

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

MARTIN BRENNAN Mr. Healy 1 - 256

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 16TH
JANUARY, 2003 AT 11AM:

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

Q. MR. HEALY: We finished up yesterday, Mr. Brennan, by

looking at two letters, one from the Minister for
Finance to Mr. Lowry and one from Mr. Lowry to the
Minister for Finance, concerning that the approach to
the Minister for Finance budgetary requirements and
the consideration he was seeking from the Department
of Transport, Energy and Communications and on the
other hand, how the Department of Transport, Energy
and Communications were going to meet those with
specific reference to whether any contribution was
going to come from the license process. Would that be
right? And you recall that in the letter from Mr.
Lowry to Mr. Quinn, Mr. Lowry stated that he was
strongly of the view that an access fee set at a level
that would more than cover the Department's costs and
at the same time should escape scrutiny by the
Commission is the appropriate course and that 5
million is the appropriate level. And I was querying
with you whether that seemed to date the time from
which it was decided to scrap the royalty element in
any payment for the license. I think I have something

else that can help you to deal with that in any case?

A. Okay.

Q. I want you to go to Document 34, or Leaf 34. This is

a document generated on the 27th, that is to say after

the two letters, but in fact refers to a meeting that

took place before them on the 25th between Mr.

Fitzgerald, yourself, and Mr. Towey on the one hand

and Mr. Michael Ryan and Mr. G. Ryan of Telecom

Eireann on the other. And the purpose of the meeting

was to discuss issues relating to the grant of a

license to a second GSM mobile telephony operator.

A range of issues were discussed, but you will see at

paragraph 2 of the document, bullet point 2, that it

appears that the Telecom Eireann representatives

expressed the view that by limiting the fee

requirement for the GSM license to 5 million, an

opportunity to generate Exchequer revenue was being

missed. It was accepted that this was purely a matter

for the Minister."

In other words, I think as you intimated yesterday,

Telecom Eireann wanted you to charge the incumbent a

lot of money, and they were here representing or

submitting to you that fixing the fee at 5 million

was, as they saw it, allowing an opportunity to

generate revenue for the Exchequer to go amiss?

A. Yeah. Recollect, I think you will find that there is

a later letter, a last-minute letter by the Chief

Executive

Q. We'll come to that again. We'll deal solely with the question of how it got from 3 million as a royalty to 5 million. That's all I am interested at the moment.

A. It's clear, and I think we touched on this yesterday, that Telecom Eireann were also making strong representations that a royalty determined by somebody else, motivated differently, and then charged to Eircell would be the wrong way to go as well.

Q. Yes.

A. So I mean, we

Q. We are familiar with the documentation. Just for the benefit of anybody who isn't familiar, what Telecom Eireann were saying was "It's unfair to saddle us with a royalty, the percentage level of which is fixed by an incumbent who has his own reasons for doing us down", if you like.

A. And who might be taking account of longer-term opportunities, in particular, that access to the mobile license would give you an infrastructural advantage when the rest of the telecoms market was liberalised. And they were suggesting, I believe, that people would pay a lot extra for that, which was not to do with the mobile business, and Eircell would then be saddled with it; and the corollary of that, the logical outcome of that of course is higher prices as well. And there is no doubt that the senior

management of the Department, myself included, took the view that low prices was what we were after. And competition in the market place.

Q. But to get back to the point of detail, had you am I right in thinking that it looks like the royalty had been abandoned by this stage and we were now dealing solely with a 1/25 million up front

A. It certainly looks like that's about the time when that thinking came along.

Q. I am not looking for the precise date, but it must have been around this time.

A. Yes.

Q. Can you remember if there was any discussion about this? Because the documents don't seem to show it; any political discussion, for instance?

A. I'd be fairly certain that to the extent that there was discussion, it would have been between Mr. Loughrey, Mr. Fitzgerald, myself, and Mr. Towey. I don't remember any interest on the part of my own Minister, and I don't know what was the situation in the Department of Finance.

I did say before, and I reiterate, that Telecom management and unions were making their own input into the political system about their agenda. So I don't actually know the extent to which the Minister for Finance, who was in one side of the Government, if you like, without being too explicit about it, might have

been more open to the trade union lobbying than my Minister. But I don't recall my Minister having any interest in this topic or getting any involvement in detail any involvement at all, in fact, in this process at this time.

Q. Well, there might have been an identity of interests between the Exchequer's desire to raise money and the post office union's desire to saddle the incumbent with a large entry fee?

A. Management and unions.

Q. Management and unions, yes.

Could I just go to Leaf 35, then, and we'll come to that letter to which you referred. This is a letter of the 31st January from Telecom Eireann, from Mr. Alfie Kane, then Chief Executive, to Mr. John Loughrey, Secretary of the Department of Transport, Energy and Communications.

"Dear Mr. Loughrey, as you may be aware, discussions have recently taken place between officials of your Department and the company in relation to the license to provide a second GSM service in Ireland.

"I understand that it is proposed that the successful applicant will only be required to make an up-front payment of $\text{€}1/25$ million for the license. In addition, further payments will be required for spectrum use, and at a later stage a small payment, based on the turnover, to contribute to the funding of regulation

in Ireland may be required."

That payment based on turnover is not the royalty payment; it's simply to fund a Regulator?

A. Yeah.

Q. "I am also aware that in the discussions mentioned above and in correspondence, some of my colleagues in Telecom have expressed a view that the up-front payment proposed is astonishingly low. My purpose in writing is to express my own personal view based on my extensive experience in dealing with such issues.

"I would most specifically suggest that the proposal to award a GSM license for an up-front payment of only €1/25 million would not only be tantamount to giving money away but would be difficult to defend under any circumstances. I say that for the following reasons:

"1. Mobile telecommunications has been shown, both in Ireland and elsewhere, to be one of the most profitable sectors of the telecommunications market.

A license to provide mobile services is therefore capable of generating substantial profitable revenue for a considerable period for the successful applicant. If the successful applicant does not have to assume any significant responsibility for meeting part of the cost for providing universal service, then a fee of only 5 million would be a license to make a very excessive financial return on this investment."

We'll try to deal with some of these points as we go

along. There was of course an obligation being placed on the new operator to provide a universal service, so that was a misapprehension on Mr. Kane's part, wasn't it?

A. I think Mr. Kane is more likely referring to universal service of telecoms generally, not just mobile.

Q. You mean mixed as well as mobile telephony?

A. Yes. But having said that, the opening interconnect regime at the exorbitant prices that were in it were also designed to the same end as viewed by Telecom.

Q. Secondly, "The value of a license to gain entry into the mobile telecommunications business has been demonstrated by the level of interest shown in such licences in other countries both within and outside the European Union. There is no reason to suppose that applicants for the second Irish license will be any less enthusiastic.

"3. The European Commission have taken a keen interest in promoting competition in the mobile sector and it is known they are concerned to prevent entry fees being used to deter potential entrants. However, the Commission have objected not to entry payments per se, but only to such payments being set arbitrarily at an excessive level. A mechanism to allow potential entrants to suggest the size of fee they could sustain would meet the Commission's concerns. There is no doubt in my mind that a process acceptable to

tendering consortia would attract bids well in excess of 5 million while at the same time meeting a number of other important criteria.

"As you know, liberalisation of all telecommunications services is on the horizon, and many organisations, including Telecom Eireann, are planning with that in mind. The value of a mobile license is enhanced in these circumstances because of the opportunity it provides to gain essential experience in operating in the Irish market in the lead-up to the general liberalisation.

"Many of the organisations likely to be involved in seeking the second Irish license will be substantial international telecommunications operators in their own right, or closely affiliated to such operators.

Such organisations will be fully aware of the value of the mobile license, will have factored this into their business case, and are well able to pay the market rate.

"We are all that is Government, the Department, and Telecom itself struggling to develop a valid strategy that will prevent a financial crisis for Telecom emerging. Part of that struggle means balancing conflicting needs in terms of public expenditure and dividend payments. In that context, how could we justify giving away some 30 to 50 million. It is, in effect, what we would be doing

because a successful operator will commit the necessary level of capital expenditure and other resources to make their mobile operations succeed, irrespective of whether they pay 5 million or 50 million for the license. Of course they will argue eloquently in favour of a 1/25 million fee and be delighted if they succeed.

While this is clearly not a matter in which Telecom should expect to exercise any direct role or responsibility, I felt the need to let you have the benefit of my own knowledge and experience. Given the strength of my view, it is, I believe, very appropriate to write now, before any final decisions are made, rather than be critical after the event.

"For these reasons I believe that it is worth looking again at the question of the entry fee for the second mobile license. I hope that the factors mentioned above may be helpful to you in your consideration of this very important decision for the country."

Now, I just want to track ahead for a moment. While Mr. Kane had a case to make and was coming from, I suppose, an adversarial position, he was arguing that Telecom, the Telecom Eireann case. Something in what he says about the size of a fee must have been taken on board, or is something with which you must agree, because ultimately you increased the fee even after it was capped to 15 million, effectively; isn't that

right?

A. Yes, we did that in the context of doing a deal with the Commission. What's interesting for me is that Mr. Kane's estimate of what the payment might be wasn't widely divergent from our own views twelve months earlier.

Q. By that you mean 30 million?

A. 30 to 50. We had been saying about 20, going on what was a year earlier, so it's reasonably consistent.

And I suppose now, when we all, from the benefit of seven years of 20/20 vision, we know what happened in the telecommunications market, an all-out auction approach was applied to third-generation licences where companies went mad with bidding and which contributed in a major way to the way that sector has ended up in recent years.

Q. Do you think that's the reason?

A. There is clear enough evidence that several companies overshot in bidding for 3G licences and has definitely contributed to the decline of the market.

Q. But would that have been an overshooting, the figures that were suggested at this time?

A. I have no idea.

Q. I think what Mr. Kane was saying was that the market at that time, given the market conditions at that time, would decide on a price that would, if you like, be consistent with what the market felt could be made

out of the business; isn't that right?

A. Yeah.

Q. And people at that time had an optimistic but far less optimistic view of the market than we had in subsequent years, isn't that right?

A. I guess so.

Q. So I'd say it's reasonable to say he felt the market would determine the price and that the market wouldn't pay more than could be made out of the business; isn't that all he is saying, really?

A. Yeah. I am struggling to understand the point you are making.

Q. I am trying to understand his point.

A. He was coming from a point where no royalty, because the other guys are setting it, high fee for the incoming guy as long as we don't have to pay it. I mean, that's there is a huge element of special pleading about that, as you can recognise.

Q. But you eventually did go this route. You went an auction route?

A. We went the route of 15 and 10.

Q. No, before that you went an auction route.

A. Okay.

Q. So you did go the route that he was arguing for here, didn't you? You went pure auction route, in the sense you had an auction

A. We did eventually go for an auction.

Q. You went a route where the market would determine what they would bid for the license?

A. Yeah, there was

Q. Subject to a minimum

A. As you can see, the evidence is all there, that there was interdepartmental differences about what was the appropriate approach to go. The Minister for Finance set a figure he expected to get in the budget. We still ordered the selection criteria in such a way as to play down the fee. In all the publicity surrounding the start of the competition, the Minister was at pains to say this was not about the biggest cheque, because that was the view of our Department.

Q. But the fact remains that you did go the route that he was suggesting?

A. Yes, we did, yes.

Q. So you did you must have had some confidence at that time that that was an appropriate route to go and that it wouldn't result in an excessive amount being paid which would ultimately impact on tariffs?

A. Yeah, we were trying hard in the Department to get some balance between the Minister for Finance's revenue requirements, which he had put a number on by then, and our view of the market, which was to drive this competition through tariffs, through technology, and while getting a fee. So we put the question of the fee down a bit in the pecking order and tried to

emphasise our view of what the competition was about in all of the surrounding publicity.

Q. And you also had to keep an eye on the EU?

A. Yes.

Q. Now, around this time the new Minister had just come in; isn't that right?

A. Yeah. I am not sure exactly what date.

Q. This is January 1995?

A. Yes.

Q. The Government change had occurred at the end of the previous year, and you had the new Government without the election, so the new Minister was presumably finding his feet?

A. Yes, and there was also a change in the Finance Ministry, if I am not mistaken.

Q. But the Minister was clearly getting or familiarising himself with this area, inasmuch as he was involved in a debate, if we can put it that way, between himself and the Minister for Finance, at a critical time for the Minister for Finance coming up to a budget and a critical time for the Minister for Transport, Energy and Communications because he wanted to get this competition off the ground?

A. Yeah.

Q. Would you have had much contact with the Minister at that time?

A. I am sure I must have had some, but I feel that most

of the interaction about this was done by Mr.

Loughrey.

Q. You would have been, at that stage, at the same time the person who was you know, at the tiller, isn't that right, where this was concerned?

A. Yes. But in terms of suggesting to a Minister how to play his hand at Cabinet, say, Mr. Loughrey, I am fairly sure, would have led.

Q. I appreciate that. In relation to briefing the Minister in general, would you have been involved in explaining to him where you were at, what you were seeking to do, policywise, leaving aside

A. Absolutely. When a new Minister arrives in a Department, every division prepares a general brief on what's topical and just gives enough information to give a flavour of what's going on, then leaves it up to the new Minister to ask questions. Some Ministers will have you in for a discussion; some won't. I don't recall what exactly happened in this case, but certainly the Department would have prepared a very substantial brief on all its activities for the Minister, and that would have been the starting point. That's what happens every time.

Q. I just want to draw to your attention a document, I don't know if it's in your book, it's at Leaf 27A. If you just check, do you have a Leaf 27A?

A. No.

Q. I'll let you have the document. It probably went out in correspondence, but it mightn't have found its way into your book.

A. Well, there were some inserts.

(DOCUMENT HANDED TO WITNESS.)

Q. In any case, you may recall, I think it was mentioned in the Opening Statement?

A. It was, yeah.

Q. It's a note dated 5th January, 1995. It came to the Tribunal from the late Mr. Jim Mitchell. And the Tribunal was informed that it was his note of contact, of a contact he had with Mr. Lowry on that day.

"I saw Michael Lowry at 3.30 today and informed him of my involvement with Esat. Tenders to be sought by advertisements in next week or two.

"A. DOB not favoured by Department

"B. DOB, FF !!

"He is available to meet principles of all contestants in February including DOB not for lunch.

"Check in 3 weeks to see if this has happened."

Can you throw any light on how it would appear the Minister formed the impression that DOB was not favoured by the Department? It's a reference to Denis O'Brien, obviously?

A. It couldn't be from me. There was a tense enough relationship between Esat Telecom and the regulatory side of the Department of which I was generally aware

but not involved in. And it may be that that's what's informing this position. I mean, it's a question you could put to Mr. Fitzgerald or Mr. McMahon would be the people who would know most about it.

Q. On your side, you didn't have any view to this effect?

A. No.

Q. And do you recall having any discussion with Mr. Lowry in which the potential contestants and at this stage you would have had an idea about who was jockeying for position out there might have been viewed by the Department?

A. I can't see how it would have arisen.

Q. Well

A. I mean, I certainly have no recollection of it. And it's just not within

Q. Would you have at any time discussed with him who you thought might be likely to apply for this license?

A. Well, I know that in one of the documents we had yesterday, I did a note for the previous Minister suggesting, you know, these were the people. I don't see in these documents whatever brief was prepared for the new Minister when he arrived or what we said in it, but whatever is in evidence, in written evidence, I am happy with. I don't recall any conversations with Mr. Lowry about candidates.

