

A P P E A R A N C E S

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THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,

15TH JANUARY, 2003 AT 11AM:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Thank you, Mr. Brennan.

Now, what I propose to start doing today is to try to form some idea of how the process evolved, how it reached the point at which Mr. Andersen was engaged, how it developed from there on, and ultimately, over the following days, we'll deal with the chronological or we'll endeavour chronologically to survey the whole process from the beginning to the end. And what I am proposing we'll do is, you know, from before Christmas, is that we'll go through the document trail.

Now, I think you have a copy of Book 251102/41, Book 41 for short, is that right, which is the departmental documents, as they have been called, Volume I. And the first document in this book of documents is a memorandum on the question of licensing service providers to provide a GSM global system for mobile communications services. Is that the document you have?

A. Yes.

Q. And I think that is in fact a briefing note for the Minister?

A. I don't actually know what its status is, but I would be surprised if that was its purpose. It was almost certainly and I mean, he wasn't even in Ireland at the time, but it's almost certainly an internal memorandum to start the process.

Q. I think you are right, because the documents are reversed in my book compared to your book; but I think in my book the the documents are slightly reversed.

It's an internal memorandum, I think, summarising the then state of affairs in relation to GSM; would that be right?

A. That's roughly what it is, yeah.

Q. The document is dated 18th February, 1993. The second document, which I want to deal with first, is a briefing note for the Minister's meeting on the 26th January, 1993, with Sigma Communications Group; can you see that?

A. Yes.

Q. And that is probably the first document we should look at, since it's the first in time. Presumably this briefing note came into existence because people with an interest in providing GSM services or competing with Eircell, or Eircom, I think as it was at the time, were making representations to the Minister to try to get involved in this business; would that be right?

A. Well, on the face of it, it seems to me that somebody requested a meeting with the Minister. The private secretary called for a brief, and this was what was written at the time. But I mean, I have no knowledge about it. I wasn't as I say, I was working in Brussels at the time.

Q. But I am asking you of course I know you have no knowledge of it.

A. It seems to me that it was a brief prepared for a specific meeting.

Q. It says "GSM is a new digital cellular mobile radio telephone system which is just now emerging on world markets. This system which was originally called Group Special Mobile, but it was renamed global standard for mobile communications in recognition of its potential in worldwide markets will permit subscribers to use their mobile phones across Europe without technical difficulty.

"Frequently planning for this service on the basis that there should be the possibility for competition in its provision. Accordingly it will be possible to establish two GSM networks in Ireland." And it notes that there are two GSM networks in England.

It then goes on to deal with Telecom Eireann's involvement: "Telecom Eireann plan to launch a GSM service this year in the greater Dublin area with a rapid roll-out of national coverage thereafter. The existing mobile cellular radio telephone system (Eircell) will continue alongside the new GSM system for some time, but eventually it is expected that the GSM system will become the standard in all member states of the community. As well as better quality service, GSM will offer greater security against

overhearing".

It goes on then to deal with licencing of GSM providers to compete with Telecom Eireann: "As indicated in paragraph 1 above, there is the technical possibility of licensing a second GSM service in competition with Telecom Eireann. The provision of GSM services in Ireland is currently regarded as being comprehended by the exclusive privilege granted to Telecom Eireann under Section 87(1) of the Postal and Telecommunications Services Act 1983. (Confirmation of this view has been sought from the Attorney-General's office).

"The Minister is empowered under Section 111(1) of the 1983 Act with the consent of the Minister for Finance, and after consultation with Telecom Eireann, to provide by order for the grant of a licence to any person to provide, inter alia, GSM services."

Now, I think we might as well get this out of the way at this point, because subsequently a different view was taken; isn't that right?

A. Yes.

Q. Early on it was thought that Telecom Eireann had the exclusive privilege of licensing themselves, if you like, or doing the business themselves or licensing anyone else to carry on a mobile telephone business?

A. Yeah. I wouldn't be very strong on that level of detail, but I think you are right in the round.

Q. We are going to come across it again and again, so we might as well get it out of the way now. And I think it was recognised that in fact this was not within the exclusive privilege of Telecom Eireann, and the EU certainly contended that it wasn't?

A. Absolutely the case that EU so contended.

Q. It's not a big issue, but it comes up time and again as a technical issue.

A. Okay.

Q. In numerous documents.

"Previous representations by Sigma (previously Motorola).

"In 1990 in separate meetings with the Minister of the day and with departmental officials, Motorola (now Sigma) indicated an interest in providing GSM services either as a licensed service provider or as a supplier to a service provider. Motorola were informed that a GSM service would be introduced by Telecom Eireann in 1993 and that the question of licensing a competitor to the Bord Telecom Eireann system could be considered at a later date.

"On the 4th December, the secretary, Mr. McDonagh, along with Mr. Ryan, met Mr. Tony Boyle, managing director Sigma Communications Group, Mr. Hans Kuropatwa, Motorola business development director, Mr. Mike Short, contracts director, Cellnet, and Mr. Peter Crowley, SKC, to inform the Department of their

interest in offering GSM services. Mr. McDonagh said that it would be a matter for the new Government to review the whole area of competition and liberalisation. Mr. Boyle said they would put their case to the new Minister when the appointment had been made.

This was January of 1993; was there a change of Government?

A. Probably was, yeah.

Q. In November '92, hadn't a new Government come into power?

A. Was it an election and a long interval for negotiation for Government or something? I don't know the details, but yes, it sounds right. I mean, that's the stage at which the Department of Transport, Energy and Communications was formed, I think. I mean, Mr. McDonagh was secretary of a different Department. I have forgotten which one, but it had "Communications" in its title.

Q. I follow. Paragraph 5 deals with other expressions of interest.

"The question of licensing the provision of network services, including GSM services, has already been raised with the Department by other potential operators of the system, but mostly the question was discussed without final proposals being on the table.

"Minister Brennan, in response to a parliamentary

question on the 5th December 1991, said that he would not rule out the possibility of licensing, in time, the possibility of GSM services to compete with Telecom Eireann". And an extract from the relevant Dail debate was annexed.

The conclusion was that "It will be necessary now for the Department to examine the feasibility and timing of allowing the competition to Telecom Eireann. This study can be put in hand shortly, and the Minister would probably wish to bring the outcome of such an examination to the Government."

It goes on to say that if the Minister decided to go ahead, then there would have to be an invitation from all interested parties by way of a notice in the newspapers, and tenders would have to be invited.

It goes on to Paragraph 7 to refer to EC initiatives and says: "The development of the system was stimulated by EU initiatives in the form of a Council recommendation which urged the coordinated introduction in all member states of public pan-European cellular land based mobile communications within a defined time-frame and in conformity with harmonised standards." I think we can summarise all those by saying there was a lot of EU stimulation of liberalisation of telecommunications in the member states, and as part of that, Ireland was being encouraged to introduce competition into the market;

isn't that right?

A. I think I recall knowing that the I think the Council of Ministers in June of '93 set a time-frame for a full liberalisation of telecommunications markets in the Community. The Irish Minister of the day came home saving Ireland from derogation for with a derogation of five years until 2003. That's just kind of folk memory.

Q. Well, clearly at that stage, in January of 1993, this note shows the state of the Department's thinking on the state of the Department's knowledge and what the issues were in relation to telecommunications and where any stimulus was going to come from; would that be right?

A. Yes. But please bear in mind that at that stage I think it was still the Department of Communications; it hadn't connected with Transport and Energy. When Transport, Energy and Communications came together, there was a different economic outlook in that Department which was more benign towards liberalisation, let's say.

Q. I want to go to the document now which is the first document in your book, which is in fact chronologically the next document. It's a memorandum on the question of licensing service providers to provide GSM mobile, a system for mobile communication services. I think it seems to be by Mr. Howley or Mr.

Howley

A. Ms.

Q. Ms. Howley, on the 18th February 1993. It starts off again with a description of what GSM entailed. It then goes on to the proposed harmonised introduction of GSM service on a pan-European basis. It says "Telecom Eireann, with 22 European organisations, are committed to the harmonised implementation of GSM services within a specified time-frame."

I think what is being referred to there is not harmonisation of a liberalisation regime among different member states but harmonisation, a technical harmonisation between different telecom service providers; is that right?

A. I think it's about all countries having a service using the same frequency spectrum, so that you could use your mobile phone wherever you would go.

Q. I see.

It went on to say that Telecom Eireann had indicated that they planned to launch GSM services in June of 1993 in the greater Dublin area with a rapid roll-out of national coverage thereafter. "The existing mobile cellular radio telephone system will continue alongside the new GSM system for some time, but it is expected that eventually the GSM system will become the standard in all member states of the community".

Paragraph 3 noted that "Application has been received

from two service providers for a licence to provide GSM services in competition with Telecom Eireann". And the applicants were described as Sigma, previously Motorola Communications Group, and Southwestern Bell Corporation.

"The proposals from SBC may not be taken as standing alone, as they are linked to the offering of a full range of telecommunications services, including national and international trunk and private circuit services, radio paging services and value-added services."

Then, under the heading "Competition", it notes "It is a matter for decision whether competition in the provision of GSM services should be allowed".

It went on to refer to a "Post Office Review Group recommendation that the monopoly given to Telecom Eireann should be restricted to the minimum necessary for efficient operation of the network. The group also recommended that machinery be provided for appeals by parties who may be denied opportunity to compete in areas covered by the monopoly. In this way the system would be responsive to continuing changes in technology and to develop community attitudes.

"The indications are that competition should be allowed in this area. It is widely claimed that competition will transfer into a better-quality service, reducing charges to the customer together

with a more efficient operation in providing the service.

"The European Commission is anxious that member states which have not yet licensed competing GSM operators should do so as soon as possible. It is reported in the January 1993 edition of Mobile Europe (a trade magazine) that the Commission has expressed concern about the situation in a number of countries including Ireland, although the Commission has not yet raised the matter with the Department. It is also reported by Mobile Europe that the Competition Directorate has written to the Belgian Government on two occasions in the last 12 months advising that maintaining a monopoly would represent a breach of the Treaty of Rome. In the circumstances, it is recommended that competition in the provision of GSM services should be allowed."

Could I ask you at this point whether on the 18th February, 1993, there was a Department, a DTEC?

A. I don't actually know what date it was set up. I think it possibly was a bit later, but it was certainly around that time.

Q. I see.

It goes on to deal with the extent of competition.

"Since the size of the market for these services is unknown, and having regard to the adverse effect which competition could have on Telecom Eireann's revenue,

it would be prudent to limit the number of operators to two, i.e. one licensed operator in addition to Telecom Eireann.

"It is a matter for consideration whether a decision to limit the number of GSM licences granted could withstand a legal challenge. However, the emerging pattern in the community provides for authorisation of two competing operators in most Member States."

A. I think at that stage there may have been an issue about how many could be accommodated in the reserve spectrum as well, but I wouldn't be technically up to give you details on that.

Q. The next heading then refers to the legal position. And I don't propose to go into that in detail, because ultimately the legal position didn't cause any problem and never became an issue. And it simply deals with some of the issues that I have mentioned already, whether this was a telecom privilege or whether the Minister was the person who granted the exclusive privilege to a new applicant.

Then at Paragraph 7 on page 6, the memorandum goes on, under the heading identified "Competitor": "If a decision is taken to allow competition to Telecom Eireann in the provision of GSM services, the following steps will need to be taken.

"A, the decision would have to be publicly advertised to allow other operators to put forward proposals.

"B, the advertisements should invite applicants to submit detailed proposals and business plans by a specified date.

"C, proposals and business plans would be assessed by the Department with the assistance of consultants.

"D, the two companies who have already applied for a license would be advised of the decision and given the opportunity to review their proposals and submit detailed business plans.

"E, the question of which group of consultants the Department should engage would also have to be addressed.

"Applicants' business plans are necessary in order to assess which operator is the most likely to offer the best public service combining extensive coverage, reasonable charges, technical competence and financial standing.

Under the heading "Licence fee":

"The proposed license will enable the providers of GSM services to have

"1, interconnection facilities with the public switched telecommunications network." That means the fixed line network; is that right?

A. Mm-hmm.

Q. "2, access to the radio frequency spectrum". That is to enable them to actually deliver a mobile phone service; is that right?

A. Well, assuming the Tribunal goes on to hear a series of witnesses, there is other people better qualified to answer the technical questions than I am. But there are two aspects of the use of radio frequency in mobile telephony. One is a simple phone to base station. But telecoms companies also use a different range of spectrum for transmitting over longer distances, so there are different issues that arise from frequency spectrum, most of which I would be fairly amateurish at.

Q. I am happy with the amateurish response. I don't think we are going to be troubling ourselves too much with the technical aspects.

These facilities, it is expected, will contribute greatly to the profits of licensees. It is also the opinion that a private operator could have an adverse effect on Telecom Eireann's revenue."

A. That's not a view I'd share, by the way.

Q. I appreciate that, yes.

"In addition, the cost of engaging consultants to assess the applications would have to be taken into account. Having regard to these factors, it is considered that the license fee should be very substantial.

"The fee could either be tied to the use of the spectrum or based on a percentage of turnover. If based on turnover, audited accounts would have to be

provided".

It goes on to refer to the duration of the license and suggests a seven-year period, but recognises that this is arbitrary.

It then goes on to deal sort of generally with the terms and conditions of a license.

It then deals with the need for an independent regulatory office to regulate the activity of competitors in this business. And finally, in the recommendation at paragraph 12, it says "The following recommendations are submitted for the Minister's decision.

"A. That one other service provider should be allowed to provide GSM services in competition with Telecom Eireann.

"B. That the Minister's decision should be announced and applicants invited to submit detailed proposals and business plans."

Now, I think it's fair to say that from in or around that time onwards, a process which ultimately led to the competition, and eventually the granting of the license was more or less started, with stops and digressions along the way?

A. Yeah, I think that's fair enough. I think I said in my evidence before Christmas that when I came to the telecoms business in September '93, I was given a series of folders by a Mr. Ryan, and one of the

folders contained a memorandum about GSM. I think it may well have been this particular memorandum. And I mean, I would have regarded it at the time as a reasonable first start at looking at the issue, but no more than that.

Q. It identified, in any case, the issues. I mean, it identified how. It identified firstly the issue of introducing competition. Secondly, who would grant the rights to that competitor, the Minister or Telecom Eireann? Thirdly, what process would be used to identify a competitor?

It made a first stab at identifying the sort of criteria, and I think the criteria mentioned here were ultimately very, I suppose, primitive, but nevertheless, the first set of criteria which evolved to paragraph 19 of the RFP by 1995. It identified the license fee as an issue, one which became a controversial one as it went along.

The next document, Leaf 3, is another memorandum on the GSM license, dated 20th May, 1993. This is a memorandum of Mr. Ryan's. There is a covering sheet with it. It's addressed to Mr. Fitzgerald. Was Mr. Fitzgerald at that time the assistant secretary?

A. He had become the assistant secretary in that area in the setting up of the Department, is my understanding.

Q. I see.

A. He had previously been the assistant secretary in some

part of Energy.

Q. And this looked like a document to bring him up to speed, as far as I can see. You can I'll let you comment on it in a minute.

It says: "Addressed to Mr. Fitzgerald, provision of competitive digital mobile cellular communications (GSM)".

It's to Mr. Fitzgerald. It says: "I attach a memorandum on the above topic. As you will see, there are a number of decision points cascading from agreement with the principle that competition be allowed in the GSM service.

"The principal matters for decision are:

" how many competitors?

what should the licensing conditions be?

how should competition be regulated?

the need for a separate subsidiary in Telecom

Eireann to handle GSM

the terms of the press advertisements and notes

for the guidance of applicants.

"I have suggested a line of action in relation to each of these, but the best way to proceed from here might be for us to discuss the proposal some time that it is convenient for you."

It starts off with a summary as follows: "Sigma Communications Group has applied for a license to provide digital mobile cellular communications service

in competition with Telecom Eireann. A similar application was made by Southwestern Bell Corporation as part of a proposal to provide a complete alternative telecommunications service nationwide.

This memorandum recommends that competition in the provision of GSM services be allowed, that initially one competitor be allowed into the market, that proposals for the provision of a service be invited publicly, and that these proposals be evaluated by consultants with a view to selecting the best proposal".

In paragraph 2, then, it describes what GSM is, and I think we have been over that.

Paragraph 32 describes the EU legislative scenario.

Paragraph 4, the Irish legislative scenario.

Paragraph 5 describes the principal issues to be addressed, which, as we have already mentioned:

"Should there be competition? And if so, how should other competitors be licensed? And if they are to be licensed, then under what conditions should competition be allowed?"

It goes on in paragraph 6 to deal specifically and at length with the question as to whether there should be a competitor. I don't think we need to go into the detail.

In Paragraph 7, it goes into the question of how many operators there should be; and as we know, ultimately

the conclusion was that there should be two.

A. There is a sentence in there which reveals a mindset which is different from the mindset of the Department of Transport, Energy and Communications: "It is felt that consideration of whether a second competitor to TE should be allowed into the market should be deferred until we see the progress of the first challenger to the telecoms monopoly" that was the mindset that had to be changed and got changed.

Q. In other words, that there might be some impetus to introduce competition, but we were going to hold off for as long as we could.

CHAIRMAN: It's a bit of a King Canute approach in the first instance, whereas laterally you in fact welcomed the European approach.

