows the decision and principles enunciated in *Schumacker*. Thus the court states:

> "25. Such is the case particularly where a non-resident taxpayer receives no significant income in his Member State of residence and derives the major part of his taxable income from an activity pursued in the Member State of employment, so that the Member State of residence is not in a position to grant him the advantages which follow from the taking into account of his personal and family circumstances (see, *inter alia*, judgments in Schumacker, C-279/93, EU:C:1995:31, paragraph 36; Lakebrink and Peters-Lakebrink, C182/06, EU:C:2007:452, paragraph 30; and Renneberg, C527/06, EU:C:2008:566, paragraph 61).
>
> 26. In such a case, discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the State of residence nor in the State of employment.
>
> 27. In paragraph 34 of the judgment in Lakebrink and Peters-Lakebrink (C182/06, EU:C:2007:452), the Court stated that the scope of the case-law arising from the judgment in Schumacker extends to all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment (judgment in Renneberg, C527/06, EU:C:2008:566, paragraph 63).
>
> 28. Thus, in relation to such tax advantages connected with a particular taxpayer's ability to pay tax, the mere fact that a non-resident has received, in the State of employment, income in the same circumstances as a resident of that State does not suffice to make his situation objectively comparable to that of a resident. It is additionally necessary, in order to establish that such situations are objectively comparable, that, due to that non-resident's receiving the major part of his income in the Member State of employment, the Member State of residence is not in a position to grant him the advantages which follow from taking into account his aggregate income and his personal and family circumstances."

70. Counsel also cited the reference in *Ritter-Coulais* Case C-152/03 to emphasise that the CJEU views cases such as these through the prism of freedom of movement and occupation. There, the two appellants were a couple who resided in France (one was German, the other had dual German/French nationality) but both worked as teachers in Germany. The court decided that Article 48 of the Treaty, which is now Article 45 TFEU, must be interpreted as precluding national legislation that does not permit persons in receipt of income from employment in one Member State, and assessable to tax on their total income there, to have income losses relating to their own use of a private dwelling in another Member State taken into account for the purposes of determining the rate of taxation applicable to their income in the former state, whereas positive rental income relating to such a dwelling is taken into account. At para. 33 the court stated:

> "33. Moreover, it is settled case-law that all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State."

71. In reply submissions, Counsel for the plaintiff also relied on *de Groot*, Case C-385/00. Mr. de Groot was a Netherlands resident and national who in the first 3 months of 1994 had employment in various Member States, with about one third of his income earned in the Netherlands, and two thirds in Germany/France/UK. He then became unemployed. He was divorced in 1987 and paying maintenance. He paid foreign tax for 1994 in Germany, France and the UK without reference to his maintenance payments. In his Dutch tax return he sought allowance under Dutch income tax law, and DTAs with Germany and France, and for a proportion of his expenses, but under Dutch law the proportionality test was applied also to the (substantial) maintenance payments with the result that he lost some 60% of tax reduction. He claimed a tax disadvantage because account was not taken of his personal and family circumstances. He relied on Article 48 – which is now Article 45.

72. The CJEU cited *Schumacker* in affirming that direct taxation falls within the competence of the Member States, but that they must exercise such competence in accordance with Community Law and avoid any overt or covert discrimination. The Court stated:

> "76. Any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article 48 of the Treaty and Article 7 of Regulation No 1612/68 (Case C-419/92 Scholz [1994] ECR I-505, paragraph 9, and Terhoeve, cited above, paragraph 27).
>
> 77. Moreover, it is settled case-law that all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-370/90 Singh [1992] ECR I-4265, paragraph 16, Terhoeve , paragraph 37, Case C-190/98 Graf [2000] ECR I-493, paragraph 21, and Case C-302/98 Sehrer [2000] ECR I-4585, paragraph 32).
>
> 78. Provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (Case C-10/90 Masgio [1991] ECR I-1119, paragraphs 18 and 19, and Terhoeve , paragraph 39, and Sehrer , cited above, paragraph 33).
>
> 79. Thus, even if, according to their wording, the rules on freedom of movement for workers are intended, in particular, to secure the benefit of national treatment in the host State, they also preclude the State of origin from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State (see, to that effect, Terhoeve , paragraphs 27 to 29).
>
> 80. Consequently, the fact that Mr de Groot has Netherlands nationality cannot prevent him from relying on the rules relating to freedom of movement for workers as against the Member State of which he is a national, since he has

> exercised his right to freedom of movement and worked in another Member State (Terhoeve , paragraphs 27 to 29, and Sehrer , paragraph 29).
>
> Whether there is an obstacle to freedom of movement for workers
>
> 81. It must be noted first that in the main proceedings Mr de Groot, a Netherlands national, resides in the Netherlands and received part of his income for 1994 in that State. The other part of his salary for that year was paid by foreign companies for work done in three other Member States. It is therefore undisputed that he exercised his right to freedom of movement for workers.
>
> …
>
> 83. Secondly, it is clear that the parties to the main proceedings are agreed that, due to the application of the proportionality factor, a portion of the personal tax relief to which Mr de Groot was entitled did not give rise to an actual tax reduction in the Netherlands. He therefore suffered a real disadvantage as a result of the application of the proportionality factor since he derived from his maintenance payments and from the tax-free allowance a lesser tax advantage than he would have received had he received his entire income for 1994 in the Netherlands.
>
> 84. That disadvantage caused by the application by the Member State of residence of its rules on the avoidance of double taxation is liable to discourage a national of that State from leaving it in order to take up paid employment, within the meaning of the Treaty, in the territory of another Member State."

The court answered the first question :

> "1. Article [45] precludes rules such as those at issue in the main proceedings – irrespective of whether or not they are laid down in a convention for the avoidance of double taxation – whereby a taxpayer forfeits, in the calculation of the income tax payable by him in his State of residence, part of the tax-free amount of that income and of his personal tax advantages because, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account."

Thus the plaintiff argued on the basis of the principles enunciated in this caselaw, and by analogy, that s.127B discriminates against the aircrew in question by adding to their income tax burden and preventing them availing – or availing fully – of reliefs or allowances that would be available under the tax law of their State of residence, and thus infringing their Article 45 rights.

73. The defendants' response to these arguments centred on Article 5(2) and the contention that direct taxation, not being a competence conferred on the Union, falls within the competence of Member States, and that disparities between national tax systems are not prohibited by the Treaties but "…result from the exercise in parallel by two Member States of their fiscal sovereignty" – see *Kerckhaert-Morres* Case C-513.04, at para. 20. That case concerned taxation of dividends in Belgium which had already been taxed at source in France. In determining that the Belgian legislation was not obliged by EU law to allow a set-off in respect of the tax levied in another Member State at source, the CJEU noted that DTAs "..are designed to eliminate or *mitigate* the negative effects on the functioning of the internal market resulting from coexistence of national tax systems…" (para.21)(emphasis added). In para. 22 the Court observed:

> "22. Community law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community. Apart from …[company/subsidiary taxation, associated enterprises and taxation of savings interest]…no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level."