Q. Well, the Tribunal has tried to get the document which was used to brief the Minister on the state of play,

as it were, in the Department, but it apparently isn't available or can't be located. Can you recall a face-to-face meeting with the Minister concerning, as it were, the state of play in the Department?

A. No. That's not to say it didn't happen; I just don't recall it.

Q. Yes.

A. I mean, there was almost certainly a discussion at some time about the entire telecom sector, but I don't remember any specific discussion about this on its own, or I don't remember the details of any discussion.

Q. Well, it's obviously something I'll have to take up with Mr. Fitzgerald and Mr. Loughrey, I suppose, or even Mr. McMahon, who was from the other side.

Go now to Document 33. This is described as Office of the Regulator, Minister for Transport, Energy and Communications, aide-memoire, competition in digital cellular communications.

Around this time, the Minister was trying to bring this matter to the Cabinet, and a number of documents, as far as I can see, perhaps aide-memoires or draft aide-memoires were prepared. And it's not easy to be sure about which document ultimately went to Cabinet, but there are aspects of the documents which in any case will throw some light on how the thinking of the Department was evolving, and so I just want to mention

them to you, and we may be able to identify the precise document that ultimately went to the Cabinet.

I'll draw your attention to it at a later point; it's about 2 or 3 documents down the road.

A. I'd expect in the normal course the Cabinet secretariat would know what was circulated at Cabinet.

Q. I see. That may be a better route to take to identify it.

If you look at this document, in any case, and you go to the third paragraph, it says "The Minister now considers it appropriate to revise the original proposals in relation to fees payable by the second GSM operator. The practice in many European countries where a second GSM operator has been licensed has been to require a fee for access to the market, whereas UK has adopted an open-access policy without fees. For example, in Italy, Omnitel offered \$555 million. In Spain, the second operator paid around \$700 million, while in Belgium it is proposed to seek a minimum of \$100 million. It is considered that about $\frac{1}{2}$ 20 million could be secured for the Irish license. However, a large up-front fee could inhibit bids and have resulted in a less aggressive approach to market development, and it was decided by the former Minister to seek instead an up-front license fee of $\frac{1}{2}$ 3,000,000 and an unspecified annual royalty the amount offered to be determined by tenders as part of the

tender process, and equivalent royalty would be required from Eircell."

If you pass on to the next paragraph, "The Minister has reconsidered the financial terms in light of more recent developments.

"In the context of the requirements of the competition rules of the EU treaties, the Commission has taken up with other Member States the legality of imposing large up-front fees for GSM licences (even if equivalent charges are levied on the incumbent operator) as constituting a barrier to market entry, or in most cases, as State aid to the existing operator. Legal action by the Commission is considered likely, and final adjudication on the question may well become a matter for the Court of Justice. An annual royalty fee would be particularly at risk to such a challenge.

"The Chief Executive of Telecom Eireann has made strong representations to the effect that the imposition of royalties on the incumbent operator has not been done in other countries where a second mobile operator has been licensed and that it is unreasonable that Eircell should be obliged, without any say in the matter, to match royalty payments based on a new operator's view of the market and tailored to secure a license.

"Regard to the risk of legal action arising from the

Commission's position and the arguments adduced by Telecom Eireann, the Minister has now decided that priority should be given to securing bids which would maximise market development and penetration, offer innovative tariffs and low prices while maintaining comparable competitive terms between the new operator and Eircell. A substantial fee from a new operator only would inhibit effective competition and discourage bidders. A comparable large fee for the sake of equality from Telecom on behalf of Eircell would be an onerous burden on the company at a time when it has to prepare for competition not only in mobile but in all its operations. The Minister has decided therefore to limit the entry fee to 5 million for the new entrant only, drop the annual royalty requirement, and award the license to the bidder presenting the most attractive approach to market development, a commitment to a high quality nationwide service and an innovative approach to tariffs and low prices. The absence of a large fee requirement should attract a wider field of quality bidders and lead to a competitive market. The level proposed can be justified as necessary to cover the costs of organising a competition and would not distort the market or incur action by the Commission as being a significant barrier to entry into the market.

I don't think I need to go into the next paragraph.

Now, as of that time, again sometime around the end of January, the Minister was, as we said a moment ago, had moved away from the royalty in favour of a fixed up-front fee of $\text{€}1\frac{1}{2}$ million.

The next document I want you to go to is Document 32.

This is undated, but I gather that it was generated around the end of January of 1995, and is a draft speaking note of the Minister for the Cabinet, or for a Cabinet meeting, and registers his unhappiness with the demands of the Department of Finance for a significant Exchequer contribution from the Department of Transport, Energy and Communications.

Do you recall the document or having any input into creating it?

A. I don't recall having an input into creating it, but I suspect it was generated between myself and Mr. Loughrey.

Q. I understand it's divided into 7 points.

"1. I undertook last week that I would secure $\text{€}1\frac{1}{2}$ million for the budget revenue from the telecommunications sector.

"2. The choice as to how was left to me.

"3. I have decided, A, to let market forces determine the GSM license fee. This should secure at least $\text{€}1\frac{1}{2}$ million. The Finance wanted this approach.

I think it's intended to say that this should secure at least 25 million for the Department of

Finance in any case.

"B. There should be no dividend from Telecom in 1995.

"4. The Minister for Finance, in an official letter to my Department, is stated as not agreeing to the provision for a dividend in 1995 and that I should not inform Telecom that no dividend is expected and that a dividend of $\text{€}1/25$ million per annum is expected from 1996.

"5. This is not acceptable to me and is contrary to last week's understanding. Telecom's financial position and the problems facing them are so serious that a dividend is not feasible for 1995 or subsequent years, based on present knowledge.

"If there is a shortfall below 25 million in 1995 from the GSM fee, I will seek to make it up from the vote but not from a dividend.

"If there is an excess over $\text{€}1/25$ million, I want the right to restore the cut in the provision for CIE grant.

"6. As regards 1996 onwards, we should await the outcome of my discussions with Telecom on their medium-term strategy for cutting costs, meeting competition, and the structure of a strategic alliance before coming to a rational conclusion on whether dividends can be afforded.

"7. I wish the Government to note my position."

A. As you read that, I would bet that it's it was

drafted by Mr. Loughrey.

Q. But this is now a shift away from a $\text{€}125$ million maximum fee to a $\text{€}125$ million minimum fee, with the market being allowed to determine the size of the fee, ultimately?

A. Yes. And I think this is the Department trying to reconcile conflicting objectives and conflicting interdepartmental positions. I am as certain as certain can be that the Department was in the driving seat in relation to it and not the Minister. The Minister was surely coming back from Cabinet with you know, what the Minister for Finance required, and the Department was trying to assist in achieving whatever that was.

Q. But are you saying that the shift from a $\text{€}125$ million maximum to a $\text{€}125$ million minimum was not driven by the underlying policy of the Department of Transport, Energy and Communications but by the need to get over a debate or a tension between Finance and the Department of Transport, Energy and Communications over the budget?

A. Yes. The Department of Finance wanted 25 million, come hell or high water, and we were trying to find ways of satisfying that requirement. And one of the reasons I am talking about Mr. Loughrey probably drafting this is the reference back to the CIE grant. I wouldn't have been familiar with that at all, you know.

Q. But even if you didn't draft the document, in any case you are familiar with the issues being canvassed?

A. Yes.

Q. And I am just drawing attention to the rather stark change from what's contained in the draft aide-memoire where the Minister is saying, a $\text{\$}1/25$ million max is the way to go, to ultimately a change where you end up a $\text{\$}1/25$ million minimum, and there is no evidence of any policy discussion of this in the Department. And I am simply trying to clarify that this was driven then by politics, if you like, Cabinet politics, interdepartmental tensions and budgetary constraints?

A. Yes. And I am not sure of the chronology of those documents now either. Several of them are undated, and the fact that this one comes before the aide-memoire doesn't seem to make sense.

Q. Yes, but one way or the other, there was a change, wasn't there, from a $\text{\$}1/25$ million maximum to a $\text{\$}1/25$ million minimum?

A. Oh, yes.

CHAIRMAN: Well, you said yesterday that you had apprehensions the project might be shelved at Cabinet if there were stark divisions between Finance and DTEC. And does this reflect your anxiety to put together some form of deal?

A. There is absolutely no doubt that that was an attempt to bring the Department of Finance and ourselves to a

common position going to Government. I mean, I have experience down the years of lots of things getting lost in the Cabinet agenda because of interdepartmental differences. Languishing there for months.

Q. MR. HEALY: I think the next document gives a flavour again of some of the tensions at the time. It's in Leaf 37 Leaf 36; I beg your pardon. It's an undated handwritten note from Mr. Lowry to the Secretary. Although undated, it appears to refer clearly to this period.

It says "Secretary,
contact Finance:

"I had a clear understanding that I had the option as to how I raised the 25 million. I stated that I did not want to levy Telecom with a dividend. We made the decision on GSM on that basis. We made our decision in good faith and with the agreement of finance. Why have the goalposts changed?

"It is not acceptable to me.

"I will agree by way of compromise to consider dividend from Telecom in 1996 but definitely not" I think that should be 1995.

"By 1996, Telecom will have equity injection from strategic alliance. I reiterate the financial reasons why it would be unwise indeed, foolish to proceed as requested by Finance.

"Signed, Michael Lowry.

"You will get me on my mobile after 6 p.m."

It's possible that that resulted in the document you think was drafted by Mr. Loughrey, isn't it?

A. It possibly is. In the final paragraph you said "I reiterate". The capital "R" suggests he was telling Mr. Loughrey

Q. At the top you will see that it found its way into your files at some point. Do you see whose handwriting that is?

A. That's Mr. Loughrey's handwriting.

Q. I see. What does "Mr. Brennan, for your files" mean?

A. That he has dealt with it, and it's just to keep the continuity of the record. I mean, if he wanted me to do anything about it, he would have so indicated in a note like that.

Q. I understand.

The next document is a briefing note for the Minister on the GSM issue, and I gather it's from February of 1995, though I can't date it any more precisely than that.

It says at the outset: "In the event that progress is achieved at the Cabinet committee meeting, it would be worthwhile to seek the committee's approval to enter the GSM question on the agenda for the Government meeting next Tuesday. The deadline, except in exceptional circumstances, for circulation of

memoranda is I I am on Thursday for a Tuesday meeting.

This will have already passed when the committee meeting is held."

Now, do you recognise this document, or do you think that you had any role in drafting it?

A. I wrote across the top of it, "mine?" I am not sure.

Q. I think the opening boxed paragraph seems to accord with the flavour of some of things you have written in other parts of the documentation. It's not a major issue whether you drafted it.

A. The opening box paragraph is a simple statement of fact. Any civil servant, if it was a brief for a meeting happening after the deadline for a Cabinet, would have put in that caution. If you want to be in Cabinet next week, you better clear it with the committee, the committee being containing all the Party leaders in Government.

Q. I don't think the detail of the document need concern us, but I think it was part of a process which ultimately led to the bringing of this matter to Cabinet in any case around this time.

The next document, Document 38, was again part of the debate between the Minister for Transport, Energy and Communications and the Minister for Finance. It's from Mr. Fitzgerald to the Secretary of the Department of Finance, and it's marked for the attention of Mr. Doyle, on the 2nd February 1995. And it seems to have

found its way at some point onto your file; would I be right in that?

A. The manuscript note above my name is my handwriting, and it says something like "FT" which is Mr.

Towey "Copy given to me" I don't know what the rest is; "in confidence", or something like that.

That's my handwriting, is the only point.

Q. It goes on: "I am directed by the Minister for Transport, Energy and Communications to refer to his letter of 1st February to your Minister concerning the provisions to be made in the budget for income from the telecommunications sector.

"As conveyed orally to you, the Minister has decided that the GSM license fee should be determined by the market subject to a minimum fee of $\text{£}1\frac{1}{2}$ million in combination with an acceptable market development plan and tariff structure. The Minister reserves the right to determine which bidder best meets the requirements of the sector, giving due weighing to both the bidder's development plan and fee. It is estimated that the realisable fee should amount to an extra 20 million in addition to the 5 million fee already provided for.

"In view of the amount likely to be realised from the GSM fee, and taking account of the challenge facing Telecom from the need to restructure its operations and particularly its financial base to meet

competition, and to secure a successful strategic alliance, the Minister considers that it would be most unwise to expect Telecom to pay dividends for some time. Accordingly, he advises that no provision for such income should be made in the 1995 budget. The Minister proposes to inform Telecom of this in due course.

"The Minister will circulate an aide-memoire on GSM license tomorrow, and as agreed orally, will record that the Minister for Finance agreed to his proposals."

If you go to the next document, Leaf 39, there is an aide-memoire, or what may be may be a draft aide-memoire, dated 3rd February 1995, and I think from the handwriting on it and the emendations here and there, it's clear there was a draft. And there are other documents later on which suggested it was not the document that went to the Cabinet committee, as ultimately it was the Cabinet committee dealt with the matter initially, so we can just pass on from it.

A. The only point I would make, I think that looks like Mr. Lowry's handwriting, judging by a previous page we were looking at a while ago. It could also be and I can't read the words as they are it could also be notes to remind himself of points he wants to make at a discussion.

Q. I follow.

Go to Leaf 40; you will see a response from the Department of Finance on the issue of to what extent dividends would be expected in the future from Telecom Eireann. And it refers to a letter of the 1st February 1995 from Mr. Lowry to Mr. Quinn, and also to Mr. Fitzgerald's minute of the 2nd February, the one we have mentioned a moment ago. And I think it simply says that the Minister for Finance did not agree that no provision for a Telecom dividend should be made in the 1995 budget.

And it goes on in the third paragraph: "He considers that a dividend could be paid if the very high increase in the depreciation provision envisaged by the Department were reduced. The Minister requests that your Department should not inform Telecom that it will not be expected to pay a dividend in 1995 or in subsequent years.

"The Minister is not changing his overall 1995 budget provisions insofar as the combined income from the dividend and the mobile license is concerned.

"It is already clear that it will be difficult to follow in 1996 the fiscal policy set out in the Government programme, and there is now no reason to expect that the position will become any easier in subsequent years. The Minister has therefore decided that the budgetary planning for 1996 and later years will assume a minimum total yield from Telecom Eireann

of 25 million per annum receipts by way of dividends and corporation tax."

Can you tell whose writing that is underneath?

A. Mr. Loughrey's.

Q. And it says: "Minister, I understand that at last week's meeting of the Government it was agreed that he would" that somebody would "decide how the 25 million would be forthcoming. This appears to be a totally unacceptable additional levy. Await your instructions."

The next document, then, at Leaf 41, is dated sometime in February of 1995, and it's headed "Office of the Regulator, Minister for Transport, Energy and Communications, aide-memoire for Cabinet committee."

I think we can pass on to the portion which deals with the fee question, since this was the issue exercising people's minds at the time. It's at paragraph 10, and this aide-memoire for the cabinet subcommittee was designed ultimately to get a decision which would enable the Minister to proceed with the competition; isn't that right?

