

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 - 121

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 28TH

JANUARY, 2003 AT 11AM.

MR. HEALY: Today, Sir, I propose to deal with an aspect of the evidence on the evaluation project connected with Mr. Andersen's role in the inquiry being carried out by the Tribunal. Now, I am going to deal with one small matter before I do that, but then what I propose doing is having the registrar read into the record a report prepared by Mr. Andersen detailing his involvement in the process. This was a report which the Tribunal requested the Department to provide. It was paid for by the Department and provided to the Tribunal in January, 2002.

Now, ultimately, in view of the fact that Mr. Andersen has resiled from an agreement to give evidence to the Tribunal and has left the matter of his future attendance at the Tribunal in some doubt, a question may arise concerning what weight is to be attached to this document. But in the first instance, I think it should be read into the record, and questions concerning its weight can be dealt with at a later point.

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Before I do that, just one matter I want to get out of the way, Mr. Brennan; do you remember the last day we were discussing the approach to what's called "Other aspects," that is the risks, sensitivities and credibility factors and whether they

would be scored or not, and in particular whether they would be scored in the context of issues concerning financial capacity of a consortium or financial capacity or capability of an individual consortium member, and you said that you felt that the scoring of those matters was, as far as the evaluation model was concerned, an optional matter; do you remember that?

A. I do indeed.

Q. Well, I have had a look at the evaluation model again, and the documentation on it, and certainly I think you may be right in what you are saying in that. I'll just refer you to you needn't actually turn it up

A. Could I say that

Q. Maybe I'll just read this first so that you know what the state of play is. If I could just refer you to the evaluation report, Appendix 3, the evaluation model this is in Leaf 51, Book 46. It's also in Leaf 117 of Book 42.

And in describing the evaluation process, which I'll come to look at later on, Mr. Andersen says "Procedure for the qualitative evaluation process", and he says "Despite the 'hard' data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects, such as risk and the effect on the Irish economy, may also be included in the qualitative

evaluation which allow for a critical discussion of the realism behind the figures from the quantitative analysis." Then he goes on to discuss the matter in more detail.

Just so that you will appreciate, what you were saying, but were unable to put your finger, on does have some support in what Mr. Andersen was saying?

A. You will find it also has some support in the original tender by AMI. Arising from my evidence in December, the Tribunal wrote to me asking me to do some further research. I am I haven't completed all of my research yet, but I was finding the same kind of evidence that you are now citing.

Q. He does also mention it in the evaluation report, but that is after the event, and one might take a view of that; but there is no doubt that the evaluation model is something that he put together before the event, as it were. I am just clarifying that so that because we may need to refer to it again, you will be able to be certain that it is referred to in the evaluation model.

A. It's also relevant to say that in the matrix in the evaluation model, the items that are marked "Subtotal" are subtotals of what follows rather than what's above. There is only two items under "Other aspects", one of which is risk and the other of which is effects on the Irish economy. I believe there was a conscious

decision that effects on the Irish economy had no part of the descending order of priority in the selection criteria and so on.

Q. For a very specific reason?

A. So there was only one issue, which was the other risks.

Q. The effects on the Irish economy couldn't be taken into account for fear that it could fall foul of the EU regulations, and the suggestion that the evaluation process was carried out on a basis which was discriminatory, and that if somebody conferred benefits on the Irish economy, they would get the licence; and if somebody wasn't prepared to confer the same amount of benefits, they mightn't get the licence or mightn't get as high a score. That was ruled out because of the risk that that view could be taken; isn't that right?

A. I believe we were conscious of that from very early on in the process.

Q. Yes.

I think I'll now ask the Registrar to read Mr.

Andersen's memorandum on Andersen 'Management International's experience as the lead consultant in the GSM II tender in Ireland 1995, January 2002.

CHAIRMAN: It will inevitably take a while, Mr. Brennan, if you'd rather go back and sit. Whatever suits you.

A. Okay. Thank you.

REGISTRAR: "Preface.

"Confidentiality.

"The memorandum is an internal working paper for the Irish Tribunal of Inquiry (Payments to Messrs. Charles Haughey and Michael Lowry) (hereinafter the Tribunal) only. The memorandum should be considered confidential and it may not be communicated to any third party in any shape or form without Andersen Management International AS (hereinafter AMI) prior consent.

Purpose and scope of the memorandum:

"This memorandum has been prepared at the request of the Tribunal by AMI. This memorandum is made to supplement the prior general overview provided by AMI in the memorandum of July 20001, entitled 'Confidential memorandum on Andersen Management International's involvement in and some cornerstones of the GSM II tender in Ireland'.

"Irrespective of the fact that AMI's fees for the preparation of this memorandum are to be paid by the Department of Public Enterprise in Ireland, this memorandum is intended only for the Tribunal.

"The objective of this memorandum is to contribute to the Tribunal's overview and understanding of the events that took place in connection with the public tender of the second GSM licence in Ireland in 1995

(hereinafter the GSM II tender) as well as the procedures and methodology applied to the GSM II tender. Since the particular focus of the Tribunal with regard to the GSM II tender process is that of the circumstances concerning the evaluation of the winning applicant, i.e. Esat Digifone, this memorandum deals with specific aspects about Esat Digifone and their licence application, where such information was available to AMI and has been considered relevant.

"The basis for AMI's preparation of the memorandum is AMI's engagement in 1995 by the then Department of Transport, Energy and Communications (hereinafter the Department) as their lead adviser in connection with the execution of the GSM II tender. It is important to note that the GSM II tender has already been designed by the Department in conjunction with the other external advisers prior to the AMI's appointment.

AMI GSM II project files:

"The description of the selected events and dates relating to the GSM II tender as described in this memorandum are to a large degree based upon AMI's many GSM II project documents on file (many as electronic files and fewer as hard copy) and to a small degree on the memory of the AMI consultants. To a large degree, AMI's project files on the GSM II tender project consist of documents and correspondence prepared and

issued by AMI (electronic files) whereas only a small number of the documents have been generated by the Department or other third parties related to the GSM II tender project (hard copy files.) AMI's electronic archive for the project consist of approximately 280 documents, including the documents relating to the regulatory project (c.f. Section 2.3 below) that AMI carried out partly in parallel with GSM II project.

