**THE COURT OF APPEAL**

**Neutral Citation Number [2021] IECA 103**
**Court of Appeal Record No. 2019/109**

**Costello J.**
**Noonan J.**
**Collins J.**

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

**- AND -**

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

**BETWEEN/**

**FLORENCE CAREY**

**APPLICANT/RESPONDENT**

**- AND -**

**AIRBNB IRELAND UNLIMITED COMPANY**

**RESPONDENT/APPELLANT**

**JUDGMENT of Ms. Justice Costello delivered on the 8th day of April 2021**

1. This is an appeal against the judgment of the High Court dated 16 January 2019, and the addendum thereto of 1 February 2019 ([2019] IEHC 90), and the order perfected on 21 February 2019 whereby the respondent/appellant, Airbnb Ireland Unlimited Company, was ordered to furnish to the applicant/respondent certain information set out in the Schedule to the Order pursuant to s. 902A of the Taxes Consolidation Act 1997 (as amended) ("TCA 1997") and Regulations S.I. 549 of 2012 ("the 2012 Regulations"). In this judgment, I shall refer to the appellant as "the company" and the respondent to the appeal as the "the applicant".

**Background**

***The Company***

2. The company operates a website which enables individuals to make one or more rooms in their house or apartment (or the house or apartment in its entirety) available for rent by individuals on a short term basis. The website is available in 191 countries and in all 28 EU member states. A person who wishes to make the room/apartment/house available for short term rent can create a listing concerning that accommodation which prospective customers can then browse and make a booking directly with that individual via the company's booking mechanism if desired.

3. The individuals who make their homes available to others are referred to as "hosts" and those who book them are referred to as "guests", and the rooms/properties they place on the site for booking are referred to as "listings". The company's European corporate headquarters are located in Ireland, and it controls the registration information submitted by individuals who place their listings for rent on the platform in respect of, inter alia, the member states of the European Union, including Austria. Individuals who wish to use the site, whether as prospective hosts or prospective guests are required to register with the company and are referred to as "users". Users may register using an email address or using either a Google or a Facebook account. All users are required to provide their full name, email address and date of birth. A host who wishes to place a listing on the site is required to give the address of the property in question, a profile photo and payment information. The exact address of the premises is withheld from other users until a guest makes a booking. Prospective guests searching for a listing will find a map which is deliberately inexact. The exact location is not provided to a prospective guest until the guest makes a booking.

4. It is an express term of the agreement between the hosts and the company that they will provide "*accurate, current and complete information during the registration process and update such information to keep it accurate, current and complete*". However, the company does not take any steps independently to verify the accuracy of the information provided.

***The role of the applicant***

5. The applicant is a Principal Officer in the International Tax Division of the Revenue Commissioners. Her responsibilities include ensuring compliance with Ireland's obligations as to the exchange of information with other member states of the EU, including under Council Directive 2011/16/EU on administrative cooperation in the field of taxation ("the Directive"). The Directive repealed the previous Directive 77/799/EEC.

6. The Directive provides a framework for administrative cooperation between member states of the EU and, in particular, in the field of exchange of information for tax purposes. The underlying principle is that where a member state ("the requesting authority") requests information from another member state ("the requested authority") which is foreseeably relevant to the administration and enforcement of taxes, the requested authority must provide that information and must make necessary enquiries and take such actions as are required to provide such information. If the information is requested by a requesting authority in accordance with the terms of the Directive, the requested authority is obliged to use its measures aimed at gathering information to obtain the requested information. The terms of the Directive will be considered further below.

7. Ireland transposed the Directive into domestic law by the 2012 Regulations which came into effect on 1 January 2013. Regulation 6(1) provides that the Revenue Commissioners as requested authority "*shal*l" at the request of the requesting authority disclose any information which is permitted to be disclosed by the Directive. Regulation 14

provides that, in the context of complying with the provisions for the exchange of information, an application can be made to court to compel the provision of information to the Revenue Commissioners as requested authority pursuant to s. 902A of the TCA 1997.

8. The applicant is a competent authority for the purposes of the Directive and an authorised officer for the purposes of s. 902A of the TCA 1997.

***The request for information***

9. On 6 March 2015, the Bundesministerium für Finanzen (the Austrian Federal Ministry of Finance, hereinafter "the Austrian tax authority") submitted a request for information, pursuant to the Directive, to the Revenue Commissioners as the Irish competent authority. Following an exchange of correspondence, the Austrian tax authority submitted amended requests on 19 May 2015 and finally on 29 June 2015. The request for information confirms:

    (i) that the request for information was made pursuant to the Directive and was an exchange of information request;

    (ii) Austria, as requesting authority, confirmed its ability to provide similar information;

    (iii) Austria, as requesting authority, confirmed that it had exhausted the usual sources of information which it could have used in the circumstances of obtaining the information requested, without running the risk of jeopardising the achievement of its objective;

    (iv) Austria, as requesting authority, confirmed that the information to be received would be subject to the secrecy provisions contained in the Directive;

    (v) Austria, as requesting authority, confirmed that the information to be received would be used for the purposes delimited by the Directive.

10. The Austrian tax authority sought the names and addresses of hosts of the company, identified in the list attached to the request for information, and the hosts' date of birth if available. The list attached to the request for information identifies 365 rental properties that are identified by their unique registration number with the company. Each of the properties are located in Austria and are available to rent on the company's platform at a value in excess of €100 per night.

11. The request for information describes the foreseeable relevance of the information sought as follows:-

    *"[The company] with its headquarters in the United States runs a platform for people who intend to rent out rooms and apartments with a focus on short-term rentals for travellers. All clients of [the company] outside the United States are taken care of by the Irish subsidiary. In any case throughout Austria more than a thousand accommodations are offered for rent for tourism purposes via the exchange platform [of the company]. In several cases (especially in rural areas) it*

*was possible to identify the owners of property rented by [the company], and we found that they were not compliant with Austrian tax law. Usually, the correct identification of all the individual providers is hardly possible, since in the offers no precise names and addresses are given.*

*Due to our experience we consider that the landlords receive an additional source of income in this way that should lead to considerable taxable income. Given a permanent and continuous rental an income of at least [€20,000]/year can be achieved by the landlords. With this income limits for taxation in Austria are exceeded for sure. We have attached a file with those rentals where the landlords rent out their accommodations for more than [€100]/night, and in these cases it can be assumed, that tax relevance is given."*

12. The background to the request is an investigation conducted by the Austrian tax authority into the income tax liability of individuals who place properties for rent on the company's platform. At the time of the commencement of the proceedings, it was an open, ongoing investigation. The Austrian tax authority has formed the view that there is widespread non-declaration and non-payment of Austrian income tax where individuals are renting out rooms or properties on the company's platform and receiving income which is subject to Austrian income tax. The individuals identified in the request for information had all advertised properties or rooms to rent at a rate in excess of €100 per night.

13. The Austrian tax authority said that it was possible to identify the owners of properties to rent on the company's platform in certain circumstances in some rural areas, but it was not possible to do so in urban areas. They said that in urban areas it was not always possible to link the properties offered on the platform to individuals. In its investigations up to the date of the application, the Austrian tax authority had been able to identify the landlords of some properties in rural areas and assessments under the Austrian Income Tax Act were made. The Austrian tax authority confirmed that, as a result, there had been settlements of tax claims amounting to several thousand Euro per taxpayer. Since its investigation commenced, a number of taxpayers made voluntary declarations of income received from hosting property with the company, which income had not previously been declared.

14. At paras. 17 to 19 of her grounding affidavit, sworn on 18 July 2016, the applicant avers:-

*"17. In the context of considering a request for information, it is important to note that I, together with my colleagues, carefully examine each request for information received, to satisfy ourselves as to compliance with the Directive, and enquire as appropriate and seek further information or clarification of a Requesting Authority where necessary. I also place reliance on the confirmations received from a Requesting Authority, supported with factual and legal detail where required. In this case, having sought clarifications and information from the Requesting Authority, and having carefully considered the request for information, I have formed the view that the request for information is a valid request and have*

*satisfied myself as to the matters outlined at paragraphs 8 and 10 above [the requirements of the Directive].*

*18. I therefore take the view that I am obliged to use the powers conferred on Revenue under the Taxes Acts and in particular section 902A TCA 1997, interpreted in accordance with Regulation 14 of the 2012 Regulations, to procure the provision of the information sought for the benefit of the Requesting Authority, to be used for the purposes delimited by the Directive.*

*19. In this regard, I have formed the view that as regards individuals identified by the Requesting Authority by reference to their unique registration number with [the company], they may have failed or may fail to comply with the provisions of the tax laws of Austria, and that such failure is likely to have led or to lead to serious prejudice to the proper assessment for collection of Austrian tax."*

15. The applicant averred that having engaged further with the Austrian tax authority she was satisfied that the information sought was foreseeably relevant to the Austrian tax authority's investigation and that the information sought also satisfied the test under Irish national legislation: "*that there are reasonable grounds to suspect that the information is relevant to a liability, that is to say, to Austrian tax*." The applicant has satisfied herself that the application was a valid one.

16. Ms. Anne O'Callaghan of the Revenue Commissioners wrote, by letter dated 16 July 2015, to the company and requested the information sought by the Austrian tax authority. The company and its advisors, Ernst & Young, raised concerns about complying with the request for information and correspondence and discussions took place between the applicant and her colleagues and the company and Ernst & Young. On 21 January 2016, Ms. O'Callaghan requested that the information sought be provided within seven working days from the date of that letter, failing which a notice would be served under s. 902 of the TCA 1997. In reply, on 5 February 2016, Ernst & Young confirmed on behalf of the company that "*because of their concerns that voluntary compliance with this particular request by the Austrian Authorities would place them in breach of their data privacy obligations, they are unable to provide the information you have requested*."

17. On 11 February 2016, the applicant issued a letter enclosing a notice issued pursuant to s. 902 of the TCA 1997 to the company. The notice required the company to furnish the information sought by the Austrian tax authority as requesting authority. The letter acknowledged the concerns raised by and on behalf of the company and indicated that the Revenue Commissioners had considered those concerns, and that, for the reasons previously outlined, it considered it appropriate to issue the notice.

18. On 16 March 2016, the company indicated that, while it was anxious to cooperate with the Revenue Commissioners, it could not comply with the request for information because to do so would place it in breach of its obligations under privacy law. By letter dated 23 March 2016, the applicant afforded the company a further period of twenty-one days to furnish the information specified in the notice. She indicated that if the information was

not given within the time allowed, an application would be made to the High Court for an order pursuant to s. 902A of the TCA 1997.

19. On 15 April 2016, the company requested of the applicant, as authorised officer, that it be put on notice of any application together with the grounding documentation, and that it be given an opportunity to respond, and secondly, that all necessary care would be taken to ensure the confidentiality of the company in these proceedings.

20. The applicant swore her grounding affidavit on 18 July 2016 and the originating notice of motion commencing these proceedings issued on 20 July 2016 returnable for 17 October 2016. Pursuant to s. 902A(7), the proceedings are conducted in camera.

**The legislation**

***The Directive***

21. The Directive repealed and replaced Directive 77/799/EEC concerning mutual assistance by the competent authorities of the member states in the field of direct taxation and taxation of insurance premiums, on the grounds that it no longer provided for appropriate measures in a rapidly changing globalised era. Recital 9 of the Directive provides:-

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

22. The recital emphasises the balance between the exchange of information in tax matters to "*the widest possible extent*" while prohibiting "*fishing expeditions*" or a request for information "*that is unlikely to be relevant to the tax affairs of a given taxpayer*".

23. Recital 27 provides that the Directive is subject to Directive 95/46/EC ("the Data Protection Directive") and provides as follows:-

> *"(27) All exchange of information referred to in this Directive is subject to the provisions implementing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. … However, it is appropriate to consider limitations of certain rights and obligations laid down by Directive 95/46/EC in order to safeguard the interests referred to in Article 13(1)(e) of that Directive. Such limitations are necessary and proportionate in view of the potential loss of revenue for Member States and the crucial importance of information covered by this Directive for the effectiveness of the fight against fraud."*

24. Certain of the rights and obligations laid down in the Data Protection Directive may be limited in order to safeguard the interests referred to in Article 13(1)(e) of that Directive. Article 13(1) of the Data Protection Directive provides that member states may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21:-

> *"when such a restriction constitutes a necessary measures to safeguard:*
>
> *…*
>
> *(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters".*

25. Article 1 of the Directive defines the subject matter in the following terms:-

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

26. The primary obligation on member states is to cooperate with each other with a view to exchanging information that is "*foreseeably relevant to the administration and enforcement of the domestic laws*" of other member states. The Directive applies to all taxes of any kind levied by, or on behalf of, a member state or the member state's territorial or administrative subdivisions, including local authorities, with the exemption of VAT, certain customs duties and social security contributions. One of the issues in the case is whether the request is foreseeably relevant to an investigation or whether it is impermissible fishing in respect of 365 unidentified taxpayers, whom it is not alleged are tax defaulters.