A. Yeah.

Q. It says "The award of a GSM license in essence incorporates the concession of a right to enter a highly profitable business where a new operator can earn large economic rents. The practice in many EU states has been to capitalise on this opportunity by

capturing substantial Exchequer revenue by charging large fees, particularly where the market is to be limited to a duopoly. In some cases the license process was reduce to little more than an auction. The payment of substantial fees for GSM licenses is well accepted among the international corporate telecommunications community. The initial GSM proposal approved by Government last November incorporated an up-front fee for the license of 3 million by the newer operator only and an annual royalty (to be determined as part of the tender process) which would be paid by both Eircell and the new operator. It was estimated that this would yield in the region of 20 to 25 million Exchequer revenue on a present-value basis. Following strong representations by Telecom Eireann against the payment of a royalty by Eircell, a comprehensive reappraisal of the fee proposals was carried out within the Department. It also emerged that the European Commission has begun investigations into the practice in other Member States of raising large fees for GSM licences from the perspective of compatibility with the competition rules. The question of this developing into a successful legal action demanding the return of such fees is speculative at this time. It is being made clear that the GSM fee is a voluntary fee on the basis that where a number of broadly

equivalent bids are received, the fee does not constitute a barrier to market entry. Against this background a number of possibilities for fees in conjunction with market development plans were considered by the Department of Transport, Energy and Communications in consultation with the Department of Finance. The options considered for the payment of fees by the new operator and not by Eircell were the imposition of an administrative fee of 5 million the imposition of a fixed up-front fee of 15 to 20 million.

provision for the market to determine the appropriate up-front fee payable in the course of the tender process.

"The final option was agreed between the Minister and the Minister for Finance. It should be recognised, however, that the existence of a high fee will inevitably result in a market being less competitive than would be otherwise be the case and might give rise to litigation from the European Commission."

It would seem reasonable to suggest that the Telecom Eireann intervention would not only cause the Department to have second thoughts about the royalty, but also cause the Department to have second thoughts about a fixed minimum fee; that in addition it was the Telecom Eireann intervention that prompted the

open-ended fee rather than a fixed fee of, say, 15 to 20 million?

A. It's hard to be sure at this point. I mean, clearly they were lobbying more than just our Department. I suspect there was a role for programme managers and so on, but I don't know. I am going back to some of the earlier conversation; when material relevant to the budget is in discussion interdepartmentally before budget day, it's always kept at a very high level, so I almost certainly wasn't privy to some of the exchanges coming up to budget day, whenever budget day.

But I mean, your basic point is we are now gone a full circle from a low-fee royalty, low-fee no royalty to an open-ended fee, where we, as Department of Transport, Energy and Communications, were still determined to get the message out to the market that we were more interested in low tariffs than high fees. That's where we are at this point. Sorry, that seems to be where we are at this point.

Q. But was the design of the competition then to some extent I am not blaming you or your Department for it; there were political constraints it was to some extent slightly haphazard, in that your original approach to the matter or the principles governing your original approach to the matter were being sidelined?

A. Yeah well, "haphazard" is not a word I would use in describing how policy evolves in discussion between departments.

Q. The policy didn't evolve here, this was political, wasn't it?

A. It was clearly some politics and some policy. I don't know who was calling the shots in the Department of Finance; for example, was it the Minister or was it Mr. Curran? I just don't know.

Q. One of the key features of this was not that it just went full circle from a fixed low fee to an open-ended auction element. But the other full-circle element of it was the fact that Eircell were not going to have to make any contribution; isn't that right?

A. Yes.

Q. And that is something that had been flagged from the very beginning, as we said yesterday, from Ms. Howley's first memorandum?

A. Yeah. And I think my own view at the time was that that was never going to survive Brussels.

Q. That's what I was just going to ask you. I think you said that to me yesterday ,that you thought you'd get away with an auction as long as you had Eircell on board as being obliged to pay or to make an equivalent payment?

A. Yes.

Q. But here you had and auction and no Eircell on board?

A. That's right, yeah. And I don't know how many hands were in the drafting of this aide-memoire, but the reference to the likely reaction of the European Commission, I think it sounds like a sentence I wrote myself, to keep the marker there, at least.

Q. Was the Minister brought fully up to speed on that risk of intervention by the EU?

A. I'd say almost certainly, yes.

Q. Do you remember the last time, before Christmas, we were discussing some of these matters; you mentioned the Minister was furious with you about the delay

A. The Minister was furious with me what the Minister was furious with me about was causing a development that delayed the competition and thereby would attract negative media attention on a Sunday. That's what he was furious about, plain and simple.

Q. How did you cause a development that delayed the process? Weren't you the person from the beginning who said "Look, this is going to cause problems for us"?

A. I was interacting I knew that as soon as we'd launched the competition, we had to share the documentation with the Brussels Commission. And I suspected that that would give rise to a reaction in this area, but I thought that it could have been happening in a dialogue with the Commission in a shorter time-frame, so that we could give the market

whatever message the market needed before the existing closing date. And that's what didn't prove possible.

Q. So was it your impression that the Minister was always aware of the risk of the EU intervention, but that what he was furious about was the length of time it was going to take to get over it, is it?

A. What he was furious about, plain and simple, was giving rise to speculation, or giving rise to bad publicity, because of the need to delay the competition.

Q. I just don't see how you were responsible for that.

A. All I know is that there was a phone call from his car no, sorry, this is getting on into where there is documentary evidence. We issued a press release, or word went out, anyway, that the closing date was being postponed. There were follow-up press queries. Mr. Loughrey phoned the Minister in his car to discuss the line to be taken in the follow-up queries. And that conversation took place on a loud speaker phone, and I knew from the Minister's reaction that it was shoot-the-messenger time, let's say.

Q. Well, in any case, whoever was responsible for that final sentence I read out was flagging at this time that that this mightn't be a runner?

A. Yeah.

Q. And the next item, the only other item on this memorandum to which I want to draw your attention, is

paragraph 11, the selection process. It says:

"Consultants will be engaged to assist in the process of final selection and will also be on board in time to assist in the final stages of preparation of the Department's information memorandum mentioned in paragraph 10. The selection of the successful tender will be determined by reference to the following.

the quality and credibility of the business plans of applicants with particular emphasis on a progressive approach to market development, a commitment to high quality nationwide service and an innovative approach to tariffs with a view to reducing costs to consumers the proposed fees for the license.

"The highest bidder will not necessarily be successful, and this is clearly stated and emphasised in the tender documentation. The documentation indicates that the Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant in accordance with the information required therein and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

Then there is a list of criteria. And I think it more or less accords with the list drawn up by Mr. Roger Pye; would that be right?

A. I think so, or more accurately, I suppose, drawn up in the context of the iterations with Mr. Pye. I don't think he specifically drew up the list.

Q. Yes, except that I suppose it's fair to say that a document was sent to him, and he was the first person to put shape on it in the form of making a list of criteria and putting them in a particular order

A. No, I think he asked us to consider the order in which they might be put and strongly recommended that they be in descending order of priority. And then between Mr. McKenna and I, we responded to that and sent him out the next draft.

Q. In sending this to the Cabinet committee and ultimately creating a document which was to constitute the basis of a Cabinet decision, this order priority was going to be effectively indicative of Government policy in this area; isn't that right?

A. Yes.

Q. If you go to Leaf 42, this seems to give an indication of how the matter was dealt with at Government around this time. It's a memorandum that says "The Government decided on the 7th February 1995" there is a reference to a Government reference number that a Cabinet committee consisting of the Taoiseach, Tanaiste, and Ministers for Finance; Social Welfare; Transport, Energy and Communications; and Enterprise and Employment should review the proposed

terms, tendering procedures, and proposed advertisements for the digital mobile cellular communications license.

"The Cabinet committee met on the 16 February 1995 and

"Noted the discussions at programme manager level in relation to leased lines

agreed that these discussions should be completed within the next two weeks

also agreed that the Minister for Transport, Energy and Communications would revert to the Minister for Enterprise and Employment for consultations before any decision is made

agreed to proceed with the proposed GSM tender competition as outlined in the Minister for Transport, Energy and Communications aide-memoire for the Cabinet committee and

agreed that the Minister for Transport, Energy and Communications would submit to the Government in the near future outline proposals for the independent regulation of the telecommunications sector.

"The Cabinet committee also had a brief discussion on Team Aer Lingus and Irish Steel."

That would seem to suggest that firstly a decision was made at Government that a subcommittee or a committee of the Cabinet would be formed to oversee, as it were, the setting up of the process. That Cabinet

subcommittee met on the 16th and agreed to proceed with the GSM tender competition as outlined in the aide-memoire for the committee that I have just referred to?

A. Mm-hmm.

Q. Does that mean that the members of that cabinet subcommittee or their programme managers would have been circulated with that aide-memoire prior to reaching that decision, or would it simply have been brought to that meeting?

A. Well, it would certainly have been brought to the meeting and circulated there as a minimum. It could have been circulated in advance. Programme managers, I don't know; I mean, the reference to programme managers

Q. It's in a different context here?

A. The decision is specific to leased lines, but I am broadly familiar with what were the issues were, but Mr. McMahon was the one who led on that issue. But it was connected in the sense that of the ways of trunking telecommunications traffic, leased lines is one option and radio frequency is another option. And Telecom Eireann took the view that leased lines in Ireland were underpriced compared to other countries, and they wanted them increased anyway; but they particularly wanted them increased before the second GSM operator came into play.

And clearly that's I mean, Mr. McMahon can elaborate on that an awful lot more than I can, but that's the general scenario. So there is a link, and the programme managers were looking at leased line; I don't know were they looking at other business or not.

Q. I am more interested in the procedure in bringing a matter like this, in bringing it either to Government or a Cabinet committee.

A. We had some of this discussion yesterday. For a formal memorandum to Cabinet, other than from the Minister for Finance about financial matters, it must be circulated to other Ministers; they must be given time to respond; their responses must be considered and responded to in turn, and so on. And it's about three or four weeks, and it's laid down in the Cabinet handbook.

Aide-memoires for the Cabinet are the exception rather than the rule. There is less formality involved. And for Cabinet subcommittees, they are no more than a briefing document.

Q. Well, the next document is a memorandum for Government dated the following day, 17 February 1995. And as you pointed out yesterday, it's in a form with which we are fairly familiar. It describes the decision sought.

"The Minister for Transport, Energy and Communications seeks the approval of the Government that an open,

competitive bidding process be announced with a view to the granting of license to a second cellular phone operator. The bidding process will be promoted and controlled by the Department of Transport, Energy and Communications, and it is expected that a recommendation will be put by the Minister to Government in time for a final decision by the 31 October 1995.

"The general terms and conditions attached to this license are set out in the attached appendix.

"Cabinet committee consideration:

"The Cabinet committee referred to Decision S22048E, examined the Minister's proposal on the 16 February 1995, and concluded that the proposal of the Minister for Transport, Energy and Communications on the tender process for the award of the license be agreed."

It went on to deal with leased lines and so on, which needn't concern us too much at this point.

A. While that is formally a memorandum, it doesn't follow the template, so it was obviously an expedient.

Q. Though I notice the next document we are going to come to is the Government decision, and that's dated the 2nd March.

A. Yeah.

Q. Can I take it and if I can't, maybe you can direct me towards the appropriate place where I can find out;

if necessary, as you say, the records of the Cabinet
but is it fair to assume that with that memorandum
from Government, the aide-memoire was also circulated,
the one that had been prepared for the cabinet
subcommittee?

A. I think if it was, it would be referred to.

Q. I see.

A. In the memorandum.

Q. It says "The general terms and conditions attached to
this license are set out in the attached appendix."

I suppose if, as you say, the aide-memoire was
mentioned, it would have been set out in an appendix
as well?

A. Yeah. It may be that that's a reference to the
aide-memoire; I mean, just don't know. What I do know
is that there are Cabinet records, the agendas, the
documents used; there must be a continuous series from
the foundation of the State.

Q. And it should be possible to see precisely what was
before the Cabinet?

A. And for how long. It's quite possible this was on the
agenda and just not reached, because you know, the
gap from the 17th to the 2nd March, when it seems all
the items were settled interministerially, was
curious. That could simply be there was no Government
meeting, or that it was on the agenda but not reached.
I have no explanation for that, but an explanation can

be got, because the agendas exist.

Q. If you go to the Government decision, it may be of some assistance, in that you will see it's dated 2nd March. It's addressed to the Minister, to the private secretary to the Minister for Transport, Energy and Communications, and it's copied to Mr. Loughrey, Mr. Fitzgerald, to yourself and Mr. Colin McCrea, who was in fact one of the programme managers; is that right?

A. He was Mr. Lowry's programme manager.

Q. "I am to refer to the memorandum dated 17 February 1995 submitted by the Minister for Transport, Energy and Communications and to inform you that, at a meeting held today, the Government approved the announcement of an open competitive bidding process with a view to the granting of a license to a second cellular phone operator on the basis that

"1. The bidding process would be promoted and controlled by the Department of Transport, Energy and Communications.

"2. A recommendation would be put by the Minister to Government in time for a final decision on the grant of the license to be made by the 31 October, 1995 and

"3. The general terms and conditions attaching to the license would be as set out in the appendix to the aide-memoire."

That's possibly an indication that the aide-memoire accompanied the memorandum for Government?

A. Yes the only curious thing about that Government decision, normally the formal written decision from Cabinet would be a straight lift out of the "decision sought" paragraph. The fact that it's different suggests that there was some discussion in the Cabinet.

Q. What do you see as the main differences?

A. The difference is just that the wording is completely different. I mean, we didn't raise an issue about who was controlling the bidding process, for example; it wasn't raised in the decision sought, but it came out at the end.

Q. Well, the decision sought did request that the bidding process or that a decision would be sought to the effect that the bidding process would be promoted and controlled by the Minister. It did

A. Yeah, okay.

Q. It did say that. I think maybe the format is slightly different, though I do think

A. That may well be.

Q. In substance, I can't see any difference.

A. Okay.

Q. Would I be right in saying that the decision recorded was that the process would be the aegis of the Department, but that the ultimate decision would be a matter for the Government on a recommendation from the Minister?

A. Yes.

Q. The next document is in Leaf 45, and it's an announcement of the competition.

A. Mm-hmm.

Q. If you go on to Document 46, this is a memorandum for applicants there are two documents here; I am not sure what order you have them in. Firstly, there is the

A. I have the competition document first and the information memorandum second.

Q. The RFP or the first document that you have is the actual formal request for tenders?

A. Yes.

Q. And it sets out the terms under which those tenders will be evaluated?

A. Yes.

Q. And sets out the closing date of the 23rd June, 1995.

I am just trying to get the actual date of this document. I think it's I understand that it's a document of the 2nd March, 1995.

A. Chairman, could I request a comfort stop for two minutes, please?

CHAIRMAN: Of course.

THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AS FOLLOWS:

Q. MR. HEALY: This is the document which evolved over the period, I suppose, 1993, '94, '95, ultimately to

take the form that it had when this announcement was made?

A. Yes.

Q. At this point, just two aspects of the document that I want to draw to your attention. Do you remember yesterday we discussed how on two occasions, drafts of the document were sent to the late Roger Pye for his comments?

A. Yes.

Q. A draft was sent to him on the first occasion; he sent it back, and he had made this he had suggested this ordering and tabulation of a number of criteria which he had abstracted from the document.

When the document went to him a second time, obviously it was in a form which included that list. And that, if you like, second iteration by the Department with his comments is, I think, what ultimately led to this final form; isn't that right?

A. Yeah.

Q. If you look at paragraph 9 of this draft well, maybe it might be no harm if we just put the whole put the various paragraphs in some context. I don't want to go through them all.