A. Yeah.

MR. HEALY: Leaving aside the I suppose the policy orientation, it identified what was entailed in introducing competition; in any case, even at that early stage, referring in paragraph 9 to regulatory authority, to the need for a separate subsidiary for Telecom Eireann's Eircell arm, it goes on in paragraph 11 to deal with the type of invitation that would be given to the public.

It's headed "Public Advertisements".

"Although Sigma Communications has indicated a wish to be allowed to provide GSM services, it is suggested

that the most equitable way of proceeding now is to invite by public advertisements proposals from interested parties to provide the GSM service. Notes for guidance would invite applicants to furnish a business plan and a technical proposal. It will be necessary to have any proposals received evaluated with a view to selecting a suitable operator. As well as publication in the daily press, a notice will appear in the EU Official Journal, and those who have already contacted the Department about the provision of GSM services will be written to individually. A draft newspaper advertisement, along with notes for guidance of license applicants, are at Annex 2 and Annex 3 respectively attached. Applicants will be invited to provide the fee they are prepared to pay for the licence to provide GSM and the same conditions should be then be applied to Telecom Eireann's proposed subsidiary company which will operate the GSM service."

Now, I think it's worth maybe drawing attention to the fact that at that stage, there seems to be no doubt but that a fee would be sought, and in addition, no doubt but that Telecom Eireann subsidiary would be asked to pay a similar fee; isn't that right?

A. Yes.

Q. Then the annex contains a sort of rough guide to the type of license; that's the first annex. And the

second annex contains an indication of the type of invitation to tender.

Under Heading Number 5 under paragraph in paragraph number 5, under the heading "Information which must be provided by applicants for a license for GSM services", the draft says: "It will be necessary for each applicant to furnish the Department of Transport, Energy and Communications with A, business plan; B, technical proposal".

The business plan is described as one that should cover as a minimum the first five years operation of GSM services by the licensee, and should contain a clear indication of the availability of adequate technical, financial, and managerial resources; e.g. names and qualifications of personnel, details of costs of proposed system, and sources of funding involved.

Projected profit and loss account, details of market research, estimated lead time to start up, proposals for the continuation of the service to customers in the event that the licensee withdraws from the business before the end of five years and the fee which the licensee is prepared to offer."

It then refers to the type of technical proposal that should be submitted.

The next document, Leaf 4, is

A. I should say in relation to that one, before you go

off it, that the very end of it strikes me as
extraordinarily naive for the state of preparation.

It says "Applications must be received within a month
from this date."

Q. Yes. While there may have been a degree of optimism,
how could you get this thing up and running and I
think that optimism had to be tempered during all of
1993 and 1994 for a whole number of understandable
reasons, again the overall approach, the
identification of the issues seems to have been, in
outline terms, a fairly accurate one which was
followed consistently throughout until you got to the
final RFP?

A. I think it's fair to comment at this stage, when I
came to the telecom side late in September of '94,
what struck me was that you had a very too small a
number of highly motivated individuals with far too
much to do, and the chances of this being carried
forward with that team were very slim indeed. And I
presume that's what motivated Mr. Fitzgerald to
reorganise the organisation in the manner that I think
I described before Christmas.

Q. I see.

The next document is very much, again, part of the
preparatory phase, I think what you may have described
either in evidence or in some written material as a
learning curve. It's a report on an EC DG XIII

workshop on development of regulatory policy for mobile and personal communications in Brussels in September of 1993. It's by Mr. Condon. Was Mr.

Condon, if you look at the bottom

A. I have no idea who Mr. Condon is. It doesn't sound to me like anybody who worked in the Department. It may well be a Commission person; I have no idea.

Q. Was he somebody connected with KPMG?

A. I don't know.

Q. The document is one which has come to the Tribunal from the Department's papers. It describes what happened, what presentations were made, and what the result of those presentations was. I think you get a flavour of it from the executive summary on the third page, I think. It says: "A Green Paper on mobile and personal communications will be published by the EC within the next twelve months. The workshop was arranged to give a kick start to the debate on issues that will be addressed in the Green Paper. Reports and two studies commissioned by the EC DG XIII" was that the directorate dealing with communications?

A. Telecommunications, yeah.

Q. "Reports and two studies commissioned by the EC DGXIII were presented.

1. Licensing and declaration procedures for mobile communications." That was by KPMG and "2. Study and analysis of new methods of frequency allocation in the

Member States and comparative analysis of recent developments in the field". That was by Coopers & Lybrand.

"In relation to Report 1, research has been carried out into existing procedures in Europe and the US. It was suggested that duopoly should be the minimum in each Member State" referring, in other words, to the introduction of one competitor to nearly always an existing State incumbent; wouldn't that be right?

A. Except in the case of Greece, I think.

Q. Where it was a private incumbent, was it?

A. I think in Greece they started by issuing two licences and didn't give any to the incumbent.

Q. I follow.

"It was suggested that duopoly should be the minimum in each Member State; that auctions and lotteries should not apply, but licensing procedures should be objective, transparent and not discriminatory; that there should be recommended guidelines for terms and conditions to encourage harmonisation; that direct international access be permitted; relationship between dominant" is that "telecoms operators"?

A. Yes.

Q. "and affiliates should be transparent and at arm's length and also between mobile operators and service providers with no arbitrary refusal to deal."

I think what that seems to suggest is there should be

a liberalisation of the market initially, or at least at a minimum involving a duopoly in each Member State, and that the new or that the operator should be identified by objective, transparent and non-discriminatory procedures, and that there should be no unsatisfactory links between operators?

A. Yes. I think the reference to service providers is people who would purchase wholesale and rebrand. I am not sure of that, but I think that's roughly what it means.

It looks more and more to me, by the way, this was a document prepared and promulgated by the Commission themselves. You mentioned Mr. Condon. There was a Mr. Condon in KPMG, but he didn't have the initials WG.

Q. I was just suggesting KPMG or Coopers & Lybrand because they are mentioned, but in any case, nothing turns on it. This is a document in the Department's files and simply gives an outline of what happened at a workshop, and I think the executive summary is sufficient to describe what happened and what way the thinking in the EU was going.

Were you at that workshop, do you recall?

A. No.

Q. Was there any representative of the Department at it, do you know?

A. I suspect there was, but it's just something I don't

know. I am sure if the Tribunal asked the Department, they could find that out, but it's not something that I would

Q. It's not a major issue. That is presumably how it came to be on the files, because somebody was probably at it or may have been speaking to somebody at it?

A. In the normal course, if the Commission promulgated the document, even if someone wasn't there, they'd probably send it to someone on their mailing list.

The most likely thing is that somebody represented the Department.

Q. The next document in Leaf 5 is a report of a meeting on the licensing of a second GSM operator on the 18th October, 1993. And it seems to have been a meeting between the Department, represented by you and Mr. Conan McKenna, on the one hand, and Telecom Eireann, represented by Mr. Alan Corbett and Mr. Gerry Ryan, on the other?

A. Yeah.

Q. Do you remember that meeting?

A. I certainly remember being at the meeting. Mr. Corbett was, at that time, Deputy Chief Executive with particular responsibility for new businesses, or enterprises outside the core business, or whatever. Mr. Ryan worked for him.

Q. The background is described as follows: "The meeting had been arranged at the request of the Department to

discuss certain issues of relevance in our intention

to license a second GSM operator in Ireland.

"Mr. Brennan explained that a decision in principle to introduce competition in the GSM area having been made, the Department is now anxious to progress the licensing progress to tender. He pointed out that our current plans would be to go to tender during the month of November. There will be up to three months for the market to react and submit bids and a further evaluation period of about three months. The aim then would be to have a second operator licensed by the middle of 1994. Items discussed and conclusions reached were as follows:

"1. Market size roll-out plans.

"Telecom Eireann provided a document showing their projections of mobile market size up to the year 2000. The market would grow to about 200,000 by the end of the decade with the analogue product gradually disappearing. Telecom Eireann are anticipating a market share of 30 percent for a competitor. This would mean that a competitor could expect up to about 50,000 lines by 2000 a figure which may not be attractive. TE accepted that their projections for market size are probably on the conservative side. They stated that their objective for their GSM product was total coverage of Ireland within the shortest possible period. Their feeling was a competitor would

target the Dublin area only where post of money is to be made. Telecom Eireann were informed that we could not envisage granting a license to an operator to target the Dublin area only, and that it was likely that geographical coverage and roll-out plans would be bidding issues in the tender process for a GSM license. In a more general context relating to GSM, Telecom Eireann pointed out that the Department would be likely to receive a number of bids, given that the GSM business is a highly profitable one with potential returns up to 30 percent on assets employed.

Now, the rest of that meeting referred to technical issues concerning the usage of spectrum, the allocation of numbers, legal questions as to who would actually issue the license. Also an issue that arose time and again in the course of the evolution of the process concerning planning permission, would a competitor need planning permission to erect towers and so forth, to roll out the system?

A. A certain amount of, I suppose, special pleading running through the Telecom Eireann side of it.

Q. That's fairly obvious, isn't it?

A. Yeah.

Q. Telecom Eireann, do I understand, had an obligation to assist you with information in any case?

A. I think there is a provision in the '82 P & T Act where the Minister is entitled to call for their

advice and assistance.

Q. And was it on that footing or was it on some more sort of informal footing that this meeting was taking place?

A. I am nearly sure I specifically mentioned that I was using availing of the Minister's powers under whatever section it was.

Q. I see.

In relation to the separation of Eircell/Telecom Eireann, the note reports that "You pointed out that whatever basis is developed for dealing with the competitor must also be applied to Eircell. In a competition scenario, Telecom will need to be able to demonstrate that Eircell is a completely separate business. Also we presume that whatever interconnect charges are levied by Telecom Eireann on the competitor will also be levied on Eircell. Telecom Eireann accepted this view, and Mr. Corbett suggested that the only really satisfactory way of demonstrating a separation between Eircell and Telecom Eireann is for the formal establishment of Eircell as a subsidiary rather than relying on its current status as a separate business unit.

"The Department undertook to consider whether we wished to require this. Mr. Corbett pointed out that there were board meetings on the 3rd November and the 1st December and that the Department should think

about the subsidiary question for Eircell so that a proposal to create a subsidiary could be put before the board on one of those meetings".

It then dealt with interconnection issues, and again, so that we are all ad idem at this, interconnection is essentially the connection, or am I right in thinking it's the connection between the mobile operator and the fixed-line network operated by somebody like Eircom?

A. Yeah, I think the language refers to the funding, the money flows that arise from the delivery of calls in both directions.

Q. The more people operate mobile phones, the more money Telecom Eireann, as a fixed-line operator, would make, because there had be a large number of calls being made on mobile phones would be to fixed lines; is that right?

A. Yes, yes. And I mean, the idea of 15p per minute, given that they had just rebalanced the ordinary calls at 9p plus VAT for three-minute calls, sounded then outrageous, you know. And I always figured it would come down to a penny, which it did as soon as the Regulator got their hands on it.

If I could explain it a little bit better. When you make a call on a mobile to somebody on a fixed line, there is a proportion of the revenue held by the mobile operator and a proportion handed over, but the

same process happens in the other direction. It comes up throughout these documents. But that's just to understand it.

Q. And the question is, who is going to get the largest chunk of the amount of money passing back and forth?

A. Yes. And in case there is any doubt about it, Mr. McKenna was Mr. Towey's predecessor.

Q. You have already explained that.

A. Okay.

Q. And I presume it was Mr. McKenna who probably made this note?

A. Yes.

Q. And again, can we take that this was part of your learning process requiring Telecom Eireann to provide you with what information they had, presumably you were getting information from potential private operators as well at the same time?

A. Yeah. I started with the KPMG Green Paper for the Community, and that gave me a sort of a sufficient basis to start asking the right kind of questions.

And as I think I again came up before Christmas, as soon as it became known out in the telecoms market that I was engaged in this project, people would ring up and say "Can we come in and see you?" And for quite a period, I had kind of an open-door policy.

They'd come in and they'd make a pitch, or I'd ask them questions, or whatever. But this is all dealt

with in evidence in previous days.

Q. The next document is a note for the Minister; I think a note from you. It looks like I think its exact date is 19th October.

You say: "Despite the very strong current of day-to-day work in the division, good progress is being made in considering the range of complex issues which surround this question. We had a fairly hard nosed meeting with Telecom Eireann on the subject yesterday.

"I am aiming to be in a position to submit a positive recommendation for a tender competition by mid-November. End October never had a realistic chance. The recommendation would be accompanied by the appropriate documentation to launch the competition. The launch itself would be a milestone, but after that it would be necessary to give the market three months to respond. I am pencilling in the 23 February as the closing date. Evaluation of the tenders will probably take a further three months and is likely to require outside assistance in the form of consultancy. Even if they issue the license with no unforeseen delays by the 1 June 1994, it will still take some time (6 to 18 months) for the competition to actually appear.

"Our present thinking is to identify a series of headings which would each be a feature of the bidding

process including most notably application fee, annual fee, radio spectrum fee and channel requirements, roll-out of coverage, tariffing ideas, duration of license. There will be a second series of issues to be covered in bids, such as business plan, financial and technical capacity, technology, and quality of service. Finally, a long list of areas where we will have to state a position including interconnection regime to the Telecom Eireann system, infrastructure questions, emergency services, directory and directory inquiries, numbers, revocation, type approval of equipment, privacy interception, etc.

"Some of the issues lend themselves to classic project analysis and some are judgmental, thus making equitable evaluation procedures difficult.

"Probably the most difficult issue is the regime for charging by Telecom Eireann for calls destined for their customers. Telecom Eireann are working urgently on this but will not, they say, be able to determine a fully justifiable and defensible position until early January. I am inclined to accept this. It is clear to me that the Telecom Eireann GSM operation will have to be separated into a subsidiary and operate in the same milieu as the competitor. However, mobile communications is a hugely profitable business by conventional standards. With a conservative estimate that the market will quadruple in this decade and with

prices being gradually reduced to half of current levels, 30 percent return on capital is eminently achievable.

"Telecom Eireann could use the interconnection tariffs as the vehicle for getting cash out of their new subsidiary while nobbling the opposition. It is crucial that we as a Department get this one right.

The initial documentation will simply have to indicate that an equitable arrangement is being devised and will be promulgated by a given date in good time to be taken into account by bidders. Planning laws could be a significant obstacle after a license is issued, and we are opening dialogue with the Department of the Environment. Telecom Eireann's development of towers and dishes are exempted services, but private sector proponents will have no such luxury, even if the licensee was to put dishes on Telecom Eireann towers, a possible scenario, he would still I am advised have to go through the planning process.

"If we announce the launch, the competition will take some of the heat off, but ongoing dialogue with contenders will be time-consuming.

"Finally, and this is more than a flyer for now, analysis so far indicates that access to the mobile communications market is a very valuable asset indeed, and to be first in is a bonus. If Telecom Eireann could be persuaded to take in a joint venture partner,

as has happened elsewhere, into this specific business, it is certain that this will release a significant amount of capital which could be usefully deployed towards improving the balance sheet of the main company. It may be an attractive experiment."

You are dealing with a number of matters here. In the first page, I think you suggest, perhaps maybe as you said yourself a moment ago in another context somewhat optimistically, that you might be up and running sometime in 1994. You then go on to deal with the series of headings which would be a feature of the business process, and you identify an application fee, an annual fee, a radio spectrum fee, and so forth, as items needing to be considered.

I just want to ask you one aspect of this. At that time, in this memorandum no, how shall I put it the debate appears to have developed concerning a fee.

It seems to have been taken as granted that there would be fees to be paid for this privilege; is that right?

A. Yeah, I think that's a reasonable interpretation.

Q. There had

A. There was some something in our head about and this comes out again later about whether a royalty or an up-front payment was the better approach in economic terms. It should be neutral except for the capital requirement at the beginning.

Q. I appreciate that that issue is developed later on, but perhaps that's what's envisaged here to some extent by an application fee and an annual fee. But notwithstanding what was mentioned in the paper summarising what transpired or what took place at the Brussels workshop, it seems to have been taken as, as I said, taken for granted that there would be a fee charged for this license?

A. A fee at some level, anyway.

Q. At some level?

A. Yeah, it looks like that, yeah.

Q. And you also identify the interconnection issue. I think this is the point you were making earlier, that Telecom Eireann could use it to they could use the interconnection regime in such a way to favour themselves as to put pressure on any new entrant into the market.

A. Yeah.

Q. And then finally, you mention two other matters; you suggest that, as had been mentioned in earlier memoranda, that planning laws could cause problems for new operators who wouldn't enjoy the benefit of exemption from the planning laws that Telecom Eireann enjoyed. I don't think Eircell as a separate subsidiary enjoyed that benefit?

A. It wasn't a separate subsidiary.

Q. But at a later stage?

A. There came a stage when the exemption was withdrawn.

Q. Yes.

A. And they were given, as I think I mentioned this before; they were given six months' notice of the withdrawal. At that time everywhere they had a little telephone exchange they poured the foundation and said that's a work in progress now.

Q. And then finally you suggested this was, I suppose, something else altogether a partner for Eircom dealing exclusively with the Eircell or mobile side of the business; is that right?