27. Article 3 sets out definitions applicable to the Directive. The "*competent authority*" of a member state means the authority which has been designated as such by the member state. In Ireland, that is the Revenue Commissioners. The "*competent official*" means any official who is authorised to directly exchange information pursuant to the Directive. The applicant is a competent official authorised to exchange information pursuant to the Directive. The Austrian tax authority is a requesting authority within the meaning of the Directive, and the Revenue Commissioners is a requested authority within the meaning of the Directive. It is accepted by the parties that the request by the Austrian tax authority is an administrative enquiry within the meaning of the Directive.

28. Chapter II of the Directive deals with exchange of information. It is divided into three sections; exchange of information on request, mandatory automatic exchange of information and spontaneous exchange of information.

29. Article 5 deals with the exchange of information on request and provides as follows:-

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

30. A requested authority is required to provide the information sought by the requesting authority. It must come within the scope of Article 1(1). If the information is not in the possession of the requested authority it is required to make administrative enquiries in order to obtain the information sought. Article 6 governs administrative enquiries. It also is in mandatory terms and provides:-

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

31. Article 6(3) is particularly relevant to this case. It provides:-

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

32. In Ireland, this means the Revenue Commissioners, as the requested authority, must avail of the provisions of the TCA 1997 open to them when conducting domestic investigations.

33. Chapter IV deals with conditions governing administrative cooperation. Article 17 provides:-

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

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

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

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

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

34. Article 18 provides that if information is requested by a member state in accordance with the Directive, the requested member state shall use its measures aimed at gathering information to obtain the requested information, even though that member state may not need such information for its own tax purposes. The obligation is "*without prejudice to paragraphs 2, 3 and 4 of Article 17*". It is not stated to be without prejudice to subpara. (1) of Article 17.

35. The issue whether Article 17(1) establishes a pre-condition that a requesting authority must have exhausted the usual sources of information in order that the requested authority be obliged to provide the information was central to one of the grounds of objection by the company and is discussed more fully below.

36. Article 20 provides that requests for information and for administrative enquiry shall, as far as possible, be sent using a standard form adopted by the Commission and shall include at the very least the identity of the person under examination or investigation and the tax purpose for which the information is sought.

37. Finally, Article 25 deals with data protection and provides:-

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

38. Article 25 thus limits the scope of the obligations and rights provided for in the articles set out in the Data Protection Directive to the extent required in order to safeguard the interests of the member states in relation, inter alia, to taxation.

***Transposition of the Directive into Irish law: the 2012 Regulations***

39. The 2012 Regulations were adopted for the purpose of giving effect to the Directive. The 2012 Regulations came into operation on 1 January 2013. Regulation 4 provides:-

*"The Revenue Commissioners are the competent authority in the State for the purposes of the Council Directive and shall comply with the requirements imposed by the Council Directive on competent authorities in a Member State."*

40. The 2012 Regulations thus impose a mandatory obligation on the Revenue Commissioners to comply with requirements which are "i*mposed*" by the Directive on competent authority.

41. Regulation 6 provides:-

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

*(2) The requested authority shall not be obliged to provide information for the purposes of the Council Directive where the requesting authority is unable to provide similar information.*

*(3) The requested authority shall not be obliged to disclose any information for the purposes of the Council Directive that would, in the opinion of the requested authority, disclose any commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.*

*(4) Nothing in these Regulations permits the requested authority to authorise the use of information disclosed by virtue of the Council Directive to a requesting authority other than for the purposes set out in Article 16 of the Council Directive.*

*(5) Where the requested authority is unable to supply the requested information to the requesting authority, it shall provide the grounds for the refusal to the requesting authority."*

42. Regulation 6 imposes the primary obligation upon the Revenue Commissioners as requested authority. They are obliged to disclose information, which is permitted to be disclosed, by virtue of the Directive on the request of a requesting authority to that authority. The company argues that the Revenue Commissioners are only permitted to disclose information if they are obliged so to do. If the Revenue Commissioners, as requested authority, disclosed information to a requesting authority which they were not obliged to disclose, the company submits that they would be processing personal data in breach of the protections of the Data Protection Directive and, accordingly, such processing is not permitted, as the Directive is subject to the provisions of the Data Protection Directive.

43. Article 6(3) of the Directive requires the requested authority to follow the same procedures as it would when acting on its own initiative, or at the request of another authority in its own state, in order to obtain the requested information or to conduct the administrative enquiry requested. This provision of the Directive is transposed into Irish law by Regulation 14, which provides:-

*"14. (1) In this Regulation –*

*"foreign tax" means a tax chargeable under the laws of a territory other than the State in relation to which the Council Directive applies;*

*"liability to foreign tax", in relation to a person, means any liability in relation to foreign tax to which the person is or may be, or may have been, subject, or the amount of any such liability.*

*(2) For the purposes of complying with provisions with respect to the exchange of information contained in the Council Directive, sections 900, 901, 902, 902A, 905, 906A, 907 and 908 of the [TCA 1997] shall, subject to paragraph (3), have effect-*

*(a) as if references in those sections to tax included references to foreign tax within the meaning of this Regulation, and*

*(b) as if references in those sections to liability, in relation to a person, included references to liability to foreign tax within the meaning of this Regulation, in relation to a person.*

*(3) Where sections 902A, 905, 907 and 908 of the [TCA 1997] have effect by virtue only of this Regulation, they shall have effect as if the references in those sections to-*

*(a) tax, were references to foreign tax, and*

*(b) any provision of the Acts (within the meaning of section 1078(1) of the [TCA 1997]), were references to any provision of the law of a territory, other than the State, in accordance with which foreign tax is charged or collected."*

44. In this case, the information sought by the Austrian tax authority is not known to the Revenue Commissioners. They are required to make enquiries. The legal basis for their actions are s. 900, s. 901, s. 902, s. 902(A), s. 905, s. 906(A), s. 907 and s. 908 of the TCA 1997, and Regulation 14 of the 2012 Regulations. I turn now to consider the provisions of the TCA 1997.

***Taxes Consolidation Act 1997***

45. Section 902 deals with requests of an authorised officer for information to be furnished by a third party. An authorised officer means an officer of the Revenue Commissioners authorised by them in writing to exercise the powers conferred by the section and s. 902(A). "*Liability*" in relation to a person has the meaning set out in s. 900(1): "'*liability' in relation to a person, means any liability in relation to tax to which the person is or may be, or may have been, subject, or the amount of such liability*".

"*Taxpayer*" includes any person "*whose identity is not known to the authorised officer and includes a group or class of persons whose individual identities are not so known to the authorised officer.*" The means by which an authorised officer requests the information from a third party is by service of a notice. Section 902(3) provides:-

*"A notice shall not be served on a person under subsection (2) unless the authorised officer concerned has reasonable grounds to believe that the person is likely to have information relevant to the establishment of a liability in relation to the taxpayer."*

46. The subsection is expressed in negative terms and prohibits an authorised officer from serving a notice under s. 902 on a third party unless certain matters are met. The

threshold is that the authorised officer has reasonable grounds to believe those matters. The authorised officer must believe that the person upon whom the notice is to be served is "*likely to have information*" and that the information is "*relevant to the establishment of a liability in relation to the taxpayer*".

47. Where the authorised officer is satisfied that she has reasonable grounds for such belief she may serve a notice in accordance with subs. (2).

48. Section 902(2) provides as follows:-

> *"Notwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under statute or otherwise, and subject to this section, an authorised officer may for the purpose of enquiring into a liability in relation to a person (in this section referred to as "the taxpayer") serve on any other person (not being a financial institution within the meaning of section 906A) a notice in writing requiring that other person, within such period as may be specified in the notice, not being less than 30 days from the date of the service of the notice, to do either or both of the following, namely -*
>
> *(a) to deliver to, or make available for inspection by, the authorised officer, such books, records or other documents as are in the other person's power, possession or procurement and as contain, or may (in the authorised officer's opinion formed on reasonable grounds) contain, information relevant to a liability in relation to the taxpayer,*
>
> *(b) to furnish to the authorised officer, in writing or otherwise, such information, explanations and particulars as the authorised officer may reasonably require, being information, explanations and particulars that are relevant to any such liability,*
>
> *and which are specified in the notice.*

49. Once a notice is served under s. 902(2), the third party is required to provide the information to the authorised officer. If the person fails or refuses to comply with the notice, then the authorised officer may make an application to the High Court in accordance with the provisions of s. 902A. Section 902A(2) provides that an authorised officer may make an application to a judge of the High Court for an order requiring a person (other than a financial institution within the meaning of s. 906A) to do either or both of the following:-

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

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

50. Subsections (3) and (4) of s. 902A provide as follows:-

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

*(a) that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons, may have failed or may fail to comply with any provision of the Acts,*

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

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

*(c) that the information—*

*(i) which is likely to be contained in the books, records or other documents to which the application relates, or*
*(ii) which is likely to arise from the information, explanations and particulars to which the application relates,*
*is relevant to the proper assessment or collection of tax.*

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

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

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

*as may be specified in the order."*

51. Thus, before an authorised officer may make an application to a judge pursuant to subs. (2), certain pre-conditions must be satisfied. A notice pursuant to s. 902 must have

been served on a person who has failed to comply with the notice within the time specified. The authorised officer must then be satisfied as to the matters set out in subparas. (a), (b) and (c). The authorised officer must obtain the consent in writing of a Revenue Commissioner to the making of an application pursuant to subs. (2). Once these pre-conditions are met, then an authorised officer may make an application pursuant to subs. (2).

52. The judge must be satisfied that there are reasonable grounds for the authorised officer making the application in order to confirm that the application is properly brought. Then the judge must satisfy his or herself that there are reasonable grounds for the application being made. Only if the judge is so satisfied may the judge, in his or her discretion, make an order as specified in subss. (4)(a) and (b). The judge must consider the application *ab initio*. It is not an appeal from the decision of the authorised officer. Neither is it a review of the decision to issue a notice pursuant to s. 902.

**Decision of the High Court**

53. The trial judge held that the court only had such power as was conferred on it by s. 902A of the TCA 1997. Murphy J. held that the power of the court was limited to considering the specific matter set out in the section and the court had no power to determine matters of law or fact which fell outside those provisions. She believed that the matters set out in the Issue Paper agreed by the parties could not be determined in the proceedings brought pursuant to s. 902A, and held that the court had no power to determine substantive issues of fact or law which the parties had invited the court to determine in the application.

54. The proceedings were brought pursuant to O. 84B of the Rules of the Superior Courts, the order under which applications brought pursuant to s. 902A must be brought. Order 84B requires that the company be put on notice of the application. Therefore, I respectfully disagree with the High Court that the applicant erred in putting the company on notice of the application. The company was entitled to participate in the application. The nature of the application is not an *ex parte* one. It follows, to my mind, that the trial judge's analogy with a warrant type procedure is incorrect.

55. Section 902A(7) of the TCA 1997 provides that every hearing of an application and of any appeal from the order of the High Court is to be heard *in camera*. The parties submit that there could be no appeal if the initial application were to be heard and determined ex parte. It is thus clear that the appropriate procedure was not an *ex parte* one. It also follows that the contested application is to be conducted *in camera* and that is a requirement of s. 902A. The applicant had no choice in the matter. She was required to bring the application under the section and she did so under the applicable order for the bringing of the application. I am satisfied that the trial judge erred in relation to her jurisdiction. The trial judge was required to address the legal issues raised in the proceedings and there was no basis for holding that she was debarred from dealing with the proceedings simply because an alternative procedure, in her judgment, might have

been a more appropriate procedure for dealing with the complex issues of law raised in the application.

56. The court considered the application solely by reference to the provisions of s. 902A and was satisfied that it should exercise its discretion to make an order pursuant to subs. (4) directing the company to furnish the applicant the names and addresses and, if available, the dates of birth of the persons identified, as were sought in the s. 902 notice.

57. The company appealed the order and, while the applicant opposes the appeal, the parties agree that this court can and ought to address the substantive issues raised and argued in the court below, but which the trial judge declined to resolve.