The first paragraph invites the applications.

The second paragraph describes the section under which the license will be granted, and that it would be valid for fifteen years.

The third paragraph requires applicants to give full ownership details for proposed licensee and indicates that they will be expected to deal with matters referred to in the following paragraphs in their submissions. The minimum fee is mentioned in the next paragraph, at 5 million; it points out that applicants are free to offer a higher amount.

It then goes on to refer to the in paragraph 5, to the recouping of the full costs of administering and regulating the sector by means of an annual license fee.

In paragraph 6 it refers to another fee for, I suppose, access to frequency; would that be right, a fair way of putting it?

A. Yeah.

Q. The seventh paragraph provides that the minimum requirement would be for coverage of 90 percent of the population within four years of the issue of the license.

Paragraph 8 requires applicants to indicate their intentions regarding initial tariffing of the service and a proposed regime for the future development of the tariffs together with the extent to which they are prepared to make firm commitments in this area. The approach to a competitive market will be a major evaluation criterion.

Paragraph 9 provides that "Applicants must demonstrate

their financial capacity and technical experience and capability to implement the system, if successful, and must include a business plan for at least the first five years and a complete technical proposal." It goes on to indicate what the business plan should contain.

Paragraph 10 requires applicants to indicate their proposed approach to service provision/air time resale.

11 indicates that they are going to have to provide that an applicant would have to provide for free access to emergency service numbers and so forth.

Paragraph 12 deals with interconnection and expressly provides that the new operator would have a right to such interconnection and describes a proposed interconnection regime.

Paragraph 13 deals with I think technical aspects of interconnection.

Paragraph 14 requires applicants to include with their applications firm proposals for the disposition of any net windfall gains which arise.

Paragraph 15 requires applicants to propose methods for transmission of traffic, for example leased lines, PSTN, private infrastructure, or a combination of the above.

Paragraph 16 points out that additional information might be sought from applicants in the course of the

evaluation.

Paragraph 17 indicated that the "license would incorporate conditions including but not limited to unauthorised interception of traffic, transferability of ownership. Penalties, including revocation of the license, for breach of the terms of the license, surrender, publication of tariffs, fair competition, and the provision of information to the Minister."

Paragraph 18 made it clear that the license would not provide exemption from any applicable planning legislation or any powers of compulsory acquisition or any powers of passage over property.

Paragraph 19 is in the form which we referred to earlier; it provides that the Minister intends to compare the applicants on an equitable basis subject to being satisfied as to the financial and technical capability of the applicants in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in the descending order of priority. And they are set out in that order.

Paragraph 20 provides that the Minister cannot be bound in advance to select any type of application or any application.

21 reserves the Minister's right to alter any of the deadlines of the competition.

Just as well that that paragraph was introduced.

Paragraph 22 provides that the Minister will not be responsible for any costs incurred by applicants in preparing their applications.

Paragraph 23 requires that each application should contain a statement that it will be valid as to its contents for a period of 180 days.

24 indicates that applicants may present questions regarding the competition for answer by the Department, and gave a deadline for presenting those questions.

Paragraph 25 required that applications should contain an index, an executive summary not exceeding 25 pages, and the entire document should not exceed 350 pages.

And it gave the address to which the application should be made.

If you recall, Mr. Pye examined the original draft that was sent to him, and as I have suggested, abstracted from that a list of criteria in what he felt were the intended order of priority. And he put those into a separate list, and that list has been incorporated in subsequent drafts up to this final form. But

A. My recollection is that he suggested that they be put in descending order of priority, but we determined what that order was.

Q. I think it was very close to his order, wasn't it?

A. I mean, I don't know, but it could be easily checked.

Q. What I am just trying to get a grip on is how you viewed the entire document after putting those itemised criteria in that descending order of priority in paragraph 19, because he took many of those from other parts of the document; do you follow me?

A. Yeah.

Q. But those other parts of the document were also left in the document; do you see what I mean?

A. Yeah.

Q. To give you an example, paragraph 9 provides that "Applicants must demonstrate their financial capacity and technical experience and capability to implement the system, if successful, and must include a business plan for at least the first five years and a complete technical proposal."

So that highlights the requirement of an applicant to demonstrate his financial capacity and technical experience.

And then if you go to paragraph 19, you'll find that in his original list, Mr. Pye listed financial capacity and technical capability as criteria. You have put them into the headline as a requirement that or an indication that the Minister intended to compare applications on an equitable basis subject to being satisfied as to financial and technical capability.

But how does one read the requirements of paragraph 19 consistently with the fact that they are also

mentioned in paragraph 9? Do you follow me?

A. I think paragraph 9 is the requirement we are setting out, and what we call the chapeau to paragraph 19 is simply reminding everybody that it's in the context of already having passed the test in paragraph 9; then you are comparing them in relation to criteria.

Q. Does paragraph 19 in some way reiterate what was contained in paragraph 9?

A. Yeah, it's a reminder, I suppose, that you know, in order to get to the comparative stage, you must have passed the test in paragraph 9.

Q. But as I understand it, from examining the documents which we'll come to later, mainly Mr. Andersen's documents, there was no threshold test of financial capacity or technical experience. There was no test of financial capacity and technical experience which was passed first by any of the applicants?

A. I don't know what you mean by a "threshold".

Q. Well, we discussed it the last day. I am wondering, are you using it in that sense? You say the applicants must pass the test set out in paragraph 9?

A. Yes.

Q. Were applicants subjected to a test? I understood from what you told me the last day that you believed that there was a test but you weren't aware of what the test was or what the elements or criteria of the test was.

A. If I could put my understanding as follows

Q. Yes, do.

A. I understood that Andersens my understanding at the time was Andersens came to the Project Group and said that no applicant fell to be disqualified for failure to meet the minimum requirements. Now, I understood that to include, as well as the technical business of numbers of pages and so on, to include having passed this threshold.

Now, by the time Andersens came with that information, I and other members of the Project Group had read all the applications, and to the extent that Andersens said they are all okay, having read them myself, I didn't see any particular I didn't consider questioning you know, how they arrived at that conclusion, because I had read the documentation myself.

I mean, each one had, say, at least one partner who had done this business before elsewhere.

Each there was sufficient indication of the financial standing to suggest that they weren't going to fail on that account, so I am confident that Andersen's statement that none fell to be disqualified for not meeting the minimum requirements included this area. And I am confident that having read the documentation, all of the applications myself, that I didn't find any reason to question it.

Q. But as I understand it from our discussion the last day, we drew a distinction, and you acknowledged that there was a distinction, between formally complying with the requirements, the procedural requirements to get into the competition, and complying with substantive requirements such as this one, financial capacity and technical experience. Would you agree with that distinction?

A. I think that's a distinction you were making. I don't think I bought into it.

Q. Would you agree that there is a distinction?

A. There are certainly they are at different levels.

I mean, counting the pages is not the same as satisfying yourself that you know, if you license this crowd, that they would have the financial and technical capacity to do the business. They are at a different level of test, if you like. But that's not to say that there is a formal differentiation between them.

Q. I drew to your attention, I think, before Christmas that Mr. Andersen had mentioned that in this competition, there was no substantive threshold test for technical or financial capability, something that he was used to in other competitions. He did mention that there was a test or a filter for procedural compliance with the requirements of the competition. Now, what I suggested to you was that in making that

distinction, Mr. Andersen was distinguishing between a test for formal compliance with the requirements for the competition and a test for substantive compliance with some threshold test, and I was suggesting to you that he had indicated that there was no test, no threshold test for substantive compliance. And you said to me, I think, before Christmas that you felt that he had indicated to you or that there had been some discussion in which he had said he was satisfied that the various applicants had the required financial and technical capability to get past the first stage of the competition?

A. All I can do is keep reiterating that my understanding of what happened at the meeting whenever; late August or early September was that the consultants came and said that they all met these technical requirements and that none of them fell to be disqualified for not meeting the basic requirements of the competition. And I understood that to include financial and technical capability. I don't know whether that was explicitly said or not, but it was certainly my understanding; and having read each of the applications myself, I didn't see any particular requirement to probe into that any further.

Q. I appreciate your own view that you had read the applications, but what I was concerned about was Mr. Andersen's view, and that's what we were discussing

before Christmas. I just want to draw to your attention a document; I am not sure if it's in the books

A. I think I was given it yesterday, was I, this one where he talks about number of pages and so on?

Q. That's Andersen Management International fax cover sheet, Leaf 90A.

A. I think that was handed to me.

Q. Do you have a copy of this one?

A. I certainly had it yesterday. I don't know whether I gave it back or whether I put it just in the wrong place.

(DOCUMENT HANDED TO WITNESS.)

Q. I can give you a hard text copy of it now.

A. I have just been given one now.

Q. It's a fax from Andersen Management dated 8th August, 1995. Now, I think you would have been on holidays, in fact, when this was received, would you?

A. Yes, you asked me to check when I was on holidays.

From the 24th July to the 18th August.

Q. It's addressed to Fintan Towey from Michael Moesgaard Andersen. It says

"Dear Fintan,

"Attached to this fax you will find our memo on conformance with the defined minimum requirements together with a list of the labels we will use. We would appreciate to get a copy of the cover letters,

(cf. the statement of A3). We have used more time on this part of the work than expected, as also an additional consultant was necessary.

"In addition, I already now foresee that we are understaffed re in particular tariffs in which area I foresee that it will be more difficult to compare the applications than expected. Thus, I have requested Michael Thrane to also have a closer look on the applications with a focus on marketing.

"Best regards.

"Michael Andersen."

Then on the next page, dated 7th August 1995, there is a heading "GSM 2 license in Ireland. Comparing the conformance of the applications with minimum requirements.

"Introduction.

"The received applications for license to provide and operate a GSM 2 system in Ireland have to observe at least the following minimum requirements.

the entire application should not exceed 350 pages excluding appendices.

the executive summary should not exceed 25 pages.

statement concerning offered license fee payment.

90 percent coverage of the population should be reached within four years of issue of the license.

validity statement concerning the applications

(180 days).

"The following requirements are also essential but not fully checked yet.

plans should be expressed in 1995 prices

service should be provided continual 24 hours a

day all days

meantime between repair

quality of service

only type approved equipment to be used

service providers

emergency service

directory service

facilities for security interception by the State

subscriber billing.

windfall gains.

quantitative tables both paper and electronic

versions.

"Such requirements could probably not be rejection criteria, and for this reason they are transferred to the qualitative analysis for further investigations."

On the next page he had a conformance test showing whether the applications have the requisite number of pages and so forth. And there are a number of notes attached to that. The final remarks at paragraph 3 are as follows:

"The applications from A1, A3, A4, and A5 are in full conformity with the minimum requirements.

As can be seen from note 1, A2's application has some

"page problems" in the Technical volume, the Management volume, and in the Other Aspects volume.

It is recommended by letter to contact A2 on the subject and request a clarification.

"A6 has in the executive summary as well as in the entire application too many pages (cf. note 3). A decision has to be taken by the Department concerning the matter.

"A7 has not been part of the analysis concerning the minimum requirements. However, A7 is not yet in conformity with the requirements outlined by the Department."

I think that's Telecom Eireann, A7?

A. Yes. We asked Eircell to send in a pro forma application to give us a benchmark from somebody already in the business in Ireland.

Q. There is a note on the front, then, from Fintan Towey, which says "Note: Following examination of applications, decision taken that all are valid.

Tender requirement is that applications 'should not' exceed 350 pages." And the "should not" is in quotation marks.

Could I suggest to you that that is the only document in all of the documentation which refers to any minimum requirements having been passed, and that doesn't refer to any, as I have put it, substantive requirements. It's only about whether you have the

correct number of pages, the correct number of books,
the correct number of whether you have indicated
you are going to pay money, whether you have indicated
you are going to give 90% coverage and so forth?

A. That's what that document is saying on the 8th August.

I am trying to convey to you my understanding at a
later date which was probably very late August or
very early September, most likely very late August
is that when Andersens said to the group that no
application fell to be disqualified for not meeting
the minimum requirements, I understood that, which was
an oral presentation, I understood that to include
financial and technical capability. All I can say in
the interest of trying to be helpful is that the
Tribunal will no doubt hear from other people who were
involved in those discussions and what their
impressions were and the Tribunal obviously has to
draw conclusions. All I can do is reiterate my
understanding was that the passing of meeting the
requirement for technical and financial capability was
covered by the consultants at that stage, and that
having read the applications myself completely by the
time the conversation took place, I saw no reason to
question this. And I mean, as the competition went
on; I questioned lots of things, but I saw no reason
to question this, because I read it myself and I had
come to the same conclusion in general terms.

Q. Would you agree with me that there is a slight difficulty from the Tribunal's point of view, in that Mr. Andersen and I think this would not be an understatement records almost everything he does and almost every decision, certainly, that he makes?

A. Well, you have had more contact with him about that than I have.

Q. I am judging by the documentation. It was on foot of what you said that I looked at the documentation again, on foot of what you said that I found this document which seems to accord with what he says in his narrative report, of which you have been given a copy, in which he describes how he did conduct a conformance check on procedural but not on substantive requirements; but you say that in any case you have a recollection

A. No, I am saying my understanding at the time was that whatever statements were made in the group covered financial and technical capability.

Q. But you could have been mistaken, then?

A. I guess it's possible that I was mistaken, yes.

Q. Not mistaken in your recollection?

A. No, mistaken at the time. Of course it's quite possible, but I also think that even before that, Michael Andersen had started to say, before the competition was launched or as soon as he came on board, Michael Andersen had started to say he wouldn't

have expected any application to fail to meet technical and financial, so he had a certain mindset as well.

Q. Yes.

I think this might be an appropriate place, because I am going to go onto the second, which is in fact I think the first meeting of the Project Group, next.

When I say "first", the first meeting on your watch; isn't that right?

CHAIRMAN: We will proceed with that at two, then, Mr. Brennan.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AT 2 P.M.:

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

Q. MR. HEALY: Thanks, Mr. Brennan. If you go to Leaf 47, we have the minutes of the second meeting of the GSM Project Group on the 6th March, 1995. The first aspect of the minute relates to updating the group in relation to what had happened since the previous meeting. As I understand it, this is really the first meeting since you got the competition underway?

A. Yeah.

CHAIRMAN: Do we have the first meeting, Mr. Healy?

Q. MR. HEALY: The first meeting was during, if you like, a different dispensation; it was in 1994, and it was a very, very preliminary meeting. We have an agenda for

it, I think, and that's all.

CHAIRMAN: Yes.

Q. MR. HEALY: This is the first meeting after the process became operational.

"MB indicated any significant changes on the GSM issue since the last meeting. I.e.:

a change in emphasis from royalties to up-front payment but considerable emphasis on deal for the consumer

a clause to ensure that the consumer benefits from any windfall profits

a clause signalling that a funding mechanism may be set up for the Regulator when established

interconnect prices are included in the

documentation including a listing for Northern

Ireland. All international calls to be routed

through Telecom Eireann's switched network

advance warning of a possible Universal Service

Fund

agreement for a 7 year duopoly subject to

satisfactory performance on the part of the GSM II

operator

T & R Regulatory Division to provide dispute

resolution during tender process."

Can you just clarify one matter for me in relation to

the time scale of the license or the duration of the

license, Mr. Brennan. It was a 15-year license, isn't

that right, with a 7-year duopoly?