A. Yeah. I mean, we were at that stage beginning to wonder about the future of Telecom Eireann and how it would face into a liberalised market in the telecoms business with the kind of staffing levels that it had and inefficiencies that it had and so on, and debt that it had. And we were searching around and this became more obvious into '94, although it's not particularly in evidence in this Tribunal or in the documents currently before the Tribunal that we were as a separate project, we were looking at the future of Telecom Eireann.

Q. I think that's referred to in places here and there in the documents as the strategic alliance proposal or plans that were being evolved for Telecom Eireann; is that right?

A. Well, I suppose, I'd have to do a little bit of

explanation on this. When we got comfortable with the language of the telecoms business, the Department set up a strategy group with some outsiders to look at the future of the telecoms business. And that's where we first came in contact with Mr. Pye. He was invited to join that group by a facilitator we had. And we had a number of our outsiders, and we worked up over a short period a 50-page document, our vision for the future of the sector. Somewhere along the way, the word was out that we were a different team with a different outlook. And I am not so sure of the date, but cable and wireless lobbed in a straightforward cash bid for a share of Telecom Eireann. And that caused a new focus on that as a separate project, and it got a life of its own. And I think by late '94 a separate division was set up where one of the people working for me was promoted and headed up the division to deal the strategic alliance. But up to that point, I was involved in both projects. I am not sure when exactly it happened, more likely '95 than '94, when it started to become a real project.

Q. Is that therefore what I understood to be the reference to the strategic

A. It became the strategic alliance eventually.

Q. I see.

The next document in Leaf 8 is a letter from Mr.

Simonet Leaf 7 is a letter from Mr. Simonet of

the 25th October of 1993 to Mr. Sean Fitzgerald. Am I right in thinking this was from the Director General for Competition?

A. Mm-hmm.

Q. DG IV.

In it, it says: "Dear Mr. Fitzgerald, I write to you concerning a bilateral meeting held on the 28 June 1993 with Mr. Ryan and his staff where we discussed two important and urgent issues in the telecommunications area.

"The first of these concerned the implementation of the 1990 Services Directive in the Republic, and in particular the scope of exclusive rights on voice telephony. By letter of 30 July 1993, I have received a response on this issue. I would like to reserve my position on this reply until I see how matters develop in the market.

"I now need to follow up the second issue, on which I have not received a reply. This concerns the GSM mobile telephony monopoly in the Republic. I should be pleased to know what steps you are taking for the granting of additional GSM licences and what time-frame is envisaged.

"Recently the Commission initiated infringement procedures against two Member States which have failed to authorise at least a second GSM operator. The Commission is also in discussion with a third Member

State which has not opened up GSM mobile telephony to competition.

"You will understand that in the absence of an explicit undertaking by the Irish authorities to introduce competition for GSM mobile telephony in the near future and on the basis of a detailed timetable, the Commission will have to consider opening formal proceedings against Ireland. I would be grateful if you could provide the Commission with a reply to my question within a period of four weeks. My services are at your disposal for any help you may require ."

I think it would be fair to describe that as the start of a little gentle pressure from Brussels on the liberalisation issues?

A. When you see a reference to four weeks, then that's an indication it's the start of a formal process.

Q. Now, from this point on, it would be wrong to say you were under the cosh, but you were always operating in circumstances where there was, to some extent, some EU element breathing down your neck; would that be right?

A. Yes.

Q. We'll go on now to Document 8, which is a record of a meeting with the Department of Finance on 1st November 1993. You represented the DTEC with Mr. Conan McKenna, and the Department of Finance was represented by Mr. Charlie Smith and Mr. Jimmy McMeel.

And Mr. McKenna, I think in the same style as in his

previous note, firstly mentions the background and says: "This meeting had been arranged at the Department's request. The purpose of the meeting was to fill the Department of Finance in on plans to set up a tendering process for a second GSM license and to let them know our general strategy in relation to this."

I think the document is useful because it describes what stage you were at at that stage in your own Department and what view you took of it.

"Mr. Brennan set out the following points.

"It has been decided in principle to open the digital mobile phone market up to a single competitor for Telecom Eireann. Apart from the general desirability of competition in this area, and this is being planned for by Telecom Eireann, there is considerable pressure from the EC for us to follow suit among the twelve.

The Minister has therefore decided that proposals for the licencing of a second GSM operator should be put forward as soon as possible.

"Our intention is to engage in a tendering process for the second license in which it will be left open to the market to "bid" on critical items (e.g. up-front and ongoing fees for the license, spectrum fees, roll-out and coverage, etc.) An early draft of the basis for tender was handed over at the meeting".

You then identified the critical path, or I suppose a

projected time scale, as follows: "Settle the issues internally by the end of November.

"Publish the competition and issue tenders by mid-December, with a turn-around period of three months.

"Evaluation period then of three months.

"License issued and operational by June 1994.

"In our view, there should be an appropriate balance between the initial fee and ongoing State-take.

Affordable tariffs were also important, and the tender document was styled to achieve this balance. Ongoing take should be revenue-related.

"It was important from our view that there should be a common approach to the evaluation of the tenders between ourselves and the Department of Finance, and we are thinking also of consultancy assistance in the evaluation.

"Our intention is that the decision will be made by the Minister following the appropriate statutory consultants, but we are leaving open the question of a submission to Government at this stage.

"In response to a query then, it seems your side pointed out that the existing mobile market was about 50,000 units". The note goes on: "This is likely to grow to over 200,000 the end of the century.

"The issue of interconnection with the PSTN is a critical one, and the numbers which emerge here will

have to be correctly balanced in the interest of long-term financial viability of Telecom Eireann and of the new licensee.

"The Department of Finance said that in principle they were in broad agreement with the strategy which Mr. Brennan had outlined, and they would propagate an awareness of our intention up the line in that Department. They will respond in writing to the documentation.

"There was an agreement that we would keep in touch in relation to developments and that a common approach between the two departments in relation to the evaluation of tender was desirable."

Now, I think at that stage, you were still of the view that there would be an initial fee and an ongoing State-take, something in the nature either as you said earlier either of a royalty or some ongoing figure calculated in some way in relation to how well the business was doing.

At this stage, also it seems that your Department was of the view that the decision would be made by the minister following the appropriate statutory consultations, but you were leaving open the question of a submission to Government at this stage."

I have an understanding on that, but I may not be correct; perhaps you'd just explain precisely what's meant by that.

A. Under the statute, the 1982 Act, I am fairly certain that the Minister has a right to license with the consent of the Minister for Finance. But there is a general practice that important decisions get brought to the attention of Government, either by way of formal memorandum in a case like that, the form would be to note the Minister's intention to do so or an aide-memoire where he would mention it in passing. And it's a judgement that would be made when you are ready to go, whether to go by the aide-memoire or by the formal memorandum.

Q. But would I be wrong in thinking that a distinction is being made here between a decision being made by the Minister and a decision being made by the Government?

A. I think it's probably overstating it. Under the law, the decision is a decision of the Minister.

Q. Yes.

A. But in general good practice, important decisions are mentioned, formally or informally, at Government.

Q. I see.

A. And I can't say any more about it, really. I mean, in today's Cabinet manual, it would be mandatory to bring something as important as this to the attention of the Government. Back then, I don't know without checking.

Q. I am simply interested in your thinking. We know that ultimately it went that route anyway, but ...

A. Yeah.

Q. The next document is in a sense following on from that meeting. It's a letter from Mr. Furlong, Assistant Secretary in the Department of Finance, to Mr. Loughrey, Secretary of the Department of Transport, Energy and Communications, 15th November or the 5th November; it's not clear to me. It's probably the 15th.

A. I would have taken the opposite view, but it's not important.

Q. You think it's the 5th?

A. Yeah.

Q. If you look at the bottom, it says the stamp at the bottom, it says "16th", so it probably is the 15th.

A. Yeah, okay.

Q. It says: "Dear John.

"Your Minister stated recently in the Dail that he proposes to invite tenders next year for a license to operate a second national mobile telecommunications service. There have been preliminary contacts between our departments on the matter.

"This is an important development for Irish telecommunications. Obviously the proposal has implications for the Exchequer through the State's ownership of the existing sole provider of telecommunications services and also in regard to the fee structure to be applied. As you know, under the 1983 Act, the consent of the Minister for Finance is

required for the grant of a license that would break Telecom Eireann's exclusive privilege and for the charging of fees. In view of its significance, we feel it would be desirable that this Department would be closely associated with the project at all stages, including the preparation of the tender process, the selection of consultants, and the evaluation of bids, as well as the elaboration of a suitable fee structure. We would suggest a small interdepartmental Project Group. I hope you will agree with this arrangement."

Without going into the detail, we know that ultimately such an arrangement was put in place.

Now, the next document is a confidential memorandum prepared in the Department of Transport, Energy and Communications, I understand, on the 26th November, 1993. And it says "The Minister is proposing that a tender competition be held to license one national competitor for Telecom Eireann in mobile telephony.

All main questions, including State-take, roll-out, geographically, tariff regime should be determined by the competition.

"2. The mobile telephony business of Telecom Eireann should be separated out in subsidiary and should be subjected to licensing. It should submit business plans ,etc., and should pay fees equivalent to those emerging from the tender competition. Telecom

Eireann's license will be subject to the same duration as the new operator. Telecom Eireann should be told of these intentions.

"3. Consultants should be recruited to evaluate tenders, and procedures for this should commence at an early date.

"4. Telecom Eireann should be required to finalise their position on interconnection charges by 31 December so that applicants can be informed of the Department's position by 15 January 1994.

"5. The question of a possible joint venture agreement partner in Telecom Eireann business should be considered.

"6. Any appreciable delay in commencing the tender competition is likely to cost money. The closing date should be set at approximately three months and the award date three months later".

Under a heading "Possible Promoters of Second License", it says "We have had indication of interest from

a consortium of Motorola, Cellnet (British Telecom) Sigma (an Irish communications group.

Singapore Telecom (who would form a consortium.

Deutsche Telecom, (German Embassy query.

Esat Telecom (an Irish communications company who would need to form a consortium.)

"It is almost certain that Vodafone (second UK

operator), one or more regional Bell companies, France Telecom will each examine the proposal. There are likely to be others, but consortium-type combinations of the above are the most likely.

"The position regarding cable and wireless is difficult to read. If they are serious about a strategic alliance with Telecom Eireann, then they may disqualify themselves from this competition."

Would I be right in thinking that because that document, headed "Confidential and Sensitive Information", it indicate in some way that crystallisation of thinking at a high level in the Department.

A. I don't know. The manuscript notes that can't be seen on it are my handwriting, and I am trying to figure out what they say. It's not obvious what they say.

Q. It's very difficult.

A. Something about "for An Taoiseach" is there anyway.

Now, on a regular basis, when the House is sitting. I presume the House is sitting that time of the year.

If the Taoiseach had noticed that things were to be raised in the order of business you would be asked urgently to prepare a note, and a note of this kind would be prepared. It's more likely confidential and sensitive so that he didn't go and read the whole thing out; that he made a judgement as to how much of it that he would use on the day.

And for example, all the bottom part of who might be interested was quite speculative, really, you know.

Not very accurate in terms of what turned out afterwards.

Q. Well, it wasn't totally inaccurate either.

A. Well, Cellnet didn't dance, Vodafone didn't dance; you know.

Q. Well, they did initially. But they decided that the pace was too

A. I am only speculating what the purpose of the note was; I don't actually know. If I had the copy where I could read the transcript, it could probably help.

Q. It did indicate in any case that the thinking of Department at that stage was that Eircell would become a separate subsidiary and that Eircell would be subjected to licensing in the same way as any new competitor and that it would have to pay whatever the new competitor was obliged to pay for the license?

A. Yeah.

Q. And again, am I right in thinking that this doesn't seem to have become a hot potato at that point.

A. It doesn't seem to have done, no.

Q. The next document in leaf 12 is a letter, leaf 11 sorry, is a letter of the 30th March, 1994, to Mr. Roger Pye in KPMG Peat Marwick in London, from Mr. Conan McKenna and it's as follows.

"Dear Roger,

"I refer to Martin Brennan's letter of the 25 March and your letter of the 19 March 1994 regarding consultancy services. I am pleased to confirm the engagement of KPMG Peat Marwick to provide services as described in the letter above not exceeding £20,000.

"The interconnection task is the most difficult to define at this stage but what we have in mind is that you would provide us with bench marking for a workable regime. We would find simplicity of approach in such a regime particularly attractive."

I think that a letter simply flags the formal commencement of KPMG's involvement in the process?

A. Yeah. I think it's fair to say that whatever documentation I submitted up the line in the Department before that, Mr. Fitzgerald or Mr. Loughrey or both took the view that it would benefit greatly from an outside external opinion without committing to recruit consultants at that stage and as you said before Christmas, the late Roger Pye was available and known to us and had been the project leader in doing the document for the Commission which we referred to previously. And we asked him would he do, would he give us his general reaction to the state of the documentation as it then was and would he do some work on the interconnection issue. And I think his involvement in our Telecom strategy group was on a loose understanding that he would be compensated but

never pinned down. So we wrapped the three into one and said would you do the whole lot for $\frac{1}{2}$ 20,000 and it was as simple as that. And in fact, as evidence was shown later, he was involved in two iterations of the documentation.

Q. I think we are just going to go through it. What he did mainly for you at this point was you showed him the documentation that you were proposing to use to invite tender. He commented on it. You took his comments on board and sent him back another version, another iteration as you put it, and again he made his comments and the idea I think was at that stage my reading of it is that you were seeking the comfort of an outside expert in this field that you were going along the right road?

A. Exactly.

Q. Would that be right?

A. More Mr. Loughrey was seeking more than me, but it was being sought.

Q. His next letter to you is a letter of the, I think, 6th April 1994. And it's his comments on the draft GSM documentation. I don't propose to go through the GSM documentation in draft form as it was at that stage, it would be too tedious. There are aspects of the comments I simply want to highlight just so as we can show the evolution of the thinking of the Department.

"Dear Martin.

"Comments on draft GSM documentation.

"Thank you for asking KPMG to review the draft documentation for the proposed second GSM license in Ireland. In general we found that the majority of the important issues were covered both in the tender and in the memorandum.

"We have endeavoured to enhance the content and you will find our comments and suggestions in the enclosed report. This has been organised into sections covering the three documents you sent us.

"Our principal conclusions are given in Section 4 and are summarised here.

"Policy and content.

- Competition policy. Current policy is for a mobile duopoly. This position needs to be fully clarified with respect to other wireless services in particular, PCN (DCS 1800) in order to avoid Ireland getting out of step with the EU once again.

- radio frequencies. This is one of the two technical areas requiring attention before the invitation to tender is issued.

- interconnection and related policies concerning infrastructural rights and revenue sharing constitute the other technical area that needs to be solved as soon as possible. The second GSM operator's right to interconnection should be

explicitly stated.

- whether or not the terms of license bids should be combined in conditions of the license should be considered."

It then goes on under the heading "License award process".

"- a public memorandum explaining key points could prove helpful and would avoid many questions from bidders.

"- the process is complicated.

"A tender for the license and a separate one for the spectrum.

"A combination of beauty parade and a fee element with unclear weighting.

"Several conflicting evaluation criteria and no indication of relative importance."

I think what he is saying there was the process envisaged in the documentation was slightly complicated and these are suggestions or issues that he identified as ones that might cause problems.

"Each of these aspects should be clarified. Otherwise the process could become too judgemental, with many risks. State value may not be maximised . The outcome could be challenged. And the Irish Government's overall sector policy on telecommunications may lose credibility at a critical time.

"- a mechanism to ensure transparency in the handling

of questions should be organised.

"- a non-refundable fee for the purchase of the tender

document which would help to finance the

administration of the process should be considered.

"An additional general point concerns the tone and

content of the documentation. While the invitation to

tender covers most key items, they are not set out in

a way that matches the mindset of a prospective

bidder. Instead, key factors have to be deduced by

careful reading. This does not encourage bidding or

emphasise the attractiveness of winning the second

Irish GSM license. Government and consumer goals will

be maximised by encouraging widespread bidding during

a year when several other opportunities exist.

Repackaging the documentation would be worthwhile if

time is available."

If we just go to the main part of the report and to

page 7, where he deals with, I think, the selection

criteria.

That's para 3.2 of the report. Have you got that?

A. Yeah.

Q. "The selection criteria indicated in the tender

documents are.

tariffs

initial and ongoing payments

use of frequency

coverage

roll-out

financial capacity

technical experience and capability

credibility

performance guarantee

self-imposed service levels above minimum

requirements

approach to air-time resale.

"This is the order in which they appear in the document and therefore could be construed as being the order of importance/weight, although the trade-off between tariffs and State payments is recognised.

Some issues are to be noted:

Tariffs. Although the levels of tariffs is undoubtedly an important element, the extent to which tariff packages are innovative and display an understanding of user needs is also important in maximising consumer surplus.

National employment is not a stated criteria, but the stimulation of national industry, e.g. of air-time sellers and associated dealers, could be considered a selection criterion.

Frequency. It is not clear whether the efficient use of frequency which is desirable is a selection criteria or whether it is the amount bid for spectrum fees. Additionally the structure of spectrum payment, e.g. pay as you use or up-front for initial channel

allocation, etc."

Presumably should go on to mean should be clarified.

"Technical ability. Paragraph 10 states that "A complete technical proposal" should be submitted. It should be made clear how detailed this is required to be, e.g., detailed frequency plans are extremely complex, and they are not in themselves a good evaluation criteria. Rather it is the overall spectrum efficiency committed to by the bidder that is more adequate measure for selection.