**Jurisdiction to determine matters ventilated but not decided by the High Court**

58. The first issue for consideration is whether, in light of the decision of the High Court, this court has jurisdiction to determine the issues which the High Court declined to determine. In *AA v. Medical Council* [2003] 4 I.R. 302, Keane C.J. held:-

> *"I am satisfied that, in such a case, this court is not deprived of its jurisdiction to consider whether the Applicant should be refused the reliefs sought on discretionary grounds because the High Court has not adjudicated on that issue. It would seem to me unjust that, where a particular ground has been raised and fully argued in the High Court, a party should be precluded from obtaining a decision on that ground in this court through no fault of his own. In the present case, it would mean that the case would have to be remitted to the High Court, with an almost inevitable further appeal to this court, resulting in the incurring by a party not in default of significant costs and delay in having the appeal resolved. That does not seem to me to be a just and convenient way of dealing with the appeal."*

59. In *Kerins v. McGuinness* [2019] IESC 11, the Supreme Court heard an appeal from a Divisional Court of the High Court which ruled that matters raised in the applicant's case were not judiciable having regard to the separation of powers and, consequently, did not engage upon or determine them. The Supreme Court held that the issues were justiciable, and then had to consider whether to remit the matter to the High Court. Clarke C.J. determined that the Supreme Court could rule on the issues, noting that the evidence before the High Court was entirely on affidavit and the Supreme Court was therefore in as good a position as the High Court to assess the evidence and reach conclusions.

60. In *A.B. v. The Clinical Director of St. Loman's Hospital* [2018] IECA 123, Hogan J., speaking for the court, identified four issues which should be considered in determining whether an appellate court can resolve matters not resolved in the High Court. These were:

    (1) whether the issues were argued before, if not determined by, the lower court;

(2) whether the issues can be determined on the basis of the evidence before the appellate court, and the nature of the evidence;

(3) whether the issues canvassed before the lower courts are significant;

(4) whether the interests of the conduct of the litigation are best served by determination of the issues.

61. In this case, the issues were argued before the High Court; the evidence is all set out in the affidavits; it would undoubtedly save time, expense and further uncertainty if this court were to resolve the issues and; the issues are of great importance to both parties.

62. I am therefore satisfied that this court has both jurisdiction and that it is appropriate to resolve the issues which were heard by the trial judge, but not resolved by her.

63. For these reasons, I believe, that this court ought to determine the issues raised and which require to be resolved in order to determine whether the High Court order directing the furnishing of the information sought by the Austrian tax authority to the applicant should be reversed.

**Article 17(1) of the Directive**

64. The first ground of challenge to the validity of the request for information by the company is based on Article 17(1). The company argues that the requesting authority is required to exhaust its usual sources of information which it could have used in the circumstances for obtaining the information requested. It says that this is a pre-condition to a valid request and it is justiciable. It relies on the decision of the Court of Justice of the European Union (CJEU) in the case of *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes* (Case C-682/15). It says it is clear from the facts set out on affidavit that the Austrian tax authority did not exhaust its usual sources of information. It says that the applicant, as the moving party, must prove that the Austrian tax authority has exhausted its usual sources of information and on the facts of this case the applicant has failed to establish this essential pre-condition. For this reason, the High Court erred in directing the company to disclose the information set out in the notice of motion.

65. In *Berlioz*, the CJEU held that the requested information must be foreseeably relevant to the investigation or enquiry: it described this as a necessary characteristic of the requested information. The court noted that it was necessary to determine by whom and how that characteristic is to be assessed (para. 65). In para. 69, the court said that the requesting authority must be able, in the context of its investigation, to determine the information it considers it would need, having regard to national law, in order properly to assess the taxes due. At para. 70, the court concluded:-

> *"It is therefore for that authority, which is in charge of the investigation from which the request for information arises, to assess, according to the circumstances of the case, the foreseeable relevance of the requested information to that investigation*

*on the basis of the progress made in the proceedings and, in accordance with Article 17(1) of Directive 2011/16, after having exhausted the usual sources of information which it has been able to use in the circumstances."*

66. It is for the requesting authority in the first place to assess the foreseeable relevance of the information requested.

67. The court said that the requested authority had an obligation to review the request, but that the scope of its review was limited (para. 76). At paras. 77 and 78, the court held:-

> *"77. In view of the system of cooperation between tax authorities established by Directive 2011/16, which, as is apparent from recitals 2, 6 and 8 of Directive 2011/16, is founded on rules intended to create confidence between Member States, ensuring that cooperation is efficient and fast,* ***the requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation****. The requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State, and it cannot be expected to have such knowledge (see, to that effect, judgment of 13 April 2000, W.N., C-420/98, EU:C:2000:209, paragraph 18). In any event, the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority.*
>
> *78. However, the requested authority* ***must nevertheless verify whether the information sought is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority.****"* (emphasis added)

68. The requested authority's review of the request is limited. This is because of the principle of mutual trust: the fact that the requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting state, and it cannot be expected to have such knowledge and, most importantly, it may not substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority. The review must be limited in order to secure the objectives of the Directive. The task of the requested authority is to *verify* that the pre-condition is met and not to *establish* that the pre-condition is met. It is a low threshold.

69. These reasons apply equally to the issue whether the requesting authority has exhausted its usual sources of information prior to making its request. As a matter of principle, if the requirement in Article 17(1) is also a pre-condition to a lawful request, these principles and reasons likewise would apply and I see no reason why a different, higher threshold of review should apply to the requirement to exhaust usual sources compared to the requirement that the information be foreseeably relevant to the investigation of the requesting authority, as this would limit the scope of the exchange of information which is to be "*to the widest possible extent*".

70. At paras. 85 and 86 of the judgment, the court held:-

> *"85. In the light of what has been stated in paragraphs 70 and 71 of the present judgment concerning the requesting authority's discretion, it must be held that the limits that apply in respect of the requested authority's review are equally applicable to reviews carried out by the courts.*
>
> *86. Consequently, the courts must merely verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not – manifestly – devoid of any foreseeable relevance having regard, on the one hand, to the taxpayer concerned and to any third party who is being asked to provide the information and, on the other hand, to the tax purpose being pursued."*

71. The CJEU makes it clear that the review by a court of the request for information is confined to verifying that the information order is based on a sufficiently reasoned request by the requesting authority that is not "*manifestly devoid*" of any foreseeable relevance. There is no obligation on the requested authority to satisfy the court that the request is foreseeably relevant to the enquiry or investigation. In the first place, it is a matter for the requesting authority and thereafter, it is a matter of verification by, initially, the requested authority and, thereafter, if necessary, the court seised of an action brought by a relevant person (as in this case).

72. In *Berlioz*, the CJEU held that a relevant person (that is, a person to whom a request for information has been directed) has a right pursuant to Article 47 of the Charter of Fundamental Rights of the European Union to challenge the legality of the information order. The right recognised in *Berlioz* is to challenge the order. The fact that a relevant person chooses to challenge the validity of the information order does not alter the limited scope of the review of the requested authority to verify the fact that the request complied with the requirements of the Directive. As a matter of EU law, the requested authority is not required to establish all of the constituent elements of a valid request, merely that it is not devoid of foreseeable relevance, and that the formal conditions to a valid request have been met.

73. In *Berlioz*, the court was silent as to who bears the burden of proof where a relevant person challenges the validity of an information order and so it is of limited assistance in resolving this issue. The question must be assessed by reference to the limited function of the court when reviewing the request for information. On the other hand, a relevant person who seeks to challenge the validity of the request, and of an information order founded on the request, has a right to do so and is not so limited. The court is limited in the scope of its review. It is verifying what was said by the requesting authority and ascertaining whether or not the request is devoid of foreseeable relevance to the investigation concerned or, if Article 17(1) is justiciable, whether the requesting authority has exhausted its usual sources of information. It seems to me therefore that, by emphasising the limited scope of the review carried out by the court, and the fact that it carries out the same exercise as the requested authority, *Berlioz* does not require the requested authority to prove to the court all the elements of a valid request as set out in

Annex 1 of Regulation (EU) No. 1156/2012 (the form to be used for requests for information). This, in my view, would be inconsistent with the court carrying out the same task as the requested authority. A procedural requirement of national law cannot alter the application of EU law.

74. In this instance, Article 6(3) requires the requested authority to follow the same procedures as it would when acting on its own initiative in relation to domestic taxpayers. This is in keeping with the general approach of leaving procedural matters to be decided by member states. But, this is always subject to the requirement that the procedures adopted give effect to the substantive requirements of EU law and do not impermissibly constrain the rights of parties derived from EU law. Therefore, the applicant, as the moving party in the proceedings before the High Court, pursuant to s. 902A, is required to satisfy the court that she is entitled to bring the application and, if the court independently so concludes, to the making of the order, as she would were it for the purpose of investigating Irish taxpayers. This is, itself, a low threshold, as was held in *An Inspector of Taxes v. A Firm of Solicitors* [2013] 2 I.L.R.M. 1. This procedural requirement of national law cannot, however, be construed or applied so as to frustrate the application of EU law and make it unduly onerous for the Revenue Commissioners, as a requested authority, to comply with a request issued pursuant to the Directive.

75. In my judgment, it is for the applicant, acting on behalf of the requested authority, to place before the court the materials furnished by the requesting authority, and any other matters relied upon by her to verify that the requesting authority had exhausted its usual sources of information prior to making its request pursuant to the Directive. Once this low threshold is met, if the relevant person disputes that this is so, then, in pursuing its challenge to the application for an order under s. 902A, the relevant person must demonstrate that the requesting authority has not exhausted its usual sources of information. A challenge to the application for an order on this ground by the relevant person does not alter the review to be conducted by either the requested authority or the court. Specifically, it does not elevate the threshold to be satisfied upon review. In para. 77, the CJEU said the requested authority (*a fortiori*, the court) cannot substitute its own assessment of the possible usefulness of information sought for that of the requesting authority. Likewise, it seems to me, by reason of the fact that the requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting state, it cannot substitute its own assessment of whether the requesting authority has exhausted the usual sources in the circumstances of the particular case. If the court cannot know – and is not required to know – the factual and legal circumstances when assessing the foreseeable relevance of a request, and is not required to interrogate this for the purposes of an Article 5 verification, then it cannot be a requirement to do so on an Article 17(1) enquiry.

**The evidence regarding the enquiries conducted by the Austrian tax authority**

76. The request for exchange of information was filed using the form established by the Commission, pursuant to Regulation (EU) No. 1156/2012. Neither the form nor the 2012 Regulations make any distinction between a request in respect of an individual or a group

or class of taxpayers. The request is said to be linked cases: "*365 of Austrian natural persons with business relation to [the company]*". At A1-6, the requesting official confirms:-

> *"I confirm that I have exhausted the usual sources of information which I could have used in the circumstances to obtain the information requested, without running the risk of jeopardising the outcome of the enquiry."*

77. The form identifies the individuals as "*365 of Austrian natural persons with business relation to [the company].*" The form describes the case and the tax purposes for which the information is sought in the following terms:-

> *"[The company] with its headquarters in the United States runs a platform for people who intend to rent out rooms and apartments with a focus on short-term rentals for travellers. All clients of [the company] outside the United States are taken care of by their Irish subsidiary.*
>
> *In any case throughout Austria more than a thousand accommodations are offered for rent for tourism purposes via the exchange platform. In several cases (especially in rural areas) it was possible to identify the owners of property rented by [the company] and we found that they were not compliant with Austrian tax law.*
>
> *Usually, the correct identification of all the individual providers is hardly possible, since in the offers no precise names and addresses are given.*
>
> *Due to our experience we consider that the landlords receive an additional source of income in this way that should lead to considerable taxable income. Given a permanent and continuous rental an income of at least [€20,000]/year can be achieved by the landlords. With this income the limits for taxation in Austria are exceeded for sure.*
>
> *We have attached a file with those rentals where the landlords rent out their accommodations for more than [€100] per night, and in these cases it can be assumed that tax relevance is given. These landlords are clearly identified by [the company] registration numbers therefore we do not consider this request as a group request but as 365 individual requests for information.*
>
> *In the following cases all national investigative means have been exhausted, but it was not possible for us to make a clear identification of the landlords from the available information."*

78. The form again confirmed that "*all national investigative means have been exhausted, but it was not possible for us to make a clear identification of the landlords from the available information.*" The Revenue Commissioners were asked to provide the first and last name of the landlord (instead of the Company Identification Number), the date of birth of the landlord and the correct address.