A. Yeah.

Q. Does that mean that for 7 years there was not going to be any other operator licensed in the market?

A. In that particular technology, but I think

Q. I see

A. I recollect there was another technology, DCS, emerging at the 1800 spectrum, where we didn't give any assurance about that except that the two incumbents would be what were known then as born licensees. But there may be others.

Q. Can you explain yes, I appreciate that; they weren't given a duopoly in this. Can you explain to me how the new licences that we know came on-stream recently, or did they come on stream?

A. You had the Meteor Orange business. I can't explain I mean, I was gone off the telecom scene a long time by then.

Q. My state of knowledge is based exclusively on your documents, so...

A. I mean, we set up an independent Regulator and obviously the independent Regulator started to take a different view of the market. I don't know how it came to be that the next

Q. Nobody complained about it, at least no complaints reached the point where it resulted in litigation or anything like that. Maybe somebody from the

regulatory side may be able to assist us.

A. I said very early on, the market exploded beyond what anybody foresaw. So everybody was happy at that stage, except of course the losers for that license.

Q. Yes.

"2. Spectrum issue was raised by Aidan Ryan.

Although recognising that 2 by 7.5 MHz allocation was reasonable for GSM II, this meant that spectrum currently in use by Telecom Eireann would have to be freed. T&RT and T&RR would have to coordinate between themselves, Telecom Eireann RT, and GSM II on this."

A. There was a flaw in the preexisting regime for charging for spectrum to the extent that you paid so much per band up to a certain level; once you paid a certain level, then you could use all you liked after that for no extra charge. As a consequence of that, there was a lot of sloppy spectrum allocation. And this was the first time it needed to be looked at and tidied up, and that's what that paragraph was talking about.

Q. I understand.

"Critical path. Document detailing critical path was circulated" I have that document; I don't know if we need to put it on the overhead projector. It indicated that it gave the timing from the 2nd March competition announcement up to the selection of the successful applicant by 31 October and the main

milestones along the way up to then.

"It is agreed that the consultants will be required to advise on a successful applicant by approximately mid-September in order to give ample time to put the matter to Government for decision. Tender document commitments to announcement of successful applicant by 31 October 1995. Crucial from a credibility point of view to maintain a political commitment and to comply to this deadline. The group also flagged the possibility of protracted negotiations with the successful applicant after the announcement. To avoid this, it was considered that the Government decision awarding the license should be subject to successful negotiations; in any case, it is expected, A, that GSM II will be under time pressure to get the second mobile network up and running; and B, that negotiations should be eased, as much of the material from the successful GSM bid will form the basis for producing the license. Furthermore, to speed events, it was agreed that the drafting of the license should begin prior to the decision on the successful applicant. The option of getting the consultants to draft the license is favoured.

Point 4 deals with consultants. Martin Brennan gave a brief rundown on six short-listed candidates who would each make two bids: One for advising on selection, one for drafting the GSM license, and it was agreed

that a team with Martin Brennan, Fintan Towey, and I think Mr. McQuaid, is it, John McQuaid, would select the consultant, keeping Project Group informed of developments.

The next point deals with information rounds, and we have already mentioned that, that the intended or the prospective licensees, the applicants for the license, would put questions, and you would prepare a memorandum responding to those questions.

"6, procedures for dealings with potential bidders during the tender process was agreed.

" no one-to-one meetings

no social outings

a record to be kept of any meetings/conversations

between DTEC people and any of the bidders

DTEC should stress at any such meeting that it is

an informal exploratory contact

where any issue of import does arise, the matter

will be referred to the formal written procedures.

"The 7th point was on the discussion of items which would need to be examined in the context of GSM II.

And a reference here again to the DCS 1800 license.

You go on to say that the group flagged that

difficulties may arise with ring-fencing the effective

liberalisation of infrastructure for GSM purposes.

However, this was not seen as a topic for this forum.

Other issues were flagged legislative/statutory

changes required by GSM II, taxation issues, and numbering."

These were issues that members of the group would be dealing with on an ongoing basis as the process developed.

The 8th point is "Next meeting was arranged for 10am on Wednesday 29 March. At that point the successful consultants team will have been selected. All queries should have been received by DTEC by 24 March, so Group Members will be given an opportunity to read over the packaged set of queries on Tuesday 28 March."

I'll just deal with two matters at this point. In relation to the critical path, at that point you envisaged that you would be able to announce a successful applicant by 31 October 1995. And you have already dealt in part with this, issue, but you envisaged being able to advise on a successful applicant by mid-September in order to give ample time to put the matter to Government for decision.

Does that not seem to suggest that you were giving or allowing at that stage or envisaging six weeks for it seems rather a long time for the Government to advise or the Government to consider your advice on a successful candidate.

A. Yes, but that was, as I think I said before, a conservative view of you know, leaving plenty of room for slippage. And in the context at that stage,

we were talking about an auction and beauty contest running in tandem. And I think I said in evidence before Christmas that if you had a situation where there were extremes of those in terms of, say, one adequate technical and business plan and a very high bid or a super business plan and a low bid, there would certainly have been a need for some degree of interdepartmental sorting out. Now, I mean

Q. I still can't understand that, by the way, since you had an evaluation system, so you were going to get a score, weren't you, one way or another?

A. Well, you were if you retained consensus within the group.

Q. Yes.

A. I mean, the representatives of the Department of Finance would probably have had some difficulty in the group if it had proceeded on that basis.

Q. Right.

A. And I mean, while we have the documentation launching the competition, and you obviously selected the documentation to keep it to a minimum and relevant, there were press statements issued by the Minister laying a very heavy emphasis on our Department's view of what was required.

Q. That's true. Is it the case, then, that you felt that where you had a contest that involved an open-ended auction element, you might need up to six weeks, or

certainly more time than you would otherwise need, to tie down or to achieve a consensus at the end of the day between two departments who might have slightly different priorities?

A. I think that in designing this, we were just being conservative.

Q. Yes. Did you ever form a view on how much time you would need to give the Government an opportunity to consider your recommendation after the auction element was taken out of it or when after the open-ended auction element was taken out of it?

A. Not really. I think the next time that this came into play was when Michael Andersen in a conversation with me advised strongly that there was a lot of merit in a quick announcement and a lot of risk in delaying an announcement once the outcome was clear.

Q. All right.

In item 6, there is a reference to a set of rules you developed for conduct in the course of the process.

And I think we can go to the actual memorandum that you prepared, in Leaf 48, which I take it would have been circulated, am I right, from what's stated at the top, to every member of the Project Group?

A. Yes.

Q. And to the Secretary, to Mr. Fitzgerald as well?

A. Sorry, not every member of the Project Group. I circulated it to, according to what's on it, the

Secretary, Mr. Fitzgerald; the heads of the two other units in the Department; and all of my own relevant staff.

Q. Yes. Doesn't that mean that everyone in the Project Group would have got it? When I say "got it", the heads of their sections would have got it?

A. I am fairly certain I generated this document myself, and I brought copies to the meeting, and I'd be surprised if I just didn't circulate them to everybody.

Q. The next document in Leaf 49

A. Before you go on to that, just two minor comments about the report of the meeting, because it will become relevant later on.

You will notice that the report was circulated outside the group to Mr. Fitzgerald, who was my boss. The point I want to make is that you'll find, as you go forward through the series of reports, that several of them were so circulated; but when there was key confidential information, there was deliberate conscious decision not to let it go outside the group. So you will find that his name is not on some key reports.

Q. I understand.

A. And we had a discussion before Christmas about the composition of the group. At that stage, Mr. McMahon was the only representative of his division. For some

months after that, he was accompanied by Mr. Dillon, and then towards the end he was accompanied by Mr. O'Callaghan. That's just referring back to a discussion we had before Christmas about heads of their division and their Deputies. It's not of any particular significance now.

Q. The next document is in Leaf, I think I said Leaf 49.

It's dated March 16th, and it's headed "AMI detailed and costed proposal for tailor-made expert and consultancy service in connection with the evaluation and license award to an operator to install and operate a second GSM network in Ireland."

Can you just clarify one matter for me. Was this in fact the Andersen tender, or was it a document that was generated in the course of your discussions with them?

A. I am nearly certain it's their tender. It has all the hallmarks of being their tender.

Q. Was it they inserted the poem from Tadhg Dall O'hUiginn at the bottom left-hand corner?

A. Yes, sorry, we didn't. I wouldn't be able to.

Q. Mr. O'Donnell will have a view on that now. I don't want to go through all of their tender, but there are aspects of tender I want to go through, inasmuch as it describes how they envisaged their services being delivered and how they envisaged the evaluation being carried out.

Can I just say at the outset, their tender was accepted. Up to now we have only discussed the acceptance of their tender in terms of the amount of money they intended to charge. I think you were satisfied they were at least that Andersen and at least one other tenderer, I think they are mentioned, we can mention them now. KPMG, they were mentioned in a minute, were capable of delivering the services, but that KPMG were too expensive. And I think in fact, now that I recall, you also mentioned a difficulty you had with an aspect of the KPMG tender, but you accepted their tender. Does that mean that you also accepted their approach to how they would carry out the work and how they envisaged the evaluation taking place?

A. I think in general terms, yes.

Q. Because the reason I ask that is as far as I can see, the proposals they made as to how the evaluation should be conducted tally more or less with what's contained in their ultimately in their report; and I don't see any suggestion anywhere from your side, from the Department's side, that you disapproved of the way they would carry out the evaluation. Would that be right?

A. That's true. But there is a sense in which their tender was applying a sort of a proprietary model for doing things like this to a competition structure that

they didn't design. So there was a kind of a need to build a bridge between the two.

Q. I follow.

Apart from that and that gave rise to some difficulties, I know, in the course of the evaluation process in general terms, in terms of general approach, do I take it that you accepted their view as to the general approach that ought to be taken as to what you should be seeking to do, the way in which you should seek to do it and how long it should take, roughly, for you to do it?

A. Yeah, I think that goes without saying, subject to whatever nuances might be in the documents we come to.

Q. I appreciate that. I don't want to go through every aspect of it. They identify what they see as the task, and they suggest how they would do it. It gives an insight into how they ultimately constructed their evaluation criteria; when I say that, how they ultimately used your evaluation criteria in the context of what they saw as their, as you put it, their proprietary model for evaluating applications like this. I don't need to deal with the introduction. That's in Section 1.

Section 2 deals with their perception of the complexity of the Irish GSM II tender.

Section 3 deals with what they call their suggested solutions to some of the anticipated problems.

Section 3, Subsection 2, deals with what they call the preparatory part of the work. And I think the main interest in that section is contained on page 7, where in the second paragraph they say "In addition we propose that the consultants initially participate in elaborating a document with an outline of the logical links between key legislative and regulatory options as expressed in the RFP document on the one hand, and different kinds of evaluation criteria and techniques on the other. This translates into the final specification of the evaluation criteria which could be grouped around the four categories outlined as follows."

In order to put this in context, we have the list of criteria in paragraph 19, and I think what Andersen have done here is to draw these together under a number of headings which they see as pivotal in carrying out any evaluation; would that be right?

A. I think there is a chance that what they are doing is taking their model, which they had done before, and trying to remould it to fit our specification. And I think that there is an extent to which things that they would have had in marketing might have fitted more neatly into credibility business plan for us and those kinds of crossovers which I think got sorted out later on.

Q. Did they?

A. I think they did.

Q. I was wondering about that.

A. I think they did.

Q. When we come to their actual evaluation report, we'll see these approaches cropping up again. Firstly, they identify what they call "four dimensions" in which the evaluation process should be viewed.

The first thing is the marketing dimension. And they divide that into they say that "Marketing dimensions such as the applicants' approach to market development, the proposed tariffs, degree of customer care, the efficiency" in fact I don't know whether it's "consumer" or "customer" "the efficiency of distribution channels and some of the classical quality of service indicators recommended by the OECD, performance indicators, (OECD 1989). Roll-out, coverage, national roaming, and the extent of the applicant's international roaming plan."

A. And it's already clear at that stage, just taking that heading, it touches on several of our selection criteria, which is where we had to get to reorganising as we went through the evaluation.

Q. That refers to, for example, the approach to market development, which is the first item?

A. Yes, roll-out, coverage, national roaming.

Q. Yes. Next, the technical dimension, "such as the quality and the viability of the technical approach",

which is again one of the criteria in your RFP. "And the efficiency of the proposed use of spectrum resources (frequency). Speed and degree of geographical and demographical coverage."

Then he adds on "Feasibility of cell planning and antennae sites. Degree of redundancy, network security, realism and correctness in traffic planning, network capacity, and network quality of service parameters such as blocking and drop-out rates, including performance guarantees."

Next dimension is "Management dimensions such as the concerted competence of the single members of the bidding consortium, the legal status of the operating company, including financial links to parent companies, the expected appointment of key persons, and the credibility of the business plan."

Lastly, "Financial dimensions such as the amount the applicant is prepared to pay for the right to the license, the ability to provide low tariffs, the degree of financial solidity, including the initial equity offer to the new company, cash-flow profile assessing the necessary period in order to achieve break-even of the discounted cumulative cash flow, and the internal rate of return."

I think the underlined elements of that text coincide with criteria identified in paragraph 19; is that right?

A. In general, yes. I thought roll-out and coverage might have been underlined, if that was the case, in the first bullet. I am just taking this now as we walk through it. I suppose that's the most obvious one.

Q. I think that they have underlined speed and degree of geographical and demographical coverage, and I think that they probably have that they identify that with the timetable for achieving minimum coverage requirements and the extent to which they may be achieved; I am suggesting that, in any case.

A. There is no difference between us here except that I see roll-out and coverage in the first one and different language in the second one. It's not important.

Q. Even as we read it, we can see the overlap between where some of these Andersen, as I suggest we call it, dimensions might have been put under several different headings in this four-heading list.

But to get back to how this developed, in the ordinary way, if Mr. Andersen had been brought in at the stage at which, for example, KPMG were brought in, and if he had been hired at that stage to develop the RFP and to conduct the evaluation, then obviously the RFP or his input into the development of the RFP would have been, I suppose, tailor-made to ensure that the criteria fitted his, if you like, evaluation package, if I can

put it that way?

A. I suspect very much that that may be what happened when he got further similar commissions from the Regulator. Yes, I think if he had got the job of design, operate, and conclude, it would have been a different RFP than our RFP; but bearing in mind the history of our RFP, where I was asked by a different Minister to work on something, and when I got it to a certain stage, somebody else thought mightn't it be a good idea to get an expert to look at this, and we wanted to do that in a time-frame which didn't allow compliance with the full-blooded EU procurement rules which you would have had to go through if you were to recruit the consultants at that stage, and so on. It's just related to the history of how the competition came about, I suppose.

Q. I appreciate that. Mr. Andersen himself comments, and I think we mentioned this the last time; we'll come to his detailed comments eventually, but I think he suggests, and I take it you'd agree, that ideally, the person who is conducting the evaluation should be involved in framing the evaluation criteria, because then you don't have this problem of marrying two approaches?

A. That's true, but I have never seen a consultant to recommend less work for himself.

CHAIRMAN: Just one little aside: You have been very

helpful in explaining some of the rather esoteric jargon of telecommunications. One that I am not entirely certain about is, in my own mind, is "roaming agreement". Would you like to give us your version of that.

A. Internationally, it's the ability to use your Irish phone in another jurisdiction where normally an operator will have a formal agreement about costs and revenue transfers and so on with at least one operator. Sometimes they will have agreements with a number of operators in the same jurisdiction, and in that case your phone will default to the strongest signal.