"Where references are made to dates of electronic documents, AMI is unable to confirm the exact date of such documents, as the date on which a document was issued cannot always be identified due to the use of auto-generated date fields, which leads the document to always and automatically generate and show the date on which the document is being viewed, e.g. during the research and printout of the AMI project files for this memorandum, these documents would show and print the current date that the document was viewed and printed (i.e. a date in December 2001.)

"It is the impression of AMI, however, that most of the dates of the documents are reliable."

CHAIRMAN: Sorry to interrupt, Ms. Burke, but it occurs to me as we go in the report proper, there is a considerable number of footnotes which I think both complicate and unduly protract the reading. And what I would propose is the document without the footnotes

be read, but any person will be at liberty to allude to or rely upon those footnotes and to assist in making them effectively part of the record; I would propose that our website should contain the entire documents, footnotes.

REGISTRAR: "AMI's consultancy contract with the Department:

"AMI's expertise.

"AMI has assisted Telecom regulators in numerous jurisdictions in the award of in excess of 120 mobile communications licences, the second GSM licence in Ireland being one of them. Prior to the contract with the Department, AMI had just assisted a number of similar EU countries with GSM tender qualifications in particular, including, but not limited to, Denmark, Norway and the Netherlands. The AMI team finalised its assignment in the Netherlands during March 1995, and the same core team commenced the assignment on behalf of the Department from April 1995.

"However, the Department retained approximately 25% fewer services/resources from AMI than the regulator in the Netherlands. For example, the Dutch regulator retained AMI to perform far more preparatory work, to develop a higher level of confidentiality during the course of the tender, to perform more supplementary analyses, and to assist with the conclusions of the licence negotiations.

"After the GSM II tender in Ireland, AMI assisted the ODTR with, for example, the following spectrum tenders: the third mobile licensing process, the two FWPMA tenders, the so-called Orange case in the High Court and the Supreme Court, the Broadnet FWPMA litigation in the High Court and the subsequent review of the FWPMA evaluation, the DCS 1800 Spectrum tender with Esat Digifone and Eircell, two FWA tenders and a tender on TETRA.

"An AMI team is currently assisting the ODTR with two 3G (UMTS) tenders, both of which are to be finished during the first half of 2002. However, it is not the same team as that which assisted the Department some seven years ago during the GSM II tender addressed in the memorandum.

"The contractual setup between the Department and AMI:

"AMI was engaged by the Department upon winning the Department's public tender for consulting services in relation to the GSM II tender.

"The Department's public tender for consultancy services was announced in the Official Journal of the European Community in late 1995. AMI responded to the announcement and contacted the Department upon which AMI received a formal invitation to submit a tender by letter of 2 March 1995 from Martin Brennan of the Department. Upon first submitting a prequalification document and upon being prequalified, AMI submitted a

final tender and quotation on the 16 March 1995 to the Department. AMI's tender was chosen and accepted by the Department in late March 1995, and AMI subsequently commenced work on the GSM II project in April 1995.

"The Department retained separate legal advice (the Attorney General) and, consequently, AMI did not provide any legal assistance to the Department.

"Despite the commencement of work by AMI on the GSM II tender project in April 1995, a formal and written contract between the Department and AMI was not signed until 9 June 1995 due to the negotiation of certain contractual issues in the meantime. The total contract fee was agreed to (to a maximum of) IRi;½297,450 exclusive of expenses. This professional fee was to be billed according to time spent, as payment for the scope of work defined in the contract, c.f. Clause 1 of the signed contract. Any work outside of the scope defined had, in effect, to be preapproved by the Department.

"However, after the signing of the contract, it was necessary to amend the contract with regard to the scope of work. The amended contract meant that the Department would be separately invoiced for any work completed by AMI which is clearly distinguishable from and/or ancillary to the work for which AMI originally tendered, i.e. work related to dealing with the

European Commission's involvement with the tender process. The contractual amendment was agreed on the 14th June 1995.

"Later during the process, it was necessary to once again make an amendment to the terms of the contract with the Department. This was as a result of work that was not envisaged by the Department: This included receipt of more applications than assumed or anticipated, complaints from the interested parties, the inadequate nature of the original tender documents, and the Department's delay in allocating personnel resources to the subevaluation groups.

There was less than perfect preparation by the Department prior to AMI's involvement in the tender process: This made it necessary to pose and evaluate applicant-specific written questions to the applicants in order to compare the applications on a fair basis.

It was also necessary to make substantial recalculations concerning certain applicants' information: This was because some of information given by the Department orally to some applicants did not conform with specifications given in the tender.

These further changes were agreed on the 14 September 1995 and resulted in the agreement of a total fixed fee of IRİ₺ 370,000 as requested by the Department.

This fixed fee approach was, of course, very different from the original tender and quotation from AMI (16

March 1995). As such, it was not a totally satisfactory solution to AMI, as this fixed fee left insufficient room for certain added value services which AMI would have prepared to have been in a position to provide, e.g. thoroughly satisfactory supplementary analyses, and for AMI's participation in the substantial licence negotiations with the nominated candidate.

"Scope of work according to contract:

"The Department had been doing preparatory work concerning a GSM competition (tender) since late 1995.

It was the understanding of AMI that the Department together with other external consultants often referred to by the Department as "Low budget consultants (hereinafter the consultants) had developed the design of the tender. The most important of these included the evaluation criteria for the competition and the so-called RFP document (hereinafter RFP), both of which we understand were settled in 1994 and early 1995. Furthermore, AMI was told by the Department that the evaluation criteria in paragraph 19 of the RFP were approved at governmental level.

"A formal decision in relation to the GSM II tender in Ireland was announced by Michael Lowry, the then Minister for Transport, Energy and Communications (hereinafter the Minister), on the 2 March 1995, on

which date a press release and the RFP, together with an information memorandum (i.e. the tender documents) were circulated.

"When AMI commenced the work in relation to the GSM II tender after having won the tender, the style of the tender, that of the beauty contest and the rules to be applied, including the evaluation criteria approved by the Government prior to the time when AMI commenced work on the GSM II tender in April 1995 were reported to AMI by the Chairman of the GSM II tender steering group.