79. In her grounding affidavit, at para. 39, the applicant avers that the Austrian tax authority confirmed on several occasions that it had exhausted its usual sources but was unable to obtain the information requested. She referred to exchanges between the Revenue Commissioners and the Austrian tax authority, and the legal and technical issues identified which prevented the Austrian tax authority from conducting an internet search as suggested by the company:-

> *"These include inter alia that, for the purposes of discharging their functions under Austrian law, the Requesting Authority's officials have no access to social media and it is therefore not possible for officers of the Requesting Authority to follow the links to social media as suggested by the [company]. I am satisfied therefore that the [company's] assertion concerning an internet search as an available means of obtaining the information is incorrect."*

80. By letter dated 22 October 2015, Ms. O'Callaghan of the Revenue Commissioners wrote to Mr. Ernest Radlwimmer, the head of the Austrian Central Liaison Office of the requesting authority, seeking further information in relation to the request. Mr. Radlwimmer replied on 20 November 2015 confirming that he had exhausted the usual sources of information which could have been used in the circumstances for obtaining the information requested. He said that the investigations had led to certain conclusions:-

> *"In urban areas (e.g. Vienna) it was not possible to allocate the offered objects (apartments, studios) to specific persons. If there is only the first name known, and if there is only an imprecise indication of the rented address given, the landlord cannot be identified. Even with the support of other authorities, it is not possible to identify the landlords.*
>
> *In rural areas under certain circumstances the landlords of the offered objects (houses) could be found out and in these cases an assessment according to Austrian Income Tax Act took place. The resulting tax claims amounted to several thousand Euros.*
>
> *In this context it was also determined that as a consequence in local areas some landlords had voluntarily filed a self-incrimination."*

81. He explained that it was not possible to determine the identity of the landlords if only their first name and approximate location of the property are available. He said:-

> *"With the available information it is absolutely impossible to determine whether the taxpayer is compliant [or](sic) noncompliant. Basically we have to assume that those taxpayers are noncompliant because they also violate other rules for example the commercial rental prohibition of condos; the payment of city tax; furthermore, it is not allowed to rent out a rented apartment. VAT has not been considered in the request, since we assume that the landlords take the small business regulation in claim (sic)."*

82. In response to a request for further clarification, it was stated:-

> *"In rural areas information about activities from administrations (also tax administration) are spread around (rumours…). As soon as tax administration is getting active in a certain field, this is spread very quickly and other (up to this date) not identified persons try to file their additional income voluntarily in order to avoid punishment (according to Austrian law you are able to avoid punishment if you declare your income at the tax office before tax administration is auditing you).*
>
> *…*
>
> *We are in contact with other local administrations, which are responsible for some regulations concerning properties, rented to tourist (like hotels). These administrations noted, that there is no additional city tax from private persons announced or payed (sic).*
>
> *That people rent their own flat or a rented flat for touristic matters (sic) we know from third party information (e.g. neighbours) and in these cases also as result in investigations or field audits (sic).*
>
> *As the undetected cases could not be assessed yet we do not exactly know for each person which rules are violated. It very much depends on the single case (e.g. if it is your own building you cannot violate rules concerning rented properties). But this is exactly why we need your information."*

83. On 27 May 2016, Mr. Radlwimmer informed the Revenue Commissioners that, as a matter of Austrian law, it could not use the telephone numbers of the hosts to identify the hosts in question. He confirmed that the officials could not use social media for their investigations and they could not use their private social media access for business purposes. Therefore, it was not possible to try to follow the links on the company's platform to social media. He confirmed that "*[m]ethodical search on the website of [the company] could not be continued because the IP address of tax administration was blocked. The geocodes are useless in big cities. As we have experienced in some cases they are false (sic). … The proposed methods [of the company] are beyond any reasonable research for presumptive taxpayers, regarding time and methods.*"

84. He stated:-

> *"As we follow media reports in Austria and also in Germany, [the company] raises the strong suspicion that all hosts are tax evaders. Based on lack of information we are not able to debilitate (sic) this. In fact, it could even hinder the hosts to be compliant (sic)."*

85. He then explained how his officials tried to identify hosts in three examples and explained that they could not identify the hosts in relation to three properties chosen.

86. In a telephone conversation with Ms. O'Callaghan on 8 June 2016, Mr. Radlwimmer explained that he referred to coverage in media reports which suggested that there was widespread tax evasion amongst hosts and that there had even been an article in Die Welt which set out steps for hosts to take in order to avoid paying tax on rental income from letting property. He said that German and Austrian tax laws are similar so those steps could also have been applied by Austrian hosts.

87. Finally, there was a seven-page letter dated 21 November 2016 written by Mr. Radlwimmer in response to the affidavit sworn by Ms. Smith on behalf of the company. He confirmed that the request for information was based upon investigations done by his authority and "*the limited possibilities to identify with a certainty of 100% the hosts and their income by performing activities in renting one or more rooms in their house or apartment. If we were able to identify these persons we would not have had to send the request for information.*" At page 2 of his letter he said:-

> *"The assessments with results of several thousand Euros are respectively for each of the identified hosts. Assessments could only be done if the host could be identified clearly. The Austrian Tax Administration tried structured identification by using the data provided on [the company's website]. The investigations in different cases leaded (sic) to success because of information about the hosts that were provided from third parties like neighbours or on other platforms. It was no[t](sic) identification based upon the web research at [the company website]. The number of hosts and stays were taken, amongst other sources, from [another website of the company]. Besides that the Austrian Tax Administration tried to filter from publicly available information to get data from the website [of the company] that did not lead to success in identifying the presumptive taxpayers."*

88. He gave an example of a person letting a chalet in the western region of Austria who failed to declare income of €70,000 from the letting. He referred to a Russian national who bought a flat in Vienna who gave a different first name in the host description. The person and the apartment were only identified with assistance from neighbours. Another flat in the city of Vienna was owned by a company located in Cyprus, where they could not find the beneficial owner. In another instance, they identified a woman in a city in the western region of Austria, which was popular with tourists in the summer, who did not declare any income from renting her premises for the years 2011-2014. In 2014, she earned €19,500. He referred to a landlord from Vienna who made a self-declaration of about €14,000 in 2015 and €15,800 in 2014. He said that "*[d]ifferent instruments from Google Search up to on-site inspection were performed*" in achieving these results.

89. At pages 3-4 of his letter he said:-

> *"As we cannot identify the taxpayers we cannot argue that they are compliant. We cannot find proof for compliance when not knowing them (sic). The research with the offering and comparison with taxpayer database in all of those cases in the request did not lead to a result.* ***Every single case was examined*** *but as*

*explained in the answer to our letter … dated 19 May 2016 we could not verify the hosts.*

*…*

*In our experience … the violation of income tax law goes hand in hand with non-payment of other taxes like VAT, tourist tax, tax on wages for cleaning stuff, sale of alcohol and not paying the appropriate duties."* (emphasis added)

90. He instanced other examples of breaches of other provisions of Austrian law.

91. He confirmed that the starting point in the investigation was not media reports about tax evasion but cases that were "*announced by neighbours*" complaining about visits. The City of Vienna was very active in order to collect the correct tourist tax. The Austrian tax authority started their investigation for income tax purposes in close cooperation with the City of Vienna.

92. He confirmed that:-

*"The Austrian tax administration is able and does so to use (sic) all legally available resources. An internet search by using Google is possible. It belongs to the usual task of auditors to examine all circumstances. The Directive 2011/16 states in Article 17 "has exhausted the usual sources of information which it could have used in the circumstances". That is what we did.*

*But it has to be stated that research is quite difficult as looking for criteria in German language, a lot of results have to be eliminated as they are connected with persons in Germany. We are not allowed to use social media as part of the internal security settings of the tax administration. The first attempts to identify hosts were by simple Google search and did not bring results for certain bigger cities like Vienna or Salzburg. Using search by fancy locations in rural area result was found if it is not a typical tourist resort (sic). The identification is only possible if the host offers the apartment also on other platforms, using full name and address. …*

*We clearly want to state that as far as Austrian tax administration is able to google as a usual source of information, we were not able to clearly identify any of the hosts mentioned in the request.*

*Another characteristic of Austria is the structure of flats. In cities most people live in rented flats what (sic) [which] make an identification of the host by using the property registrar impossible.*

*…*

*The Austrian tax authority has conducted searches as far as this is in line with Austrian legislation and the usual way of administration. We appreciate the efforts of Ms. Smith, nevertheless we have to confirm that Austrian tax administration is*

*unable to do such a search and then identify the person as [the company] without any doubts without breaking Austrian law."*

93. I have set out the evidence from the requesting authority in great detail because the company says that it can show that the Austrian tax authority did not exhaust the usual sources of information; that it is possible to identify the hosts by means of straight-forward Google searches and, for this reason, the court should allow the appeal.

94. In her affidavit, sworn on 7 November 2016, Ms. Smith said that she personally conducted an internet based search on the three hosts identified in Mr. Radlwimmer's letter of 27 May 2016 and she had been able to identify matches with a sufficient degree of probability as would warrant an enquiry being made of those persons by the Austrian tax authority. Ms. Smith said that she used a Google search for a premises described in the listing by the host on the company's platform. The fourth result produced by Google yielded the precise name and address of the property. In addition, comprehensive contact details were available on a tourist site which was likewise thrown up by the Google search. That site contained the postal address, an email address and two contact phone numbers. She said it took her approximately 15-20 minutes to obtain the information.

95. In relation to the third example in Mr. Radlwimmer's letter, she conducted a simple Google search using information contained in the host's publicly available profile on the company platform and found a business website containing a full name, business address and contact details. She said that in relation to the first example in Mr. Radlwimmer's letter the search was more complex. When she searched on Google using the name of the company, the first name of the hostess and "Vienna", the Google result produced some information which led to further Google searches, including through Google Images, which, according to Ms. Smith, established a likely match between a particular individual, her full business address and contact details, and a host on the company's website. She accepted that this took approximately twice as long as the other two searches. She concluded "*that the searches I have personally performed dispel any notion that the Austrian Tax authorities have exhausted all usual sources of information*."

96. The company's solicitors engaged an Austrian law firm, Binder Grösswang, to conduct internet searches out of a sample of forty-one of the host ID numbers listed in the request for information from the Austrian tax authority. Dr. Johannes Barbist, partner in Binder Grösswang, described the focus of his search as being whether the full names, addresses and dates of birth of the users of the company platform could be identified using the known landlord or accommodation ID numbers as a starting point for the search. Forty landlord IDs were chosen to cover both small villages and big cities across all nine Austrian Provinces. Dr. Barbist said that out of a sample of forty-one searches the contact details (that is the full name, address, telephone and/or fax number, email address, professional and/or personal website) of twenty-three matches for the hosts could be identified. Out of these twenty-three, nine gave a VAT number. Seventeen matches for hosts could not be identified and one match for a host was deemed not to be

sufficiently reliable. Dr. Barbist said that the hits showed rather limited information on the user profiles when accessed without setting up either a company user account or connecting to the company via a Facebook account. Dr. Barbist acknowledged the limitation of Google searches in the following terms:-

> *"By nature, searches via the search engine 'Google' have intrinsic deficiencies. They do not necessarily provide true, accurate and/or complete results, in particular, matches for the host identified in our search need not necessarily deliver contact details and personal data of the real host. Also note that our search was both limited in time (in general no more than 40 minutes per Host ID number as we felt that additional effort would not produce other or better results) and in substance (limited to easily accessible publicly available sources)."*

97. Of the twenty-three searches yielding a positive result, thirteen are based on photographic identifications of either the rented properties or the hosts/probable hosts. The photographs were not exhibited in the report and, in the circumstances, it is not possible to assess the reliability or probability of these identifications.

98. Ms. Smith, in her affidavit, said that the Austrian tax authority has submitted 365 separate requests and, as such, it must demonstrate that it has exhausted all of the usual sources of information "*in respect of all 365 accounts*". She said the company does not say that it would be possible to identify all of the hosts in this matter. Its position is, to the extent that it is possible to do so in respect of any host, then it is a clear requirement of the Directive that *all* usual sources of information be exhausted in respect of *that* host prior to the making of *any* request under the Directive.

99. The company adduced further evidence of searches conducted by Dr. Barbist accessing the company website through a Facebook account, but it was subsequently accepted that it was not relying upon this information and accepted that it was legally questionable whether this was a lawful form of investigation for the Austrian tax authority. It must be acknowledged that resolution of this issue would have been facilitated had the information ultimately provided by the Austrian tax authority been provided in a comprehensive manner with the initial request, or so soon thereafter as the applicant sought further information and verification of the reasons for the request, and the steps taken to show that it had exhausted its usual sources of information.

***Discussion***

100. While the role of the requested authority and, on review, of the court is significant, it is also limited. It is required to verify the statement of the Austrian tax authority that it has exhausted its usual sources. It may not substitute its opinion for that of the requesting authority on the relevance of the "*information*" sought to its investigation, so the court must be careful to ensure that in verifying whether the requesting authority has exhausted its usual sources of information, it is not drawn into substituting its view on the law and the facts for that of the requesting authority on this issue, in respect of which the requesting authority is uniquely well placed to form a view. The applicant and her colleague engaged, over a number of months, with the representative of the Austrian tax

authority in order to verify this fact. She and her colleague, Ms. O'Callaghan, raised the appropriate questions and interrogated the answers provided. The answers show that the Austrian tax authority investigated the identities of hosts of the company using a number of sources of information. It achieved some success. It identified some hosts, and this resulted in tax returns which had previously not been made, and other hosts came forward to make voluntary declarations. It requires reliable information in which it can have confidence so as to exercise its statutory duties. Google searches are not capable of producing information which carries the same level of confidence. Importantly, Mr. Radlwimmer indicated that if it had been possible to obtain the information sought, the request would have been withdrawn in whole or in part. The request has been outstanding for five years. The court is entitled to have regard to this fact. Due to the very significant delays in concluding this application, it is reasonable to infer that the Austrian tax authority would have pursued other lines of enquiry in the intervening period. The fact that the request has not been withdrawn goes some way to verifying the confirmation that the requesting authority had exhausted the usual sources of information prior to making the request. It is implausible that the Austrian tax authority would pursue this application if the information it seeks was available with relatively simple Google searches, as is urged by the company. Questioning the need for the information under the guise of questioning whether it has exhausted the usual sources of information is inconsistent with the principle of sincere cooperation and mutual trust which the requested authority and the court is required to adopt.