The Opinion of Advocate General Geelhoed in that case (delivered 6 April, 2006) also noted that any potential disadvantage to the Belgian residents in respect of dividends did not result from any breach of the free movement provisions of the Treaty which - "….do not as such oblige home states to relieve juridical double taxation resulting from the dislocation of tax base between two Member States." (para.30). At para. 31 he opines:

> "31. …. the possibility of juridical double taxation, in the absence of priority rules between relevant States, is an inevitable consequence of the generally accepted method under international tax law of dividing tax jurisdiction between States – that is, the distinction between home State taxation (worldwide taxation of residents) and source State taxation (territorial taxation of non-residents). Under Community law, the power to choose criteria of, and allocate, tax jurisdiction lies purely with Member States, as governed by international tax law. At present, there are no alternative criteria to be found in Community law, and no basis for laying down any such criteria."

Counsel argued that this approach permits s.127B, under which Ireland selects work in international airspace and the effective place of management/control of the employer, as the criteria to determine the place of taxation of non-resident aircrew.

74. Counsel for the defendants argued that s.127B is a tax of general application that does not discriminate between nationals of different Member States, and that aircrew taxed under s.127B have equal entitlement to the allowances and reliefs available under Irish tax law. It was argued that it is an inevitable but permissible consequence of Member States competence to determine jurisdictional rules and rates applicable to income tax that employees resident in certain Member States will be subject to different tax burdens. It was noted that the bilateral DTAs (which are promulgated by statutory instrument approved by Dáil Éireann and have the force of law under s.826 TCA 1997), prevent any double taxation, and are not themselves the basis for any charge to tax.

75. It was argued that the OECD MTC is only a guideline and has no impact on DTAs. While it must be accepted that this is so, as indicated earlier in this judgment the continuation of s.127B is arguably in conflict with current 2017 guidelines, has not kept pace with the change to payment of social insurance in the local State of residence, and is out of tune with employee desires and sentiment as expressed in the 2018 collective agreements.

76. In response to *Schumacker* Counsel relied on the case of D. Case C-376/03, where the CJEU declined to strike down a Netherlands' wealth tax that treated non-residents with less than 90% of their wealth in the Netherlands, such as Mr. D, a German resident, less favourably than residents in that they could not avail of an allowance based on personal/family circumstance. The justification for not following the *Schumacker* principles was explained by the Court:

"36. This allowance – which is intended to ensure that at least a part of the total net assets of the taxable person concerned is exempt from wealth tax – performs its function fully only if the imposition of the tax relates to all his wealth. Consequently, non-residents who are taxed in that other Member State on part only of their wealth do not in general have grounds for entitlement to the allowance.

37. As in the case of income tax, the view is to be taken as regards wealth tax that the situation of a non-resident is different from that of a resident in so far as not only the major part of the latter's income but also the major part of his wealth is normally concentrated in the State where he is resident. Consequently, that Member State is best placed to take account of the resident's overall ability to pay by granting him, where appropriate, the allowances prescribed by its legislation.

38. It follows that a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State and the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not discriminate against him.

…

41. The different treatment of residents and non-residents by the Member State in which the person concerned holds only 10% of his wealth and the lack of an allowance in that case can be explained by the fact that the person concerned holds only a minor part of his wealth in that State and that he is accordingly not in a situation comparable to that of residents. The circumstance that that person's State of residence has abolished wealth tax has no bearing on this factual situation. Since he holds the major part of his wealth in the State where he is resident, the Member State in which he holds only a proportion of his wealth is not required to grant him the benefits which it grants to its own residents."

77. Counsel also sought to distinguish the CJEU case law relied upon by the plaintiff, on factual differences, or on the basis that cases – such as *Asscher* - concerned the application of different tax rules to non-residents who are nationals of other Member States (rather than the application of the same rule to different situations), and other cases such as *de Groot* emphasised that the rights claimed could only be asserted if the free movement/residence rights under Article 45 were engaged (proof of which was absent). Counsel also disputed that the plaintiff could show discrimination in any objectively comparable situation, or any obstacle to free movement of the plaintiff's aircrew.

78. It is not for the court to attempt to weigh or resolve these competing arguments. However, if the plaintiff had adduced the evidence that I have found to be lacking then I am of the view that the plaintiff would have made out an arguable case under this heading.

The plaintiffs' claim based on freedom of establishment- the case under Article 49
79. The core of this claim is that s.127B in contrary to the principle of non-discrimination in Article 18 and is a restriction on the plaintiff's right to establishment (Article 49) or freedom to provide services (Article 56) within the EU. These latter two articles provide:]

"Article 49: Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 56: Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union."

80. It is appropriate to set out some of the plaintiff's evidence that its "effective place of management" is Ireland, notwithstanding that it operates across 84 bases in 20 Member States. At these bases the plaintiff leases office space and crew rooms, there are base captains and crew supervisors and safety staff, and aircrew attend pre-flight meetings. However, instructions and rosters are received from Dublin, and base flight reports and other relevant information is forwarded to the Dublin HQ. When the plaintiff opens a new base it needs to transfer experienced aircrew from existing bases to the new base so that experienced staff work alongside new aircrew. This business model and growth of the plaintiff's business therefore depends on free movement of crew across its bases. By comparison Aer Lingus, who operate across three bases in Ireland and Northern Ireland, do not face the same issues of free movement and the effect of s.127B.

81. In addition, the Ryanair Group holds Air Operator's Certificates (AOCs) for four local companies namely, Ryanair DAC in Ireland, Ryanair Sun S.A. in Poland (since April 2018), Laudamotion GmbH in Austria (August 2018), and Ryanair UK Limited in the UK (December, 2018). In his third Affidavit sworn on 1st March, 2019 Mr. Sorahan confirms that the Ryanair Group may add further AOCs in the future, and that there is no reason why it would be precluded from obtaining AOCs in all Member States in which it has bases. He adds –

"5…. However, as Ryanair would still be effectively managed and controlled from Ireland, aircrew transferred to such foreign AOCs would not be relieved from the impact of s.127B because the application of that section is dependent on the place of effective management of the airline, not the location of the AOC.

6. The policy behind Open Skies was to permit EU-owned airlines to have open access to all Member States, and reduce the requirement to have multiple AOCs and separate national regulation. Ryanair would prefer not to have to obtain multiple AOCs and break up its central management and control in Ireland, which has been one of the bases for its successful operations to date. The impact s.127B may, however, require this to happen."