"The evaluation criteria decided by the Department in co-operation with the consultants prior to AMI's involvement had been laid out as follows:

"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 herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

credibility of business plan and applicant's approach to market development;  
quality and viability of technical approach proposed and its compliance with the requirements set out herein;  
the approach to tariffing proposed by the

applicant, which must be competitive;  
the amount in excess of the minimum initial  
licence fee which the applicant is prepared to pay  
for the right to the licence (as later amended  
according to the Department's letter of the 14  
July 1995 to the potential parties and in  
accordance with the Department's agreement with  
the European Commission);  
timetable for achieving minimum coverage  
requirements and the extent to which they may be  
exceeded;  
the extent of the applicant's international  
roaming plan;  
the performance guarantee proposed by the  
applicant;  
efficiency of proposed use of frequency spectrum  
resources."

"Accordingly the GSM II tender design had been  
finalised by the time AMI commenced work, even though  
it was lagging in certain respects, such as, but not  
limited to, tender specifications and evaluation  
methodology. The tender as it was designed by the  
Department and the consultants did not comply with  
standard European practice at the time (as well as  
today) for GSM mobile tenders. This was because there  
was no predefined substantial minimum requirements  
which one would expect to see as a matter of course,

e.g. a requirement to show a solvency degree at minimum 20% (as was to be the case in later GSM tender in Ireland). Furthermore, the RFP did not institute a procedure concerning possible rejection of applications at this phase of the evaluation in case of non-fulfilment of measurable minimum requirements.

"AMI never had contact with the consultants, who had ended their work prior to the commencement of AMI's work in April 1995.

"Other parallel tasks for the Department:

"Apart from work relating to the GSM II tender, the Department also retained AMI to prepare a report on the regulatory regime in Ireland.

"On foot of AMI's tender proposal of the 16 March 1995 concerning the consultancy services related to the GSM II tender, the Department requested AMI to make a proposal concerning advice on the possible establishment of an independent regulator in Ireland.

AMI submitted such proposal on the 11 May 1995 to the Department, and the contract in relation to this work was agreed on the 12 July 1995.

"The work in relation to the regulatory report was initiated around June 1995 and finalised shortly after the 3 September 1995 by the issuance of the regulatory report entitled 'Towards world class? Agenda for regulatory actions'.

"The work was carried out partly by desk research,

partly by field research. As part of the field research, AMI conducted a questionnaire in the form of interviews. The interviews targeted Irish key industry experts identified to AMI by the Department. Among the persons identified by the Department and subsequently interviewed by AMI was Denis O'Brien, CEO of Esat. Not only Denis O'Brien but also some other Esat staff participated in the meeting which lasted approximately one hour. The meeting focused entirely on regulatory matters and did not deal with the GSM II tender issue.

"Project organisation:

"The Department had overall responsibility for the conduct of the competition, but the ultimate responsibility was naturally with the Minister. A steering group or project team, (hereinafter PTGSM) was established to conduct the tender process. The PTGSM comprised members from the then 3 telecommunications divisions of the Department (the technology division, the policy division, and a third division) and representatives from the Department of Finance. AMI consultants participated in some of the meetings from time to time, although AMI had no permanent members of this group. Martin Brennan, the Department, was the Chairman of the PTGSM and Fintan Towey acted as the secretary. It is AMI's impression that written minutes of meetings were taken for each

PTGSM meeting by the Department, but AMI has only one of these.

"Besides the PTGSM, specialised subevaluation working groups were also established temporarily to carry out evaluation of the applications, c.f. below in Section 8.2 about these subevaluation groups.

"The civil servants of the Department had control of the entire competition process, including contact with the (potential) applicants and the Minister. AMI did not meet the Minister at any stage before, during or after the process.

"The tasks and timing of the tender process.

"Major milestones of the tender process:

"The part of the GSM II tender process in which AMI was involved covers the period from April 1995 to November 1995; thereafter there was a short period in which AMI very briefly continued to provide services to the Department. These services comprised the following. First, one meeting of a preliminary nature, with the winning applicant, Esat Digifone, with regard to negotiation of licence terms. (We understand that there were other meetings between the Department and Esat Digifone on this issue but AMI was not involved). Secondly, advice to the Department from Copenhagen via telephone, on the Department's dealings with some of the disappointed applicants. Thirdly, one AMI consultant was asked to participate

in meetings in Dublin with disappointed applicants.

(AMI agreed to do so notwithstanding the fact that this, together with other work, was not remunerated by the Department as the project was by then out of budget).

"Below is a short summary of the central milestones and events of the tender process. For a fully detailed listing of events, reference is made to more narrative description of events provided below in Sections 5-11:

as documented earlier by reference to the press release of the Minister, the competition process was announced and opened by the Minister on the 2 March 1995, i.e. prior to the involvement of AMI, and in conjunction with this, the request for proposals (hereinafter RFP) and associated information memorandum for the tender were released. According to RFP, the closing date for the submission of applications of the 23rd June 1995.

12 interested parties (hereafter interested parties) purchased the tender documents.

a facility was provided in the competition process for interested parties to pose questions in writing in respect of the tender documentation.

According to the RFP, paragraph 24, interested parties could pose questions until 24 March 1995.

in response to these questions, the Department and Telecom Eireann (concerning technical matters of interconnection) each issued one information memorandum on 28 April 1995.

on 12 May 1995, major additions in the form of guidelines (hereinafter guidelines) to the RFP were circulated by the Department to the interested parties, including further points of clarification, guidance on assumptions for the preparation of applications, a number of mandatory tables requesting quantitative information in a specific form and on a particular basis, and an initial draft licence. The additions were played on the advice of AMI.

by letter of 28 April 1995 from the European Commissioner Karel van Miert to the Minister, and in the dialogue that ensued in May-July 1995 between the European Commission and the Department, the European Commission expressed serious reservations concerning the licence fee terms and conditions in the tender documents and their non-adherence to EC telecommunications legislation.

due to the ongoing dialogue with the European Commission, the original closing date of the 23rd June 1995 for the submission of applications was temporarily suspended by the letter of 16 June

1995 to all interested parties in order to allow any possible changes to be made to the terms and conditions of the tender competition upon the outcome of the negotiations with the European Commission.

the dialogue with the European Commission ended on 14 July 1995, and it resulted in certain amendments to tender documentation concerning the payment of licence fees by the winning GSM II applicant as well as the incumbent Irish GSM mobile operator, Eircell. These amendments were published and sent to interested parties by letter of 14 July 1995 which letter in consequence of the suspension of the tender informed the parties of a revised closing date being 4 August 1994.

on the closing date of the 4 August, the Department had received 6 applications plus a preliminary GSM business case description from Eircell, which was already in commercial operation from a GSM (1) system.