"Also whether a complete technical proposal includes full site identification requires clarification. It should be noted that site identification is an extremely expensive exercise and in itself does not constitute a good collection criteria other than to indicate commitment and the ability to launch service in minimum time scale.

"Overall it should be noted that there is a considerable trade-off to be made between the various selection criteria. Issues such as roll-out and coverage can affect the amount a bidder can offer for the license as much as tariff levels. It is likely that bidders will seek guidance during the bidding process and what the relative importance of these criteria. Ambiguity in this area could lead to a contention of the result."

Now, he is raising an issue there, I think, that at

that stage hadn't been addressed; and that was firstly, the prioritisation of the criteria, and secondly the weighting and the way you would actually evaluate them; isn't that right?

A. Yeah.

Q. The next document, in Leaf 13, contains

A. Could I just mention a couple of things that I marked in this when I was looking

Q. Please interrupt me as you feel you need

A. At the bottom of page 4, the question of right to build infrastructure is raised for the first time, and it became a relatively important feature later on.

Q. Are you referring to

A. Page 4 of the main KPMG document, last bullet point.

Q. Yes.

A. I just think it's important because the question of infrastructure will come up again and again, and we went further than most Member States had done at the time, ultimately.

Q. I take your point, yes.

A. And then there is an interesting discussion at 2.7 about Irish participation. I just thought I'd draw your attention to it.

Q. I'll certainly read it out. It says: "The extent of Irish participation in bidding consortia is left to the discretion of the market place. The issue of special State-owned Irish enterprises such as

electricity, ESB, should also be considered. Should the right to build own infrastructure be granted to the GSM operator? Then the electrical distribution network will reduce the cost structure of certain elements of the network significantly, a factor of between 10 and 15. Any consortia containing ESB will thus be in a position to propose more attractive financial conditions.

"We suggest allowing Irish State-owned enterprises to be included in consortia. This measure will increase real Irish participation and State value.

"As the presentation of these utilities on any consortium will be a favourable factor, the Department's own position with regard to any conflicts of interest should be addressed."

Because you were of course the Department responsible for many of these; isn't that right?

A. Right.

CHAIRMAN: Am I right, Mr. Brennan, in implying from things you have said this morning, and also before Christmas, that you'd have been more than happy to have gone on working with Mr. Pye in KPMG as the consultants for the whole project if financial constraints had permitted?

A. Yes, well, we for a bigger consultancy, we were obliged to go through a tender process by EU rules in any event, and the proposals that came from Mr. Pye's

company had what we regarded, apart from being very expensive, had an inappropriate approach.

CHAIRMAN: Yes, you referred to that before Christmas

Q. MR. HEALY: Leaf 13 contains a redraft of the documentation following Mr. Pye's comments. And the document is beginning, as we now see, to look a lot more like what ultimately became the request for tenders.

A. Mmm.

Q. This is dated this is headed "Draft advertisements redraft of documentation following KPMG advice 26/4/1994."

It contains the paragraph 19 in a form that is much closer to the form that that paragraph ultimately took, and that was one of the key paragraphs in the eventual evaluation process.

It says: "The Minister intends to compare the tenders on an equitable basis in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

credibility of business plan and financial availability of applicant:

technical experience and capability of applicant.
the present value of initial and ongoing payments to the State for the license over the license period.

technical quality and viability of solution
proposed and its compliance with the requirements
set out herein
ability to match minimum roll-out requirements and
acceleration of them
efficiency of proposed use of frequency.
ability to match coverage requirements.
the approach to tariffing proposed by the applicant
the extent of applicant's roaming plan
the performance guarantee proposed by the
applicant."

If you remember, before Christmas, when we were
dealing with the questions, we touched on the way this
paragraph changed a little. We'll come to it again
later on.

A. Yeah, it's interesting that paragraph 10 in the first
line talks about demonstrating financial and
technical financial capacity and technical
experience. I think that became an issue in other
dialogue before Christmas as to how that came back
into paragraph 19 or how it got separated from the
other criteria.

I don't have a clear answer as to when exactly those
various decisions were taken, but it seems to me that
technical experience is something you either have or
haven't. And that's something you can compare degrees
of, and the same might be said about financial

capacity. But again, I use this language more that's more rationalisation than recollection, but it sounds reasonable.

Q. I think it's worth noting as well that paragraph 10 is in this paragraph 10 in this draft is more or less in the terms in which these conditions were laid down in the ultimate draft. There was, in other words, a paragraph 10 I think it may have been paragraph 9 in the ultimate draft; I am not sure. I think it was called paragraph 9 in the ultimate draft, but it provided that tender must demonstrate the financial capacity and technical experience and capability to implement the system. I think that stayed in the draft at all times?

A. I think it probably did, yes.

Q. But when we get to the final draft, we'll be able to compare them all?

A. I don't recognise the handwriting in the various notes on this, because it suggests because it's not McKenna's and it's not mine, it suggests there was some kind of a consultation process going on in the Department as to how to respond to the input from KPMG.

Q. If you look at the next document, which is in Leaf 14, it's headed "First meeting 29/4/1994, 7 Ely Court." Do you remember, you discussed with me before Christmas where you felt the first meeting of the

Project Group had taken place, and you thought it had taken place there; do you remember that?

A. Yeah, I think I do, yeah.

Q. And that seems to suggest that the review you have just mentioned was being carried out. It's dated 29/4/94. The redraft is dated 26th. And there seems to be a review at this point of basic project documentation. Do you see that?

A. Mm-hmm. I think at that stage too, both Mr. McMahon's division and mine were located in Ely Court, but sometime shortly afterwards, my division moved to the Department's headquarters and his division stayed in Ely Court.

Q. I see.

A. And I am mentioning that because somewhere in the Opening Statement something was addressed to me at Ely Court long after I left it. Or addressed to the Minister at Ely Court, even.

Q. Now, before going back to your dialogue with Mr. with the late Mr. Pye, in Leaf 15, I come to another letter from the Commission, and this time the Commission were ratcheting up the pressure a little, in which the document I've referred you is a letter from the Commission, International Affairs Division, to Mr. Dick Spring, who was then, as well as being Tanaiste

A. International Affairs Division is a receipt stamp in

the Department.

Q. Sorry, I beg your pardon, yes?

A. It's not clear in fact it's from the Commissioner himself, the Competition Commissioner.

Q. But it's to the it's from Karel van Miert to Mr. Dick Spring. Do you see that?

A. Yeah.

Q. Who wasn't obviously the relevant Minister at that time?

A. No, he was Minister for Foreign Affairs, which meant they were getting more formal.

Q. And it starts in the usual formal way: "Sir, I have the honour to draw your Government's attention to the matter of the authorisation in Ireland of the second GSM operator".

If you go to the third paragraph, it continues: "The Commission considers, for the reasons detailed in the enclosure, a State measure extending the dominant position of a telecommunications organisation which was granted exclusive rights for the provision of a fixed public telephone network to the new GSM market is contrary to this Treaty provision. The Commission is therefore initiating infringement procedures under Article 90(3) against two Member States which have not granted a GSM license to at least a second GSM provider.

"During informal talks with the relevant services of

the Irish Government in mid-1993, it was announced that the Irish Government would consider granting a second GSM license in the near future. According to the latest information available, the Commission understands that such a decision has not yet been taken.

"Since Telecom Eireann is developing its GSM service in the meantime acquiring a significant competitive advantage in comparison with a potential future competitor, the Commission now considers that Ireland has failed to fulfil its obligations under Article 90(1) of the Treaty by not initiating the procedure for granting at least a second GSM license within a reasonable time.

"Such failure to implement applicable Community law has a disrupting effect on the completion of the internal market in communication services."

There are then handwritten notes which seem to suggest that the document found its way from the Department of Foreign Affairs to your Department.

A. Yes.

Q. It goes on: "In these circumstances, pursuant to Article 90 (3) of the Treaty, the Commission asks the Irish Government to submit to the Commission within two months of the date of this letter

either the measures it intends to take to grant at least a second GSM license including a detailed

timetable

or its observations on the content of this letter.

"After taking note of these observations, the Commission may if necessary adopt a decision under Article 90(3). It may also adopt such a decision if it fails to receive the observations within the time stated."

Then with that is a reasoned opinion from the Commission setting out in detail and in formal terms the view of the Commission and the view upon which they based that formal direction to the Irish Government to either indicate that it should license somebody and say when it proposed to do so or otherwise to make comments which would keep the EU at bay?

A. Mmm.

Q. I don't think we need to go into the details. At that stage it was a much more formal threat of infringement proceedings from the Commission; that would be a fair way to put it?

A. Yes.

Q. The next document then, in Leaf 16, is part of the dialogue with Mr. the late Mr. Pye. It's his letter to you of the 10th June 1994. The document I have contains the word "Draft" on the front of it, but seeing as it's on your files, it must be either the document you received or something very close it to

it, and I don't think there is anything in it that is going to cause any particular difficulty if in fact it was a draft.

It says: "Dear Martin.

"Tender documentation for second GSM operator.

"Thank you for asking KPMG to look once again at the documentation for the second GSM operator and the related plans for interconnection.

"We have reviewed the documents which I received last week from one of your colleagues in Wicklow and compared them with the earlier version of the same documents and our own comments on that earlier document. We have also analysed the proposed interconnect rates which you gave me last week on the telephone.

"Firstly, may I say that the new presentation provides a much clearer format which both presents the Department and Ireland in a good light and makes it easier for prospective bidders to understand the nature of the competition and the prospective license".

Now, unless there is something in the main body of that letter to which you want to draw my attention or the attention of the Sole Member, I'd suggest that you go to the second-last page of the letter as opposed to the annexes, or third-last page I think. Second-last page, sorry. Page 8, which contains the conclusion.

A. It's not a very clear copy.

Okay, I have it.

Q. The numbers on the top left-hand side under the KPMG logo; do you see that?

A. Mm-hmm.

Q. "As mentioned earlier in this letter, our principal concerns about the revised document are:

" compliance with EC policy

the interconnection terms

the extent to which a true level playing field

exists between Eircell and the prospective new GSM operator."

He then goes on: "The set of evaluation criteria and their ranking may have the following effect on GSM:

"The license will be awarded to a sound consortium financially and technically

"Significant payments will be made to the State, both up front and over time

"As a result of these State payments and other cost disadvantages, the costs of GSM 2 are high by industry standards and are relative to Eircell's analogue service

"GSM is positioned as a high-tariff up-market service targeted at people needing roaming to continental Europe

"The introduction of GSM services stimulates the cellular market, mainly benefiting Eircell's analogue

service, which remains the mass market cellular

service, also meeting much need to roam to the UK.

"Such an outcome would not be fully consistent with the overall Government policy outlined in the information memorandum or with the EC Green Paper on mobile communications.

"We recommend that the Department reviews the mobile terms and continues affecting cost drivers and the arranging of evaluation criteria to encourage an outcome which more closely fits the Government policies and the EC Green Paper. Alternatively at least the Government policy should be adjusted.

"The Green Paper focuses on the need for license award procedures to be carried out in an open, transparent, and non-discriminatory manner. Of particular importance are the proposed positions that state:

"Whichever method is used to award licenses ... the method should be chosen and implemented in a way that ... ensures that the final selection offers the maximum guarantees for ... the achievement of the goals laid down of any public service requirements. A particular priority should be maximising benefits to users, in particular in terms of price and coverage."

"Licensing conditions ... must ensure respect of competition rules and ensure transparent and non-discriminatory behaviour between fixed and mobile operators in common ownership.

"I hope that these comments are useful. Please telephone me for clarification."

A. I should perhaps say that the reference to Wicklow at the very beginning is a reference to the final meeting of the Telecom strategy group that I referred to previously, which was an evening and a day. So by then, Mr. Pye was very familiar with evolving Irish telecommunications policy, and that's how he is able to refer to you know, alternatively Government policy would have to be changed, and so on.

Q. But in any case, at that point, he is still suggesting that the evaluation criteria chosen and the way they had been ranked might not necessarily have the effect which he perceived to be the object of Irish Government policy. Now, up to that point there still had been no major discussion concerning issues that were developed in the documents to which I'll refer now, namely the question of whether there should be any payment, whether there should be no payment, whether there should be a fixed up-front payment and an ongoing payment, whether Eircell should have to pay anything and how much Eircell should have to pay and how you'd compute it or calculate it; would that be

A. All of that comes much later in the documentation. And I mean, there were other things afoot. I don't have a clear chronology of this, but I mean, there was a fairly lengthy delay in getting from this stage to

actually issuing, starting the process, and there was certainly a lot of lobbying going on by Telecom Eireann, both management and unions. And there were political signals, like, for example, there was a political signal that there would be no launch of a competition until an interconnection regime was agreed with Telecom Eireann, which was, you know, an important determinant of the whole business and so on. So you know, I mean, you could say at this point we were ready; why didn't we launch it for a long time after? I am just trying to rationalise that or explain that.

Q. Yes, but just to clarify one thing you said a moment ago, when you say there was a political signal that nothing would be done until an interconnection regime was agreed with Telecom Eireann, do you mean that that was a signal that put Telecom Eireann in a driving seat in some way?

A. To an extent, yes. I don't think that's documented, but it is a fact.

Q. I see. It wasn't, as it were, a diktat that you will agree an interconnection regime?

A. No, I think it was the other way around.

Q. I see. That they would they I suppose, perhaps understandably and opportunistically, were relying on this to push out the launch date?

A. Yes.

CHAIRMAN: It's probably appropriate to adjourn now until five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF MR. BRENNAN BY MR. HEALY:

Q. MR. HEALY: Thank you, Mr. Brennan.

Just before lunch we were looking at Document 16, the late Mr. Pye's response to and comments on the Department's proposed request for tenders. And just before that, I think well, sometime shortly before that, we had looked at an earlier letter from him, his first letter, and his comments on the first draft, and there is just one aspect of that that I just want to mention to you.

If you go back to document, the document in Leaf 12, which is Mr. Pye's first response, dated 5th April 1994. And do you remember I drew attention to the paragraph 3.2 on page 7, in which he identified the selection criteria indicated in the tender documents. Now, I didn't go through the actual proposed tender document in the form in which it stood at that time. I arranged to get copies, and I think I may have them available.

(DOCUMENTS HANDED TO WITNESS.)

It's headed "Summary of Memorandum Competition in Digital Mobile Cellular Communications"; that's the

front page. The next page is a memorandum setting out basically, I suppose, the Department's view on how they envisaged approaching various aspects of the process. And then the part to which I want to draw your attention is the final part, headed "Draft advertisements, Department of Transport, Energy and Communications, tender for license to provide digital mobile cellular communications."

Now, following that you have a number of pages containing the actual proposed tender in the form in which it stood at that time. If you look at what Mr. Pye says on page 7 of his letter at paragraph 3.2, he lists the selection criteria indicated in the tender documents. And as we have mentioned, those are the selection criteria which ultimately, in a somewhat similar form, found their way into paragraph 19 of the final draft, whereas looking at Mr. Pye's letter, you might think that there was in fact a list of criteria in the draft request for tender or draft tender documentation. As I understand it, there was no such list; do you follow me?

A. I hear what you are saying, yeah. But the document you just gave me seems to be dated November of the previous year. Now, I don't know whether there were subsequent documents or not.

Q. Yes. I think that the document I gave you, the memorandum is dated November 1993, if you look at the

actual draft advertisements. Do you see that?

A. Yeah.

Q. The front page says "Applications which must be received not later than 12.00 noon on the 30th March, 1994, should be addressed to"; do you see that?

A. Yes.

Q. So clearly that portion of the document seems to be of a much later

A. I wouldn't agree with that.

Q. You wouldn't?

A. In earlier stuff we were looking at this morning, we talked about allowing three months for the preparation of the applications and three months for their assessment, so that date might be more consistent of a document of

Q. November?

A. Yeah. I can't say whether this is the document given to Mr. Pye or not. And there was something I should have said in the days before Christmas in response to something you said. The preparation of documentation for the Tribunal was carried out by officials who had nothing to do with the competition. So I have no way of knowing what document is what at this stage.

Q. We will try to see if it is referring to one or two other portions of the document, whether this is as I think it might be; I may be wrong the relevant document.

If you look at the document I have given you, and in particular, the second page of the draft advertisements, if you examine that page, I'll come to the detail of it in a moment

A. Sorry, I am not following you.

Q. You see

A. The draft advertisements is one single page.

Q. Go to the next page, sorry, I beg your pardon, next page, tender documentation for GSM service. Do you see that?

A. Yeah.

Q. If you look at that document, there is, as far as I can see, no list of criteria in the form in which the criteria ultimately appeared in paragraph 19 of the final draft.

A. That's why I am raising doubt as to whether this was the document given to Mr. Pye or not. I have no way of knowing.

Q. I understand, but let me just go a step further.

A. Okay.

Q. What Mr. Pye says is that the selection criteria indicated in the tender document are and he lists them; if you examine that Item 3, tender documentation, you will see that there is a reference to each and every one of the items mentioned by Mr. Pye, and the references to those items is in the order in which they are mentioned by Mr. Pye. Do you

understand me?