82. In the Replying Affidavit of Áine Blackwell sworn on behalf of the defendants on 6th March, 2019, she agrees with the proposition that whether Ryanair Group holds an AOC is not determinative under s.127B, rather it is whether the employment is exercised on board an aircraft that is "operated by an enterprise that has its place of effective management in the State." However, she adds –

> "7. I say and believe that, if the local subsidiaries holding the AOCs at issue have their place of effective management in those States (respectively Poland, Austria and the UK), income earned by locally resident employees of those subsidiaries will not fall within the charge to Irish income tax by virtue of Section 127B. Similarly, if the Ryanair Group creates further local entities with their place of effective management outside the State, income earned by employees of such entities will not fall within the scope of Section 127B."

83. Ms. Blackwell also points out that the plaintiff's agreement with ANPAC, the Italian trade union, quoted earlier in this judgment, includes the following:

> "During phase 2 Italian tax will be applied to pilots' earnings (subject to any double taxation agreements) when section 127B ceases to have effect or when a new AOC structure which is managed and controlled from outside of Ireland comes into effect".

This wording does seem to contemplate the possibility of the establishment by the Ryanair Group of a corporate structure that manages and controls the flight operations the subject of an Italian AOC, and that aircrew will be employed by such company.

84. Ms. Blackwell then responds to Mr. Sorahan's suggestion that s.127B "may" require the plaintiff to break up its central management and control in Ireland:

> "9……I say and believe that, as is evident, s.127B forms just one aspect of a broader regulatory and taxation context to which Ryanair is subject in Ireland. I say and believe that any decision by Ryanair to move its management outside Ireland would, clearly, have implications going beyond s.127B, but also for the broader regulatory and taxation, including corporate taxation, context to which Ryanair is subject."

Presumably this is, in part at least, a reference to Ireland's current corporation tax rate that is perceived in some quarters as advantageous.

85. In arguing this case the plaintiff relies on the agreements that it has negotiated – and continues to negotiate - with trade unions/representative bodies, with the dates for transition to local payroll and payment of local tax commencing this year or otherwise as outlined earlier in this judgment, but the plaintiff does not rely solely on these collective agreements. It relies on the "changes in legal framework" discussed previously, including the following matters –

(a) the (alleged) discriminatory financial disadvantage to its Non-Irl/UK/NL resident aircrew;

(b) that it costs the plaintiff more than its non-Irish competitors to deliver the same net pay as a result of which "it can become commercially unviable to continue to compete and operate in particular jurisdictions (e.g. Timisoara in Romania), unless Ryanair endures the uncompetitive measure of inflating gross salaries of aircrew employed by Ryanair to offset the negative impact of s.127B (Statement of Claim para.15.c);

(c) that if the plaintiff were to deduct local taxes as well as income tax under s.127B the net pay would be so reduced that "Ryanair would be faced with industrial action and/or resignations" - para.29 of Mr. Sorahan's Affidavit, where he notes the significant industrial action in the summer of 2018 and the impact on the travelling public, employees and the plaintiff. He asserts that –

> "Ryanair would suffer severe and irreparable damage to its reputation generally but, in particular, to its reputation with aircrew and to its reputation amongst consumers."

(d) Mr. Sorahan adds –

> "30. Second, even if Ryanair bore the brunt of the double income tax payment by paying the relevant amounts to the Revenue Commissioners on behalf of all Non-IRL/UK aircrew, that would require it to pay approximately €5m per month to the Revenue Commissioners. If these monthly amount were payable by Ryanair on any kind of sustained basis, Ryanair's costs would increase by approximately €60m per annum and, unless it re-commenced making the deductions of its aircrew, it would result in these increases being passed to consumers by increasing the cost of its flights. Ryanair would be forced to choose between damaging its reputation with its aircrew by re-commencing deductions and risking industrial unrest, or damaging its reputation amongst consumers who rely on it to deliver as a low-cost carrier."

(e) The plaintiff asserts that damages would not be an adequate remedy, and that it would suffer irreparable loss if s.127B continues to apply to its aircrew. Mr. Sorahan avers that even if the plaintiff paid the income tax twice this would send a negative message to aircrew (whether the plaintiff's employees, aircrew choosing to move between bases, or would-be employees) and affect their choice of employment – rendering the plaintiff less desirable for employment, with ineligibility for local tax reliefs and the requirement to navigate tax processes in two jurisdictions. He asserts that aircrew would be likely to leave them if s.127B was applied to them in the face of the relevant agreements.

(f) Further Mr. Sorahan asserts the plaintiff would face issues with its 142 million customers, and reputational damage with the EU Commissioner and other EU politicians (correspondence with whom is exhibited) and Member State ministers, and there would be a negative impact on collective agreements to date and on-going negotiations in some 12 EU centres. He particularly cites the agreement with Vereinigung Cockpit (VC) Pilot Union I Germany, where the full legal text has yet to be finalised, but in respect of which he says to get this far been hard-fought over 13 months.

(g) He argues that paying income on salaries to two tax authorities would cause airfares to rise, damaging the plaintiff's image as a low-cost airline, and in his Replying Affidavit sworn on 1st February, 2019 he avers:

> "38……It could also lead to market distortion which negatively impacts on consumers. For example, if Ryanair's cost base increased significantly, it may be forced to remove capacity from the market, close bases and slow down its growth plans, leading to a situation where consumers may not have the choice to avail of Ryanair's low cost fares. As a result, other airlines would almost certainly choose to increase their fares, and by extension, their profits. None of these matters are capable of being compensated in damages."

(h) Mr. Sorahan further avers:

> "39. In addition, this period of double payment could lead to practical difficulties which would be very difficult to undo e.g. a member of aircrew could present their P60 obtained in Ireland as a result of Ryanair's payment in that jurisdiction to the German tax authorities (where Ryanair was also paying tax) and recoup the money paid by Ryanair to the German tax authorities. If this was done, it is impossible to see how this money would ever be recouped by Ryanair."

Mr. Sorahan also responded to the suggestion by the defendants that the plaintiff could, pending hearing, increase the salary to aircrew to make up the net pay differences caused by s.127B:

> "40. In addition, if Ryanair bore the brunt of s.127B by increasing gross salaries (all of which would be subject to Irish tax) in order to deliver a net pay position equivalent to that of what would be earned under local taxation, it would not be feasible to undo this increase in gross salaries, as no member of aircrew would ever agree to return to previous lower salary levels if s.127B was found to be incompatible with EU law."

(i) Mr. Sorahan on behalf of the plaintiff gives the usual undertaking as to damages, and no issue with this is taken by the defendants.