101. For these reasons, carrying out the limited review required of this court, I am satisfied that the requesting authority has exhausted its usual sources of information as contemplated by Article 17 of the Directive. If the company opposes the making of an order under s. 902A on the grounds that the Austrian tax authority has failed to exhaust its usual sources of information, that burden rests on the company to show that the requesting authority, the Austrian tax authority, has not, as it asserts, exhausted the usual sources of information available to the Austrian tax authority to investigate the identities of the 365 hosts, the subject of the request for information.

102. Bearing in mind the principle of sincere cooperation and mutual trust, I am not satisfied that the company adduced evidence which would justify this court in rejecting the explanations put forward by Mr. Radlwimmer on behalf of the requesting authority. The results of the searches conducted by Ms. Smith and Dr. Barbist do not, to my mind, establish that the Austrian tax authority had not exhausted its usual sources of information prior to issuing this request. It was accepted by counsel for the company that it was not for the court to determine any contested issue as to what were the "*usual sources*" in Austria, nor the nature and extent of the lawful enquiries permitted under Austrian law. Furthermore, insofar as there is a conflict of evidence on affidavit, this court is not in a position to resolve such a conflict (see, *RAS Medical Limited v. RCSI* [2019] 1 I.R. 63). Neither side sought to cross-examine the deponents of the other. I take the view that once the company opposes the making of an order on the grounds that the requesting authority has not exhausted its usual sources of information, and the applicant and the court have verified that the requesting authority complied with the

requirements of Article 17, then it is for the company, as the party opposing the granting of an order in those circumstances, to establish why this court should not accept that the evidence adduced verifies the fact that the requesting authority exhausted its usual sources of information prior to requesting the information the subject of the application. In my opinion, the company, as the relevant person, has not shown that the requesting authority did not exhaust the usual sources of information, as required by Article 17(1), prior to requesting the Revenue Commissioners to furnish further information pursuant to Article 5 of the Directive.

103. I approach the assessment of the evidence as to the exhaustion of usual sources on the assumption that the company was correct in its argument that this was a necessary pre-condition to a lawful request within the scope of Articles 1 and 5 of the Directive. I shall turn now to consider whether, in fact, the company's contention is one with which I agree.

104. The applicant argued that the decision of the CJEU in Berlioz was confined to Article 5, for the "*foreseeable relevance*" test. She submitted that there is no reference in any of the recitals to a requirement to exhaust usual sources of information as a pre-condition to a valid request for information pursuant to the Directive. Article 1(1) characterises the information which is to be exchanged as information which is foreseeably relevant to the administration and enforcement of domestic laws of the member states concerning certain taxes. The character of the information that would be "*foreseeably relevant*" is a core aspect of the obligation established by Article 1(1) and Article 5. The exchange of information provided for in Article 5 is in Chapter II of the Directive. Article 17 is in Chapter IV of the Directive and deals with conditions governing administrative cooperation. The applicant argued that there is a qualitative difference therefore between Article 17(1) which refers to "*… provided that the requesting authority has exhausted the usual sources of information …*" and Article 1(1) which requires that member states shall cooperate with each other "*… with a view to exchanging information that is foreseeably relevant to the administration and enforcement of domestic laws …*" .

105. The applicant emphasised the importance of mutual trust between member states and referred to the case of *Eamonn Donnellan v. The Revenue Commissioners* (Case C-34/17). She referred to para. 77 of the judgment in *Berlio*z, quoted above, to the effect that:-

> *"… the requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation…".*

106. It, therefore, is a matter which the requested authority, and the court on review, must take on trust, based on the certificate of the requesting authority.

107. The problem, as I see it, with the submissions of the applicant is that this reduces Article 17(1) to an empty formula, as, once the requesting authority states that it has exhausted

its usual resources, that is the end of the matter. The applicant argues that Article 17(1) is intended to protect a requested authority from unnecessary requests, but her submissions fail to explain how this could amount to anything other than an empty formula in the circumstances.

108. She argues that the Article 17(1) certification should not be reviewable by the requested authority based on the principle of mutual trust and based on the fact that it will have no, or very limited, knowledge of the factual or legal circumstances prevailing. It should not substitute its view as to whether or not the usual sources of information have been exhausted for that of the requesting authority. She also argues that the requesting authority must be afforded a margin of appreciation.

109. Each of these arguments was advanced and acknowledged by the CJEU in *Berlioz*, in relation to Article 5, and yet the court concluded that the question of whether the information was "*foreseeably relevant*" was justiciable. The court established a very low threshold; that of "*devoid of any foreseeable relevance*".

110. In principle, I see no difference between Article 5 and Article 17(1) in this regard.

111. The applicant referred to the provisions of Article 2 of Council Directive 77/799/EEC which was repealed by the Directive. This provided:-

> *"(1) The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilized, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result."*

112. The applicant argues that Article 2 makes clear that under Directive 77/799/EEC, the requested state was given a discretion not to comply with the request for information if it formed the view that the competent authority of the state making the request had not exhausted its own usual sources of information. The applicant argues that this shows that this was a provision in ease of the requested authority and was therefore not a matter which could be relied upon by either a taxpayer or a relevant person.

113. She submits that, while Article 17(1) has been recast, it cannot be the case that it was intended to limit the exchange of information given that Recital 9 makes clear that the intention of the Directive is to provide for exchange of information in tax matters "*to the widest possible extent*".

114. In considering whether Article 17(1) imposes a condition upon a requesting authority, the applicant emphasised the wording "*provided that the requesting authority*" in the English version of the Directive. While each language is equally authentic and the English

translation is the definitive English version, it is perhaps worth noting that in the French version ("*à condition que l'autorité requérante*") and the German version ("*unter der Voraussetzung, dass ...*"), each should be translated as "*on condition that*". No one language version has greater authority than another, but it is notable that at least two other versions of Article 17(1) should be translated as "*on condition that*" rather than as "*provided that*". This would suggest that, notwithstanding the repeal of Article 2 of Directive 77/799/EEC and the recasting of Article 17(1), it was intended to introduce a condition that a requesting authority exhaust its usual sources of information prior to making a request of an authority in another member state pursuant to the Directive.

115. The third and fifth questions referred to the court in Berlioz asked whether a court was required "*to verify that the condition of foreseeable relevance [of the information requested] has been satisfied in all its aspects, including in the light of Article l7 of [the Directive]*".

116. In para. 87 of the judgment, the court noted that the referring court also asked whether reviews to be carried out by the courts must cover compliance with the provisions of Article 17, but it did not expressly address this question. It made two references to Article 17 in its judgment. In para. 70, quoted above, the court says that it is for the requesting authority to assess the foreseeable relevance of the requested information to its investigation "*and, in accordance with Article 17(1) of [the Directive], after having exhausted the usual sources of information which it has been able to use in the circumstances.*"

117. The court did not confine itself to saying that the requesting authority was required to assess foreseeable relevance. An additional requirement was indicated, but it did not specify whether this was also a condition. However, if it has no relevance, it is difficult to see why the court referred to it at all.

118. In para. 75 of the judgment, it sets out the third and fifth questions of the referring court, and at para. 88 it concludes that the relevant party, Berlioz, did not rely on any "*limit*" within the meaning of Article 17 of the Directive when it contended that the information order was invalid.

119. However, notwithstanding this statement, earlier in para. 88 of the judgment, in reference to Article l7 the court stated:-

> *"It must be noted that those provisions which, as far as some of them are concerned, could be taken into account in determining the legality of a request for information to the relevant person, …".*

120. The Advocate General was of the view that the article imposed a condition, albeit one which the requested authority could not require the requesting authority to comply with.

121. When one looks at the provisions of Article 17, it seems probable that this reference to "*some*" of the provisions is likely to include a reference to Article 17(1) as it would appear

that the other paragraphs are not immediately relevant to determining the legality of a request for information. The terms used in the other paragraphs of Article 17 are permissive, not mandatory. On the other hand, Annex 1 of Regulation (EU) No. 1156/2012 sets out the details to be provided in the form for a request for information, which includes the "*fulfilment of the legal requirement imposed by Article 17(1)" of the Directive*.

122. As regards the role of Article 17(1), Berlioz was not directly concerned with this point. The decision of the court does not exclude consideration of Article 17(1), but neither does it make it explicit that it is a condition of a valid request that the requirements of Article 17(1) be met. If it were not for the fact that I am satisfied that the company has failed to establish, as a matter of fact, that the requesting authority did not exhaust the usual sources of information prior to making its request, I would have concluded that the interpretation of Article 17(1) is not *acte clair*, and would have considered making a reference to the CJEU pursuant to Article 267 of the Treaty on the Functioning of the European Union. However, for the reasons I have given, I do not believe that such a reference is necessary in order to determine this particular point in this case and therefore, no reference is required.

**Is the request for information an impermissible "fishing expedition"?**

123. The principal obligation under the Directive is to exchange information that is foreseeably relevant to the administration and enforcement of domestic laws of other member states when requested to do so. Recital 9 of the Directive makes it clear that the Directive is intended to provide for the exchange of information in tax matters to the widest possible extent. However, member states "*are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.*" Article 1(1) does not refer to the tax affairs of a given taxpayer. It refers to information that is "*foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.*"

124. The company argues that the information pursuant to Article 1(1) must be foreseeably relevant to the tax affairs of a given taxpayer. It says there is no given or identified taxpayer in this case. Article 20 provides that "*requests for information and for administrative enquiries pursuant to Article 5… shall, as far as possible, be sent using a standard form adopted by the Commission…*". The standard form "*shall*" include "*at least*" the identity of the person under examination or investigation and the tax purpose for which the information is sought. The form adopted by the Commission pursuant to Regulation (EU) No. 1156/2012 requires the requesting authority to identify the legal basis for the request for information; the identity of the person under examination or investigation; a general case description and, if appropriate, specific background information likely to permit an assessment by the requested authority of the foreseeable relevance of the information requested to the administration and enforcement of the domestic laws of the member states concerning the taxes referred to in Article 2 of the Directive; the tax purpose for which the information is sought and; fulfilment of the legal requirements imposed by Article 17(1) of the Directive.

125. The request from the Austrian tax authority used the form established by the Commission. Part B deals with identification of the taxpayers and general information about the request for information. In the section dealing with the identification of natural persons, the form states "*365 of Austrian natural persons with business relation to [the company]*". In relation to the address, the form states "*365 of individuals with a business relationship to [the company], Ireland and taxable in Austria*". In relation to other identification information, the requesting authority adds "*[t]his group of persons advertises/advertised their apartments/rooms for rent via the Internet platform of [the company]*". The Austrian tax authority confirmed that the application is in respect of 365 individual cases and is not a group application.

126. The company places great emphasis on this fact and says that it is binding upon the court. It means that the court must approach its task of reviewing the foreseeable relevance of the information requested by reference to each individual, the subject of the request. But, because the individuals have not been identified, there is no evidence in relation to them individually and it is not asserted that any one of them is not tax compliant. They have nothing in common save that they are all hosts who rent out premises at a nightly rate of €100 or more. There is nothing to link them to the complaints identified by the requesting authority. The company submits that, in the circumstances, the request amounts to a "*fishing expedition*" which is expressly prohibited in Recital 9 of the Directive.

127. The company relies upon the opinion of Advocate General Kokott in Joint Cases C-245/19 and C-246/19 *Luxembourg v. B & Another*; *F.C. v. A*, delivered on 2 July 2020, in support of its case. In relation to the first case, the Spanish tax administration sent the Luxembourg tax administration a request for exchange of information concerning an individual, F.C. The Luxembourg tax administration addressed a decision to Company B ordering it to provide information relating to contracts concluded by Company B with Companies E and F in relation to the rights of F.C. in the years 2011-2014, and all invoices issued or received in connection with those contracts, and details of the bank accounts and financial institutions in which the cash shown on the balance sheet was deposited. The investigation was in respect of an identified Spanish taxpayer and the request was directed towards a company incorporated in Luxembourg. Company B challenged the decision directing it to provide the information on a number of grounds including an argument that the information sought was "*not foreseeably relevant*" for the purposes of the investigation conducted by the Spanish tax administration. Similar issues arose in relation to the second of the joint cases, which also arose from the Spanish Tax Authority's investigation into the tax affairs of F.C.