around mid-August 1995, it was determined by the PTGSM upon review of the applications that they should all be admitted to the evaluation.

prior to performing the evaluation, the Department based upon a cooperative effort with AMI issued some applicant-specific questions

to each applicant in order to clarify certain issues of various applications. The questions were sent by individual letter on 24 August 1995 to all applicants and the deadline for providing the answers to the questions was 4 September 1995.

an individual presentation meeting was held with each applicant at which the applicant was requested to clarify certain specified points in the application. The 6 meetings (i.e. one meeting with each applicant) were held from 11 to 14 September 1995.

in the period from August-October 1995, the quantitative and qualitative parts of the evaluation were carried out.

on 25 October 1995, the final evaluation report (hereinafter the evaluation report) with the PTGSM's recommendation of a winner of the tender was prepared and issued by AMI to the Department upon which the Minister should determine the applicant being recommended (i.e. Esat Digifone to be the winner, which decision was publicly announced in the evening of the 25 October 1995.

subsequent to the announcement on the 25 October of Esat Digifone as the winner of the licence, AMI was only to a very limited extent involved in the licensing negotiations with Esat Digifone and the issuance of rejection letters to other applicants

as well as dealings with some of the disappointed applicants wanting to discuss or challenge their rejection and the result of tender with the Department.

"4. Development of the tender documents.

"Development of the original tender documents released:

"On the 2 March 1995, the tender documents were released, c.f. the reference above in footnote 8.

"As already noted above, AMI was not in any way involved in the development of the RFP or the related information document. These were released on the 2 March 1995 when the tender process was opened and the tender documents released to the public. AMI was not appointed until April 1995.

"In the press announcement in relation to the opening on 2 March 1995, the Minister with regard to the policy consideration stated the following:

"I want to emphasise that this is not an auction where the biggest cheque will win the licence regardless"...

"My aim is to see real competition and a good deal for consumers"...

"The fee proposed must leave room ... for credible business to develop the market and provide effective competition for Eircell, choice of service and a good deal for consumers".

"The question and answer session with interested

parties:

"In accordance with paragraph 24 of the RFP, the questions and answers (Q and A) facility allowed interested parties who had purchased the tender documents to submit questions regarding the competition and for these to be answered by the Department. The deadline for the submission of questions was 24 March 1995.

"9 parties of the 12 having purchased the tender documents submitted questions prior to the deadline, and a total of 230 sets of questions were posed, of which several sets contained more than one question.

"In accordance with the procedures stated in the RFP, paragraph 24, the Department issued an information memorandum on 28 April 1995 in response to the questions asked by the interested parties.

"AMI assisted the Department in the drafting of some of the answers provided in the information memorandum. Among other things, AMI issued internal working papers to the Department to be used in connection with their response to questions concerning e.g. fees and selection criteria. However, as is seen from the content of the final information memorandum, some of AMI's draft responses were only implemented in part or not at all by the Department.

"In conjunction with the Department's release of the information memorandum and in compliance with the RFP,

paragraph 13, Telecom Eireann similarly issued an information memorandum providing a summary of the matters that they had discussed with various interested parties up until 14 April 1995 relating to the possible interconnection with Telecom Eireann's fixed network.

"The purpose of both memoranda was to allow all interested parties to prepare their applications on the basis of the exact same available information.

The information in the memoranda related mainly to issues of regulatory nature.

"The guidelines clarifying the RFP:

"Certain aspects of the RFP were drafted in terms that did not necessarily guarantee that applicants would provide the required information in a uniform format. If applicants did not provide information in a uniform format, then during the evaluation process it becomes very difficult to compare applications on a fair, i.e. like for like basis. While AMI was not permitted to change the substance of the RFP due to the RFP having been approved by the Government, AMI made certain specifications to the RFP to clarify and seek information in a particular format from the interested parties.

"Hence, on the 12 May 1995, substantial additional clarifications to the RFP were circulated to the interested parties having purchased the original

tender documentation. The clarifications were presented in the form of guidelines, a document which also included further points of specification, guidance on assumptions for the preparation of applications, a number of mandatory tables requesting quantitative information in a specific form and on a particular basis, and an initial draft licence.

"These clarifications were made on the advice of AMI in order to facilitate as far as possible comparative evaluations on a like for like basis.

"In identifying the amendments necessary, AMI prepared several documents and memoranda concerning the various issues considered, e.g. several drafts of and comments to the draft licence to be included as part of the tender documents, memoranda about the composition of the application and several drafts on the quantitative tables enclosed to the guidelines and to be filled out and included in the applications.

"However, notwithstanding these additions, it was not possible to make the RFP and the attached non-formal information memorandum comply with standard European practice of the time. Several aspects of relevance to the achievement of a successful competition, bearing in mind the stated policy considerations of the Department, c.f. Section 5.1, had not been considered in the original tender documentation released on the 2 March 1995.

"A major aspect which was not considered sufficiently in the original tender documentation was that of interconnection. One of the interested parties (a consortium in which Vodafone participated) claimed that the regulatory approach to the interconnection regime as proposed by Eircom and the Department was not adequate in order to sustain and maintain a GSM II business case in Ireland. As a result of this, the Department, upon the advice of AMI, decided to circulate supplementary information in excess of the guidelines specifically on the subject of interconnection prior to the closing date, stating that the indications in the RFP on this issue were to be a matter for commercial negotiation within 6 months of commercial operations subject to arbitration by the regulator. Furthermore, AMI carried out some benchmark studies in order to demonstrate the relative attractiveness of the interconnection charges stipulated by Eircom/the Department.

"Involvement of the EU Commission:

"The negotiations with the EU Commission:

"By letter of 28 April 1995 from Commissioner Karel van Miert to the Minister, the European Commission expressed serious reservations concerning the inclusion in the evaluation criteria of an auction element in relation to the licence fee for the second GSM operator without the imposition of any fee on

Eircell or compensatory means of measurements. The Commissioner was of the view that the evaluation criteria comprising the amount of licence fee that an applicant offers, (c.f. paragraph 4 of the RFP) discriminated against the winning applicant compared to the incumbent GSM 1 operator, Eircell, who had not had to pay any licence fee for its GSM 1 licence.

"It subsequently became clear through contact between the Department and the Commission that infringement proceedings would, as in the Italian public tender of the GSM licences, be initiated against Ireland if the licence fee discriminated against the second GSM operator relative to Eircell.