(j) Under the heading "Balance of Convenience" Mr. Sorahan refers to the limited application of s.127B given that it only applies to airlines having their effective place of management in Ireland who are permitted to carry passengers, cargo or mail on aircraft with 20 seats or more – only the plaintiff, Aer Lingus, Cityjet and Norwegian Airlines. He avers that it has no practical effect on Aer Lingus "as it does not operate from bases where s.127B bites", but that "Ryanair's hardship is Aer Lingus' gain on the 46 routes on which Ryanair and Aer Lingus currently compete directly (e.g. Dublin-Pisa) and Ryanair aircrew are subject to s.127B while Aer Lingus aircrew are not.

Discussion

86. While the discriminatory financial disadvantage to aircrew said to be caused by s.127B which is central to the Article 45 claim also features in the plaintiff's case under Articles 49 and 54, I do not regard it as an essential element (at least at this interlocutory stage) and it may be better characterised as part of the background to the claim. Accordingly, the evidential frailties highlighted in respect of the plaintiff's claim based on aircrew suffering financial disadvantage by virtue of the continued operation of s.127B do not apply to this interlocutory claim, or at least not with the same force.

87. I find that the essence of this claim in the context of the application for interlocutory relief can be summarised as follows:

> • because of changes in 2012 resulting in 'local' payment of social security, and more recently changes to the 'industrial landscape', deduction of income tax in Ireland under s.127B is no longer acceptable to non-IRL/UK/NL based aircrew whose collective demands and actions have made it a commercial imperative that the plaintiff come to agreements with aircrew/their unions to move to locally based contracts, payroll and tax deduction/remission;
>
> • that while the plaintiff could pay income tax twice - in Ireland and the Member State of residence – in the short-term, while the new agreements are being implemented, this would in due course cost about €5 million per month (circa €60 million per annum), and would not be commercially sustainable beyond the short-term;
>
> • that the continued operation of s.127B with such double payment of tax would conflict with the collective agreements and, potentially, cause reputational damage with aircrew, unions, passengers and Commission/politicians;
>
> • that pending determination of these proceedings, and/or in the medium or long term, if s.127B continues to bind the plaintiff it will become a commercial imperative that it move its "effective place of management" out of Ireland e.g. to one or more alternative management structures in Italy or Germany or elsewhere, to avoid deduction of aircrew tax/USC in this jurisdiction, and/or to avoid payment of income tax a second time in aircrew countries of residence, to comply with collective agreements, and to avoid damaging industrial action and potential reputational damage, all of which the plaintiff apprehends will be irreparable and in respect of which it asserts damages would not be an adequate remedy;
>
> • that this is – or would result in - a breach of the plaintiff's right to establish in Ireland (or a right not to dis-establish its Irish HQ) and its freedom to provide services, and is discriminatory and infringes Articles 18, 49 and 56. To paraphrase counsel on Day 3, "the plaintiff is being forced to set up in another Member State rather than its Member State of choice, because of s.127B, and this is the consequence of what happens if the imposition of s.127B taxation continues pending the final determination of these proceedings – the plaintiff has an obligation to mitigate its loss."

88. The detailed legal argument for engagement of Article 49 is set out in the plaintiff's written Submission at para.s 36-47,and a summary would not do it justice. The footnotes (but with numbering 1-30 in place of 84-114) are included:

> "36. First, Ryanair is within the direct contemplation [Article 54 TFEU] and personal, material and territorial scope of Article 49 and, because it has vertical direct effect [Case 2/74 Reyners], is entitled to rely on same against the Defendants [Bernard, The substantive law of the EU, p.206]. More particularly, Ryanair is a company [Under Article 54 TFEU, companies are entitled to rely on the rights of establishment under Article 49 TFEU] formed in accordance with the laws of a Member State of the European Union [Case C-47/12 Kronos, para 46] with an Irish "nationality", for the purposes of those articles [Case C-330/91 Ex p. Commerzbank, para 13]. In addition, Ryanair has a presence in other Member States via its AOCs and its bases, the latter becoming even more "local" with staff now paying social insurance locally and being moved local contracts of employment, tax and local payroll. Ryanair is engaged in an economic activity [Case C-281/06 Jundt] and operates from multiple bases within the context of Open Skies and is "established" within the

meaning of Regulation (EC) No. 847/2004 [Regulation EC No. 847/2004 provides: "Establishment on the territory of a Member State implies the effective and real exercise of air transport activity through stable arrangements; the legal form of such an establishment, whether a branch or a subsidiary with a legal personality, should not be the determining factor in this respect."]. Given that Article 49 applies to airline companies established in one Member State which supply air transport services between it and a third country [Case 476/98 Commission v Germany, para 145. See also, Regulation (EC) 847/2004, para 3], it applies to Ryanair. Regulation No. 847/2004 states at para 3 "the Community has also clarified the right of Community air carriers to benefit from the right of establishment within the Community, including the right to non-discriminatory market access.

37. In relation to territorial scope, for the reasons set out above in relation to workers, there is a sufficient "inter-state" element. In addition, Ryanair is entitled to challenge s.127B by relying upon Article 49 against its home state, there being plenty of cases where this has happened [Case C-200/98, AB and Y AB para 26.], including tax cases [See eg. De Groot].

Second, and contrary to well-established principles of EU law [Case C-55/94, Gebhard, para 37 (establishment); Arblade Case C-55/94, para 37 (services)], s127B is liable to hinder or render less attractive the exercise of Ryanair's rights by constituting an obstacle to effective secondary establishment in other Member States [Schutze, European Union Law, pp.625 to 634, Case C-212/97 Centros,, para 22; Case C-167/01 Inspire Art para 101; Case C-422/02 Caixa Bank]. Given that it costs or would cost Ryanair far more to staff a plane flying from its EU (non-Irish or UK) bases than it costs or would cost airlines whose staff do not pay tax under s.127B, it is liable to discourage secondary establishment. By extension, s.127B is liable to favour local companies [See eg Case 3/88 Commission v Italy where it was held that an Italian law which restricted access to state contracts to companies which were largely in state ownership, "essentially favoured Italian companies" and breached Article 49 TFEU.] and prevent Ryanair from operating in its foreign bases on the same terms as local airlines. No matter where it is operating from, because it is managed in Ireland, Ryanair and its aircrew remain locked in the disadvantageous orbit of s.127B.