In national roaming, which is really a separate issue and part of the special pleading of start-up people, is they want to be able to roam into the Eircell system so that when they start with low coverage, their people can still make calls when they are away from that area.

CHAIRMAN: Okay.

Q. MR. HEALY: You had to make do with the resources you had, and you had to make do with the situation as it stood in light of what you just told me: One man preparing or assisting in the preparation of the criteria and another team coming in evaluating the applications. Did you have any concerns that there was a risk that the original order and the original

set of criteria might be subsumed in some way by Mr.

Andersen's matrix, if you like?

A. I either knew or came to know that you could reorganise what he called dimensions and indicators; when they were marked separately, you could bring them back into an order which matched our descending order of priority, or selection criteria and so on. Now, whether I knew that at that moment or whether I came to know it as a process evolved, I don't know.

Q. Maybe we'll touch on it in a more concrete way when we come to the actual evaluation.

If you go on to page 10. He describes what he calls the executing part of the process, and in the first subsection he describes what he calls "Evaluating the applications and the applicants."

"The evaluations of the applications and the applicants constitute the third cornerstone of the tender.

"Consideration the possibility of eight applications multiplied by, e.g., 350 pages, excluding technical and promotional appendices, there is an initial need for establishing auxiliary tools, like conformance testing against formal requirements and the correct use of (calculatory) assumptions from the tender documents. In addition to this we will work out a semi-structured "Readers guide". And each participant should be instructed to pay special attention to one

or more of the main areas marketing, technical, management and financial aspects.

"The next step will be to relate the applications to the evaluation criteria and to apply the chosen evaluation models. As this is often a complex task, some interaction with the applicants will probably be an advantage. The applicants' presentation of their applications should be based on predefined guidelines prepared by the licensor with the assistance of the consultants.

"Having clarified remaining questions, our evaluation techniques will reveal where the applications are close to being equal and where major and critical discrepancies appear. The important areas in which critical and decisive discrepancies appear will be subject to supplementary analyses. It might, for example, be difficult to assess whether the applicant's approach to tariffing is competitive, and therefore Section 5 provides an example of how a supplementary analysis can be carried out within this particular area. Other potential areas of supplementary analyses include frequency economy, cell planning, traffic handling, roll-out plan, internal rate of return or contribution margin. Sensitivity analyses will also be carried out in order to assess, inter alia, cross cutting coherence of each application and risks of project failure.

"In addition to such analyses, a supplementary analysis of the applicant's track record will be carried out. Emphasis will be placed on the consortia's proven technical capability and ability to attract a substantial amount of binding financial resources in order to finance both the offered license fee payment and the network investments.

"The results of applying the chosen evaluation model, the supplementary analyses made and the track record investigations/verification will be presented in separate documents."

The next section is headed "Preliminary outline of the work programme". As you pass on again to the same type of division as we had in the last section, on page 13 you have the preparatory part. The first phase is "Framing the work". And in this he suggests how the work should be framed. He says the first step is as follows: "The Department evaluates the offers received from the invited consulting firms, signs a contract of co-operation, and the work commences immediately.

"2. Joint meetings between the Department and the consultants are conducted in order to define the logistics of the tender process (including the organisational setup, meeting frequency, time schedule, final work programme, the IT facilities and the like). An example of our planning tools, which we

also suggest to use in this project, is shown in Annex

D. At this stage we also propose to make a document on all the security procedures to be followed during the process in order to avoid leakages or unauthorised use of sensitive and confidential information. We have, for example, developed a GSM tender document-handling system which has been used in a number of GSM tenders and which offers "military security".

"3. The consultants would like to conduct a series of predefined interviews with key persons in order to gather the specific information necessary to carry out the task.

"4. At this point in time it is suggested to assess the general relationship between the legislative and regulatory framework on the one hand and the evaluation on the other.

"5. Once the evaluation criteria are further detailed, it will be possible to commence the designing of the evaluation models. In this respect, close co-operation and common understanding between the consultants and the Department are exceptionally important. It is suggested to take some of the computer-based models developed by Andersen Management International into consideration. In addition, it might also be useful to use the qualitative evaluation techniques developed as a starting point." He refers

to Section 5.

If you go on to subsection 3 of Section 4, which he calls the executing part of the work programme. The first step involves "The specific plan of action states who is in charge of what in relation to the submitted applications. The analysis is commenced as soon as the applications are received. The first part of the work is to register the applications and to check whether they conform to the formal requirements such as the ceiling of 350 pages, excluding appendices.

"Once the task is performed, the application is formally admitted. This means that they can be seriously evaluated. We expect all applications to conform to such a degree that they should be admitted." That's the second step.

The third step: "Also a preliminary assessment of the fulfilment of formal and non-formal minimum requirements such as a reasonable degree of geographical coverage, a not-too-protracted roll-out, etc., is to be conducted.

"As an entrance to the in-depth evaluation, a lot of critical reading is necessary. The exact amount is of course both dependent on the number of applications and their quality.

"The next step is to perform the quantitative evaluation, which can partly be obtained by utilising

our GSM number-crunching model and partly by the use of a more formal security system.

"Having familiarised with the applications, it will be time to conduct presentation meetings with each applicant. We suggest that all applicants get the same general questions in advance and that there will be a possibility to pose individual applications- specific questions during the presentation. It is unequally important that the meetings are well prepared in order to show to the applicants that the evaluation, both in relation to procedural and material aspects, is performed in a professional manner."

I think that the use of the word "unequally" means there "exceptionally" in a somewhat unusual Danish English that's used.

The next step: "The most demanding step, however, is the qualitative evaluation. We suggest to proceed in such a way that it comprises a number of different aspects such as marketing, technical, financial, management, and legal aspects. For each aspect, a number of dimensions, indicators, and subdimensions can be delivered. One of the scoring methods is to award marks during a ballot. If agreements concerning the award of marks cannot be reached, or if there are any remaining doubts, we suggest that supplementary analyses be carried out.

"During the entire evaluation phase, a number of track recording and verification issues should be given attention. The information provided in the applications is not, per se, fully correct and valid, and rather boosting language can be part of the application. The track record of the management team, the proven record of the proposed billing systems and the liquidity and solidity statements are prime examples of potential issues for track recording and verification."

Again, just so we are on the same wave length, can you tell me what you understand by "track recording" there?

A. Offhand, I can't, no.

Q. I think it means that you examine a person's track record?

A. It looks like that.

Q. It doesn't mean keeping a record of a track?

A. If you read it into the third sentence, it's the track record of the management team, etc.

Q. I think it's perhaps a somewhat unusual phrase, but I understand it to mean that you examine someone's track record when they tell you something, especially if they are making a presentation on their own behalf and are likely to use what he calls "rather boosting language", meaning, presumably, puffing themselves up or whatever?

A. Yeah.

Q. Next step, "Last but not least, a holistic approach is appropriate in which both the quantitative and qualitative evaluation is integrated and overall aspects are taken into account in order to meet the objectives set out by, for example, the Minister."

Now, if you go to the final section, which is the "Other comments" on page 16. Now, I refer to some but not all of the steps. There were in fact 23, and the text goes on here: "The outlined 23 project steps comprise a true subset of the services stated in the TOR. Consequently two alternative approaches emerge from the step-by-step programme outlined above.

either to deliver the consultancy services as stated in the TOR

or participation of the consultants during all the outlined 23 project steps, i.e., including the original part on, for example, the drafting the optional part on, for example, the drafting of the license. This approach is labelled "TOR +" in the budgetary projections in Section 9.

"Evidently we have a flexible approach to the degree of consultants' involvement. Once the Department has decided which part the consultancy services offered the Department will want to use, we will elaborate a more detailed work programme integrated in our project manager tool. Over the entire co-operation period,

the Department will receive adjusted work plans, including critical paths and deadlines, in order to get an indication of the current work in progress.

"We also have a flexible approach in relation to the liaison with the Department during the course of the assignment. As we see it, it will not be adequate for the Department to outsource all the work. We would rather suggest that we have a primary responsibility for performing the work and duly delivering the required output, but with close reference with the Department. This means that we intend to liaise closely with the key persons from the Department in relation to regulatory matters, sensitive content-related issues regarding the evaluation and, for example, securing and marketing of the application. Concerning the latter, we would prefer if key persons from the Department could be dedicated to participate, for example, in the subgroup-like work ballots during the qualitative evaluation. In addition we would prefer if output to be delivered from us are addressed to, e.g., "a GSM steering group" with participation from the Department.

"The more exact way of co-operation is to be included in the fully-fledged work plan which has to be agreed on the basis of the first draft contained in Annex D.

Lastly, in Section 5, the heading is "Specific comments and suggestions concerning the evaluation

models."

He says "The nucleus of the evaluation is to apply the adopted evaluation models on the admitted applications. In fact we expect all applications to be substantially better than the minimum requirements, and it is therefore likely that 4 to 5 applications will be admitted to the in-depth material examination during both the quantitative and qualitative evaluation. One of the advantages of having both a quantitative and a qualitative evaluation is that they often turn out with the same end result, which will be a strong argument for the validity and reliability of the procedures behind the nomination of the highest-ranked application. In addition, the quantitative evaluation will generate a wealth of useful "hard data" which can serve as a fact base for the later coming qualitative evaluation."

Did you agree with AMI as to how you would work with them or what contributions the Department people would be making to the evaluation process?

A. I think we certainly agreed who would do what for the Department in relation to the various what he called "sub-groups" or "ballots". The word "ballots" didn't register with me before, I'd have to say.

Like, for example, it was clear that Mr. McQuaid and Mr. Ryan, and I rather think maybe Mr. John Breen, who was a radio expert with us, were clearly dedicated to

work with the Andersen group in all aspects of the technical evaluation.

In the case of the evaluation of the business cases and so on, it was clearly Billy Riordan and Fintan Towey who worked with the Andersen people who may have been, I think from memory memory or refreshed memory Jon Bruel and maybe Michael Thrane. My recollection of the others is less clear. I was myself quite interested in the tariff evaluation and probably participated in a sub-group on that. And I think Fintan Towey may have done also. I think

Q. It's not sort of who did what and where, but what was the basis of your participation? I am really referring to the section of that tender where Mr. Andersen says that it would not be adequate for the Department to outsource all the work, but then he suggests that Andersen would have the primary responsibility for performing the work and duly delivering the required output but with close reference to the Department.

What I am trying to work out is, what was the relationship between the Department and Andersen? Andersen were not hired to do the evaluation on their own and produce a result; isn't that right?

A. It's difficult it's a bit difficult to explain. I don't think we discussed in detail in the Project Group how this would work in practice, but my

experience of the sub-groups that I participated in was that Andersens came forward with their analysis, their proposals, their questions. We had exchanges based on the fact that we had also studied the material and then it iterated onwards from there. And I suspect that that's the way it was dealt with in each of the sub-groups.

Q. Was this a dynamic that evolved, as it were, accidentally, or did anyone sit down and work out who was to lead the generation or evaluation material?

A. I would say that we in the Civil Service side expected that we were paying Andersens to do what I'll call the donkey work.

Q. They were doing donkey work on every front isn't that right? Who was putting it all together?

A. I have no detailed knowledge of what went on, say, in the technical group, because I never attended there.

I have no idea whatsoever whether Andersen's experts worked out propagation, signal propagations properties and so on, or whether John Breen did it; I just don't know. Equally

Q. Don't you think you should know how the evaluation process was carried out, who was dealing with what?

A. What I know is that at a certain stage, the people who did the technical evaluation came back to the Project Group and made presentations as to what they concluded and how they had come to conclude that way. And we

asked them layman's questions or questions that may have arisen from other aspects of the evaluation.

When you say I ought to have known, that's what I did know.

Q. Who was pulling the whole thing together? Was it Andersen, or was it the Department?

A. I was Chairman of the Project Group. The Project Group was receiving inputs from the various sub-groups. Who was pulling it together? Andersens were doing the calculations, the detailed analysis and so on.

Q. They ultimately put a report together; isn't that right?

A. Yes.

Q. And you gave that report your endorsement, as it were?

A. Well, there were at least two iterations of the report, which obviously we'll be going into in some days from now, where there was a lot of interaction about the structure of the report and so on.

Q. At the very outset of this process, at the time that this document was submitted to the Department by Andersen, did you have a vision, as it were, as to how the process would be carried through and who would ultimately produce a report or a recommendation for the Minister?

A. I don't think I had a vision in those precise terms. I mean, bear in mind this was their bid to secure the

work in the first instance, and when they got the work, then we had to develop a working relationship with them. Best practice in terms of how the Civil Service approaches consultancy would always require that you have some kind of hands-on relationship, and that you learn something, and that you understand what went on, etc. But it doesn't require each person to understand every bit of it. I as Chairman tried to understand as much of it as I could, but I could never get my head around the detail of the technical stuff, for example.

Q. Can I just come to one aspect of this that we have already touched on. If you go to page 19, the second-last paragraph.

In fact, if we look at the table first, you see where the headings we discussed earlier, "Marketing aspects, technical aspects, management aspects, financial aspects" are grouped together in a set of aspects or dimensions, and then there are subheadings of competitive strategy, market development, coverage, and so on. Some of these changed as the process actually got underway, but this was roughly the way you proceeded; isn't that right?

A. Yes. But bearing in mind always that we reorganised these eventually to fit our own

Q. Of course, this is his attempt to anticipate it at his tender stage?

A. Well, I reiterate, it's his attempt to use his model to evaluate our competition.

Q. Yes, but you accepted it?

A. Of course. I am not denying that.

Q. Well, you had to accept somebody's model in any case at this stage, unless somebody was prepared to develop a model just for your situation.

A. Which presumably would have been far more expensive as well.

Q. Yes. It did cause a problem at the end of the day, maybe not one you could have anticipated, perhaps Mr. Andersen could have anticipated it, but it did cause difficulties, didn't it?

A. Yes.

Q. In that he was trying to reverse his matrix or his model into your criteria?

A. Yeah. I'd have to refresh myself on that, but I mean, there were issues towards the end, yeah.

Q. If you look at the second-last paragraph, "Furthermore it is suggested to award marks, for example A1, A2, A2, A3, A4, A5, instead of points in order to underscore the qualitative nature of this part of the evaluation"

Ultimately what you ended up with was a final store which was in what he calls marks, I suppose what we would call grades, wouldn't that be right, but which you were anxious to convert into what we would call

marks or numbers?

A. That certainly happened at the end. The bit you read out, the "furthermore", I am just having difficulty understanding the connection between A1, A2, A3 and marks. I think there is some confusion in the way that's drafted.

Q. I think it's my understanding that in Scandinavia, and I am sure the people from Telenor will confirm this, grades are often given as 5, 4, 3, 2, 1 where we would give, A, B, C, D, E; but the giving of numerical grades, 5, 4, 3, 2, 1 is not according marks like we would use them, if you understand me, in marking exam papers.

A. Okay, I hear what you saying, but given that he was also using pseudonyms for the consortia, it is confusing.

Q. I think if you go on to read it, instead of points, in order to underscore the qualitative nature of this aspect of the evaluation, and ultimately the qualitative evaluation became for two reasons the dominant or the ultimate evaluation here, isn't that right? It was also envisaged it would be perhaps the most important part of the evaluation, but the quantitative evaluation had to be to some degree abandoned; isn't that right?