"During the period of negotiations with the European Commission, AMI prepared at the request of the Department two memoranda on various issues concerning the arguments and demands put forward by the European Commission.

"The first memorandum was issued on the 30 May 1995 and named "Memorandum concerning the GSM II tender in Ireland and the approach of the Commission," and in Section 4 of the memorandum, AMI stated to the Department that "It is in the Irish interest to come to a common understanding with the Commission before the evaluation commences, alternatively to postpone the expire date." The reason for this recommendation by AMI was based on experience from other Member

States that if a common understanding was not reached prior to the evaluation, the Department would run the risk of being forced by the Commission to refund the licence fee to the GSM II licensee at a later point in time, as well as being sued by the disappointed applicants wanting to challenge the evaluation criteria.

"The second memorandum by AMI was issued to the Department on 20 June 1995 for the attention of Martin Brennan and Fintan Towey, and it was simply named 'Licence fee payment'. The memorandum provided an analysis of international best practice in the area of fee payment for cellular mobile licences and compared this with the proposed solution in the Irish GSM tender (i.e. the proposal that was later implemented as an amendment to the RFP via letter of 14 July 1995 from the Department to the prospective applicants).

"As part of AMI's services, one AMI consultant joined representatives of the Department as well as the Department of Finance in a meeting in Brussels with civil servants from Commissioner van Miert's Directorate General around the beginning of June 1995.

"A revised licence fee requirement was agreed with the Commission whereby the second GSM operator would volunteer a licence fee in the range of IRġ½5 million to IRġ½15 million and Eircell would pay a fee of IRġ½10 million. This approach was endorsed by Commissioner

van Miert on the 14 July 1995 in a letter to the Minister (i.e. in effect a letter of 'negative clearance' from the European Commission).

"Temporary suspension of public tender closing date:

"Due to what transpired during the negotiations with the European Commission prior to the expiration of the original closing date of the 23 June 1995 the Office of the Attorney General advised against proceeding with the tender in its then form (i.e. as set out in the RFP) due to the risk of legal action by the Commission. Instead, the Office of the Attorney General advised that agreement first be reached with the European Commission, e.g. by the licence fee criterion being changed to meet the reservations with regard to the issue of possible discrimination put forward by the European Commission.

"Accordingly, when it was obvious that the discussions with the Commission would not be finalised ahead of the original closing date of 23 June 1995, the process was suspended by the Department's letter of 1 June 1995 to all interested parties.

"The amendment of the licence fee criterion:

"The amendment of the licence fee criterion stated in the RFP was notified by letter of 14 July 1995 to all interested parties. All addressees of the letter had to confirm their receipt of the letter by signing the letter and forwarding it by fax to the Department.

"Extension of the closing date for licence

applications:

"The Department reopened the competition process by the said letter of 14 July 1995 (c.f. footnote 23) to the interested parties, and in that same letter, the Department informed the parties that the closing date for submission of the applications had been postponed until 4 August 1995.

"In consequence, the initial target date of 31 October 1995 as in the intended date of the announcement of the winner of the GSM II licence competition was postponed to the end of November 1995.

"Development of the evaluation model:

"About the evaluation model in general:

"It was necessary to develop a model to be used in the evaluation of the applications for the GSM II licence in order to ensure that all applicants were evaluated on equal terms and according to the same parameters.

The purpose of the evaluation model is to enable the evaluators to apply in practical detail the evaluation criteria set out in relatively broad terms in the RFP.

Accordingly, in designing an evaluation model the practice is to set out in detail dimensions and indicators into which the evaluation criteria provided in the RFP will be divided, and how these dimensions and indicators are to be evaluated/measured and compared among the applicants. Dimensions and

indicators are, in effect, supplements of the broad evaluation criteria, designed to assist the evaluators to analyse and evaluate the applications in a methodical and uniform manner. The evaluation model, in effect, sets out how the evaluation process is intended to be carried out.

"The evaluation model was entirely confidential to all but the relevant persons in the Department (i.e. the Minister, the PTGSM members, and the members of the subevaluation groups, c.f. below in Section 8.2 and the AMI personnel involved in the project. The only information concerning the evaluation model available to the applicants was the evaluation criteria listed in descending order of priority in paragraph 19 of the RFP. In this regard reference is also made to the Department's information memorandum of 28 April 1995 where the Department states that "... a model to be used to assist the evaluation of tenders for the second GSM licence is being developed by the Department in conjunction with its consultants. Criteria will be evaluated in the order of priority detailed in paragraph 19 of the tender document (RFP). The Department does not intend to publish further details of this model".

"The final evaluation model was described in Appendix 3 to the evaluation report of the 25 October 1995, with this evaluation model having been settled and

finalised in advance of the closing date of 4 August 1995.

"Without setting out the evaluation model in all its detail, the processing of the applications in the GSM II tender may generally be described as follows, with the advancement to Step 2 in the process being conditional upon the application's fulfilment of the requirements listed in Step 1:

Step 1: The applications were to be reviewed in order to determine if they fulfilled the measurable (quantifiable minimum requirement defined in the RFP)

Step 2: Clarification of the application content via applicant-specific written questions as well as an individual presentation and questioning meeting (both general and applicant-specific questions) with each of the six applicants.

Step 3: The quantitative and qualitative evaluation procedure as set out in the evaluation model.

"Strictly speaking, only steps 2 and 3 make up the evaluation, as the quantitative and qualitative evaluation model is applied to the applications fulfilling certain measurable minimum requirements.

"The development of the evaluation model:

"Since no evaluation model had been prepared by the Department and their consultants at the same time as the development of the RFP (and this would be entirely

normal in AMI's experience), AMI started to develop a draft evaluation model immediately in conjunction with the development of the guidelines to the original RFP.

It is important from the outset of the design of a tender and the development of a RFP to be careful to fix the evaluation criteria listed in the RFP in a way so as to ensure that the evaluation criteria are measurable and operable, and that all applicants will be evaluated equitably having regard to the chosen evaluation criteria.

"Accordingly, the work of the evaluation model was initiated in April 1995 and the definition of the model was settled prior to the original closing date of 23 June 1995. It was subsequently slightly amended prior to the postponed closing date of 4 August 1995 due to the requirement of the European Commission concerning the payment of licence fees.

"The evaluation model applied the so-called best application method (i.e. a beauty contest) where the "Best" application should be nominated as the winner.

"Best" was to be measured against the evaluation criteria outlined in paragraph 19 of the RFP.