39. Section 127B is particularly vulnerable to caselaw which seeks to ensure that a company's rights of secondary establishment are not rendered ineffective by measures which discriminate against its employees. For example, in Segers [Case 79/85], the CJEU ruled that Articles 49 and 54 prohibited a Member State from excluding the director of a company from a national sickness insurance scheme on the ground that the company had its registered office in another Member State, even though it did not conduct business there. The CJEU held that this type of discrimination against employees "indirectly restricts the freedom of companies of another Member State to establish themselves" [Para 21] via secondary establishment, in the host State. Therefore, the disadvantages experienced by Ryanair aircrew under s.127B [SOC, para 22(a), also (b)-(n)] (including the inability to access local allowances, etc.) breach Ryanair's rights of establishment [Reyners where a Belgium measure preventing the pursuit of an occupation by a Dutch person in another Member State was contrary to Article 49 TFEU].

40. Section 127B is also problematic in light of settled EU caselaw that restrictions on access to markets are caught by Article 49 [Case 201/15 AGET Iraklis, paras 49-51]. For example, in AGET Iraklis [Case C-201/15] it was held that Greek law requiring prior approval for collective redundancies and a ban on such redundancies in the absence of such approval was "such as to render access to the Greek market less attractive" and therefore, liable to constitute "a serious obstacle to the exercise of freedom of establishment in Greece" [At paras 53-57] . Similarly, Ryanair complains that s.127B restricts its ability to set up and remain in markets where s.127B bites [SOC, para 22 (g), (h)].

41. Section 127B is also vulnerable to challenge in light of case law evidencing a move away by the CJEU from the strictures of rules on primary and secondary establishment. Recently, the CJEU has focused less on determining whether there is an interference with primary or secondary establishment and more on whether there is a general interference with the right of establishment. For example, in SVEIC [Case 411/03. See also Case C-438/05 Viking Line, paras 72 to 74] , the CJEU did not concern itself with whether a German measure restricting inbound mergers could be viewed as a restriction on secondary establishment and, before finding that the law could deter the exercise of establishment [Para 22] , simply noted that :-

"the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively under the same conditions as national operators." [Para 18]

42. Therefore, even if Ryanair did not have bases in other Member States upon which it could rely to plead an infringement of secondary establishment, the foregoing general principles would come to its aid.

43. Third, s.127B directly or indirectly discriminates against certain Irish airlines, including Ryanair, in manner contrary to Article 49. For example, s.127B causes a marked difference in treatment between Irish-managed airlines with a multi-base business model such as Ryanair and Irish-managed airlines with a minimal base model, such as Aer Lingus, which airlines are obviously objectively comparable. Although s.127B is expressed to apply to all Irish-managed airlines, it indirectly discriminates against multi-base airlines who must take the burdens of s.127B with them to any new base they open and, once there, operate within the strictures of s.127B; airlines with a minimal base model are entirely unaffected by s.127B when they expand or operate their businesses.

44. In addition, s.127B causes a difference in treatment between non-Irish managed airlines and Irish-managed airlines. Again, these airlines are objectively comparable; given that s.127B prevents Irish-managed airlines from accessing local markets or operating on the term similar to its "local" competitors, the former discriminated against in accessing or operating in those markets [SOC Para 22 (a)-(n)].

45. Therefore, given that it is also discriminatory, s.127B is vulnerable to recent developments in tax cases according to which the CJEU is more likely to find a breach of Article 49 where a measure is truly discriminatory, than it is where a measure merely restricts Article 49 [Case C-374/04 Thin Cap Group Litigation, per AG Geelhoed, para 48. Also Barnard, pp 399 to 409].

46. Finally, insofar as it is necessary to consider Article 56 in this context, given that it is usually considered subordinate to Article 49 [Gebhard, para 22, also case C-452/04 Fidium Finanz], it should be noted that, despite Article 58 ["…freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport"], under recent case law there is scope to argue that the prohibition on measures which restrict freedom to provide services which derive from Article 56 are, in substance, applicable to air transport services via the prohibition of discrimination in Article

> 18 TFEU [Case C-628/11 International Jet Management, para 55-62]. In such a case, the basic principles set out in relation to establishment would be equally applicable here. In addition, jurisprudence specific to Article 56 would be relevant, such as Alpine Investments [Case C-384/93], where a Dutch commodities future company established in the Netherlands was entitled to rely on Article 56 to challenge a Dutch ban preventing it from cold-calling clients, even in Member States where the practice was not prohibited and the measure was contrary to Article 56 because it "directly affect[ed] access to market in services in the other Member States and is thus capable of hindering intra-Community trade in services."
>
> 47. Further, or in the alternative, the restrictions on Ryanair's rights of establishment or on its provision of cross-border air transport services set out above are contrary to the general principles of non-discrimination on grounds of nationality under Article 18 TFEU."

89. In oral argument counsel for the plaintiff emphasised passages from the judgment of the CJEU in *AGET Iraklis* Case C-201/15, in which the court held the Greek legislation that required prior approval for collective redundancies by a Greek cement producing company, which was a subsidiary of a French multinational group, infringed the freedom to establish.:

> "55. Such national legislation constitutes a significant interference in certain freedoms which economic operators generally enjoy (see, by analogy, judgment of 28 April 2009, Commission v Italy , C518/06, EU:C:2009:270, paragraph 66). That is true of the freedom of economic operators to enter into contracts with workers in order to be able to carry out their activities or the freedom, for their own reasons, to bring the activity of their establishment to an end, and their freedom to decide whether and when they should formulate plans for collective redundancies on the basis, in particular, of factors such as a cessation or reduction of the activity of the undertaking or a decline in demand for the product which they manufacture, or as a result of new working arrangements within an undertaking unconnected with its level of activity...
>
> 56. National legislation such as that at issue in the main proceedings is thus such as to render access to the Greek market less attractive and, following access to that market, to reduce considerably, or even eliminate, the ability of economic operators from other Member States who have chosen to set up in a new market to adjust subsequently their activity in that market or to give it up, by parting, to that end, with the workers previously taken on.
>
> 57. Accordingly, it must be held that such national legislation is liable to constitute a serious obstacle to the exercise of freedom of establishment in Greece."

Counsel argued that by analogy the effect of s.127B raises costs and restricts the plaintiff's ability to set up in markets where it is effective.

90. Counsel also argued that such restrictions can only be justified by objective considerations which are proportionate, citing *O'Flynn Case* C-237/94, where the complainant, an Irish national resident in the UK as a former migrant worker, was refused - under a condition of territoriality under UK law - a funeral benefit in respect of his son who died in the UK but was being buried in Ireland. There the CJEU stated:

> "19. It is otherwise only if those provisions are justified by objective considerations independent of nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law….
>
> 20….
>
> 21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective."