A. Okay, yeah.

Q. If you go to paragraph 3, it says "It is recognised that an appropriate balance must be struck between having the GSM service available at affordable and competitive tariffs"; that seems to be the first item, on the one hand, and the initial and ongoing payments to the State on the other. That's the second item, initial and ongoing payments. Do you see that?

A. Yeah.

Q. If you go to Item 7, the appropriate radio spectrum frequency, now, that's the only relevant item reference I can see according with use of frequency, and he says "(unclear)".

On the next item, 8, you have coverage, roll-out I take it to be referred to in the final sentence of paragraph 8, "Applicants should set out clearly the critical path to fulfilling this requirement and should set out any plans they have for going beyond it."

The next item is financial capacity, and that's mentioned in item 10.

A. Sorry ,the next item looking after Item 9 is tariffs.

Q. The next item mentioned by Mr. Pye is financial capacity, and that's referred to at Item 10. Next to that is technical experience. And that's referred to as the next item by Mr. Pye, and the words he uses are

"technical experience and capability", which seem to be the same as the words used in the draft.

A. Mm-hmm.

Q. There is then a reference by Mr. Pye to credibility, and in brackets he has "through business plan", and that's the next item mentioned in the document. The next item mentioned in the document on the in the third-last line of paragraph 10 is performance guarantee.

A. Okay.

Q. Then you have self-imposed service levels above minimum requirements. That seems to be referred to in paragraph 11, do you see that, service provision, do you see that, /air time resale, and then the last item is air-time resale; do you see that?

A. You are connecting that with which?

Q. I am just saying that it seems to me I am trying to work out

A. The last one, okay.

Q. If you conduct that analysis and you take the 11 items mentioned by Mr. Pye, they seem to appear more or less in the form in which he refers to them in the order in which he refers to them in that document, and and in fact, if you look earlier, if you look at the next sentence in his report, at paragraph 2.3, he says "This is the order in which they appear in the document and therefore could be construed as being the

order of importance/weight, although the trade-off between tariff and State payments is recognised".

Then he says "some issues are to be noted".

In other words, what I am suggesting is that it wasn't until in or around this time that the Department or the Project Group began to focus on the notion of a specific order of priority.

A. Mm-hmm.

Q. And that that was prompted perhaps by Mr. Pye's ordering or configuration of what he identified as the relevant criteria into a specific order.

A. Yes, he specifically advised that we should decide the order and then set them out in that order, yeah.

Q. Now, the next document I want to refer you to is in Leaf 17, and it's a letter from Esat Digifone, from its Chief Executive, Douglas Goldschmidt, its then Chief Executive, Mr. Douglas Goldschmidt, to Mr. Martin Brennan and Mr. Sean McMahon of the 11th June 1994. It's probably consequent on various or follows on from various expressions of interest, and they're submitting their views and thoughts on how the contest should be organised. Am I right in thinking that's your handwriting at the top?

A. Absolutely.

Q. You write: "Conan, please acknowledge, and thanks for this interesting paper and"

A. "Previous valuable assistance".

Q. "previous valuable assistance."

Go on to the next page. You will see that the paper is described as "Proposed criteria for evaluating competitive tenders for a GSM license and for the establishment of GSM licensing fees."

There are a number of interesting views on various aspects of the bid process and how it might be organised. I just want to refer you to the first page, where under the heading "Possible criteria for evaluating competitive tenders for a GSM license", the paper says "As the Department of Communications has indicated that the award of the second GSM license will be based on competitive factors and not on an auction, we assume that the various tenders will be judged in terms of their technical and economic performance and efficiency within various policy constraints, which is presumably be announced in the RFP if the bidders are to be evaluated on their probable efficiency, the input resources, the applied technology and the performance will have to be assessed. In all cases, there are necessary trade-offs between particular performance goals and economic financial inputs.

"From the economics of existing GSM networks, it is known that the two main performance criteria are the roll-out and the tariffs. A fast roll-out involves unused capacity, and in such case tariffs will be

higher at any one efficiency level. From the Regulator's point of view, it means that a trade-off has to be found, because both fast roll-out and low tariffs are regulatory objectives. In other words, the Regulator cannot demand both advantages from the most efficient bidder without creating other disadvantages (e.g. quality of service).

"Another important criterion is the license fee. A less efficient bidder will be able to pay the highest license fee when increasing the tariffs or delaying the roll-out. For the design of the licensing procedure, this aspect cannot be neglected. For example, an auctioning process for the license fee will never select the most efficient bidder unless the roll-out and the tariffs are fixed and binding for the bidders.

"Valuation criteria.

"Comparative valuation of tender proposals based on a series of criteria is currently the most often used way of choosing competitive licensees. It requires an Evaluation Commission and a bulk of different efficiency criteria. The evaluation depends strongly on the criteria used and their weights. A distinction is made here between discriminatory and non-discriminatory criteria.

"Discriminatory criteria are particularly important for establishing competitive conditions in imperfect

markets. For example, to promote competition it would be appropriate to prohibit the future operators (i.e. Eircell and the new entrant) not have any overlapping shares. Another discriminatory criteria would be to avoid a future restraint of trade. For example, the German operators are not allowed to participate in the first German PCN tender.

"Nondiscriminatory criteria are critical in finding the most efficient applicant under different aspects such as technical, financial, commercial and operational competence. In most countries this procedure is being applied for new license applications following a predesignated license (e.g. Telecom Eireann). It is a good method to identify speculative and exotic applicants and to restrict applications to only a very small number (short listing). However, this filter requires both the definition of the criteria with adequate weights on them bearing the risk of a wrong assessment and a competent and neutral Evaluation Commission. As a consequence, this procedure needs a lot of time, human resources and capital."

Do you know if up to this time you had had any discussion with intending applicants on whether you proposed to conduct an auction, or an auction and a beauty contest, or how you proposed to configure the fee or payment elements in any competition you

intended to set up?

A. I can't say for certain, but I had, as I said before Christmas, lots of meetings with lots of interested parties, and I was using those meetings there were people looking for meetings to canvass their suitability, and I was using the meetings to canvass their views on different aspects, and I suppose I tested views on anything that occurred to me from my research to date. But I couldn't be specific as to whether I asked any particular one about a license fee or no license fee.

Q. But up to this time, which is, you know, around May, June of 1994 I may be wrong in pinning it to May, June; it may have been April, May there had been no significant debate within the Department on the auction as opposed to no auction, on the payment as opposed to no payment strategy, and there had been no real discussion as to whether Eircell would escape having any payment imposed on it. Wouldn't that be right?

A. There wasn't a deep discussion in the Department. The only thing I would say is that the various memoranda that were prepared were seen by the senior management in the Department, so they knew what the thinking was that was in the documents at least.

Q. Yes. But up to this time, the only I think the only document which seems to raise the issue of the

auction as one for debate was the letter from the

Commission; isn't that right?

A. Yeah, Brussels certainly

Q. In which they alluded to it as a possible problem?

A. Yes.

Q. And do you know if you received any submissions I

don't think you did, but do you know if you received

any submissions, or any oral submissions, even, from

any other potential bidders on this issue of having an

auction or not having an auction?

A. I'd be reasonably confident that I had discussion with

some parties, but I don't have any recollection of

particular submissions.

Q. Turn to the next document, which is a document it's

in Leaf 18; it's a document I think of the 26th June.

A. By the way, there was a certain amount of special

pleading in that Esat letter, as you probably have

seen, as you'd expect.

Q. Of course.

This is a memorandum from you to Mr. Sean Fitzgerald,

and it's copied on to the Secretary as well.

"Re GSM competition. One of my purposes in going to

Brussels last week was to walk through our current

draft on GSM with the Commission, which is something

we are required to do. I had hoped to clear this on

the spot with DG XIII, but this turned out to be a

shade over-optimistic. DG XIII sought my permission

to pass the document on to DG IV and gives the latter 48 hours to review it. DG IV and DG XIII will give me coordinated observations, they say, by close of business tomorrow. I will need probably another 24 to 36 hours to incorporate any comments which are acceptable into the working draft. The initial reaction of DG XIII was generally favourable, but they said they will have a number of enhancements to suggest here and there.

"We have horse-traded a deal with Telecom Eireann on interconnection which, based on other information which we have, is an acceptable ballpark for a starting point, and we have agreed with Telecom Eireann language about its future review.

"We also have a second commentary from KPMG Peat Marwick London (Roger Pye) on the most recent iteration of the tender documentation. We will be taking that on board to the extent we consider acceptable while awaiting the observations of the Commission.

"By the way, I left a very heavy emphasis with the Commission on the confidentiality of the document which I had given them and asked them specifically not to have other copies made of it. I hope this holds up."

As we have already said, DG XIII is the Competition Directorate DG XIII is the Communications

Directorate and DG IV is the Competition Directorate?

A. Correct.

Q. Just to pause for a moment in connection with this confidentiality concern you had. This document was your proposed request for tenders?

A. As it stood then, yeah.

Q. Containing the criteria and the order in which you proposed to prioritise the various criteria listed for enabling you to select a competitor?

A. I'd expect that's correct, yeah.

Q. But there were no weightings or anything like that

A. No, no.

Q. involved at this stage; isn't that right?

A. No.

Q. Now, the next document, which is just two pages, containing I think your account of your dealings with the EU and the result of the consultations you had with them.

As you know, we are going to have to come back at some point in the future to discuss confidentiality and the Commission in particular with regard to your subsequent dealings with them on the question of the reconfiguration of the criteria. Did you have a concern about confidentiality?

A. I suppose in any procurement process you wouldn't want any one candidate to have an advantage over other candidates. Everybody starts from the same starting

point, but no more than that at this point.

Q. Did you have any concern about the Commission?

A. I'll put it like this: DG IV, Competition, always said that nothing leaked from their building. I don't think there is any other part of the Commission that would even attempt to claim that, and there are lots of people in the Commission who believe in sunshine laws anyway, everything should be face up. But DG IV take a particular pride in their confidentiality, arising from merger investigations and so on.

Q. But in this particular case, leaving aside any views any particular departments in the Commission might have about transparency and so on, you had made it clear that you had wanted these documents kept confidential?

A. Yes.

Q. And do I take that you had no reason to believe that they wouldn't keep them confidential when you had made an express request to that effect?

A. That's correct, yeah.

Q. If you look at your memorandum, the second paragraph I think is the first material paragraph: "I took contact with DG XIII last week, and on their suggestion also with DG IV. Mr. Loxley of DG IV phoned me this morning with a response on behalf of both DGs which touched on four aspects. They would like to be consulted again about the information

memorandum which we envisage after one month into the process.

"1. State payments. The Commission take the view that payments to the State should only be sufficient to cover administrative/regulatory costs; anything beyond this is an auction. The basis for this is that additional payments would be discriminatory. I said that Eircell would be required to pay similar royalties to those of the new licensee; a number of Member States already have broadly similar arrangements, and we could not be penalised for being late entrants. Royalties are commonplace in mining, oil production, etc. The Commission are, in my view after the discussion, unlikely to challenge us on this.

"2. Infrastructure: The Commission accept, even admire, our general approach. They advocated discounts off leased-line tariffs as an assist up to new entrants up to 50% discounts are given in some Member States. I said our existing leased-line tariffs are already too low and are causing illogical developments. They will be increased. Secondly, there is not a significant head start to be made up. If we achieve cost-based leased-line charge, then discounts would have no logic, especially if given to direct competitors. Belgium and Italy apparently gave the right to resell the existing service as "own

brand" at start-up.

The next issue deals with planning. "Can we accelerate roll-out by speeding up planning permission, etc.? I said this would distort the bidding as some consortia could have negotiated access to existing towers, etc., and Telecom Eireann should be open to offers on facility sharing. Interference in the normal planning process is not an option.

"Exclusivity of licences causes problems. The Commission would settle for deletion of our sentence on "Licensing of other (including DCS) services". I said we expect questions in the information round and would have to give clear answers, such as an intention not to lag or lead EU progress.

"Conclusion.

"If we concede to Point 4, the Commission will go along for the ride in all of the rest, in my judgement. They are not going to communicate formally with us now. They may pick up some more points at the information stage."

At that point you clearly had the impression that apart from the question of licensing other services at a future point, the Commission were happy enough with what you were proposing, even though it embodied at that time an initial payment and an ongoing royalty payment?

A. Yes, but I suspect if we were talking about both, that

the initial payment would inevitably be relatively smaller if you had an emphasis on royalty, and royalty is clearly less injurious in terms of the Treaty and so on.

Q. Yes.

A. I mean, that's

Q. It nevertheless made it clear there was an ongoing royalty payment?

A. Yes. I don't think the Commission would have objected if the competition was driven by an ongoing royalty payment.

Q. Don't you think so?

A. I wouldn't think so, but I don't know.

Q. Did you discuss that

A. It's burdening the capital of the business at start-up was their main concern.

Q. Did you ever discuss with them at a later stage I am jumping ahead now, but did you ever discuss with them at a later stage, when this became a thorny issue, whether you might replace the up-front payment with an ongoing payment?

A. I don't think so.

Q. The next document is a letter from the Irish Permanent representative in Brussels to Commissioner Karl van Miert, responding, I think, to his letter to Mr. Dick Spring, I think

A. Yeah.

Q. where he seeks an extension of time within which to give a formal reply. He wanted it extended for one month, a further month, I think; they gave two months.

He wanted it extended for a further month?

A. Probably the most common response of all Member States to all such letters.

Q. Yes.

The next document is a letter from the Department of Finance, from Mr. Jimmy McMeel, addressed to you on the 11th July 1994, and this letter would appear to be based on the views the Department of Finance had expressed, or at least some impressions they had from reading the documents you had, concerning what fees would be charged for the license. And they said:

"Dear Martin.

"We have been reflecting on the question of fee structure for the second mobile telephone license, and in particular on the proposed initial up-front fee of 3 million.

"What you were proposing was an up-front fee of 3 million and royalties in the future".

Sorry; I am just reminded of one thing I should have gone back to. Sorry.

If you go back to your memorandum on your meetings with the Commission in relation to State payments, and you'll recall that you said the Commission were unlikely to challenge you on it. You said that

Eircell would be required to pay ongoing royalties as well.

A. Mm-hmm.

Q. So at that stage, you envisaged that apart from the initial up-front fee, Eircell would be obliged to make the same ongoing payments as the new operator?

A. I think it would be unsustainable to do otherwise.

Q. Pardon?

A. It would be completely unsustainable to do otherwise.

Q. Of course. But that's consistent with the thinking that goes right back to Ms. Howley's memorandum, I think in 1993, where it was envisaged and repeatedly envisaged in other memoranda that whatever, whether initial fee or otherwise, whatever was charged to a new licensee, something similar would have to be charged to Eircell.

A. Yeah.

Q. Going on then to Mr. McMeel's letter. He says: "Dear Martin, we have been reflecting on the question of fee structure for the second mobile telephone license and in particular the proposed initial up-front fee of 3 million.

"Overall we consider that it would be preferable if there was a reverse to the original plan that the balance between the amount of up-front payment and ongoing royalty should be left directly to the market.

While we acknowledge the EU Commission's thinking on

the possible distortion effect of a large up-front fee, it appears that Italy and Greece appear" I suppose that should be "to have applied an up-front fee regime without reproach by the Commission. "There is an understandable gap between the announcement of a 3 million payment in the request for tenders and the actual evaluation of the bids. It is only when the process is complete that the future royalty stream will become apparent. I fear that it is almost inevitable that, in the interim, there will be a tendency to focus on the 3 million aspect rather than on the longer-term royalties. After all, for some time this will be the only tangible figure in existence for Exchequer receipts under this heading. Given that there have been some extravagant figures in circulation about the possible value of this license (the CWU's document)" that is the Communications Workers Union?

A. Yes.

Q. "document on the future of Telecom Eireann mentioned 50 million to 100 million Irish punts. It would be preferable to avoid, at this stage, claims that the Government has not made the most of a lucrative franchise.

"It is clear in the tender documentation that the totality of revenue to the Exchequer is not the sole criterion for deciding on the award of the license.

Perhaps the Commission's fears could be allayed by phraseology in the tender documentation or in the subsequent responses to questions memorandum implying that a balanced initial fee/ongoing royalty should be aimed at. In any event, in NPV terms, the revenue from either a large once-off up-front payment or a combination of a smaller up-front amount and ongoing royalties should work out roughly the same. However, we recognise that in the event of the market growing faster than anticipated, an apparently large up-front payment might not serve the Exchequer as well as an ongoing royalty over the longer term, but this could be dealt with by appropriate trigger mechanisms which would come into play once turnover reached a certain level.

"To sum up, we feel the market should be allowed to make its own pitch between the up-front/royalty mix."

Is that a letter in which Finance were saying "We don't want a fixed up-front fee of 3 million; we want the market to decide whether they'll put 10 million up front and so much in royalty or 3 million up front and a larger amount in royalties", and so on?

A. That's the start of an interdepartmental debate which we will no doubt hear more about. I think I have a vague recollection from reading the Roger Pye stuff, though, that he was advising if you have too many financial things moving at the same time, it will

inevitably end up as an auction in any event.

Q. Well, as long as the market is going to choose any one financial or is going to make a choice as to which of two financial routes it's going to go, and if it's going to have a freedom of choice in relation to how much it bids in any one of those, there is going to be an auction. You always envisaged an auction

A. At one time we talked about a bidding line of royalty payments, a bidding line of spectrum fees, and a bidding line of a cheque. And I am nearly certain that Roger Pye advised I mean, it's either there or it's not that if you do it like that, it is inevitable that people will bid low on the long-term ones and bid high on the cheque.