"More specifically, the 8 evaluation criteria listed in paragraph 19 of the RFP were broken down into 4 so-called aspects (i.e. marketing aspects, technical aspects, management aspects and financial aspects).

Each aspect was then broken down into dimensions, and

each dimension was subsequently broken down into indicators, c.f. the overview provided in the table shown as Section 3.3 of the Appendix 3 to the evaluation report.

"The evaluation model consisted of both quantitative evaluation procedures and qualitative evaluation procedures, and AMI was contacted by the Department prior to the drafting of the guidelines for the evaluation model with instructions that the Department of Finance required the model to include a quantitative element.

"The 8 evaluation criteria/the 4 aspects form a common denominator in both the quantitative part of the evaluation and the qualitative part of the evaluation.

In addition to the 8 evaluation criteria prescribed/the 4 aspects defined, the qualitative evaluation should also include an evaluation of the aspect of risks concerning the financial and technical capability of each applicant, i.e. the sensitivities of the business cases in relation to the evaluation criteria outlined in paragraph 19 of the RFP.

"For the evaluation procedures, a weighting factor was assigned to the evaluation criteria/the dimension according to the descending record of importance assigned to the criterion (with a total of 100 for the total weighting of all criteria/dimensions). However, when the tender process was reopened after the

temporary suspension due to the dispute with the European Commission, two of the weightings were changed. The changes reflected the fact that the licence fee bid had been capped and therefore deserved a lower weighting and that tariffs were increased.

These changes in weightings were not notified to the interested parties, as they did not alter the descending order of priority of the announced evaluation criteria in paragraph 19 of the RFP.

"Finally, for the qualitative evaluation, a scoring formula was devised for all the selected indicators, with the actual score for each indicator being converted into a value between 5 and 1 (both included), 5 being the best score.

"The qualitative procedure was, of course, the fundamental part of the evaluation. It would not be possible or desirable to decide applications according to a quantitative evaluation alone. The qualitative evaluation covers many practical and technical matters, but also the more "Intangible" information (e.g. as to marketing) and commitments in the applications (e.g. performance guarantees), so the qualitative evaluation ensures a holistic evaluation, and in AMI's wide experience of these matters, this is in accordance with best international practice. Also the inclusion of issues such as risk and credibility of an application in the qualitative evaluation should

serve as a crosscheck of the realism of the figures and results from the quantitative evaluation.

"The qualitative evaluation process was to take place by discussion based upon each evaluator's review of the application in question and where necessary in-depth supplementary analyses. First, marks would be given to each dimension with the addition if needed of further indicators, then marks would be granted aspect by aspect, and finally, a total mark would be awarded for each application as a whole. In the qualitative evaluation, the marks were to be given according to a 5-point scale (A through E, with A being the best mark). An average should be made upon consensus among the evaluators. During the qualitative evaluation, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation as were used to define other indicators 'in order to make fair comparisons between the applications'.

"In accordance with the evaluation model, the quantitative evaluation was to be conducted in order to score the applications, and that scoring, together with the result of the "number-crunching" performed, should form the basis for the eligible applicant application presentation meeting c.f. section 8.5 below, and the qualitative evaluation. Conversely, when the bulk of the qualitative evaluation had been

carried out, this evaluation result was to form the basis for a recalculation of the scoring applied initially under the quantitative evaluation if mistakes, wrong information or the like could be documented (c.f. e.g. that the presentation meetings and the clarifications provided there by applicants were not considered and included in the quantitative scoring).

"In fact as described below in Section 8 no separate evaluation or ranking was made by the evaluator/PTGSM until the qualitative evaluation was complete, since it turned out during the course of the actual evaluation that only a few of the intended quantitative indicators and dimensions were quantifiably measurable or operable.

"Evaluation of applications:

"Number of applications:

"On the closing date of 4 August 1995, the Department received 6 applications plus a preliminary GSM business case from Eircell, which was already in commercial operation with a GSM 1 system.

"An 'application' was requested from Eircell for comparative purposes. Subsequently, the Department and Eircell agreed that the business case description submitted first by Eircell was insufficient to meet the needs of the Department, and as a result, Eircell submitted, on 11 August 1995, a more detailed business

case in accordance with the mandatory tables included in the tender documentation and which the other applicants had completed.

"Since this 'application' of Eircell was not in fact an application in the sense of applying for an award of a licence, it was not subjected to a full comparative evaluation. However, the GSM business case information provided by Eircell was used as a valuable reference point and served for comparative purposes, where considered relevant.

"The evaluation organisation and procedure in general:

"In order to frame the evaluation work, the PTGSM completed a number of activities prior to the closing date, including, but not limited to the following:

agreement of division of responsibilities, as a result of which it was clear that AMI was to play a significant role in the evaluation.

adoption of an evaluation model as to how a combined quantitative and qualitative evaluation should be performed c.f. Section 7 above.

adoption of detailed work programmes in order to ensure timely deliveries.

"In practice, the PTGSM was divided into 10 evaluation sub-groups that each evaluated different aspects (i.e. evaluation criteria/dimensions/indicators) of the applications. For example, one sub-group would evaluate financial aspects, whereas another sub-group

would evaluate the technical aspects.

"Each sub-group comprised members from the Department and consultants from AMI. In addition, the Department of Finance participated in the sub-groups on financial key figures and performance guarantees. The sub-groups were staffed in such a way that they comprised different members of the PTGSM (Department officials and AMI staff) with specific expertise in relation to the subjects to be evaluated.

"The 10 sub-groups each dealt with one of the issues (i.e. dimensions) mentioned as part of the 8 evaluation criteria outlined in paragraph 19 of the RFP, namely:

market development

coverage

tariffs

international roaming plans

radio network architecture

network capacity

frequency efficiency

performance guarantees

financial key figures

experience.

"About one third of the sub-group evaluation meetings took place in Copenhagen.

"Fulfilment of the measurable minimum requirements:

"All of the GSM II applications received were admitted

to the evaluation as none of the applications had such substantial deviations from the measurable/quantifiable minimum requirements of the RFP such that they should be rejected.

"The measurable/quantifiable minimum requirements of the RFP were identified to be:

a maximum of 350 pages, excluding appendices for the entire applications.

a maximum of 25 pages for the executive summary of the application.

a statement concerning the licence fee payment (c.f. the minimum licence fee of IRi½5 million stated in paragraph 4 of the RFP).

a minimum coverage of 90% of the population within four years of issue of the licence, c.f. the RFP, Paragraph 7.

validity statement concerning the application (i.e. 180 days).