Counsel argued that in the present case the defendants have not put forward any justification for s.127B, other, possibly, than the fact that it brings in tax in the order of €60 million per annum. This, counsel argued, is not a valid justification citing Case C-264/96 *ICI* Case C0307/97. He argued that the plaintiff only has to demonstrate a potential adverse effect on the right of establishment to succeed. This potential lies in the fact that the continuation of s.127B in the context of the collective agreements creates a real risk of industrial action by aircrew which will create the economic imperative that the plaintiff will have to move its effective place of management in order to avoid the application of s.127B (see discussion between counsel and the court, Transcript Day 3 pp.52-54).

91. No *locus standi* point is raised in respect of the Article 49 claim. However counsel for the defendant did argue that the plaintiff's complaint as a company established and having its effective place of management in Ireland does not come within the scope of Article 49, but is a matter for domestic law. However, I am satisfied that it is arguable that there is a sufficient interstate element to the claim in that the plaintiff is a pan-European airline, and the case is made that if s.127B remains in place the plaintiff will be commercially obliged, against its wishes, to establish its effective place of management in another Member State. As counsel for the plaintiff put it, it is arguable that a legislative provision that forces it to "de-establish" in Ireland and establish elsewhere in the EU infringes the Article 49 rights.

92. The defendants raise other arguments, such as that the case cannot be maintained because the circumstances in which the plaintiff finds itself, namely, bound by collective agreements freely negotiated or under negotiation with aircrew, are of its own making; these circumstances are said to be "a natural and inevitable risk of operating, as the plaintiff does, in a cross-border commercial environment", and due to "factors entirely outside Ireland's control" (defendant's written Submissions, para. 41 and 42).

93. While these arguments are noted they are not such that the court could with confidence say that the plaintiff's Article 49 case could never be made out. The plaintiff's affidavits and submissions have raised complex questions of fact and law. In my view the plaintiff has reached the threshold of showing an arguable case that s.127B infringes its right of establishment under Article 49. Whether such infringement is to the primary right of establishment, or a secondary right, is an aspect which may be unclear at present, but is not one on which the court needs to express any view. Also while infringement of Article 56 is included, perhaps to buttress the claim under Article 49, it seems to me at this stage that the case made is more about the right of establishment rather that the freedom to provide services.

94. The plaintiff has also pleaded that s.127B constitutes State Aid which "distorts or threatens to distort competition" contrary to Article 107 of the TFEU, in that the effect of the provision is to give indirect advantage to Aer Lingus. In the context of the

interlocutory injunction this was not argued fully by the plaintiff (or the defendant). I do not consider it necessary to address this aspect of the claim, particularly in light of my view that the plaintiff has shown an arguable case under Article 49. However, it may be said that, even if a State aid case is arguable, it suffers from the possibility that it might have been arguable as long ago as 2012 (when the new regime for social security payment locally came into being) and therefore, so far as interlocutory relief is concerned, might be met by a delay point.

'Where does the greatest risk of injustice lie?' and the adequacy of damages
95. The extract from the judgment of Clarke J. in *Okunade* in which he sets out the factors to which the court should give appropriate weight in addressing the risk of injustice in the context of a challenge to a legislative measure have been set out earlier.

96. The first factor is "the orderly implementation of measures which are *prima facie* valid". S.127B is *prima facie* valid as a tax provision duly promulgated by act of the Oireachtas. It has operated since 2011, and continues to govern the deduction and remittal of income tax not just by the plaintiff in respect of its aircrew, but also the aircrew of two other airlines having their effective place of management in Ireland and operating in international airspace. As the defendants correctly point out, it is a provision of general application. As Clarke J. observed in *Okunade* –

> "92. An order or measure which is at least *prima facie* valid (even if arguable grounds are put forward for suggesting invalidity) should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience."

Regardless of any tentative view that this judgment may suggest in relation to whether s.127B remains in keeping with the guideline 'norms' of the OECD MTC as modified in 2017, the respect due to this extant provision that has governed the levying and collection of tax since 2011 weighs heavily against granting interlocutory relief.

Moreover, it is open to doubt whether, at this interlocutory stage, the court has the power to make an order so wide-ranging that it would have the effect of suspending the operation of s.127B generally – akin to an order striking down a provision as unconstitutional – such that it would apply to the aircrew of those other airlines governed by s.127B in circumstances where they are not parties to these proceedings nor represented by the plaintiff. It would of course be open to other airlines to bring their own proceedings if they so desired.

97. The second factor is "any public interest in the orderly operation of the particular scheme in which the measure under challenge was made", and may conveniently be addressed with the third factor which requires the court to take into account "any additional factors arising on the facts of an individual case which would heighten the risk to the public interest….". The "scheme" could be read as a reference to the system of taxation generally, or more particularly the tax regime as it applies to taxation of aircrew. An interlocutory injunction would result immediately in a situation where the aircrew in question are not subject to income tax deduction in Ireland, and, as we have seen in the case of German pilots, at least some resulting uncertainty as to whether the income tax falls to be deducted and paid in the state in which they reside. If the public interest is taken to include the public interest across the EU – and Ireland shares Membership and its citizens share EU citizenship - then the orderly taxation of non-IRL/UK/NL aircrew in other Member States, and the uncertainty in taxation of such aircrew locally that would result from an interlocutory injunction is another consideration. Whilst the aircrew affected might be said to represent a public interest that wants s.127B disapplied, it is more realistic to describe them as a private group aligned with the plaintiff's sectoral interest. Further, for its duration an injunction would in due course deprive the defendants of approximately €5 million each month, which is a significant sum, although not one that might be regarded as significant in the context of overall State revenue, borrowing and expenditure. While the loss of revenue to the State is not a factor put forward by the defendants to justify s.127B, it is a factor that can be considered as a consequence that would follow if interlocutory relief were granted. An injunction would also give rise to uncertainty over the position of aircrew of the other airlines to which the section currently applies, with the possibility that further proceedings might be initiated.

98. Factor (iv) requires the court to "give due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where the measure may be found to be unlawful." These consequences are set out in Mr. Sorahan's affidavits and include his averments, in support of the plaintiffs' contention that damages would not be an adequate remedy, and have been summarised earlier in this judgment. It is convenient therefore to address factor (iv) and the adequacy of damages simultaneously.

99. As to possible financial loss, if the plaintiff continues to pay the s.127B income tax for aircrew whilst also paying income tax locally – or, as in the case of the German pilots, it pays "top-up" compensation to aircrew - it will suffer financial loss, which could be in the order of €5 per month (€60 million per annum). This is likely to become substantial particularly if, as seems likely, the ultimate determination of the proceedings is delayed by a preliminary reference to the CJEU.

100. Alternatively, if the plaintiff relocates its place of effective management to another Member State in order to avoid s.127B, it will suffer the costs associated with such re-location. While these are not quantified it may be surmised that they will be substantial given the size of the plaintiff's operations.