128. The Advocate General noted that the concept of foreseeable relevance in the Directive reflects that used in Article 26 of the OECD Model Tax Convention. The explanatory memorandum to the proposal that led to the adoption of the Directive referred to the OECD Model Tax Convention ("the OECD Convention"). Under the OECD Convention, contracting states are not at liberty to engage in "*fishing expeditions*". They may not request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

There must be a reasonable possibility that the requested information will be relevant. Paragraph 8 of the commentary to Article 26 of the OECD Convention gives examples of cases which are "*foreseeably relevant*". The Advocate General noted that there were changes to the commentary published after the adoption of the Directive and that a change in the interpretation of Article 26 of the OECD Convention in the commentary does not automatically entail a change in the interpretation of Article 5 in conjunction with Article 1(1) of the Directive. At para. 121 of her opinion she said:-

> *"Even if the experts of the OECD member countries are now in agreement that a request for information regarding all the accounts of a taxpayer and all unspecified accounts of other persons connected with the taxpayer in question held with a particular bank is an example of foreseeable relevance within the meaning of Article 26 of the OECD Model Tax Convention, it does not automatically follow that the same applies to Article 1(1) and Article 5 of [the Directive]."*

129. She was of the opinion that while there was no obligation on a court so to do, it may, if convinced by the interpretation of Article 26 of the OECD Convention, adopt the OECD approach and interpret the Directive in a similar way. She emphasised that the concept of foreseeable relevance is to be interpreted autonomously on the basis of EU law.

130. At para. 126, she said that the standard of foreseeable relevance:-

> *"… is intended to provide for exchange of information in tax matters to the widest possible extent. It is also intended to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer." (emphasis in original)*

131. She reiterated the limited assessment of the foreseeable relevance in the requested member state so as to facilitate the exchange of information, as outlined in the decision of the CJEU in *Berlioz* and refers to paras. 70, 71, 76, 77, 80, 82, 84 and 85 therein. In paras. 132-145 she considered the prohibition on "*fishing expeditions*". She identified the "*decisive*" question as being: when, in the context of the Directive, does a request amount to an impermissible "'*fishing expedition' and when does it amount to permissible administrative assistance for the investigation of a case*"? In the absence of the court having considered the issue in the context of the Directive, she relied on the decisions of the court on a comparable problem in competition law. She applied the reasoning to the cross-border mutual assistance in relation to tax affairs. At paras. 137-139, she opined as follows:-

> *"137. However, if the requesting authority must indicate the presumed facts which it wishes to investigate by means of the request for information, an account inquiry regarding all 'unspecified accounts of other persons connected with the taxpayer in question', for example, does not automatically satisfy these requirements.*
>
> *138. Rather, the requesting authority must normally include in the request for information the facts which it wishes to investigate, or at least concrete suspicions*

*surrounding those facts, and their relevance for tax purposes. These reasons must enable the requested State to justify the mutual assistance together with the associated interferences with fundamental rights (of the addressee, the taxpayer or third parties concerned) before its courts. The requirements for the duty to state reasons become more stringent as the scope and sensitivity of the requested information increase.*

*139. A request for assistance therefore lacks foreseeable relevance if it is made with a view to obtaining evidence on a speculative basis, without having any concrete connection to ongoing tax proceedings."*

132. She thus establishes a requirement that the requesting authority "*includes*" the facts which it wishes to investigate, or at least concrete suspicions surrounding those facts, and their relevance for tax purposes. A request for assistance will not satisfy the requirements of the Directive if it is made "*with a view to obtaining evidence on a speculative basis, without having any concrete connection to ongoing tax proceedings*".

133. She then gives examples of various factors which must be taken into account when distinguishing "*foreseeably relevant*" information from impermissible "*fishing expeditions*". First, the subject matter of the requesting authority's investigation and the allegation that it has made under tax law must be considered. Another "*significant factor*" she identified was the previous conduct "*of the taxpayer*". She commended the Swiss Federal Court for requiring that there be concrete evidence of a violation of tax obligations. Lastly, she said, account must be taken of the "*circumstances identified by the requesting tax administration so far.*" She gave examples where there may be a particular need for a request for information in the case of extensive networks of undertakings with unclear financial transactions between them. Another example is where the investigations conducted "*to date*" have revealed contradictory information in that regard. In the case before her, she concluded that in the absence of concrete evidence, "*a request for information seeking to identify all the taxpayer's accounts held with a bank and all unspecified accounts of third parties which are in some way connected with the taxpayer is not permissible under [the Directive], but constitutes an impermissible 'fishing expedition'.*"

134. Importantly, she concludes that:-

*"144. However, the necessary distinction must be made in the context of an overall assessment, taking into account all the circumstances of the individual case, and is therefore a matter for the referring court."*

135. She ends by stating that the request for information must provide concrete evidence of the facts or transactions that are relevant for tax purposes, so as to rule out an impermissible "*fishing expedition*".

136. The Grand Chamber of the CJEU gave judgment on the cases on 6 October 2020. The court observed that a decision directing a relevant person to provide information to a

requested authority "*is adopted during the preliminary stage of the investigation concerning the taxpayer in question, during which information relating to the tax situation of that taxpayer is gathered and which does not require an exchange of views and arguments. Indeed, only the last stage of that investigation, which begins with the sending of a proposal for correction or adjustment to the taxpayer concerned, (i) is a contentious stage meaning that the taxpayer is able to exercise his or her right to be heard … and (ii) is likely to lead to a correction or adjustment decision, addressed to that taxpayer.*" The court observed that at that point in time, the taxpayer concerned by the investigation will have the possibility of challenging, indirectly, the decision ordering that the information be provided and the conditions under which the evidence gathered as a result of that investigation was obtained and used, in the context of the action which he or she may bring against the correction or adjustment decision. If national legislation does not afford the taxpayer the possibility of challenging the decision directed towards the relevant person to provide information concerning the taxpayer to the requested authority, this could infringe the rights of the taxpayer guaranteed by Article 47 of the European Charter of Fundamental Rights. But, the relevant assessment of the possible infringements of the rights of the taxpayer are assessed at this later stage, not when the information order is served on the relevant person.

137. In para. 107, the court addressed the second question referred in the following terms:-

> *"By that question, the referring court asks, in essence, whether Article 1(1) and Article 5 of [the Directive] are to be interpreted as meaning that a decision by which the competent authority of a Member State orders a person holding information to provide it with that information, with a view to following up on a request for exchange of information made by the competent authority of another Member State, is to be considered, taken together with that request, as concerning information which is not manifestly devoid of any foreseeable relevance where it states the identity of the person holding the information in question, that of the taxpayer concerned by the investigation giving rise to the request for exchange of information, and the period covered by that investigation, and where it relates to contracts, invoices and payments which, although not specifically identified, are defined by criteria relating, first, to the fact that they were concluded or carried out by the person holding the information, secondly, to the fact that they took place during the period covered by that investigation and, thirdly, to their connection with the taxpayer concerned."*

138. Referring to its decision in *Berlioz*, the court said:-

> *"110. The expression 'foreseeably relevant' used in Article 1(1) of [the Directive] is intended … to enable the requesting authority to request and obtain any information that it may reasonably consider will prove to be relevant for the purposes of its investigation, without however authorising it manifestly to exceed the parameters of that investigation or to place an excessive burden on the requested authority. …*

111. In addition, that expression must be interpreted in the light of the general principle of EU law consisting in the protection of natural or legal persons against arbitrary or disproportionate intervention by the public authorities in the sphere of their private activities, … ."

139. It noted that a requesting authority is not entitled to engage in a "*fishing expedition*" as referred to in Recital 9 of the Directive, and then stated:-

> *"114. Accordingly, the information requested for the purposes of such a 'fishing expedition' could not, in any event, be considered to be 'foreseeably relevant' for the purposes of Article 1(1) of [the Directive].*
>
> *115. In that regard, the requested authority must review whether the statement of reasons for the request for exchange of information that has been addressed to it by the requesting authority is sufficient to establish that the information in question is not devoid of any foreseeable relevance, having regard to the identity of the taxpayer concerned by the investigation giving rise to the request, to the requirements of such an investigation and, in a situation where it is necessary to obtain the information in question from a person holding that information, to the identity of that person. …"*

140. The court reiterated that it is for the court having jurisdiction to review a decision to make the similar assessment, and it must do so by reference to the decision directing the relevant party to provide the information, together with the request for exchange of information on which it is based. In the case before the court, the referring court's doubts stemmed from the fact that the contracts, invoices and payments were not specifically identified in the decision directed to the relevant person. The CJEU addressed this issue as follows:-

> *"120. …[The]decision, taken together with that request, indisputably concerns information which is not manifestly devoid of any foreseeable relevance inasmuch as it concerns contracts, invoices and payments that were concluded or carried out, during the period covered by the investigation, by the person holding the information concerning those contracts, invoices and payments, and that are connected with the taxpayer concerned by that investigation.*
>
> *121. Secondly, it should be borne in mind that both the decision and the request were made … during the preliminary stage of the investigation, the purpose of which is to gather information of which the requesting authority does not, by definition, have full and precise knowledge.*
>
> *122. In those circumstances, it is foreseeable that some of the information referred to in the decision ordering that information be provided giving rise to the dispute in the main proceedings … taken together with the request for exchange of information on which it is based, will ultimately prove, at the end of the*

*investigation conducted by the requesting authority, to be irrelevant in the light of the results of that investigation.*

*123. However, … that fact cannot serve as an indication that the information in question can be regarded, for the purposes of the review [to be carried out by the court] as being manifestly devoid of any foreseeable relevance and, accordingly, as not meeting the requirements resulting from Article 1(1) and Article 5 of [the Directive].”*

141. An obvious difference between the current case and the case of *Luxembourg v. B*; *F.C. v. A* is that the taxpayer, the subject of the investigation, was known and identified, whereas the information sought was not. The opposite situation pertains in the case before this court; the information required is precisely identified and it is the individual identities of the taxpayers which is sought. Nonetheless, the guidance of the CJEU is of assistance in resolving the issue before this court. The CJEU has emphasised the importance of the fact that the information is sought to assist with an investigation which may be in its preliminary stages. The fact that certain information may, at the end of the investigation, be irrelevant in the light of the result of that information in no way invalidates the request. Likewise, it is implicit, that it is not necessary to assert, never mind establish, that the taxpayer under investigation has been non-compliant. This is primarily a matter for the requesting authority.

142. As will be apparent, the court’s judgment diverged significantly from the Advocate General’s opinion. The court did not agree with the provisional view of the Advocate General that the information was not “*foreseeably relevant*” to the investigation in question and that it amounted to “*an impermissible fishing expedition*”. It did not endorse her view that it was necessary that the request for information provide “*concrete evidence*” of the facts or transactions that are relevant for tax purposes so as to rule out an impermissible fishing expedition and, in general, identified the applicable threshold in terms materially different to the approach that had been suggested by the Advocate General. To this extent, the reliance placed upon the opinion of the Advocate General by the company has been shown to have been misplaced.

143. The applicant and the company express diverging views as to whether the request for information in this case constitutes impermissible fishing or whether it meets the standard of review established in Berlioz that the information is foreseeably relevant to an ongoing investigation. Critical to their diametrically opposing positions is whether the starting point is a request concerning 365 individual, unidentified taxpayers or an investigation into a group of taxpayers where there is reason to believe, on the basis of the investigation to date, that there is a failure to comply with domestic tax laws amongst some members of this group of taxpayers. In addressing the question, the commentary on Article 26 of the OECD Convention is of assistance.

144. The commentary on Article 26 of the OECD Convention was updated on 17 July 2012. The commentary defines “*fishing expeditions*” as “*speculative requests that have no apparent nexus to an open inquiry or investigation*”. At para 5.1, the authors note that a

request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation, but it must include other information sufficient to identify the taxpayer. Paragraph 5.2 provides as follows:-

> *"5.2 The standard of 'foreseeable relevance' can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any request related to the investigation will typically serve "the administration or enforcement" of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of "foreseeable relevance". However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative**. In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis** … Furthermore, and as illustrated in example (a) of paragraph 8.1, a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance."* (emphasis added)

145. I am satisfied that the evidence shows that there is an open inquiry or investigation in Austria. While the Austrian tax authority has not been able to provide the names or addresses of the individual taxpayers, it has identified them sufficiently by reference to the company's host ID numbers. The company has not said that it cannot identify the individuals based on this information and it would appear, by reason of the fact the number is unique to each host, that this is not an issue. The commentary acknowledges that the standard of foreseeable relevance can be met where a contracting state undertakes an investigation into a particular group of taxpayers who are not individually identified. It acknowledges that it will often be more difficult to establish that the request is not speculative in the circumstances as the requesting state "*cannot point to an ongoing investigation into the affairs of a particular taxpayer*". However, that alone is not fatal, because the commentary goes on to state that such failure "*in most cases would by itself*" dispel the notion of the request being random or speculative. It is not conclusive. The commentary spells out the information which the requesting state must provide in the circumstances.