"Esat Digifone complied with all the minimum requirements identified, whereas Eurofone did not.

However, Eurofone was admitted to the evaluation, as the deviations from the minimum requirements were deemed to be non-substantial and thus not reason for rejection of the application.

"Written clarifications:

"With a view to making comparative evaluations, it appeared to the PTGSM at an early stage in the

evaluation that some of the applications contained insufficient information. In accordance with paragraph 16 in the RFP, it was thus decided to pose a number of tailor-made written questions to the applicants and these questions were forwarded to the applicants on 24 August 1995:

"The answers received on the 4 September 1995 resulted in valuable improvements regarding the ability to compare the applications on an equal basis.

"The presentation meetings:

"An invitation was issued on the 5 September 1995 to each of the 6 applicants to attend a presentation meeting with the PTGSM. The invitation included an agenda for the presentation and a number of questions for response. Each applicant was dealt with on the same basis. One hour was reserved for a presentation of the business case behind the application, and another hour was reserved for the applicant to answer general questions posed to all applicants by the PTGSM in the same way, and yet a third hour was reserved for the PTGSM to pose applicant-specific questions to the individual applicants. The presentation meetings were held as 6 separate meetings from 11 to 14 September 1995.

"The applicants were not allowed to improve their application during the presentation meetings. The purpose of the meetings was rather for the evaluators

to gain further impressions with regard to the strengths or weaknesses of the applicants and to seek clarification of certain issues.

"The evaluation process:

"A large part of the quantifiable side of the applications was compiled prior to the posting of the written questions and the presentation meetings. It was put into graphics by each evaluation sub-group in relation to the dimension(s) and aspects for which the sub-group was responsible. The material thus produced served as part of the basis for the applicant-specific written questions, the presentation meeting with each applicant and the further evaluation. This material was subsequently adjusted if the clarifications provided by the applicants in their written answers and oral presentations so required.

"Specifically concerning Esat Digifone's application, there were some calculation problems, albeit of an insubstantial nature, which required the evaluators of the financial aspect were required to perform some minor adjustment to the way the financial years had been presented by the applicant (i.e. Esat Digifone used 1995-2009 as the planning period, whereas other applicants used 1996-2010). However, other applicants also had some substantial "technical" deviations in their applications such as e.g. the lack of inclusion of their business plan of reinvesting after 10 years.

"The PTGSM decided that all the results of the evaluation should be presented in one comprehensive report such that the results of the evaluation (both the quantitative as well as the qualitative evaluation techniques) were presented in an integrated fashion. In conjunction herewith, it was furthermore decided prior to the closing date that the qualitative evaluation should be the decisive and prioritised part of the evaluation. Furthermore, it became clear during the initial phase of the evaluation that 14 of the indicators identified in the evaluation model memorandum were either impossible or difficult to score as part of the quantitative evaluation process laid out in the evaluation model. Due to this meeting, the PTGSM decided "... that the foundation for a separate quantitative evaluation had withered away...". In order to illustrate the background to this, it was impossible to score quantitatively because of lack of information (concerning e.g. agreements on international roaming), meaningless scoring when the renormalisation factor was processed (e.g. licence fee payment), or because of fundamentally incomparable quantitative information (c.f. blocking and drop-out rates and tariffs).

"The PTGSM was in dialogue with the applicants by means of written communication in order to be able to process the remaining quantitative indicators further,

but it was impossible to obtain information to allow a fair comparison of the applications. On the one hand, some of the information appeared to be unrealistic or overly optimistic information in some cases (e.g. blocking and drop-out rates). On the other hand, applicants could not be allowed to improve their applications.

"In order to speed up the work, AMI had set up a separate number-crunching team, who, without forming part of core evaluation team, processed all quantifications. This meant that this sub team worked without having read the applications and without having familiarised themselves with, for example, the reservations, non-binding nature, or preconditions behind the quantitative figures forwarded by each applicant. Notwithstanding the fact that a considerable amount of their work was useful, some quantifications, which later appeared to comprise lack of fair comparability, were not used in the final evaluation.

"Consequently, it was decided by the PTGSM to perform the evaluation as an "Integrated holistic evaluation... One is that quantification appears as tables, graphics, figures etc. Another is that all clearly quantifiable indicators have been taken into consideration and have been scored..." and accordingly "... all the indicators defined for

quantification (in the evaluation model memorandum) have been taken into consideration and in compliance with the evaluation memorandum, all the eligible indicators have been taken into consideration in the holistic evaluation".

"Thus the quantitative evaluation was limited to 'regard' quantitative commitment in relation to critical indicators associated with the selection criteria prescribed in the tender document" i.e. paragraph 19 of the RFP, and non-quantifiable considerations such as market research, planning, management preparedness, etc. did not form part of the actual quantitative evaluation. In conjunction with the necessary limitation of the indicators under the quantitative evaluation, the qualitative evaluation was expanded in comparison with the 14 indicators identified according to the evaluation model memorandum, so that the total number of indicators in the evaluation ended being 56 indicators, taking account of critical but non-quantifiable aspects of the application, such as for example, performance guarantees, cell planning, market research, understanding of roaming, customer care etc.

"As provided for in the evaluation model, the evaluation report states with regard to this procedure, 'As the memorandum on the evaluation had not been changed, it was checked (page 1, indents 4

and 5, and pages 10-11, indents 5, 6, 7 and 8 (in the evaluation model memorandum) and this (the modifications to the evaluation model) was also consistent with the memorandum' c.f. e.g. with regard to indent 5 according to which the 14 indicators defined to be used during the qualitative evaluation could be supplemented with further indicators, if the already defined indicators were not sufficiently representative of the dimensions to be evaluated.

"Concerning the techniques applied in order to reach a decision on the evaluation of the indicators under the holistic evaluation approach adopted, these could be summarised as 'assessments by consensus among the evaluations, elaborate evaluation analysis by means of qualitative and quantitative methods, award of marks (rather the scoring by points assuming an interval scaling) and averaging of marks by consensus'.

"During the evaluation 'some degree of implicit weighting of the indicators' took place and the 'result in each case was arrived at through a process of discussion and consensus within each sub-group'.