Q. Of course. I think you may be alluding to it might be an analysis of Fintan Towey's.

A. It could be.

Q. But at that stage, did you envisage a fixed up-front fee and a future royalty as fixed by the Department or the Regulator, or did you envisage future royalties leaving them open to the market to fix?

A. I think at that stage we were leaving it open to the market.

Q. So they were going to bid on the royalties but not on the up-front fee?

A. Yes.

Q. And Finance therefore were looking for you to leave it

to the market to bid on both?

A. Yeah. I mean, I am sure you will hear Mr. McMeel on this in due course. I don't actually know who was Minister for Finance, and what's the significance of the reference to the CWU's document, and so on, because clearly the CWU, who were in Telecom and didn't know who their competitor was going to be, would take a certain view of the world.

Q. I think it was Mr. Reynolds was the Taoiseach at the time?

A. Yes, I think it was, before the change of Government. Mr. Cowen was our Minister.

Q. Mr. Ahern then, I think, was the Minister for Finance, was he?

A. I just don't know.

I'd also just like to mention, as we did earlier, that they talk about Greece got away with a high up-front fee. In the case of Greece, two licenses were put on the market to the highest bidder, so there was no issue around favouring the incumbent. The incumbent got no license, as far as I know.

Q. That was only one side of the argument anyway. The other side was a suggestion, valid or not, that if you had a high up-front fee, you could end up with high tariffs to recoup the fee; is that right?

A. Yeah.

Q. And I think we are going to come to that now in your

response. This is the 12th July 1994, your letter to

Mr. Jimmy McMeel.

"Dear Jimmy.

"Thank you for your letter of the 11 July 1994 regarding the question of "State-take" from the second mobile operator.

"Firstly, I wish to put the matter in perspective.

There is no crock of gold available for this license.

Our best estimate, taking all factors into account, including the very high numbers reported in respect of Greece and Italy, is that if an up-front payment was the only ingredient, it would amount to only 18 million. It could be rounded up to 20 million. You will no doubt have noted that Telecom Eireann independently used this amount in their model.

Bearing in mind that there could be up to six competitions running simultaneously in Europe, these figures may err on the side of optimism.

"Secondly, we are confident that what we are proposing is eminently defensible and presentable.

"Thirdly, an up-front payment of the order of 20 million would represent an increase of about 50% in the capital investment required for the project.

Feeding this into the project economics would be likely to lead to significantly higher tariffs and less real competition than would otherwise be the case. One of the key drivers of our general

communications policy must be high availability of services at comparatively low prices, and we are loath to put in place an arrangement which would be clearly counter to this. (The other possibility would be lower profitability with commensurately lower corporation tax.)

"We have spoken informally to the market quite extensively in recent months, and the feedback is that no matter how we present the options, if we leave two floating cash lines, the up-front amount will dominate.

"Another important consideration is that your Department's analysis focuses on the State-take from the second operator in isolation. Naturally one could expect the NPV to come out of the same ballpark for a variety of options in this case, and theoretically it should be a matter of indifference to the State in that event. This could be true insofar as cash flow to the State is concerned, but taking the wider effects on the project into account, it is a doubtful premise. More importantly in this context, however, is that an approach weighted towards royalty will capture the entire turnover of the mobile telephone business, including Eircell. Bearing in mind that Eircell is a highly profitable business, it is of considerable interest to establish a direct State-take from it. An alternative approach which would saddle

Eircell with an equivalent up-front payment to that offered by the market would likely be highly contentious, and at the end of the day would be no more than a paper transaction, since it would impact directly on the profitability of Telecom Eireann and come out of the shareholder value by one means or another.

"Finally, if our analysis is correct, and we have considerable confidence that it is, then as and if the initial payment goes above 10 million, the potential royalty would tend towards derisory levels; the market would recognise this and be even more inclined to plump for the temptation of the high up-front payment, perhaps even exclusively.

"In summary, this Department believes that there is an overwhelming case in favour of the option which we have chosen but would very much like your Department to accept this on the basis of conviction. We see no merit in this aspect being put forward to the Government as an open issue."

You were at this point, therefore, defending the notion of a small fixed up-front payment and an ongoing royalty stream

A. Mmm.

Q. on the basis that if you had a high up-front payment, it could, amongst other things, result in higher tariffs?

A. Yes. The Department's telecom strategy, which was by then written down, not published, never published, but which did have the sign-off of the Minister of the day, it could be summarised in very short order as wanting to have in Ireland, in all aspects of telecom services, benchmarking against the top quartile of OECD indicators of quality, availability and price. That was the headline of our strategy, and I suppose there was an element of you had a better chance of achieving that with a royalty, given that the State or the Department of Finance wanted money, you had a better chance of achieving that with a royalty than you had by burdening the up-front capital in a project like this.

Q. When you say at the end "We see no merit in this aspect being put forward to the Government as an open issue", precisely what was meant by that?

A. My experience is that when something that has a lot of contention between the promoting Department and the Department of Finance goes to Government as an open issue, it either languishes on the agenda or keeps going backwards and forwards and you never get a result.

Q. Are you saying it's preferable if it's resolved by the Department before it goes

A. It's always preferable to resolve, even if it means having a resolution achieved by a bilateral

inter-Ministerially. The civil service would seldom put something with such divide straight to the Government.

Q. The next document I think came to the Tribunal from I think it's the files of the Department of Finance.

Do you recognise it? It's in Leaf 22.

A. What I wrote on it at home at Christmas is "Who owns this? What origin? I never saw it before".

Q. Right.

A. And I and I suspect that the "Jimmy" is Jimmy McMeel. Other than that, I know nothing about it.

Q. In the form in which you see it there, by which I mean in the typeface you see it there, it may have come from the Department of Finance. And I think, as and when we come to look at some of the participants' documents, we will see and I am sure I'll be corrected, if I am wrong, by Mr. McGonigal that it probably came from Esat Telecom.

A. This document?

Q. Yes.

A. I have no idea.

Q. The ideas in it. Is that the first time you saw it, in the documents that were brought to your attention by the Tribunal?

A. Yeah. I don't recognise anything about it until I saw it the week before last.

Q. Do you see where it says in handwriting, "Jimmy, can we

give a response to these suggestions? I think that the point at 3 is a bit farfetched."

Do you see that?

A. I do, yeah.

Q. So it would suggest that this is something that Finance felt they had to respond to?

A. Yeah. I'd love to know who is the signatory of that manuscript note, and I can't make it out.

Q. It looks like does it look like "Gerry", or ...

A. It could be.

Q. For the moment I want to just go through it as briefly as we can, because we'll be coming across it in another form later on.

It says: "Why it is incorrect not to specify the percentage of royalties. The unforeseen consequences of unspecified royalty fees are

"1. An unsustainable business. Leaving the door open to the highest percentage royalty fee will tempt bidders to abandon their business plans in favour of a reckless approach to winning the license. The impact could be

"- any one of the following five

"- an Irish GSM business failure

"- or a devaluing of the Irish high-tech image or an Irish GSM license traded on the second-hand telecoms market, a failure to create competition for Telecom Eireann or an insignificant royalty fee

for the Government."

Do you have any views on any of those points?

A. I never really considered them.

Q. Have you considered them since you saw this document?

A. No. I was so puzzled by this document I just wrote a note on it and moved on, to be honest.

Q. So were we.

Item 2: "Irish need not apply.

"Leaving the door open to the highest percentage royalty will effectively mean 'Irish need not apply'.

Irish-led consortium will not have the resources to compete. The impact will be the following, one of the following four, or all of them:

"Only foreign-controlled consortia can afford to apply.

"A national asset being sold to the highest international bidder.

"Fragmentation in the emerging Irish telecoms business.

"No sustainable development of the Irish telecoms market.

"Open to abuse.

"Leaving the door open to the highest percentage royalty fee will encourage multinationals simultaneously bidding for other overseas licences to sacrifice Ireland as a loss-leader. '... buy the Irish license, thereby improving our standing in other

markets ...' The impact will be

"1. Lack of commitment to GSM in Ireland

"2. Neglect of an already hard-pressed Irish telecom consumer

"3. Contempt for the Irish licensing process".

A. It's a curious document. I presume it could have come from any Irish interest in putting together a consortium or something like that.

Q. It suggests that whoever is putting it forward was an Irish interested party, on the basis that it was indicating that foreigners could take it over?

A. It probably does, and there was obviously several people, several Irish people, expressing interest at that stage.

Q. As it happened, no wholly Irish-controlled consortium bid for the license; isn't that right?

A. That works two ways. I think there was only one foreign consortium that didn't have an Irish partner as well.

Q. Wholly Irish control?

A. I don't believe they did.

Q. The Irish elements were ranging from quite small to, as we know in one case, 40 or 50%, isn't that right, at most?

A. I am not so sure I'd dismiss some of them as small.

There was one that had 25 percent financial investors plus other Irish members in the consortium. I

wouldn't buy into "quite small" without looking at the numbers.

Q. The next document is in Leaf 23; it's dated November of 1994, headed "Office of the Regulator, Minister for Transport, Energy and Communications, aide-memoire".

Now, you mentioned already a distinction between an aide-memoire and a memorandum for Government. Maybe you'd just explain as well as you can precisely what the difference between those two types of document is and how they are used in making Government decisions.

A. Their use waxes and wanes, the aide-memoire end of it at least. A Government memorandum would normally look for a formal decision of the Government or for the Government to note formally an action about to be taken by a Minister and would follow a very predictable template, a very stable template, where it has to deal with certain matters. It has to deal, for example, with interdepartmental consultation.

Nowadays it has to deal with impact on rural communities, poverty, etc. It has to deal with regulatory reform or burden of regulation on industry.

I mean, it's a very predictable. They all look the same, even though they might be dealing with lots of different material.

An aide-memoire is often when a Minister wants the comfort of mentioning something at Cabinet but that doesn't require a formal decision. Now, that's sort

of a rough description, and I mean, the use of aide-memoires sometimes I mean, very recently now, the Cabinet Secretary said "We are getting too many aide-memoires; stop, please". Then they go easy for a while, then they grow again.

Q. When you refer to an aide-memoire as a document which might be used by a Minister to get the comfort of having the Cabinet being aware of something, as opposed to looking for a decision in the case of a memorandum for Government, is a memorandum for Government prepared where a decision is to be made by the Government at the request of a Minister, or where a Minister makes a decision and wants the Government to stand over it?

A. It can be either. The opening paragraph of a formal Government memorandum would either be "The Minister for whatever requests the Government to..." or "The Minister requests the Government to note his intention to..." That would be always

Q. In the latter case, does that mean he intends to go ahead anyway? Or is it a convention that if the Government don't like to note his intention or are not very impressed with that, they don't go ahead to do what he intended to do?

A. I think in the case of formal Government memos other than those by the Minister of Finance on financial issues, they have to go through set procedures that

take time. They have to be circulated in advance to interested departments and their Ministers, and they have to be given two or three weeks to offer their comments, and their comments have to be recorded, responded to and dealt with, and so on. Those constraints wouldn't apply to an aide-memoire.

Q. Now, I think this document is in something close to it might be the final form in which the aide-memoire ultimately I think this was the form in which it was intended to go to the other members of the Government, but around that time, the government changed, didn't it? There wasn't an election, remember; a new coalition came in.

A. That's right. I think the Government came to some conclusion on foot of this document, though.

Q. I am just trying to work out in my own head, by looking at other documents, what happened to this document. I think it did go to Government, but I don't think that any I don't think that I am not sure that any final decision was made on it; but in any case, I think, to make more sense out of it, I am going to ask you to turn to the next document first.

A. Okay.

Q. This is a memorandum from Mr. John Loughrey to Mr. Sean Fitzgerald. And it says: "At last night's meeting of the Government, the question of a second cellular phone license was discussed at some length.

No decision was taken. The Minister did indicate to his colleagues that he would be returning to next week's Government meeting for a decision.

"The Minister for next week's meeting intends submitting an aide-memoire, circulated a day or two at most before the meeting, for information. The existing aide-memoire should be expanded on the following basis.

"A, it should produce a high comfort factor for Telecom Eireann's future, and in particular for the agreement with Telecom Eireann following extensive discussions on Eircell's position in the new competitive framework.

"B, it should also major on the inevitability of the introduction of the GSM license, stressing that DG IV are very serious on the challenge to the completion of the internal market in cellular phones, starting with Belgium, but they have already turned their guns on us.

"C, in particular they should build on that element of the aide-memoire that stresses in effect that

"everyone will be a winner" and that competition to grow the cellular phone market in Ireland will be to the benefit of both companies, and that in particular the use of the fixed telephone network will enhance Telecom Eireann's group position.

"In short, the expanded aide-memoire should be as

user-friendly as possible and as non-threatening as possible to Telecom Eireann's general future and that of Eircell in particular."

Now, the reason I mention that document first is that I am not sure whether the aide-memoire I am going to refer you to now was the one that was mentioned at the meeting to which Mr. Loughrey refers or the one that was prepared for the following meeting. Do you understand?

A. I do, yeah.

Q. But one assumes that in any case, there wasn't a huge difference between the two of them?

A. No, except that I mean, the instructions in Mr. Loughrey's note are very political, as you can see.

Q. They are.

A. So they obviously flowed from a political discussion.

It should be easy enough to glean whether this does what he suggested it might do.

Q. Reflect his views.

A. Yeah. I mean, a close study of it would show whether it does or not, I am sure.

Q. I mean, it starts out at paragraph 1 we are back now to Leaf 23 by describing the competition for GSM license. It goes on to refer to the proposed regulatory framework, suggesting that a new operator would be licensed and that competition would be limited to two operators for a period of seven years.

In other words, that a duopoly would be put in place.

Bringing us back to the white paper we discussed at the beginning this morning.

A. Mm-hmm.

Q. It goes on to, in Item 3, to refer to the reasons for announcing the competition at this stage. And the two main reasons stated were "The principle of introducing competition in this sector of the telecommunications market is inescapable. It is being forced upon us by action of the EU Commission. Belgium went to the brink on legal proceedings and then capitulated. We already have received an opening letter in legal proceedings from the EU Commission.

"Secondly, while Telecom Eireann have been active in the analogue mobile sector in a few years and have established a profitable and successful service, their GSM service is in its infancy. If they achieve too strong a foothold before a competitor is licensed, potential competitors may view the license as less attractive, and the value to be achieved by the State from granting the license would be much lower. The corresponding amount to be charged to Telecom Eireann under level-playing-field conditions will be too low also. On the other hand, putting a competitor into play early will drive market expansion and ultimately lower prices to the benefit of the consumer.

"The importance of responding quickly to these stimuli

is expanded in the following paragraphs".

The first is the threat of EU action, and I think that may reflect the point Mr. Loughrey was making about how important it was to emphasise that threat.

A. Although he calls for a specific reference to Belgium, which I don't see

Q. It's contained in the other paragraph, paragraph 3.

A. Oh yeah.

Q. He suggests that it should be as friendly to Eircell as possible. And I think, if you look at I think it's 6 and 8, which is impact on Eircell, Telecom's mobile service and impact on Telecom Eireann interconnection. I think he is suggesting that if you have an increase in the mobile market, you are going to have an increase in business for Telecom Eireann anyway.

In paragraph 10, he goes on to describe the tender competition, and he says there will be a written procedure to select a competing licensee. And at this point it seems that you are still at the stage of promoting the notion of a $\frac{1}{2}$ €3,000,000 initial payment.

"The approach is to put an initial price of 3 million on the license and to let the market determine the full value of the license in terms of ongoing payments. The amount and form of payment for the license was devised by reference to the experience of other countries, making appropriate adjustment for

criteria such as market size, relative wealth, and other aspects of the business opportunity. On this basis it was estimated that possibly 20 million could be secured if an up-front payment only was sought. However, this would represent an increase of about 50% in the capital investment required for the project.

Feeding this into the project economics would lead to significantly higher tariffs and less real competition than would otherwise be the case. One of the key objectives of introducing competition is to achieve high availability of services at comparatively low prices. A license fee is structured to support this objective while at the same time providing for substantial State benefit. The tender documentation identifies a number of criteria in descending order of importance will be used in evaluation of tenders.

These are as follows".

They are the list as contained more or less in Mr. Pye's document commenting on the earlier request for tenders.

I don't think we need to go into the detail of the other paragraphs unless you want to refer me to any particular parts.

The conclusions at page 14 describe the objectives of the license procedures as "Discharging our legal obligation under EU law to introduce competition on fair and equitable terms into this sector.

"2. Developing the mobile market for a quality service at reduced prices for the benefit of the customer, as has been done elsewhere.

"3. Securing a stream of income for the State from use of scarce resources.

"4. Provide an opportunity to Telecom to enhance its own position from market growth and interconnect charges."

We now go on to Document 25, of the 11th November.

And I suppose that is probably the meeting to which Mr. Loughrey was referring. It looks like it could have gone from a Tuesday to the following Thursday week, in the dates.