146. In this case, while it is stated to be 365 individual requests, in all other respects it is presented as a group or class request and the justification for the request is on a group,

rather than an individual, basis. The group is clearly defined. They are individuals who rent premises for short term lets in Austria at a rate of €100 or more per night. They are clearly defined by reference to the host ID numbers. The Austrian tax authority has specified certain facts and circumstances which have led to the request. The subjects of the application, or any one of them, may have failed or may fail to comply with the provisions of the Austrian Tax Acts and, in particular, the Income Tax Code. The information received by the applicant is that there is an open, ongoing investigation by the Austrian tax authority which has yielded settlements and clear findings of non-compliance with Austrian tax law by hosts on the company's platform. This provides a reasonable basis to suspect that the subjects of this application, if treated as a group request, may have failed or may fail to comply with any provisions of the Austrian Tax Acts. Such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of Austrian tax. Settlements running into several thousands of Euros have been reached, and the subjects of the application are those with properties to rent at €100 or more per night. It is probable that those subjects may have other income and thus, there are reasonable grounds to suspect that such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of Austrian tax. The Austrian tax authority requires the information sought in order to progress its investigation and absent the information sought it cannot do so.

147. In my judgment, this information meets the requirement set out in para. 5.2 of the OECD commentary that the requesting authority provide a detailed description of the specific facts and circumstances which have led to the request and why there is reason to believe that the taxpayer(s) in the group have been non-compliant. The requirement is not that it be established that each member of the group has, in fact, been non-compliant, this sets too high a threshold. In fact, non-compliance as such is not required to be established. This is clarified by the subsequent sentence which states that the details provided by the requesting state must show "*that the requested information would assist in determining compliance by the taxpayers in the group*." This conclusion is reinforced by one of the examples given in the commentary of circumstances where information can be exchanged pursuant to Article 26. While the commentary emphasises that the examples are for illustrative purposes only, they inform the interpretation of the phrase "*fishing expedition*".

148. In Example 8(F), the requesting authority of State A was said to have established that the request for information was not a fishing expedition. The example is:-

> *"State A has obtained information on all transactions involving foreign credit cards carried out in its territory in a certain year. State A has processed the data and launched an investigation that identified all credit card numbers where the frequency and pattern of transactions and the type of use over the course of that year suggest that the cardholders were tax residents of State A. State A cannot obtain the names by using regular sources of information available under its internal taxation procedure, as the pertinent information is not in the possession or control of persons within its jurisdiction. The credit card numbers identify an issuer*

*of such cards to be Bank B in State B. Based on an open inquiry or investigation, State A sends a request for information to State B, asking for the name, address and date of birth of the holders of the particular cards identified during its investigation and any other person that has signatory authority over those cards. State A supplies the relevant individual credit card numbers and further provides the above information to demonstrate the foreseeable relevance of the requested information to its investigation and more generally to the administration and enforcement of its tax law."*

149. In the example given, there was no suggestion, nor any reason to believe, that each and every cardholder, or person with signatory authority over the cards, had failed to pay the relevant tax due in State A. Similarly, in this case, there is no suggestion, nor any requirement to establish, that each and every host identified in the request for information has failed to pay the appropriate income tax due in Austria. The information in the example suggested that tax residents of State A had credit cards issued by Bank B in State B, no more. This was sufficient to demonstrate the foreseeable relevance of the requested information (the name, address and date of birth of the cardholders) to its investigation and to the administration and enforcement of its tax law. At the very least, this suggests that the argument of the company, that the information provided by the Austrian tax authority is insufficient to demonstrate foreseeable relevance and constitutes impermissible fishing, is incorrect.

150. Advocate General Kokott said that if the national court is convinced by the interpretation of Article 26 of the OECD Convention that the national court may adopt the OECD approach and interpret the Directive in a similar way, notwithstanding the fact that, ultimately, the concept of "*foreseeable relevance*" is to be interpreted automatously on the basis of EU law.

151. In my judgment, the analysis of the OECD commentary is convincing and I see no reason not to apply it to the interpretation of what is or is not "*foreseeably relevant*" within the meaning of the Directive.

152. In these circumstances, ought the application be refused on the basis that the application is stated to be for 365 individual taxpayers, rather than a group of defined taxpayers in respect of whom the Austrian tax authority is conducting an investigation? In my judgment, such a result is unwarranted and would be inconsistent with the principle of sincere cooperation which governs the approach to be taken by requested authorities and the court to requests made under the Directive. The purpose of the Directive is to provide mutual assistance to tax authorities in member states to the widest possible extent. Recital 9 specifically provides that the procedural requirements in Article 20 "*need to be interpreted liberally in order not to frustrate the effective exchange of information*". In my judgment, to dismiss this application on the basis that it is presented as 365 individual requests, rather than as a group request would be to elevate form over substance in a manner which is incompatible with these obligations.

153. Bearing in mind that the test for review is whether the request is manifestly devoid of the foreseeable relevance to the inquiry or investigation, I am not so satisfied, and accordingly do not accept, that the request for information is not in compliance with the Directive, and I reject the arguments of the company to the contrary.

**The Data Protection Directive**

154. The data held by the company *prima facie* is data governed by the provisions of the Data Protection Directive (now the GDPR) and the Data Protection Acts 1988-2018 ("the Data Protection Acts"). The company raised the issue whether compliance by it with the terms of the order would breach its obligations as a data controller and, secondly, it raised an issue whether, if it transferred the information to the applicant, the *further* transmission of the data to the Austrian tax authority would constitute a breach by the applicant (or the Revenue Commissioners) as the data controller of such data.

155. It will be recalled that Article 25 of the Directive provides that all exchange of information pursuant to the Directive shall be subject to the provisions of the Data Protection Directive. It limits the rights and obligations of data subjects and data controllers under the Data Protection Directive. It provides that member states "shall", for the purposes of the correct application of the Directive, restrict the scope of obligations and rights provided for in Articles 10, 11(1), 12 and 21 of the Data Protection Directive to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of the Data Protection Directive. These interests are important economic or financial interests of a member state of the European Union, and include taxation matters.

156. The data protection rights and obligations of the company and of the hosts identified in the request for information are restricted by reason of the provisions of Article 13(1)(e) of the Data Protection Directive. Article 25 of the Directive, in effect, disapplies certain personal data protection rights which would otherwise apply to information sought in a request made pursuant to the Directive. This means that a relevant person, such as the company, may not rely on rights granted under the articles in the Data Protection Directive specified in Article 25 of the Directive as a reason to refuse to comply with an information notice. Neither do they afford a basis for holding that the notice is invalid.

157. In addition, Article 7 of the Data Protection Directive provides:-

> *"Member states shall provide that personal data may be processed only if:*
>
> *…*
>
> *(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or*
>
> *…*
>
> *(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; …".*

158. The provisions of Article 7 are substantially reproduced in s. 2A of the Data Protection Act 1988 (as amended). This provides:-

> *"(1) Personal data shall not be processed by a data controller unless section 2 of this Act (as amended by the Act of 2003) is complied with by the data controller and at least one of the following conditions is met:*
>
> *…*
>
> *(b) the processing is necessary -*
>
> *…*
>
> *(iii) for compliance with a legal obligation to which the data controller is subject other than an obligation imposed by contract, or*
>
> *…*
>
> *(c) the processing is necessary -*
>
> *(i) for the administration of justice,*
> *(ii) for the performance of a function conferred on a person by or under an enactment,*
> *(iii) for the performance of a function of the Government or a Minister of the Government, or*
> *(iv) for the performance of any other function of a public nature performed in the public interest by a person".*

159. It follows that if the court is satisfied that the request from the Austrian tax authority is a valid request, and that the court ought to make an order pursuant to s. 902A(4), then the transmission of data by the company to the applicant on foot of the court order, and the further transmission of the data by the applicant to the Austrian tax authority pursuant to the court order, and the obligations imposed by Articles 5 and 6 of the Directive, is lawful, both within the terms of the Data Protection Directive and the Data Protection Acts. The applicant submitted that where data processing occurs pursuant to a court order (which order in turn gives effect to the fiscal interests of another member state) there is no breach of data protection law. I agree with this submission. On the facts of this case, no issue arises as to the validity of the application or of any processing of data consequent upon any order made by this court pursuant to s. 902A.

160. The applicant went further and argued that this is so regardless of whether or not the underlying application complies with the Directive. She submitted that this does not mean that the legality of the request for information pursuant to the Directive cannot be raised in the context of the application. Rather, the issue of compliance and non-compliance with the Directive is not determined by reference to compliance with data protection law. That is governed by the Data Protection Directive and the Data Protection Acts, and once an order is made, no issue arises. As this does not arise on the facts of this case, it is not necessary to express a view on this submission and I reserve consideration of this issue to a case in which it arises for decision.

161. In my judgment, therefore, the request of the Austrian tax authority is not invalid by reason of a failure to satisfy the requirements of Article 1(1) or Article 17(1) of the Directive and thus, is to be regarded, therefore, as a valid request issued under the Directive.

162. In point (iv) of their joint Issue Paper, the parties asked the court whether the applicant, under s. 902A, must prove that the request is compliant with the Data Protection Directive and, if so, must she prove, (a) that the information sought is foreseeably relevant within the meaning of Article 1(1) and, (b) that the Austrian tax authority has exhausted the usual sources of information within the meaning of Article 17(1) in order to establish compliance with the Data Protection Directive. As discussed above, I am of the opinion that it is for the requested authority to verify whether the information sought is foreseeably relevant within the meaning of Article 1(1) of the Directive and the court, likewise, must verify this fact pursuant to s. 902A. I have also held that, as regards compliance with Article 17(1), assuming it is justiciable, the task cannot be more onerous than that laid down in Article 1(1) and, accordingly, that it too requires the requested authority and the court to verify compliance by the requested authority with Article 17(1). The applicant is required to put before the court material which verifies – not proves – these facts. Once the applicant, or the court, verifies these facts, then there is no further requirement to verify that the request complies with the Data Protection Directive.

**The 2012 Regulations**

163. It will be recalled that Regulation 4 of the 2012 Regulations provided that the Revenue Commissioners "*shall*" comply with the requirements imposed by the Directive. Regulation 6(1) provides that the requested authority shall, at the request of the requesting authority, disclose to the requesting authority any information which is permitted to be disclosed by virtue of the Directive. The company argued that the net effect of these provisions is that the Revenue Commissioners may only rely upon the regulations if they are actually required under the terms of the Directive so to do. In view of my finding that the request of the Austrian tax authority is a valid request issued under the Directive, and that the Revenue Commissioners accordingly are required to comply with the provisions of Article 5 and 6 of the Directive, it is not necessary to resolve the issue raised by the company on this point. In the circumstances, both the applicant and the Revenue Commissioners are obliged to comply with the request; it is not merely a voluntary decision on her behalf or on behalf of the Revenue Commissioners to decide whether or not to furnish the information sought.

164. Regulation 14(2) states that for the purposes of complying with the provisions with respect to the exchange of information contained in the Directive, the provisions of the TCA 1997 set out in that Regulation shall have affect subject to the modifications set out in subpara. (2). Specifically, any reference in the identified sections, which includes ss. 902 and 902A, to tax, includes a reference to foreign tax. Foreign tax for the purposes of the Regulation means "*a tax chargeable under the laws of a territory other than the State in relation to which the Council Directive applies*". The sections also apply as if references in those sections to liability in relation to a person includes references to liability to a

foreign tax within the meaning of the Regulation in relation to a person. "Liability to foreign tax" in relation to a person "*means any liability in relation to foreign tax to which the person is or may be, or may have been, subject, or the amount of any such liability*". It will immediately be observed that liability to foreign tax includes the possibility that the person may be or may have been liable to a tax chargeable under the laws of a territory to which the Directive applies. There is no dispute in this case that the possible charge to tax in Austria is a charge to tax under the laws of a territory other than the state in relation to which the Directive applies. Regulation 14(3) provides, in relation to s. 902A, that it is to have effect as if the references in s. 902A to tax, were references to foreign tax, and any provision of the Act, were references to any provision of the law of a territory other than the state in accordance with which foreign tax is charged or collected.

165. Bearing these provisions in mind, it is necessary to consider the terms of s. 902A.

**Section 902A of the TCA 1997**

166. Section 902A is a measure of national law. It is a measure available to the Revenue Commissioners, as requested authority under the Directive, to comply with their obligations under the Directive and, in particular, provides a legal basis before the Revenue Commissioners to carry out any administrative enquiries necessary to obtain the information referred to in Article 5, pursuant to Article 6 of the Directive.