A. Yeah.

Q. At that stage, were you happy to score the result

well, you must have been happy to score the result in what we would call grades?

A. I don't think that point occurred to me until quite late in the process. And late in the process, as I think I said previously, it dawned on me when we were going through this process that you couldn't actually reach a conclusion that you could stand over based on letters when you were applying weights, because you can't apply weights to letters. And we had that debate in Copenhagen, and we can go into that when we come to that part of the documentation.

Q. I just want to draw something to your attention, and it's really to flag something; it's not a criticism of you or the Department in any way.

If you go to page 23, the heading is "Necessary profile of competence and suggesting staffing". Mr. Andersen is suggesting what skills are required to carry out the evaluation, I think both on his own side and on your side. And he goes on to describe the skills of his various partners and the skills of the various members of his staff that might be involved: language skills, technical skills and so on.

If you look at the bottom of that page, the last sentence, he says "In addition" last paragraph "In addition to such skills, it is important for the success of the tender that the chosen consultancy firm cannot be accused of having hidden ties to bidding

consortia or consortia members. As we are primarily regulatory consultants, we have no bindings to the industry and the operators. Thus we are at the moment not in a position where we are likely to be accused of having past, present, or future co-operation with any of the expected bidding consortia or consortia members."

I am not sure to what extent you are aware of this, but you will be aware that the Tribunal is having difficulty in securing Mr. Andersen's continued co-operation, in that his continued attendance or his attendance cannot be guaranteed; you are aware of that?

A. I became aware of that in the Opening Statement. The way I understood it was he was presented with a dilemma over which he had no control. But that's between you and him.

Q. Not presented with a dilemma by the Tribunal, I can assure you. Mr. Andersen has apparently disposed of his interest in AMI, and he may be involved in some dispute with them which he claims prevents him from attending or further assisting the Tribunal. AMI is now owned by a different firm, which has links to or an association with Telenor. And I want to make this clear: There is no suggestion at all that there is any connection between those two things, but it is a factor which should be borne in mind and which may be

something you wish to bear in mind, because it is unlikely at this moment that Mr. Andersen will be able to give evidence.

A. From my point of view, that's a bit disappointing. And I don't want to paraphrase the Opening Statement, but I understood from the Opening Statement that he had an impossible business dilemma. I mean, that can come back in closing statements or wherever.

Q. He asserts that he has an impossible business dilemma.

A. Fair enough. I mean, I am not going to try to judge it. It's the impression I got; that's all.

Q. Well, I think you should be aware of both those facts.

A. But something

Q. I'll be putting things to you based on documents he has made available to the Tribunal, and I can't be sure that he will ever come here to stand over any of them.

A. Okay. In relation to the way you introduced this page, you talked about skills that Andersen, AMI, believed should be on both our team and theirs.

Q. Yes.

A. I am not so sure that I am in a position to buy into that in relation to this page. I think what this page is doing is seeking to convince us that his team have the skills and experience.

Q. Right, I see. I thought he was identifying the skills necessary, in saying that on his side he had all of

these.

A. He is saying "This is what's required, and I have it".

He is not saying that I need to have it. If he's

only dealing with his own side, that's fine.

Q. If you go on to Document 50 now, which is the minute

of the third meeting of the GSM Project Group. This

was held on the 29th March of 1995.

Firstly it gives the attendance, and then the first

item on the agenda is "the Consultant".

"Mr. Martin Brennan gave an update on the selection of

consultants. The choice was clearly between Andersen,

a Danish consultant, and KPMG, but KPMG was too

expensive. Andersen was to be pursued on timetable of

the projects, legal expertise in the team, and to give

a commitment that the fees would not increase over the

bid amount. Some difficulties were arising in

relation to the sanction from Department of Finance.

"2. Update on interested parties - 10 have paid their

€1/25,000 so far with another 2 interested. A list was

circulated.

"3. Information round.

"The following points were emphasised."

Then there are six bullet points.

the particular importance of confidentiality in

this industry" - something you mentioned on an

earlier occasion; isn't that right?

A. Mm-hmm.

Q. " the need to comply with the deadlines in the competition documentation.

the need to start immediately on draft replies to the information round questions
the recognition that the definition of the role of the Regulator was a key and a sensitive issue
the need to identify questions which are for Telecom Eireann and to request permission for applicants to allow Telecom Eireann, not DTEC, to answer these
and the importance of having the consultant present at the next meeting to assist in drafting detailed replies.

"Mr. Towey circulated a first-cut document categorising all the questions under headings. Infrastructures.

"Mr. John McQuaid gave a brief presentation on a draft model detailing the costs of various types of infrastructure available. This was at a first-draft stage, representing an initial step in the process of charging for spectrum. Mr. Brennan highlighted the need to examine experience in other countries."

The next meeting was fixed for 10am on I presume that means the following Monday.

The next document brings us back to, if you like, the debate between the Department of Finance and your Department, the Department of Transport, Energy and

Communications. But before I go on to it, it's a letter from Mr. Jimmy McMeel of the 31 March of 1995.

Before I go on to it, I just want to deal with one other matter.

In the period leading up to the issue of the RFP, which called for offers for a license payment on the basis of a minimum payment of 5 million and an open-ended maximum payment, can you recall if you had any discussions with potential applicants for the license in the period up to the issue of that RFP in which the approach of the Department was discussed?

A. I suspect it may have been discussed at the very early stages, when I was trying to get my head around the concept of a competition, but I don't recollect it being discussed late in the day.

Q. Would I be right in thinking that when the Department was working out whether they'd run with a $\frac{1}{2}$ 3,000,000 up-front fee and an open-ended auction on royalties, if you like, and then moving on to a $\frac{1}{2}$ 5 million maximum fee, and thereafter on to a $\frac{1}{2}$ 5 million minimum fee, that these discussions were treated as confidential and that information was treated as highly confidential?

A. Certainly the discussions around the period when it was a budgetary item coming up to budget day were highly confidential. But that wouldn't rule out that months earlier, maybe twelve months earlier, that if

somebody from the business walked into my room and they were having exchanges about various aspects of competitions, that I may have teased out questions around royalty or lump sum, size of lump sum, spectrum charges versus royalty, etc. I think it's likely that I did, but I can't say for certain that I did, and only in the context of trying to get inside the minds of people in the business and recognising that they would all be in a special pleading position.

Q. But the information in question was, at that point, treated as highly sensitive?

A. When it came to pre-budget and into the process, yes, it was regarded as confidential.

Q. Do you recall in the Opening Statement that Mr. Coughlan drew attention to a letter of the 15th March, 1995, from Mr. Moran of Southwestern Bell to Mr. O'Brien, in which he expressed concern regarding the auction element in the Irish competition and in which he indicated that he had been led to believe up to then that the license fee would be fixed, but that he was now being faced at that date I think the RFP had gone out, hadn't it, with an auction?

A. I don't recall the document now.

Q. Do you recall Mr. Coughlan mentioning it? I don't want to put it up

A. I can't say right now that I do recall it being mentioned, no.

Q. Well, in any case there was such a letter which would seem to indicate that I know you are not responsible for the letter, but it seemed to indicate that Mr. Moran had been informed by Mr. O'Brien or by somebody that the license fee would have been fixed, and that it came as a surprise to him that it was now going to be an open-ended auction. I think you recall in your discussions up to then you would have made it clear to people or you would have indicated to people that your preference was for a fixed fee?

A. I would say that I met somebody from Southwestern Bell at least once and maybe more than once, probably in 1994; but I couldn't be sure of that, and it's quite possible that I would have discussed my Department's approach to the subject of the economics of the license. It's quite possible. It's not something I can verify, but whether it happened in real time closer to the competition, I very much doubt that I had any hand in it.

Q. The only people who would have known that, presumably, were yourself and perhaps Mr. Loughrey and Mr. Towey, would that be right, Mr. Fitzgerald?

A. I would suspect it depends on what exact point this came at, in the sense that clearly there was some discussion with the Cabinet, with the Cabinet subcommittee, among programme managers, there must have been a wide-ish circle of people who knew the

debate was going on. The only part of it that was unusually sensitive, I would say, is in the period leading up to the budget. Anything that's of a budgetary relevance doesn't get discussed outside of the political system and the very high echelons of the Civil Service.

Q. I suppose, then, it would be fair to say that when you got into evaluation mode proper, if you like, and when you emphasised the confidentiality, that all information-gathering discussions and the like were subject to that very strict protocol that you introduced; but prior to that, somebody outside of the Civil Service could have formed an impression that you were going for a fixed fee?

A. I would say back in '94 no, not '95, back in '94, when people used to walk in and out to me in Ely Place, that discussions around my thinking versus trying to sort out their thinking could have led people to that conclusion. Because our Department's position on this is what was always quite clear.

Q. At that time you were thinking of a fixed fee and a royalty; I am talking about the notion of a fixed fee alone.

A. I don't know that I did or didn't canvass that idea with people in '94.

Q. When you got to the stage of moving from a fixed fee and a royalty to a fixed fee alone, weren't the

discussions rather more sensitive and more tightly controlled?

A. Yes.

Q. Because all of those changes occurred over a very short period of time?

A. Yes.

Q. And they had budgetary implications, because it was in the context of budgetary implications that all those changes took place?

A. I think that's right, yeah.

Q. So if somebody formed the impression that there was going to be a fixed fee and a fixed fee alone, that impression could only have been formed if it resulted from something a civil servant said, around that time?

A. Yeah.

Q. Or a politician?

A. Yeah. I mean, you could draw that conclusion.

Q. I am not drawing a conclusion; I am trying to work out we'll have to talk to the people involved, but I am trying to get your assistance on the small window during which a fixed fee was in fact going to be the approach taken by the Department.

A. Yeah. I can't give you any more help on that today, and I don't know if I will be in the future either.

Q. If you go on to Document 50, this is the letter from Mr. McMeel to you.

A. 51 in my book, I think.

Q. 51; I beg your pardon.

"Dear Martin, I refer to the meeting on the 29 March for the Project Group for the award of the second mobile telephony license and the suggestion that a weighting formula for the selection/evaluation criteria be developed and that this formula be released to bidders and consultants. I have discussed this development with my management. The consensus here is that it would not be prudent to go down this route, for the following reasons:

"Firstly, the final decision on this matter is for Ministers as per Section 111 of the Postal and Telecommunications Services Act 1983. In fact, in its decision (S22048E of 2 March 1995) to proceed with the competition, the Government made it clear that your Minister was to bring a recommendation to Government before a final decision on the grant of a license.

There is a danger that explicit attachment to a weighting formula could lessen the Government's legitimate freedom of action in relation to this matter and turn it instead into a mere rubber-stamping exercise. If, as a result of the weighting formula, the Government decided differently from the recommendation arrived at using the formula, the entire process could be vulnerable to challenge from disappointed applicants.

"Secondly, the Government's decision also made it

clear that the general terms and conditions attaching to the license would be as set out in the appendix to the aide-memoire. The aide-memoire circulated for the Cabinet committee meeting of 16 February outlined the selection process, including the evaluation criteria, but made no reference to a weighting formula. Had it done so, the Minister for Finance would have commented. The logical outcome to a fundamental change to the selection process would be to have the entire matter revert back to Ministers for policy direction. This would delay the overall process and may also serve to break the consensus on other aspects of the matter.

"Finally, there is an analogy between this process and public procurement, which is subject to detailed EU rules. In public procurement, the rules require the ranking of selection criteria, but there is no obligation to have a weighting matrix. This Department's experience on the public procurement side is that where weighting formulations have been applied, as in IT procurement, these have sometimes led to perverse results. It has to be remembered that in an Irish context, the second GSM competition is a once-off exercise. There is no secure way of testing the weighting formula the first "run" will be for real."

Now, there is a handwritten note on the front. Is

that in your handwriting?

A. Yes.

Q. It says "Mr. Towey, we will have to agree at the Project Group to discuss this in detail with the consultants"; is that right?

A. It sounds an autocratic statement, putting it that way, but that's what I said at the time.

Q. Up until that time, no question of a weighting formula had been mentioned; is that right?

A. I think it may have been mentioned in the Roger Pye material.

Q. I see. I can't recall it.

A. I think it may have been.

Q. Nothing hugely turns on it, but in any case, you respond to this, I think, by letter of the 3rd May. I am not going to go to that now because the matter is discussed in a number of other documents. I think we'll mention those first and then go to your express reply to that letter.

A. In terms of the detail of the reports of the Project Group, it's interesting that I can't find reference to a discussion of weighting in the report of the meeting of the 29th, and still it was the biggest item that Jimmy McMeel took out of it. I am not making it's just a comment.

Q. I think the documents that I'll be referring to in relation to it are Department of Finance documents,

because they do record, exclusively almost, the discussion on that issue.

At the fourth meeting of the Project Group on the 10th April, you had roughly the same attendants as at the last meeting. And just to get out of the way, firstly, some of the milestones in the competition.

The first item was an update on the consultant. "The Department of Finance has given the go-ahead on Andersen as our selected consultant. Press release is expected 11th April to announce a successful candidate. You had a meeting arranged with Mr.

Andersen for the 19th April. You mention that deadlines would have to be complied with, especially end of April deadline for the information memorandum.

Andersen had also committed to the 8th September 1995 for presentation of advice to DTEC. Arrangements had to be finalised to smooth the relationship between the AG's office, Mr. Gormley, and the consultant to cooperate on the production of the draft license.

DTEC had to sign a contract and confidentiality agreement with Mr. Andersen.

Now, you have a discussion here of the letter from Mr. McMeel. You go on to say "Some argued in favour of weighting criteria because of the need to provide clarity for GSM applicants. Others believed that too defined a system would leave the Government only with a rubber stamping role in the selection process.

"No conclusion was drawn, and it was agreed to re-open the debate with Andersen."

You then went on to discuss the information round questions. And the next meeting was fixed for Wednesday 19th April at 10am.

If you look at that note in relation to the meeting that you fixed for the 19th April, starting at 10am, you mention that lunch will be provided, indicating that it was going to be a fairly long meeting. Was there some reason for that, or were all the meetings that long?

A. No. I think it was that it was going to be the first meeting with Andersens, and therefore we should leave plenty of time available.

Q. I see. Now, if we just digress for a moment to the Minister's announcement of the GSM consultant, which is on the 11th April. It's Leaf 53. The main part of the the Minister notes that he has appointed Andersen International, and then he goes on to say in the second middle paragraph: "The major part of the consultancy is to carry out a detailed evaluation of the competing bids for the license, but the consultants will also assist with all other aspects of the competition. The Minister said that Andersens are particularly well suited to be his independent advisers, taking account of experience gained while recently undertaking similar tasks for both the Danish

and Dutch governments. They were selected following a competition between six short-listed firms of consultants that would commence their involvement immediately.

"Closing date for license bids was the 23rd June, and the final decision is due to be announced at the end of October".

Would you have any role in drafting this announcement, this notice?

A. It was drafted by either myself or Mr. Towey.

Q. I am just curious to know why the expression "the Minister's independent advisers" was used. What exactly is meant by that?

A. I don't know. Civil servants always, or nearly always, act in the name of the Minister anyway, so it's the Department's advisers but in the name of the Minister. Beyond that, there is not a whole lot more I can say.

Q. Well, it's a press announcement. I appreciate that these things are somewhat artificial, but it does say "The Minister said that Andersen are particularly well suited to his independent advisers". Do you follow me? It doesn't say the Minister has announced that Andersen have been appointed to be independent advisers on this.