101. It must also be accepted that re-location of the effective place of management would be a very significant decision with strategic implications, and not one that would be taken lightly or that the plaintiff wishes to take – and that these proceedings and this interlocutory application are brought precisely to avoid the plaintiff having to take such a major decision. In *Allied Irish Banks plc v. Diamond* [2012] 3. I.R. 549, Clarke J. adverted at para.96 to the situation where, if an interlocutory injunction was not granted, there might be irreversible wrongful interference with -

> "…AIB's property rights in its business, goodwill and as to confidential information concerning its customers. The courts have always been anxious to guard property rights in the context of interlocutory injunctions…".

Counsel urged by analogy that the plaintiff's freedom to maintain its established HQ in Ireland is in the nature of a property right, the loss of which could not be measured in monetary terms and which could not be compensated or easily reversed. However there are elements to re-locating that could be compensated, and reversal of such a move would not necessarily be impossible. It must also be recognised that such a move would involve an intangible loss of connection between the plaintiff and its country of origin and citizens of this country, and I attempted to express this during the hearing when saying words to the effect that 'nobody wants to see Ryanair leave Ireland'.

102. There is of course no issue raised as to the ability of the State party defendants to discharge such damages as might ultimately be suffered and awarded to the plaintiff.

103. However, Mr. Sorahan, for reasons summarised above, asserts that over and above the obvious financial loss, the plaintiff would suffer damage, particularly reputational and knock-on damage e.g. from further industrial unrest that would not be capable of quantification or remediation. An aspect of this would be loss of consumer confidence. It is also suggested that if the plaintiff re-established its effective place of management elsewhere, this would not be undone, and so the loss would be irremediable.

104. On balance, I am not persuaded by these arguments. The plaintiff is a commercial undertaking, and its claim – if no interlocutory injunction is granted – if successful is fundamentally monetary in nature, whatever it decides to do. The plaintiff might well suffer financial loss in the period up to determination of the proceedings, but I am satisfied that it is a very large enterprise with substantial resources. If it takes the decision to relocate its place of effective management, it can probably reduce the suggested losses. The experience with German pilots already indicates that the plaintiff may be able to negotiate a degree of flexibility that would enable it to minimise its losses in the short term.

105. I am also of the view that there is an element of speculation in the claim around loss of reputation, particularly in respect of the loss of consumer confidence. Indeed it is not clear from Mr. Sorahan's evidence quite how such loss might arise, given that the plaintiff would continue to comply with its tax obligations under 127B. Even if loss of employee or consumer confidence were to become a significant source of loss and damage it is surely something that the plaintiff could demonstrate through appropriate factual and accounting or other expert evidence, and the courts are well used to undertaking difficult or complex investigation of consequential loss in claims for loss of revenue/profit. It is also hard to understand how the refusal of an interlocutory injunction would have any significant consequential effect for any plans that the plaintiff may have for further expansion, and if it did, why resulting theoretical loss of opportunity or profit could not be quantified.

106. In coming to the conclusion that damages would be an adequate remedy, I am mindful of what Clarke J. said on the subject in *Okunade* and in *Dowling & Ors v Minister for Finance* [2013] 4 I.R. 576. In *Okunade* at para. 87 of his judgment he said:

> "…it seems to me that the true question is as to whether any relevant harm can be compensated in damages. The reason for this stems from the underlying principle. If a plaintiff can adequately be compensated in damages then no real injustice is risked by the plaintiff being required to wait until the trial of the action before obtaining any court intervention. Even if whatever wrong is alleged continues until the trial of the action (and thus the wrong is greater by lasting longer) nonetheless if an award of damages amounts to adequate compensation (and provided that the defendant is likely to be a mark) no real injustice will have been suffered for the plaintiff will recover additional damages to reflect the fact that the wrong was greater by lasting longer. If, and to the extent that, it can be said that exposing the plaintiff to the wrong for a longer period of time than might otherwise be the case is unjust then that will only represent a significant argument if the additional damages which would follow would be inadequate to compensate for the additional period of time for which the wrong was suffered."

In *Dowling* the plaintiffs sought to restrain the sale of Irish Life pending resolution of their claim that the sale would breach EU law. At para. 92 Clarke J, speaking for the court, said:

> "92. If, therefore, in accordance with the Okunade test, damages are truly an adequate remedy then it is hard to see how any irreparable damage, in the sense in which that term is used in Zuckerfabrik, can arise. As the ECJ itself pointed out, at para. 29 of the judgment in Zuckerfabrik, it is a well established principle of European Union law that purely financial damage cannot be regarded in principle as irreparable. Whatever Union law rights are asserted can, in such cases, if they be established when the Court has had a full opportunity to examine the merits of the case, be fully compensated in damages in a way which will vindicate the person whose rights have been infringed. It is, perhaps, hardly surprising that there is such a similarity between the test identified by the ECJ and the test which applies in many national systems such as the Irish one. The problem is the same in all cases. It is that which this Court analysed in Okunade. There is an inevitable risk of injustice in either granting or refusing interim measures. If the matters are purely financial then, at least in most cases, there will be no risk of serious injustice for a party who wins can be properly compensated in damages."

107. The principal loss that the plaintiff apprehends if its effective place of management remains in Ireland is purely financial and easy to quantify as amounting to the additional income tax and/or other compensation paid in respect of the aircrew. If it is forced to move its effective place of management, it is the costs attendant on re-location/re-establishment. While reputational damage is not "purely financial damage", I am of the view that the plaintiff has the resources in preparing and presenting such a claim to translate it into financial terms sufficient to enable a court to quantify it against the backdrop of its existing, future and planned commercial operations. I am therefore not persuaded that there is any real risk of injustice to the plaintiff that could not be compensated in damages.

108. The plaintiff also asserted that the Revenue Commissioners, who were requested in pre-action correspondence to grant a "PAYE Exclusion Order" to the plaintiff in respect of income tax deduction under s.127B for its relevant non-resident aircrew, but declined to grant such an order, had the statutory power to grant the plaintiff relief under the Tax and Duty Manual (TDM) or under s.849 of the TCA 1997. Firstly I am satisfied that TDM Part 42-04-01, which allows the making of PAYE Exclusion Orders, does not apply to non-resident employees to whom s.127B applies. TDM Part 05-05-29, reviewed May 2018, governs 'Tax Treatment of Flight Crew Members' and makes it expressly clear at 4.2 that "Section 127B TCA 1997 applies notwithstanding that the individual may not perform any duties of employment in the State and may not be tax resident here." Secondly, while there was limited argument in relation to whether section 849 empowers the Revenue Commissioners to grant relief in a case such as the present, I am inclined to the view that it is doubtful that it does. Thirdly, even if it does apply, I am satisfied that it was, and is, reasonable for the Revenue Commissioners to decline to give any relief on the basis that the s.127B tax obligation applies not just to the plaintiff's aircrew but also those of other operators, and to grant relief to some, and not others, would be discriminatory and undermine s.127B which on its face applies to all such aircrew. Accordingly this consideration does not assist the plaintiff in an exercise of weighing the balance of convenience.