A. Mm-hmm.

Q. This is, from the Secretary to the Government, Mr. Frank Murray, to the Secretary to the DTEC, 11 November 1994. "I am to refer to the aide-memoire dated 9 November 1994 submitted by the Minister for Transport, Energy and Communications and to inform you that at a meeting held today, the Government:

"1. Noted the Minister's proposal to hold a tender competition leading to the award of the single license for the operation of digital mobile telephony in co-operation with the Telecom Eireann's Eircell and

"2. Decided that the Minister should consult with the Cabinet subcommittee on telecommunications established on the 4th of May 1994 before a decision is made on

the award of the license."

This seems to be the first major formal step putting this on, as it were, a Government as opposed to a purely departmental plane?

A. Mm-hmm.

Q. Do I understand that by this time you had had no further, as it were, unsatisfactory or disturbing noises from Brussels following your meeting in which you felt that your proposals would pass muster?

A. I don't believe I had any contact with Brussels that's not on the record.

Q. Would I take it that you'd hardly take this step if you had had any unsatisfactory noises from Brussels because you were running at this stage with the proposal you had brought to Brussels, weren't you?

A. Yeah.

Q. Can you help me with the reference to a Cabinet Sub-Committee? Because the role of the Sub-Committee in this is not something I have been able to satisfactorily work out.

A. I don't have in these papers the Cabinet decision. I don't know the context in which that particular Sub-Committee was set up, whether it was for wider telecommunications business, which I suspect it might have been, about the future of Telecom Eireann and so on.

Q. I think it seems to say that, Cabinet committee on

telecommunications in general. But because of the fact that, as you know, we'll be making references to other Cabinet subcommittees, would I be right in thinking that the reference to a Cabinet Sub-Committee here and its involvement before a decision is made suggests that that was a cabinet subcommittee set up a remit up to and including the making of a decision to award the license as opposed to

A. I mean, I am conscious of the fact that this was a decision taken by Government about to fall and put on ice, so I don't know what status it had. But it looks, at that time, as if that was part of the intention, yeah.

Q. The next document then is in Leaf 26, and it seems to be a letter, a copy of a letter from DG IV to the Italian administration, who were being pursued at or around the same time by the Commission in relation to the proposals they were promoting in connection with the second mobile telephone operator; isn't that right?

A. Yeah. Maybe you should turn to Document 29 to create the link with that.

Q. Yes. It makes perfect sense, I agree. I think you got, from other documents that we have mentioned here I think this document came to you to begin with, is that right, but am I right in thinking you got it by requesting the EU for a copy of it?

A. Well, that's what the burden of my note of the 13th January is saying, that I asked Mr. Ungerer for a copy, having been made aware by my Italian colleague at a meeting that it existed. And then it looks like it was put in here at this point, simply because it had a date of the 3rd January, so it was put in chronological order. I suspect that I got it in furtherance of that conversation, yeah.

Q. It wasn't long afterwards when you got it. It happened, as it were, in the event, the letter was sent out on the 3rd January 1995. But I am not absolutely clear on how the EU dates its documents or whether a date on a document gives you an indication of the date on which it went out, because they seem to have a somewhat convoluted system of recording the dates on which documents are sent out. But in any case, it's dated 3rd January, 1995; do you see that?

A. Yeah.

Q. And if we go to your memorandum on Leaf 29, you are saying you were at a meeting, and you asked your neighbour from Italy whether they had any trouble with the Commission over GSM license fees, and he said that they had received a letter just before or after Christmas. Do you see that?

A. Yeah.

Q. And seeking full disclosure of facts and asking whether the incumbent was being levied. And they

intended to "dig in". Hardly surprising in the case

that the Italians.

A. What's interesting to me, in the context of something

else in the Opening Statement, is I made this request

of DG IV; the letter on its face is marked

"Confidential", but I still seem to be able to get my

hands on it very quickly. But I don't know when I got

it or how I got it.

Q. You rang?

A. I spoke to Mr. Ungerer, and I awaited hearing from

him.

CHAIRMAN: DG IV, you say that was sacrosanct as

regards leaks as opposed to other

A. Yeah.

Q. MR. HEALY: Just to deal with that point, I just want

to get the facts of this right. Your meeting took

place it looks like it took place around the 12th

January 1995?

A. Yeah.

Q. Your memorandum is dated if I just put it up on the

overhead projector, it's dated 13th January

A. And we were talking about the meeting yesterday.

Q. Yes. So having spoken to your colleague from Italy

and having been informed that he had received a

letter, you phoned Dr. Ungerer of DG IV, that's

Competition, to seek a copy of such letter; okay?

A. Yeah.

Q. And what you got from DG IV was an unsigned copy of Mr. Karel van Miert's letter; isn't that right?

A. Yeah.

Q. And Karel van Miert would have been the Commissioner for telecommunications in DG XIII

A. No, van Miert was the Commissioner for Competition.

Q. For Competition?

A. Yeah.

Q. And you understand that to be the letter that your Italian colleague was referring to?

A. On its face, it looks exactly like that.

Q. The copy that you received from Dr. Ungerer is not actually signed; isn't that right?

A. No.

Q. So I presume that Mr. Van Miert himself, or his office, were probably not drafting these documents; they were probably drafted by Mr. Ungerer's office. Is that right?

A. Absolutely. They would be drafted by the service of the Commission in DG IV. And I think, about infringement proceedings, they are probably cleared with the Commission College at one of its meetings. Maybe once a month or once every two months they look at infringements, so it's the fact of its existence would have been relatively wide circulation, I suspect. And I mean, I am taking it that this is something I got from Ungerer, because I looked for it,

but there is no evidence one way or the other. I

mean, I worked in Brussels for three and a half years.

I knew my way around; I knew how the system worked.

And this is on the file. I presume I got it.

Q. And this was Ungerer making it available to you, as it were, a colleague in another service; is that right?

A. But also as somebody he was dealing with in trying to bring about results favourable to the Commission's agenda in the Irish case.

Q. Were you surprised that it had the stamp "Confidential" on it?

A. I don't remember thinking about it at the time.

Q. It's only in the light of

A. It's in the light of the Opening Statement and things like that. You know.

Q. Yes. In the Opening Statement I think we were talking about a person associated with a competition getting a confidential document. Is there a difference?

A. No. There is actually something that you wouldn't necessarily be aware of. Mr. Coughlan put up two versions of a particular letter, and one of them was from a Mr. Brosnan to a Mr. Cullen. That too was an unofficial channel of communication, although you were referring it was an official communication. It was an unofficial channel of communication because Mr.

Brosnan was Chef de Cabinet to the Irish Commissioner at the time.

Q. I'm interested in your views, any light you can throw on it.

A. I can't throw any further light. The Italians told me the letter existed. I asked Ungerer for a copy. It looks like he gave me a copy. I suspect his reason for giving me a copy was because it was increasing his ability to exercise leverage on the Irish administration. You know, that is what happens to guys who don't do right. And the Commission constantly leverage one member state off another in issues like this.

Q. Just to go down that avenue of digression that we were going down, you mention that the communication or the letter that went from Mr. Cullen to Mr. Brosnan

A. Mr. Brosnan to Mr. Cullen.

Q. Was an official channel?

A. An informal channel.

Q. An informal channel?

A. Yes.

Q. But it was an official channel, wasn't it?

A. Well, it was a letter from

Q. What I mean

A. From DG IV to the Irish administration which would have come directly from DG IV to the Irish administration. It was a copy procured by the Cabinet to the Irish Commissioner and given to somebody in the Irish representation on request. I can say no more

about it. I just noticed that when it went up on the screen.

Q. What I am saying is in going from the Cabinet of the Irish Commissioner to an Irish civil servant, it went from the Commission to an Irish civil servant, from one official source to another, even though it went informally; is that right?

A. Yeah.

Q. What Mr. Coughlan was referring to in his opening was the fact that a confidential document would go from the Commission to an outsider, or from anybody to an outsider, a person who was not a member either of the Irish service or not a member of the Commission but who was in fact a third party; in this case, a third party involved in a competition to which the letter related. Would that be a major distinction?

A. It's probably too early in this process to go into that particular. I was drawing attention here to how easy it seems to have been to informally get communications out of the Commission; that's all.

Q. I agree with that. I am interested in it. All I am saying is that I am suggesting that there is a distinction between the ease with which a person in the Civil Service in one country might get a document from an official channel in the EU on an unofficial basis, and I am drawing a distinction between that and an outsider involved in a competition to which a

document related getting such a document from an official channel.

A. The only comment I would make on that is that people who know the system can get access to almost everything in Brussels.

Q. Whether they are officials of other countries?

A. Whether officials or not. I mean, the Irish Business Bureau often has information and IBEC often has information before the Irish Civil Service has it, through the same kind of unofficial channels.

Q. When you say through the same kind of unofficial channels, do you mean personal contacts?

A. Yeah.

Q. Would you exclude DG IV from that comment you made a moment ago about the EU and its leakability?

A. All I know is that I have often asked DG IV to keep things confidential, and they have always responded "We always do; you shouldn't raise that issue with us; we are the most confidential part of the Commission".

Q. But would you exclude them therefore from that general comment you made a moment ago that the EU is so leaky that non-State organisations such as IBEC, a private organisation, could get access to documentation before you?

A. I don't know whether I could or not. At one level it surprises me, looking at the face of it, that I was able to procure this document within ten days of it

being issued, even though of it a confidential letter from a Commissioner to a Minister in another Government. I am not making any particular point.

Q. You say it surprises you. I asked you a moment ago whether you were surprised, and I think you said you didn't think you were.

A. I now know how easy it was to get stuff. When I was in Brussels, I didn't often have to look for things in DG because when I was Brussels, that's not where I did my business; I was in a different line of business. But it is clear it's easy to get your hands on material in Brussels.

I don't know why I took you down this road at all by referring to Document 29, but I mean, on the face of it, I am making the point that I got this document even though it's marked "Confidential". No other point.

Q. You know that we are going to be dealing with this in the context of specific documents at a later stage?

A. I do, yeah.

Q. But I suppose I am noting the force of your comment that the it's possible to get almost any document from the EU; and I take it that what you are saying to me is that that includes the Competition Directorate, no matter what they say about their own good record?

A. I actually suspect, but I've no way of establishing it, that the DG Competition are very good at

protecting material to do with particular investigations in cartels and mergers and stuff like that, where they send out teams for dawn raids and stuff like that; I suspect they are very good at protecting that. Beyond that, there is some evidence that documents can be got. That's all.

Q. The reason one of the reasons I am pressing you on it is that there is documentation which the Tribunal hasn't yet distributed to parties associated with this inquiry in which the Commission, through Directorate General IV, has asserted that it takes the notion of its good administration so seriously that it issued a denial that there had been any impropriety in connection with the document mentioned by Mr. Coughlan, that it issued a denial to the newspapers without responding to a Tribunal's query, and it went so far as to say "We issue that denial to the newspapers, and meaning no discourtesy to the Tribunal, we issued it before responding to the Tribunal because the good administration of the Commission was so important and meant so much to us that we had to respond to requests from journalists for an answer to queries about how documents could get out of the Commission."

Does that tally that doesn't tally with what you have told us.

A. Are you talking about the Commission in general, or

are you talking about DG IV?

Q. DG IV, yes.

A. Because I suspect it is easier to get documents out of every other part of the Commission. And there are certainly parts of DG Competition where nothing leaks, but given that I was able to get my hands on this document in the circumstances of making a phone call, somebody gives it to me, it certainly raises questions about how easy it is to get them.

Q. And your experience in general is that that's the case with them?

A. I haven't had many such experiences.

Q. It would suggest, though, wouldn't it, that the Commission doesn't have a record for high standards of administration where confidentiality is concerned?

MR. NESBITT: Mr. Chairman, I am concerned about this line of questioning. I have no worries that the witness can answer any questions such as this. I do question, with respect, the relevance of those questions. If particular documents are said to have leaked from the Commission, that's a matter for the Tribunal; and if Mr. Brennan can help about those particular documents, I'd be more than happy that he is asked questions about that. But I am concerned about a general asking him to speculate about what he thinks about the Commission. If he doesn't know about the particular documents that may or may not

have leaked out, I don't think it's appropriate that

he should be asked to speculate in this way.

And I feel it's incumbent upon me to make that point

now. It's not that I am concerned about him giving

evidence. I just think that it's unfair on him to be

asked to speculate where his speculation simply is of

no assistance to this Tribunal at all.

CHAIRMAN: Well, as of now, I am somewhat struck by

the potential distinction that was put by Mr. Healy

between the context of this disclosure, made through

Mr. Brennan's probable dealings with Mr. Ungerer and

his contacts with his Italian counterpart at a

meeting, and the circumstances alluded to in Mr.

Coughlan's opening, which did relate to a potentially

sensitive matter involved in a competition as regards

a particular matter of record conferred to the

representative of a member state. I think I

presume, Mr. Healy, you'll be coming back to it when

you do reach that stage.

MR. HEALY: I will. I do want to flag, I regard it as

relevant.

CHAIRMAN: Is important, but

MR. HEALY: It was Mr. Brennan drew my attention to

this, so I am grateful to for him throwing any light

on it, because I can't say I won't be coming back to

it. I will be.

CHAIRMAN: I think it's preferable that we try to make

the maximum progress through Volume I today, noting I think that it will be a matter, if necessary, to come back to.

Q. MR. HEALY: There is just one aspect of the documents that went to you, or came to you, from Dr. Ungerer to which I want to draw your attention, and that's the if you go to the evaluation of the Commission, the first paragraph describes the Government provision under consideration. It goes on to describe the EC context and says "The Green Paper of the Commission 'relative to a common orientation in the mobile and personal communications sector within the European Union' of 27 April 1994 affirms that 'the method utilised for the issue of licences, whether it be on a "first come, first served" basis, comparative bidding, auctioning, drawing of lots, must be chosen and executed in such a way that the final selection guarantees as much as possible to respect the fundamental requisites of the invitation to tender and guarantees that it will follow through to this end in the form of commercial regulation. A particular priority should be that of increasing to the greatest effect the benefits to the user (especially in terms of price and area covered)'".

Would you agree with me that that does not outlaw auctions?

A. That part alone, no, it doesn't, no. The Commission's

position on auctions is linked to taking equivalent sums from the incumbent.

Q. There is no outlawing of auctions here?

A. I don't think the Commission would have a basis for doing that.

Q. Although they do have views about it, perhaps?

A. Absolutely, yes.

Q. Like a critical view.

Let's go to Leaf 27, a document dated 5th January, 1994. Now, I think that's probably a typographical error; it's my impression that the document was probably created on the 5th January, 1995.

A. Yeah, I have made the same note on my copy, yes.

Q. You know the way at the turn of the year people frequently make that mistake.

Memorandum: "The question of whether a fee should be charged for a license to provide a second GSM mobile telephony service, and if so, the appropriate level."

Now, this issue had now crystallised into a debating issue, hadn't it?

A. Mm-hmm.

Q. "Background: The preparatory work for a tender competition for the grant of a license for a second GSM mobile telephony service has been completed for some time. The tender documentation incorporates details of the fees payable by the successful tenderer as follows:

"- an up-front license fee of $\text{€}3$ million.

"- an unspecified annual royalty the amount being subject to proposals by tenderers as part the tender process.

"- an annual payment for spectrum, expected to amount to $\text{€}750,000$ per annum.

"The documentation also states that conditions for Eircell will, as far as reasonably possible, be equivalent to those applicable to the successful tenderer to become the second GSM operator. It was not the intention, however, that Eircell would pay the initial license fee, as the Eircell operation, being covered by Telecom Eireann's exclusive privilege, does not require a license. Following strong verbal representations by the Chief Executive of Telecom Eireann concerning the payment of royalties by Eircell, it is now considered appropriate to conduct a comprehensive reappraisal of the fee, if any, which should be payable by the successful tenderer for the second GSM license and the comparative treatment of Eircell. The spectrum payment of $\text{€}750,000$ is not being considered here. The electromagnetic spectrum is a limited natural resource for which there are competing demands. The payment of 750,000 is considered reasonable to achieve spectrum efficiency without unduly inhibiting either the new operators or Eircell's business operation."

"Should there be a license fee?"

"The grant of a GSM license in essence involves the concession of a right to operate a business service which is at present provided on a monopoly basis by Telecom to its subsidiary, Eircell. This right can be seen as a national resource, and the question now under consideration is whether it should be given to the most appealing tenderer on the basis of market development and tariff proposals or charge a fee for it. A fee in this context means an up-front payment, an annual royalty, or some combination of these, as distinct from a nominal fee to cover administrative expenses. Administrative expenses will be recovered to some extent through the 5,000 charge for the tender documentation, but this will not cover the cost of the consultancy assignment to evaluate license tenders estimated at 300,000 to 500,000. Clearly there is no shortage of uses for increased Exchequer revenue. The balance which must be weighed therefore is the negative impact, if any, which would result from the imposition of a fee for the license in terms of promoting the development of a reliable high-quality and low-cost mobile telephony service versus the benefit of boosting Exchequer revenue for other uses. The core issue is the profitability of mobile telephony. Telecom Eireann has developed a model of the financial operation of the second operator. The

model assumes that the second operator will undercut Eircell's business tariffs by 10% and compete for personal business on the basis of cheap rental rates, thereby securing 50% of a projected market of 250,000 subscribers by the year 2000. It also assumes a once-off license fee of 20 million. On this basis the following revenue and profit figures are projected.

"Revenue goes from 466,000 to 35 million between Year 1 and Year 6, and profit goes from a loss of 4.379 million to a profit of 19.417 million in Year 6.