167. An application under the section must be brought by an authorised officer. The applicant is an authorised officer for the purposes of the section. She may not make an application under the section without the consent in writing of a Revenue Commissioner. She has exhibited the consent in writing of a Revenue Commissioner to the bringing of this application. In addition to these formal requirements, which are not in dispute, the applicant must satisfy herself that there are reasonable grounds to suspect the matters set out in subss. (3)(a)-(c). I reproduce these for convenience:-

> *"(3) An authorised officer shall not make an application under subsection (2), whether or not it includes a request to be made under subsection (2A), without the consent in writing of a Revenue Commissioner, and without being satisfied –*
>
> *(a) that there are reasonable grounds for suspecting that the taxpayer, or, where the taxpayer is a group or class of persons, all or any one of those persons, may have failed or may fail to comply with any provision of the Acts,*
>
> *(b) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax (having regard to the amount of a liability in relation to the taxpayer, or where the taxpayer is a group or class of persons, the amount of a liability in relation to all or any one of those persons, that arises or might arise from such failure),*
>
> *(ba) that, in a case where the application includes a request made under subsection (2A), there are reasonable grounds for suspecting that a*

*disclosure, referred to in subsection (2A) is likely to lead to serious prejudice to the proper assessment or collection of tax, and*

*(c) that the information –*

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

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

*is relevant to the proper assessment or collection of tax."*

168. Once the applicant had satisfied herself of these matters, she may then bring the application before the court.

169. The company says that the Austrian tax authority makes clear that the application was in respect of 365 individuals and that it was not a group or class request. The company submits that the court is bound by this characterisation of the request by the Austrian tax authority and, accordingly, it must assess the validity of the application under s. 902A by reference to each of the 365 individuals identified by their host ID number with the company. In this context, the company submits there is nothing to suggest that any of them may have failed or may fail to comply with any provision of Irish tax law. It argues that the section can only be extended to Austrian tax law if Regulation 14 of the 2012 Regulations applies. The company says that it is for the applicant to establish this as a pre-condition to bringing the application pursuant to s. 902A(2). If it is such a pre-condition, then the burden rests on the applicant to prove that there is a valid request under the Directive and that the Revenue Commissioners are obliged to comply with that request.

170. I do not accept that this submission is correct. Under the Directive, the requested authority and the court are required to verify that the request is not manifestly devoid of foreseeable relevance to an open inquiry and (assuming that it amounts to a mandatory requirement) that the requested authority has exhausted its usual sources of information. Once so satisfied, Article 6 requires the Revenue Commissioners as the requested authority to make any necessary administrative enquiries and under Article 6(3) they "*shall follow the same procedures*" as they would when acting on their own initiative in relation to Irish taxes. The relevant provision in domestic law is s. 902A. Furthermore, by virtue of Regulation 14, as a matter of domestic law the applicant is authorised to apply under s. 902A for orders relating to, inter alia, Austrian taxpayers and in respect of Austrian tax. This means the application must follow the domestic procedures. The applicant must satisfy the requirements of those domestic procedures, in this case s. 902A. The applicant must assess the request, and any information provided by the requesting authority, and satisfy herself that the request is a valid request. She may then avail of the procedures established in ss. 902 and 902A. If she applies to the High Court for an order under s. 902A, she must place before the court the request and the materials furnished to her by the requesting authority, upon which she relies in making

her application, so that the court may itself verify the validity of the application and determine whether the order sought ought to be granted.

171. The company says that there are no reasonable grounds to suspect that each of the 365 individuals have failed to pay any tax in Austria. It says that the applicant cannot rely on the provisions relating to a group or class of persons referred to in subs. (3)(a) as the request from the Austrian tax authority, itself, identifies this as 365 individual requests. It submits that insofar as the Austrian tax authority has identified any tax evasion, it is not linked to any of the 365 individuals. That being so, the company submits, that there cannot be reasonable grounds for suspecting them of having failed, or of possibly failing in the future, to comply with their obligations to pay tax in Austria. In effect, the company says that, in relation to an unidentified host, the Austrian tax authority must say why that particular individual is not tax compliant in order that an authorised officer may be satisfied that there are reasonable grounds for suspecting that that particular taxpayer may have failed or may fail to comply with his or her obligations under Austrian tax law.

172. I am not satisfied that this is the correct approach. The Directive makes no distinction between group or individual requests. Neither does the form established by Regulation (EU) No. 1156/2012, which was used by the Austrian tax authority. While Article 20 of the Directive acknowledges that the standard form for requesting information "*shall*" include the information identifying the person under examination or investigation, the form is to be used "*as far as possible*", and Recital 9 of the Directive specifically provides that this Article is to be interpreted liberally "*in order not to frustrate the effective exchange of information.*" The fact that the Austrian tax authority "*considered*" the application to be in respect of 365 individuals cannot preclude the court from determining whether, as a matter of Irish law, the request is properly to be regarded as relating to a group or class of taxpayers or to 365 individual taxpayers. Under Irish domestic legislation, it is possible to make an application in respect of a group or class of persons whose individual identities are not known to an authorised officer, provided there are reasonable grounds for believing that all or any one of those persons may have failed or may fail to pay tax due by them. It is a matter for the Revenue Commissioners initially, and ultimately for the court, to assess and determine whether the request for information and the application under s. 902A relates to a "*group or class of persons*".

173. The characterisation of the application under s. 902A is a matter of Irish law to be assessed initially by the applicant and then by the court. While the Directive makes no distinction between individual and group requests for information, domestic law does. The obligation on the requested authority is to provide assistance to the maximum possible extent, so national legislation should be construed in a manner consistent with this obligation if possible. In my judgment, there is nothing in the terms of the TCA 1997 which requires the applicant to treat the form of the request from the Austrian tax authority as limiting the form of her application under s. 902A. That being so, she is entitled to treat the application as a request for information in respect of a class or group of persons, all or any one of whom may have failed or may fail to pay tax due in Austria.

174. The applicant, based upon the information she has received from the Austrian tax authority and which she has placed before the court, as discussed above, says that she has reasonable grounds for suspecting that all or any one of the class of taxpayers – the company's hosts who rent accommodation in Austria – may have failed or may fail to comply with their obligations under Austrian tax law; that is, to pay tax on rent received from renting properties on the company's website. In her second affidavit sworn on 21 November 2016, at para. 30, the applicant states "*… the individual taxpayers are members of a group being those persons who host properties on the [company's] platform. I am advised and believe that the position adopted by the Austrian authorities does not constrain this court in exercising the jurisdiction conferred by section 902A, and that (for the avoidance of doubt) I am of the opinion that the individual taxpayers are indeed members of such a group or class and am satisfied that each provision of section 902A applies to such group or class accordingly.*" In light of all of this, I am satisfied that she had reasonable grounds for this suspicion and that she satisfied the pre-condition set out in subs. (3)(a).

175. The next pre-condition is whether there are reasonable grounds to be satisfied that "*any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax … that arises or might arise from such failure*". The applicant says that she has been satisfied that such is the case. The company argues that there are no grounds for believing that and "*such*" failure of the individual Austrian taxpayers is "*likely*" to have led or to lead to "*serious prejudice*" to the proper assessment or collection of tax that arises or might arise from such alleged failure in Austria. It says that the request for information and the application by the applicant gives no indication of the number of days any individual rented out any property and therefore there is no indication of any annual receipts in respect of any of the 365 individuals. It follows, according to the company, that it is not possible to say either, (1) that any of the 365 individuals are liable to pay income tax and, (2) that any such failure is likely to have resulted in "*serious prejudice*" to the Austrian tax authority.

176. In my opinion, the company is applying an unduly high threshold to this pre-condition. In *An Inspector of Taxes v. A Firm of Solicitors*, at para. 9, Moriarty J. held that the threshold was a "*relatively low threshold of reasonable grounds for suspicion, albeit subject to the checks noted…*".

177. The applicant is not required to establish matters set out in subss. 3(a) and (b) on the balance of probabilities, as was contended by the company.

178. The correspondence from the Austrian tax authority establishes that tax settlements have been reached where it was possible to identify the hosts of properties rented on the company's website and that voluntary settlements were made by certain individuals who were not identified, but who nonetheless came forward in response to the investigations of the Austrian tax authority. The request for information is in respect of more expensive rental properties and thus, if the properties are let for a reasonable period each year, there is a likelihood that the income generated will attract income tax by reason of the

thresholds explained by the Austrian tax authority. I am satisfied that the applicant has met the relatively low threshold of reasonable grounds for suspicion, as identified by Moriarty J., in this case in relation to both the matters in subparas. (a) and (b) of subs. (3). Given my conclusions in relation to the matters set out in subs. (3)(a) and (b), and given that the information sought is the identity of the unknown taxpayers, there can be no issue in relation to subpara. (c) as the information is clearly relevant to the proper assessment or collection of tax in Austria. Thus, I am satisfied that the applicant had reasonable grounds for suspecting the matters as set out in the subsection(s) and thus, she was entitled to bring the application pursuant to subs. (2).

179. Once the applicant satisfies the requirements of subs. (3), then the applicant, as an authorised officer, may make an application pursuant to subs. (2) to the High Court for an order under subs. (4). Under subs. (4), the High Court judge must satisfy him or herself that there are reasonable grounds for the application being made. It was submitted that these reasonable grounds must encompass at least the three matters required to be met in subs. (3) as pre-conditions to the bringing of an application, and I agree with this submission. The company says that the High Court did not conclude, inferentially or otherwise, that it was satisfied that there were reasonable grounds for the application to be made. The trial judge merely held that there was "*ample evidence that the authorised officer is so satisfied*". However, for the reasons set out earlier, I am satisfied that this court may and ought to determine the matters which arise on this appeal which were not determined by the High Court, so the failure of the trial judge to form her own opinion is not dispositive of the appeal.

180. I am satisfied for all of the reasons previously discussed that, (1) the trial judge was correct to hold that there was ample evidence that the authorised officer was so satisfied and, in addition, (2) that there are reasonable grounds for the application being made within the meaning of subs. (4) of s. 902A. The court must be satisfied that the information sought is relevant to a liability in relation to a taxpayer. "Taxpayer" includes a group or class whose liabilities are not known. I am satisfied that the application relates to a group or class of taxpayers, all or any one of whom may have failed or may fail to pay tax due in respect of the renting of their properties in Austria. The reference in s. 902A to a liability to tax includes liability to foreign tax, and thus, Austrian income tax, by virtue of the 2012 Regulations. Therefore, in dealing with this application, the court must consider whether there are reasonable grounds for believing that the information sought may be relevant to a liability to Austrian tax in relation to a class or group of taxpayers whose identities are not known. In my judgment, "*there are reasonable grounds for bringing the application*" as required by subs. (4) in the circumstances of this case. The application manifestly relates to a group or class of persons. They are all hosts who rent properties for €100 or more per night and there are reasonable grounds for suspecting that all or any one of them may have failed to pay tax due on the resulting income.

181. The final matter to be considered is whether, in the exercise of its discretion, the court should make an order requiring the company to deliver to the applicant, or to make

available for inspection by the applicant, such books, records or other documentation, and to furnish to the applicant such information, explanations and particulars as may be specified in the order. In the exercise of its discretion, it is appropriate to have regard to the fact that, in this case, the application arises out of a request for information furnished by the Austrian tax authority pursuant to the Directive. There is an obligation on the Revenue Commissioners to comply with the request. In my opinion, this court ought to exercise its discretion by making the order sought by the applicant in this case.

182. In reaching this decision, I am mindful of the fact that in *Luxembourg v. B; F.C. v. A*, the CJEU noted that one of the objectives pursued by the Directive is that of combatting international tax fraud and tax evasion and that the making of orders, such as that sought in this case, may be proportionate in order to achieve that objective. I am therefore satisfied that this is an appropriate case in which to make the order sought by the applicant in the terms sought and as ordered by the High Court.

**Conclusion**

183. In my judgment, the request for information received from the Austrian tax authorities was a valid request which complied with the requirements of the Directive. I have verified that the Austrian tax authority exhausted the usual sources of information available to it prior to sending the request. The request is not manifestly devoid of foreseeable relevance to the ongoing investigation. Compliance with the order by the company and the furnishing of the information by the Revenue Commissioners to the Austrian tax authority will not breach the provisions of the Data Protection Directive or the Data Protection Acts. The applicant was authorised to bring the application pursuant to s. 902A of the TCA 1997 by a Revenue Commissioner. I am satisfied that she had reasonable grounds to bring the application within the meaning of subs. (3), and I am separately satisfied that there are reasonable grounds for the application being made within the meaning of subs. (4). This is an appropriate case for the court to exercise its discretion to make the order sought and I am satisfied that the trial judge did not err in so ordering. For these reasons, I would reject the appeal.

184. Noonan and Collins JJ. have read and agree with this judgment. The matter will be listed for a short hearing on the costs at a date to be notified to the parties by the office of the Court of Appeal.