109. I must conclude for these reasons that the least risk of injustice would lie with refusing the interlocutory injunction sought by the plaintiff, that damages are an adequate remedy, and that the balance of convenience favours retention of the status quo.

Preliminary reference

110. The plaintiff invites the court to make a reference to the CJEU for a preliminary ruling under Article 267 TFEU:

> " Article 267
>
> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

111. Mr. Sorahan exhibits a first 'draft Agreed Facts' with a view to agreeing facts for a reference. This was furnished to the defendants' solicitors but has gone no further. The defendants have not agreed the facts – and would disagree with much of the draft furnished – and argue that it is premature for the court to make a reference. Counsel for the plaintiff argued that sufficient facts can be presented to express in abstract terms the legal questions on which rulings are required. He relied on the decision in *Corsica Ferries* Case C-266/96, where the court said –

"25 In this case the description of the factual and legal context does indeed appear inadequate in some respects, thus preventing the Court from replying to certain of the questions raised with the precision desired. Nevertheless, the information in the file enables the Court to give a ruling although it will leave open certain aspects of the questions raised.

…

27 In that regard, it must be borne in mind that, as the Court has consistently held, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action... That is not, however, the case here.

28 The reference for a preliminary ruling is, accordingly, admissible."

112. In more recent times the CJEU has issued *Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2018/C 257/01). I regard this contemporary official document as the best guide to the correct approach of this court as to when and in what circumstances it should make a reference, and the following paragraphs give assistance in the present case:

"3. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised on the initiative of the national courts……[I]t is for the national court or tribunal before which a dispute has been brought – and for that court or tribunal alone – to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

5. The courts and tribunals of the Member States may refer a question to the Court on the interpretation or validity of EU law where they consider that a decision of the Court on the question is necessary to enable them to give judgment (see second paragraph of Article 267 TFEU). A reference for a preliminary ruling may, *inter alia*, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.

The subject matter and scope of the request for a preliminary ruling

8. A request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings.

9.The Court can give a preliminary ruling only if EU law applies to the case in the main proceedings. It is essential, in that respect, that the referring court or tribunal set out all the relevant matters of fact and of law that have prompted it to consider that any provision of EU law may be applicable in the case.

The appropriate stage at which to make a reference for a preliminary ruling

12. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of EU law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

13. Since, however, that request will serve as the basis of the proceedings before the Court and the Court must therefore have available to it all the information that will enable it both to assess whether it has jurisdiction to give a reply to the questions raised and, if so, to give a useful reply to those questions, it is necessary that a decision to make a reference for a preliminary ruling be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises. In the interests of the proper administration of justice, it may also be desirable for the

reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling

15. The content of any request for a preliminary ruling is prescribed in Article 94 of the Rules of Procedure of the Court and is summarised in the annex hereto. In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling must contain:

- a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred are based,

- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law, and

-a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

In the absence of one or more of the above, the Court may have to decline jurisdiction to give a preliminary ruling on the questions referred or dismiss the request for a preliminary ruling as inadmissible.

17. The referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure."

113. While it is clear that this court can make a reference at this early stage of the proceedings, and that it can do so notwithstanding that all factual disputes have not been decided, I am satisfied that a reference in this case at this point would be wholly premature for a number of reasons.

114. Before giving these reasons it is important to state that from consideration of this case at the interlocutory hearing in my view – and of course a trial judge might disagree – it is one that is likely to raise several questions on the interpretation of EU law that are "new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts" (Recommendation para.5) in respect of which it will be necessary to seek a preliminary ruling to enable the Irish High Court to give its judgment.

115. Moving to my reasons for declining to make a reference at this stage, firstly I have found that in relation to the claim based on financial disadvantage/discrimination of non-IRL/UK/NL resident aircrew there are evidential deficits such that the plaintiff has failed to show an arguable case, and it follows that there is not sufficient detail for this court to make appropriate findings of fact, or to make or frame a reference. Were the court to attempt to do so at this point it would be seeking the opinion of the CJEU based on hypothetical circumstance and without reference to relevant tax provisions/law of other Member States, and that is impermissible (see Case 244/80 *Foglia v Novell II* and Case C-406/06 *Winner Wetten*). This alone makes it unwise to attempt to make any reference in this case at this stage as it would not be a good use of court time – this court or the CJEU – to make a series of references at different times on different issues/arguments.

116. Secondly, as Clarke J. indicated in *Dowling* (para.150) the court would be slow to exercise its discretion to refer a case in interlocutory proceedings which could be overtaken by events. In particular, the stance of other Member States such as Germany who have a secondary right to tax the aircrew under the relevant DTAs is not known and may be evolving. I am of the view that both parties should be heard at substantive hearing at least to the extent necessary to establish relevant facts, and establish in broad terms the competing arguments based on those facts.

117. I would add that in my view it should be possible to agree on most of the factual material, particularly as discovery orders have been made and that process in under way. It should then be possible to identify any areas of relevant factual disagreement with a view to a hearing that will yield any findings needed to make a reference. I would hope that the parties would approach this process in as collaborative a manner as possible; while obviously our system is adversarial, and while relevant facts must be established, the core of this case is competing legal argument over whether s.127B infringes EU law, and that should be pursued in the first instance before the CJEU by way of preliminary reference.

118. Thirdly, I would be concerned that without this further process making a premature reference could result in inadmissibility, or loosely framed questions that might not achieve useful answers. This process may also serve to filter out any aspects of the plaintiff's EU law infringement claims that, when more closely considered, may not be arguable.

119. I therefore decline to make any reference under Article 267 at this stage in the proceedings. and I will make an order dismissing the plaintiff's application for the interlocutory orders set out in paragraphs 4-10 inclusive of the Notice of Motion herein dated 28th November, 2018.

120. As a final note, during the hearing I expressed some surprise that, as a result of the collective agreements reached by the plaintiff with aircrew in recent times, there has been no engagement by other Member States with Ireland in relation to the continued operation of s.127B. I expressed the view that, while of course the parties have the right to litigate the validity of the section in this court and in the CJEU, it is a dispute that should be addressed collaboratively by the appropriate parties - whom I suggested were the plaintiff, defendants, relevant aircrew unions and the other Member States with whom the State has DTAs – by sitting around the table and negotiating. I again express the hope that that course will be pursued.