"Given that these projections assume a license fee of 20 million, the indications are that mobile telephony is a highly profitable business at present. The negative impact of imposing a fee requirement in terms of achieving tariff reductions in market development is unlikely to be significant, particularly in a situation where the new entrant will have discretion in the tender process to propose the level of the fee.

It would reduce the new entrant's costs, but on the basis of the Telecom model, this would probably be reflected in increased profitability (generating increased corporation profits tax, admittedly) rather than reduced tariffs. The new operator's tariff strategy will be to set tariffs by reference to the level necessary to win new business from Eircell rather than by reference to costs.

"The concept of the State charging fees for certain

rights or concessions is not new. It is, for example, an established practice in relation to exploration rights and toll roads. On the other hand, a negligible fee was imposed on Ryanair when it entered the air transport market. The precedent for charging fees for GSM licenses had however been set in other countries and is generally accepted among the international corporate telecommunications community.

On the basis of the foregoing, therefore, the imposition of a fee is strongly recommended.

"3. Should Eircell pay equivalent fees?

"Telecom Eireann has strongly contended that it has not been the practice in other EU countries to levy equivalent fees on the incumbent operator when a new entrant pays fees to become licensed. This contention is valid in the main. Following are examples.

"In Italy, Omnitel, the second GSM operator, was charged \$555 million.

"In Belgium, it is proposed to seek a minimum of \$100 million for the license.

"In Spain, it is proposed to seek a minimum of \$392 million for the license. (A consortium that includes Vodafone of the UK has submitted a bid of \$700 million, the highest ever bid for a second cellular license).

"In each of these cases, no fee was paid or is payable by the incumbent operator. These facts support the

contention implied by the Telecom Eireann model of the second operator's financial development that mobile telephony is highly profitable. The Dutch government, on the other hand, which issued a GSM license tender in September 1994 dropped its original plan to charge an entrance fee or special profits tax on both PTT Telecom Netherlands and the second GSM entrants. A fee of \$300 million had initially been considered. The up-front fee proposal was dropped following objections by PTT Telecom who were to be stung for the same amount while a special profits tax proposal was defeated by Parliament".

I think we should say at this point that these are very large numbers, but of course the population of Italy is much, much higher than the Irish population; the Belgian population is higher, perhaps not so significantly, and the Spanish population is much, much higher.

A. I would add in the case of Belgium that Belgium is a country about the size of Munster and is flat and therefore technically easier to put radio coverage into and has a population density population of three times ours, or something like that.

Q. More bang for your buck in terms of your investment?

A. Mm-hmm.

Q. In Belgium I think, in any case, did they not have to reach a compromise with the EU ultimately which

involved

A. I have forgotten the detail, but I think you are right.

Q. I think with the Regulator they had to reach an arrangement whereby some money was paid by the incumbent

A. I think they all ultimately had to do deals with the Commission, yeah.

Q. Italy reached a somewhat unusual compromise, I think. We'll come back to it at a later point because it will be relevant.

"The attached article for mobile communications describes the EU response to the practice of charging large scale up-front fees to new cellular telephone operators while leaving incumbent operators unscathed.

DG IV are inclined to regard this practice as discriminatory, anti-competitive, and tantamount to the provision of State aid to the incumbent operator.

Realistically, however, it is recognised that intervention by the Commission may not be politically expedient, given its primary objective of getting competition in the mobile sector. The present proposal in relation to GSM fees in Ireland, which involves levying identical charges on both mobile operators apart from the up-front fee of 3 million, is based entirely on the logic that every effort should be made to ensure a fair and equitable competitive

framework for the new duopoly market structure. The waiving of the up-front payment of 3 million runs counter to this kind of argument, and the value of this concession, taken into conjunction with the other advantages enjoyed by Eircell, should not be dismissed lightly. These other advantages include the fact that Eircell had already achieved a substantial customer base and benefits from the good reputation and customer perception of Telecom generally. It also has an established infrastructure built on the main Telecom network. A new operator opting for an independent infrastructure may have a daunting task in the acquisition of sites and planning permission."

Now, there is a line at the top and bottom of the next paragraph, and there are question marks on both sides.

Do you recall making these, or do you think you made them?

A. They don't look like my handwriting, and I'd normally do such a thing on one side, not on both sides.

Q. I think, if you read the paragraph above which and below which there is a line, it doesn't make much sense, and I think that's why the question marks were there. And it makes more sense to pass on to the next paragraph, I think.

A. I see.

Q. "Telecom Eireann has pointed out that Eircell should not be subject to royalty payments proposed by the new

entrant. Part of the rationale for leaving the royalty question open to bidders is to try to identify those bidders who will have the most aggressive approach to revenue generation, and by implication, market development. Bidders will base royalty proposals on projected net margins less the return on investment required. Therefore the most efficient operator with strong capability to generate revenue is likely to submit the highest royalty proposals. Such an operator is also more likely, always presuming that the business plan is credible, to meet the primary selection criteria in relation to market development, competitive tariff proposals, technical expertise, et cetera. There is no reason why Eircell should not be expected to adjust to match this performance. This is what competition is all about.

"Telecom Eireann also contends that tenderers to enter the GSM market will have an eye to the opportunities arising in 1998/2003 when infrastructure is liberalised and will pitch the royalty payments at a level which takes this into account. The concern therefore is that Eircell, operating at arm's length from Telecom, may be required to finance royalty payments which are based on criteria going beyond the economics of a mobile operation in isolation. This is possible. However, the business plans of license tenderers will be vetted from a credibility

perspective. Overly ambitious royalty payments which are based on buying a foothold in the Irish infrastructure market would have to be supported by business plans indicating sources and uses of revenue. Padding the revenue side artificially could lead to the tender being rejected on credibility grounds.

With regard to the liberalisation question generally, however, the tide of competition cannot be stemmed indefinitely. Once a decision is made about when infrastructure will be liberalised, there is no reason, aside entirely from the GSM question, why a potential competitor for Telecom could not commence building an infrastructure or developing the CIE or ESB networks with a view to being up and running on day one.

"Format and level of the fee.

"A fee may be charged as an up-front fee in isolation, a royalty in isolation, or some combination of both.

Clearly it is desirable to allow some measure of discretion or bidding to the market in order to determine what it will bear and to avoid underpricing the license. On the basis of the experience in other countries, it is estimated that possibly 20 million could be secured by way of an up-front payment in isolation. This could increase the capital investment required for the project by 30 to 40%, possibly giving rise to a less aggressive approach to tariff

reduction. An annual royalty payment based on a percentage of revenue, on the other hand, would be clearly defined and could be built into tariffs without difficulty. On balance, therefore, the combination of an up-front fee and an annual royalty to be proposed by tenderers is a reasonable compromise.

"Conclusion.

"The level of the fee which should be imposed for the GSM license is a complex question which can only be answered by reference to assumptions regarding the costs and approach to tariffs of the new operator, which inevitably involve a considerable degree of unpredictability. The combination of an up-front fee with annual royalty to be proposed by bidders is a reasonable proposal and it does not severely impact on the capital cost of the project and also entails flexibility to allow the market to determine the value of the license. An increase of the up-front element of the fee from, say, 3 million would provide relief to Eircell since it is exempt from this element. An increase to in excess of 10 million would probably be unrealistic, however, in terms of securing a reasonable stream of royalty payments."

Now, that was Fintan Towey's memorandum, I think summarising to some extent or rather defending the position that you had already adopted in

correspondence with Mr. Jimmy McMeel, isn't that right, and amplifying on it?

A. It's clearly motivated by the representations from the Chief Executive of Telecom that we obviously had such representations and they had to be responded to.

Whether they came directly to us as civil servants or whether they came through ministerial channels, I have no idea, but it seems to me from the early part of the note that that's where its genesis is to be found.

Q. That Eircom didn't want to have to pay royalties?

A. Well, let's say Telecom Eireann were the same thing, yeah. Didn't want to pay royalties and didn't want to pay an up-front fee. And you'll find later in the documentation

Q. They wanted everybody else to pay?

A. Yeah, of strong representation the Chief Executive to go for the highest possible cheque for the competition and so on.

Q. The next document is a note to the Secretary of the Department and the Minister and refers to Mr. Towey's note. It seems to be a document of around the same date as Mr. Towey's note, if you look at the bottom right-hand side. It says the 5/1/1995.

A. Yes. It's not totally clear

Q. I can read it as the 5th of the 1st "GSM license doc." is the

A. The only reason I am mentioning the date is because I

checked, because I was on annual leave until the 6th of January, because I wanted to know it was my draft or not. So I suspect it was Mr. Fitzgerald's.

Q. We are getting close to the point in any case where the matter is submitted to Government, and I think this anticipates a resubmission of the entire matter to what was now the new Government

A. Mm-hmm.

Q. and the new Minister.

"Issues for consideration". The first one is resubmission to Government. "The Minister has the authority to issue a GSM license under Section 111 of the Telecommunications Act 1993. The issue was brought to the notice of the former Government. It is not necessary to resubmit the matter unless the Minister wishes to do so for political reasons and to take account of the informal Government decision of the 21 December 1994. It would delay an announcement.

"Representations made by the Chief Executive of Telecom against applying the same fixed and royalty payments to Eircell as will be paid by the successful bidder. It was our intention to apply the same license conditions to Eircell in the interests of preserving fair competition. It is not alluded to specifically in the draft tender documents, and Mr. Towey's note sets out the background to this issue."

I don't think we need to go into the rest of the

document in detail. It's essentially a reamplification or a repetition of a lot of what is stated by Mr. Towey.

A. Mm-hmm.

CHAIRMAN: I think we might just conclude by taking the two letters between the respective new Ministers, because that somewhat summarises much that has been dealt with this afternoon.

Q. MR. HEALY: The next document we have already referred to, the document in Leaf 29. I think there is a different numbering system on my book, and some of the other books. Can you tell me, what does Leaf 31 of your book contain?

A. Well, Leaf 30 contains a letter signed by the Minister for Finance, and Leaf 31 is a response by Minister Lowry.

CHAIRMAN: I think those were the two documents I was referring to.

MR. HEALY: It's just my book is in a slightly different sequence. It's not a problem.

Q. On the 25th, there is a letter from Mr. Ruairi Quinn, then Minister for Finance, to Mr. Lowry, and this is where the issue becomes quite political.

"Mr. Quinn says: "Re Telecom dividend, second mobile telephony license.

"Dear Michael, I am writing to you regarding the budgetary provisions which have been made in

connection with the above. I included in my non-tax revenue forecast a figure of 25 million for dividends from Telecom, and despite the case advanced by the management of the company, I believe that this is a reasonable expectation. Payment could be by way of a final dividend of $\text{€}15$ million for the year 1994/5 and $\text{€}10$ million interim dividend for the year 1995/6.

"Obviously the level of the dividend for the calendar year as a whole will depend on the financial performance of and outlook for the company, and payment will depend on the emerging position on this front.

"I note in this regard that the Chief Executive has submitted a forecast of a 1 million profit for the year with zero dividend payment, and that he has reiterated this view. I would like to make a number of points on this.

"Firstly, the Exchequer must continue to service accumulated telephones debt of more than 300 million retained at the establishment of Telecom Eireann. It is legitimate to expect direct return on that investment. The return to date has been extremely low. Secondly, the forecast will have to be looked at in the light of the final picture on turnover and costs. On the basis of the performance to date, the outturn should be better than projected. Thirdly, an increase in depreciation from 170 million last year to

€1/2250 million this year seems excessive. A more moderate increase in the depreciation charge this year with further increases in the following two years should be sufficient.

"There is also the question of a fee for the second mobile license. We agreed at our bilateral estimate meeting recently to include 5 million as a minimum up-front fee for this. It seems clear from discussions between our departments that we cannot be certain now of a stream of royalties in the years ahead, so the sensible thing to do would be to leave it to the market to bid on a basis which would allow a much larger up-front payment to be made. I understand on the basis of what has happened elsewhere a payment in excess of 20 million could reasonably be expected.

I'll be glad to hear quickly what you think of this so I can settle this part of my budget.

"PS, I will be happy after the budget to have an in-depth discussion with you on how you see the future."

The following day Mr. Lowry responded. This letter is contained in Leaf 32 in my book, 26th January 1995.

Have you got that?

A. Yeah.

Q. "Dear Ruairi, thank you for your recent letter following up on our discussion about the estimates. I want to respond now about the GSM license.

"I am convinced that the overall national strategy for telecommunications should seek to enhance our competitiveness and promote economic growth through the provision of high-quality services at sharply competitive prices. Mobile is a sector where we can follow this strategy at an early date without having to wait for improved competitiveness in Telecom Eireann and without damaging the company for the time being. It is a relatively stand-alone segment of communications with very significant growth potential. Telecom Eireann accept this view and are planning for vigorous growth of the Eircell operation themselves.

"An expanding mobile sector also increases the volume of telephone traffic through the fixed network with consequent benefits to Telecom Eireann.

"The analysis we have undertaken shows that if we were to charge or expect a license fee commensurate with certain other countries, then prices would settle out at a level of about 20 percent higher than would be the case without such a fee. It is assumed that whether a fee is up front or an equivalent royalty has a neutral effect but increases the capital investment on which the operator will seek an acceptable return.

"Furthermore, we are now aware that the Commission of the EU has started to investigate with the Member States concerned the competition aspects of license fees for the second GSM operator. Our information is

that the Commission is pursuing both cases where fees were charged equally on new and incumbent operators and where only the new operator was charged, citing slightly different arguments in both cases. Telecom Eireann also made strong representations, which were reasonably well grounded, to the effect that a royalty which was effectively determined by a competitor and could be set at a level taking account of the longer-term ambitions in the market could damage the mobile business of Eircell, the Telecom Eireann mobile operation.

"Finally, mobile telephony is and is likely to continue to be a profitable business yielding other benefits to the State.

"In all these circumstances I am strongly of the view that an access fee set at a level he that will more than cover our costs and at the same time should escape scrutiny by the Commission is the appropriate course and that 5 million is the appropriate level.

"I am providing separately for the payment of significant frequency spectrum fees and the introduction of a regime whereby the telecommunications sector will defray the costs of regulating and administering itself without any recourse to the Exchequer in an annual license fee to be applied eventually to all operators.

"I hope you will be in a position quickly to agree to

this because at this stage, delay in launching the competition is a problem in itself."

Did you have any part in preparing this response, do you recall, to the Department of Finance?

A. There is a fair chance that I did.

Q. At this time, was it still the position that you were proposing an up-front fee of 5 million and a royalty stream, or were you just going for an up-front fee?

A. It looks from the text as if we were wavering. We were kind of taking serious account of the representations of the Chief Executive of Telecom that somebody could go for a high royalty so as to inflict maximum damage on them and to enjoy infrastructural freedom. I can't recall exactly where we were, but we were certainly against going for a full-blown auction.

Q. You had increased the up-front fee from 3 to 5 million; isn't that right?

A. Yeah.

Q. There seems to be nothing in the papers indicating any processing of any ideas that would have led to an increase in that fee from 3 to 5 million, and I am just assuming that this is probably a date from which the royalty proposal disappeared from the scene.

A. Yeah, well, certainly the paragraph at the end of the first page about taking serious account of what the Chief Executive was saying, but I mean, changing

something from 3 to 5 million wouldn't be regarded I wouldn't regard it as significant. It's a bit like at one time we were going to charge 1,500 for the documentation, and then we said "Well, why not make it 5,000?" You know.

Q. In the second paragraph of your letter you say "The analysis we have undertaken shows that if we were to charge or expect a license fee commensurate with certain other countries, then prices would settle out at a level about 20% higher than would be the case without such a fee." That is presumably referring to a large up-front fee; isn't that right?

A. Yes.

Q. Was an analysis undertaken, or was this based on sort of views that had been canvassed? Was there any formal analysis undertaken?

A. I don't know how it relates to the memorandum that you referred to of Mr. Towey's some way back. I don't have a straight answer to this.

Q. Because I could find in the papers no analysis, and am I right in thinking that no economic analysis was ever commissioned to support the proposition or to explore the proposition that if you charge a high up-front fee, you are going to have to expect higher tariffs?

A. We didn't commission an economist to give us that kind of advice. Some of our staff to a greater or lesser extent had economic training. I don't know who was

actually calling those kind of shots. I know that Mr. Loughrey was very strongly of the view that we were going to drive competition as hard as we could and that we shouldn't be burdening new projects with high license fee requirements, but he can come here and speak for himself. He was very strongly of that view. I think at lower levels in the Department, we were wavering and learning and so on.

Q. But there seems to have been no formal paper prepared in the Department by anyone with specific expertise on the question whether a high fee would actually result in high tariffs?

A. I don't recall such an analysis being done at that time. Well, I know, for example, that completely contrary to the Commission view in Brussels, that the Americans had gone over to the idea that auction was by far the best way to find the most efficient operator. But there were some discussions internally as to why those differences were there, and the key reason was that the Americans had a far more mature and more liberal market with more players, and therefore less risk of duopoly/cartel-type behaviour and so on. But beyond that, and I certainly don't recall us commissioning an economist or a consultant to analyse the issue for us.

CHAIRMAN: Mr. Brennan has been in the box a full two hours, so we shall leave it there until eleven o'clock

tomorrow morning.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
THURSDAY, 16TH JANUARY 2003, AT 11AM.