A. I don't think it's appropriate to attach any significance at all to the way that's stated. I

mean

Q. I suppose we can't ignore the plain words of the announcement at the same time?

A. The Minister never met these people. Absolutely never met them. This is just the sense in which the Civil Service operates in the name of the Minister.

Q. At the same time, I take it that somebody must have formed the view that they were being retained as the Minister's independent advisers to say this?

A. I would say they were being retained as independent advisers. Doing it in the name of the Minister is just Civil Service jargon.

Q. I appreciate that, Mr. Brennan, but it's the press announcement said "The Minister said". Was there some class of press conference to this effect?

A. I don't think this would have been the subject of a press conference. This is just the way we, in consultation with Ministers, press officers, draft statements. I think it would be entirely wrong to attach any significance at all to this. But I mean, you are putting a different case - it's the plain words of the day.

Q. Well, it's the plain words I am looking at. Should I ignore the plain words?

A. I think in this case, probably, yes. The announcement we are making is we have chosen these advisers and they are independent and they are qualified.

Q. Is it a somewhat carelessly worded statement, then?

A. I'd find it hard to accept that. We regularly use the Minister's name in things we do. Is it any different, say, from somewhere in the RFP, "The Minister will compare the applicants", or whatever, "based on the following criteria"? It's the same sense of the use of the word "Minister".

Q. It's just that in this case that's not the wording that's used. The wording that's used is "The Minister said" that Andersens are particularly well suited to be "his" independent advisers, which would suggest to me that they had

A. I am not going to persuade you on this one, but we would regularly issue press releases making any particular announcement and then put a ministerial comment at the end: "In welcoming this development, the Minister said..." We do this all the time.

CHAIRMAN: I don't truly see much turning on this one, Mr. Healy, I have to say.

MR. HEALY: It's in light of something Mr. Andersen has said in his statements. Mr. Andersen has said that he viewed himself as the Minister's adviser. Do you not recall that in one of his statements?

A. I don't specifically recall it, but I mean, Mr. Andersen said in his tender that some steps should be this is part of the stuff you didn't read out, because you didn't read everything out he started

talking in terms of "and should be signed off by the Minister". Things that never happened. I mean, they might be his view of the world, but they never actually happened.

Q. I appreciate that, yeah.

CHAIRMAN: But your positive testimony on your recollection, Mr. Brennan, is what might seem from the handout to be an actual imprimatur personally from the Minister did not in fact reflect the situation, and you were seeking to accord with what you understood to be established public service procedure in putting a ministerial attribution?

A. Yes, Chairman. I think it would be incorrect to attach any more significance than that to the matter.

MR. NESBITT: Perhaps the witness's attention could be drawn to the first paragraph of the press release.

That makes it crystal clear that the announcement was the appointment of Andersens to assist the Department.

MR. HEALY: Do you want me to read out that portion?

Q. "The Minister for Transport, Energy and Communications announced today that he had appointed Andersen Management International of Copenhagen to assist his Department with the competition he announced some weeks ago to select a licensee to become the second GSM mobile telephony operator".

And it's having made that statement that it goes on to say "The Minister said that Andersens are particularly

well suited to be his independent advisers". I mean, is this, in other words, some sort of waffle I should ignore, or is it something that I should take into consideration in the context of what Mr. Andersen said of his view of his own role as an independent adviser to the Minister?

A. I don't recall exactly what Mr. Andersen said. My case is this is Civil Service jargon for a press release. My case is that the Minister never actually met or spoke to Mr. Andersen, as far as I know.

Q. We'll go onto the fifth meeting of the Project Group, on the 19th April 1995, at Leaf 54. This time, as well as most of the other usual attendees, Mr. Michael Andersen and Mr. Marius Jacobsen from AMI also attended.

The first reference is to you, Mr. Brennan. "Mr. Brennan opened the meeting emphasizing that only 8 days remained before the memo was to be issued. Telecom Eireann was also working on their memo." This is the memorandum responding to questions from interested applicants.

"A meeting on information round issues was planned between T&R Development and T&R Regulatory and T&R Technical and Telecom Eireann for Friday 21st April 1995."

You go on to introduce the consultants. Then you go on to indicate that contracts and a confidentiality

agreement had been drawn up and that they would have to approved by the Chief State Solicitor's Office.

Then you come back to the weighting issue.

Letter from Department of Finance weighting of selection criteria.

"This issue was discussed at length again. It was pointed out that:

"1. The process would be open to legal challenge by the Commission if some sort of quantitative evaluation was not performed.

"2. The Andersen approach favoured combining quantitative and qualitative elements for evaluation.

"3. Giving no guidance as to weighting might lead to the worst-case scenario of receiving non-comparable bids.

"4. Mr. McMeel of the Department of Finance pointed out that a weighting scheme had not been approved by the Government and that such a scheme could result in removing the decision-making role from the Cabinet, a role which the Government had expressly reserved to itself.

"Common ground was established with reference to the Government's approval of the order of priority in the list of criteria in paragraph 19. It was agreed that the Andersen tender document would be circulated to the Department of Finance and that, pending its perusal, escalation of the issue to the political

arena would be avoided."

Next heading is "New conclusions from discussion of information round questions". I don't think I need to go into these in any detail.

Underneath then you have a work schedule ultimately aiming at issuing the memorandum on Friday 28th April, 1995.

Under "Other issues" it was noted that "The Andersen tender was to be re-examined to see if there was more information which should be provided in the memorandum and which had not been covered."

Finally, it seems Mr. Marius Jacobsen emphasised the importance of confidentiality, the security of information, and the timing of giving information; for example, "that no applicant receives information before the others."

Up to this time, was it the view of DTEC and your view that the weighting, A, should be applied to the criteria, and B, should be disclosed to the applicants?

A. I think that was the state of our mind at the time.

Q. The next item is Item 55, or the item in Leaf 55, a summary of questions posed by prospective applicants.

I am not going to go through them because we will come across them again when we look at the answers provided by the Department. I think this was maybe what you had referred to as the first cut produced by Mr. Towey

collating the various questions under a number of different headings.

A. Well, what somebody referred to in a meeting report as a first cut.

Q. The next document is came to the Tribunal from the Department of Finance files on the GSM process. And it's headed "Note for file meeting of Project Group for the grant of the second mobile telephony license, 19 April 1995, issues of interest to the Department of Finance."

The first heading is "Application of a weighting formula to the selection criteria".

"The selected consultants, AMI, who were present at the meeting, advised in their experience not all countries had revealed criteria weightings to applicants for new mobile telephony franchises. It will be important that any weighting formula drawn up can be defended before the European Commission. The extremes are described as a beauty contest versus an auction on the one side, all of the emphasis on the quality of the service delivered versus emphasis on the fee. Applicants have mentioned the weighting formula in their questions which have to be responded to by the 28th April and also directly to the Minister for Transport, Energy and Communications. At this stage the response will go no further than that contained in the RFP document in paragraph 19, that is

to say the selection criteria but with no weightings.

No commitment will be given that weightings will be released. DTEC are anxious to state that the question of weightings will be discussed with the consultants with a view to determining a way forward.

"The Department of Finance representatives asked whether the entire question of weightings could be deferred until after the applications had been received. DTEC could not agree to this approach. The consultants appear to be sensitive to the interdepartmental politics of the issue. They say they can come up with a formula that can generate a particular fee. There may be room for an acceptable solution in this. However, there is an issue of trust. It would be most unsatisfactory if a particular formula was drawn up to achieve a particular fee level, but in the end the market delivered a lower fee. However thus far DTEC have consistently moved back from their initial position, which was to publish a weighting formula with all the emphasis on the tariffing criteria. I stated on behalf of the Department of Finance that the issue ultimately may have to be resolved at a political level. DTEC are most anxious that it should not go to that level at this stage."

I don't think the rest there is very much of interest in the rest of the memorandum, the rest of

note, unless you want to draw my attention to anything in it. I think it's the only controversial issue in the note and one that was ultimately resolved.

A. Yeah. Something that may come up again later is the consultants' view that the interconnection charges were too high. I don't know whether it will come up again or not, but it's interesting to note it.

Q. He notes that it was likely that there would be considerable pressure to reduce the interconnection charges?

A. Mm-hmm. And then in the next page there is a reference to the failure to make progress with the development of an independent regulatory authority. I think somewhere around then the Department separately commissioned Andersens to do a paper on good regulatory practice. I wasn't involved in the commissioning. I remember seeing the paper, but they were given a second short contract around that time about that agenda.

Q. That's right. If you just go back to page 1 of the note for a moment, where in the first paragraph it's recorded that at the meeting it was stated that "Applicants had mentioned the weighting formula in their questions which have to be responded to by the 28th April and also directly with the Minister for Transport, Energy and Communications. At this stage the response will go no further than that contained in

the RFP document at paragraph 19, that is to say the selection criteria but with no weightings." Just two aspects of that.

When you say "At this stage the response will go no further than that contained in the RFP document at paragraph 19, that is to say the selection criteria but with no weightings", do you mean that you simply intended to blankly state what the selection criteria were but not to respond to queries about weightings?

A. Or maybe to confirm that they were in descending order of priority and we wouldn't be publishing weightings.

Q. That you wouldn't be publishing weightings?

A. That we wouldn't.

Q. I see. Do you see where what's recorded here is that "Applicants have mentioned the weighting formula in their questions which have been responded to by the 28th April and also directly with the Minister"? Do you see that?

A. I can't find it now again. I have lost it.

Q. Three sentences from the bottom of the first paragraph.

A. Yeah.

Q. Would you agree that that records an exchange at the meeting where it was noted that applicants have mentioned the weighting formula not just in their questions, but directly with the Minister?

A. That's what Mr. McMeel appears to be saying, yes.

Q. Can you throw any light on that? Do you have

any did you have any dealings with the Minister in which he mentioned to you that applicants had mentioned the weightings to him?

A. I don't recall any such discussion.

Q. Presumably if there were references to the Minister for Transport, Energy and Communications at the meeting, then they could only have been made by civil servants on that side of the meeting?

A. Yes, I would think so.

Q. Or from your side, in other words?

A. Yeah.

Q. And I suppose, would it be fair to say that the only people likely to be in contact with the Minister in relation to these matters were perhaps you and maybe Mr. Towey? I don't know whether you'd include him in

A. Of those present at that meeting, that's probably true. Mr. McMahon wasn't at the meeting, but it's possible that Mr. Dillon may have said something on his behalf. Bearing in mind that Mr. McMahon was the one who was regulating other aspects of the business and could well have been involved in meetings where something like this came up, I have no idea.

Q. Can you remember discussing with the Minister at all this controversial issue concerning weightings?

A. I can't remember that, no.

Q. You said that you didn't want or it was said at the

meeting, I beg your pardon, maybe you didn't say it it was recorded that at the meeting it was agreed that the matter wouldn't go to the political arena at that stage. I take it that that means that it wouldn't go to be resolved at Cabinet or between Ministers directly, that the civil servants would try to resolve it first?

A. I think that's a reasonable interpretation of that, yeah.

Q. But would I be right in thinking that it probably formed the subject of some discussions between you and the Minister or between you and Mr. Loughrey which ultimately would have been conveyed to the Minister, or Mr. Fitzgerald, for that matter?

A. It could have done.

Q. Yes.

A. I can't throw any light on it, I just don't know, but I wouldn't rule it out.

Q. Is there a way of recording contributions a Minister makes to discussions like that? Is there somebody who records contributions a Minister makes to discussions like that?

A. No. There was a time when everything that was coming from a Minister would have been recorded. Practice has changed over time.

Q. Has it?

A. I mentioned before that there are management committee

meetings; some Ministers attend, some do not.

Somebody makes a report of the management committee.

It tends to be a very bare synopsis of what's said.

If a Minister says something decisive and critical to whatever agenda you are working on, you would note a file for example, "In a discussion with the Minister, he suggested that we should do X, Y and Z", that kind of thing would be noted. But general conversations that civil servants would have to Ministers that are not tending to any conclusion or of an updating nature or briefing a Minister for a meeting he might be having with somebody else would tend not nowadays to be minuted. 25 years ago they probably would.

Q. Do I take it therefore that if the Minister asked to see you, or taking any other senior civil servant, that neither his private secretary nor anyone else at the meeting would keep a note recording the exchanges between you?

A. His private secretary would normally not be in attendance anyway.

Q. I see.

A. Private secretaries manage the Minister's office and diaries and stuff like that, to have him in the right place at the right time and so on. As I say, if I would never go in to a Minister without a piece of paper and a biro, so that if something required to be

written down, I'd have the means of writing it down.

Q. A direction from the Minister

A. But I wouldn't make a note every time that I spoke with the Minister.

Q. Even in the course of a process like this, where there were sensitive issues and a premium on confidentiality, would you not think it would have been appropriate to record specifically dealings with the Minister?

A. I am not so sure.

Q. Even with the benefit of 20/20 hindsight?

A. Even then I am not so sure I mean, that's the way of doing business of 25 years ago. It has fallen out of use. I wouldn't be particularly critical, and I know you are not trying to be critical; you are trying to find out. All I can say is that if I made a note, it would be on file. And since you have gotten all the files, I presume there are no notes that I wrote and you didn't get, so there isn't a note. That I can't see in the report of the meeting that I am recorded as saying what Jimmy McMeel reports either, so I mean, I am not trying to be obstructive, but I just can't throw any further light on the subject.

Q. And is that current practice in all departments at the moment, in your experience anyway, that the Minister's opinions, the Minister's musings, as it were, are not recorded when he is dealing with civil servants or

when he is dealing with third parties in the presence of civil servants?

A. It depends on the circumstances case by case. I mean, there are more times I would speak with a Minister and not make a record than the times when I would make a record, and I'd say on a scale of three or four to one.

Q. We know that in this case, from Mr. Loughrey's statement, that he drew the importance of confidentiality to the attention of the Minister?

A. Mm-hmm.

Q. So we can take it that we understand from his statement that the Minister appreciated the importance of adhering, as far as possible, to the strictures contained in that confidentiality protocol?

A. That's what I understood from the Opening Statement. And I didn't read all the material, but I glanced through some of the statements; I think it confirms that, yeah.

Q. I think you agreed with me earlier that if that reference to the Minister had been made at the meeting, it was probably made by you or Mr. Towey, and you have mentioned that you can't recall having any discussion about these issues with the Minister. If it hadn't been you had the contact with the Minister, who else would have is likely to have that contact? Presumably Mr. Fitzgerald or Mr. Loughrey, is it?

A. I would say the only people who would be likely to have such a conversation with the Minister would be Misters Loughrey, Fitzgerald, Brennan, Towey, and possibly Mr. McMahon; but since Mr. McMahon wasn't at the meeting, that would have had to have been relayed by Mr. Dillon.

MR. HEALY: I don't think I am going to dispose of this in the next few minutes, Sir

A. The only thing I might draw your attention to, before I do, only because it became a cause celebre after the event, is the very first question in the summary of questions posed, which asks and this is a synopsis of a group of questions from different people whether applications for the GSM license, including any associated data in electronic form, will remain permanently confidential to the Department and any additional data sought during the course of evaluation of submissions.

That became a big media event after, so I just thought I'd draw attention to it.

CHAIRMAN: Well, I can take it up further at eleven o'clock tomorrow morning.

Thank you, Mr. Brennan.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
FRIDAY, 17TH JANUARY, 2003 AT 11AM.