Furthermore, the issues of credibility, risks and sensitivities of each application were taken into account, even though these issues were not directly awarded marks, because the prior evaluation based solely on the identified indicators receiving marks led to the same result and ranking as was the

result of the evaluation of the applications with

regard to the issues of risks and sensitivities:

"... it has not been necessary to score the so-called "Other aspects" contained as an opinion in the agreed evaluation model... since it has been concluded that the general credibility of the applications is equal to the ranking of the applications. As such, it has been assumed that the risks identified can be handled satisfactorily during the licence negotiations."

"The evaluation report and the final evaluation result:

"The purpose of the evaluation report was to convey the findings and the recommendations of the evaluation by the PTGSM and the evaluators.

"An initial draft report was discussed by the PTGSM on 9 October 1995. The incorporation of comments on the initial and subsequent final draft by members of the team in relation to the presentation of the results of the evaluation process culminated in a final evaluation report. This was finished on schedule and some five weeks before the Minister had stated that he would announce the winner, c.f. that the instruction from the Department to AMI with regard to the deadlines had been that '... the final evaluation report taking into account the views of the GSM Project Group shall be submitted to the Department by AMI by 25 October'.

"The overall evaluation and final marking of the applications led to the conclusions that three candidates could be nominated for the award of the licence in descending order of priority, with certain reservations with regard to each of the applicants.

The three applicants were in order of priority: Esat Digifone, Persona, and Irish Mobicall.

"The reservations with regard to the highest ranking applicant, i.e. Esat Digifone (referred to as A5), related to financial issues, c.f. e.g. the following comments:

the financial plans, however, indicate some weaknesses against the background of market leader ambitions, in particular with a degree of solvency below 0% during some of the decisive initial years (c.f. Section 3.2 of the evaluation report)

"A5's maybe weakest point is not related to the application as such but the applicant behind the application, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst-case situation turn out to be critical, in particular concerning matters related to solvency." (C.f. Section 5 of the evaluation report).

"If the consortium behind A5 (i.e. Esat Digifone

shareholders) cannot satisfactorily cover the risks identified (but not scored) it is recommended to consider entering into licence negotiations with A3 (i.e. Persona) "(C.f. Section 7.2 of the evaluation report).

"The three quotations stated all concern the issue of Esat Digifone's financial capability.

"Despite the apprehension as to some of the financial conditions of Esat Digifone as the applicant, the evaluators chose to keep the ranking of Esat Digifone's application as the best application according to the evaluation criteria in descending order of priority because, as was stated in the evaluation report, Section 5:

"The evaluators have concluded, having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, that the project is fundamentally robust and, after a licence has been awarded, an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that, subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortia member should not have a negative impact on the ranking of the applications. It is important,

nevertheless, to draw attention to the need to deal with this factor where relevant in the context of licence negotiations."

"The evaluation report's finalisation on the 25 October 1995 led to the announcement of the winner by the Minister the same evening. The decision of the winner of the GSM II licence was made ahead of schedule. However, the Minister chose to make the decision public immediately upon making the decision.

AMI does not know the reason for the swift announcement prior to the estimated time of "End of November". Based upon AMI's experience it is, however, in general best to quickly announce the decision of who the winner is once the Minister has made the decision, in order to avoid unintended leakage and speculation c.f. that the decision is often crucial to the involved applicants of which many are publicly listed companies.

"It should be noted that up until the issuance of final evaluation report, there was some disagreement among the members of the PTGSM as to whether the evaluation could be viewed as final and a final evaluation report issued. In the opinion of AMI, the evaluation ought to and would under 'normal' circumstances have included some further analyses and elaboration of the key documents presented, but due to the budget constraints, the Department did not want a

more detailed and thorough evaluation.

"Licence negotiations with the winning applicant:

"AMI's participation in the licensing negotiations:

"The work after the evaluation i.e. the licence negotiations in particular, did not follow the projected time schedule. During the last part of the project, the provision of AMI's services exceeded the maximum fixed fee arrangement that AMI reluctantly had accepted upon the Department's request c.f. Section 2.1 above, and accordingly, AMI limited its work in agreement with the Department.

"AMI's involvement in the licensing negotiations were thus limited to the following:

preparation of 'note on the incorporation of information from the A5 application into the final licence'.

participation by Michael Moesgaard Andersen and Tage M. Iverson in the first licence negotiations meeting with Esat Digifone on 9 November 1995.

"Had AMI participated in the further licence negotiations meetings, AMI would have put emphasis towards ensuring that Esat Digifone was tied through licence conditions to the favourable offerings made in their application. In addition, AMI believed it to be important that the financial questions with regard to Esat Digifone emphasised in the evaluation report were satisfactorily resolved, c.f. primarily Sections 5 and

7.2 of the evaluation report. However, the participation of AMI at this stage was not requested by the Department.

"Concerning the issue of licence negotiations, AMI is also in possession of a copy of a letter of the 13 November 1995 from Martin Brennan, the Department, to Denis O'Brien, Esat Digifone. In the letter Martin Brennan, among other things, refers to his expressions at a licence negotiations meeting held the day prior on 12 November 1995 and points out that "The GSM licence documentation will necessarily contain specific conditions with regard to your financing arrangements for this project and in relation to effective control of the future licensee, with particular reference to possible decision making structures, voting rights etc."

"Other tasks by AMI after the evaluation:

"Rejection letters:

"Subsequent to the announcement of the winner of the public tender, rejection letters were to be sent to the 5 applicants that did not win the licence for tender.

"AMI had as part of its services under the evaluation provided a draft rejection letter for each unsuccessful applicant to be sent out by the Department immediately upon the announcement of the winner together with a short memo about how to handle

the external communications upon the announcement of the winner.

"The Department chose, however, not to use AMI's approach of immediate rejection letters nor the content of AMI's draft rejection letter. AMI did review the Department's own draft rejection letter drafted much later in April 1996 and we forwarded our comments and concerns by fax letter of 12 April 1996.

"Subsequent dealings with disappointed applicants:

"Due to budget constraints of the Department, AMI was not involved to any significant extent with regard to the interaction and communications with the disappointed applicants requesting further information on the reasoning behind the evaluation result.

"AMI's limited participation in the dealings with the disappointed applicants was:

to give advice to the Department with regard to general questions raised by the disappointed applicants and institutions representing disappointed applicants such as e.g. the US Embassy in Dublin. AMI's involvement in this respect was very limited and only took place by way of telephone conversations with the Department. AMI did not have direct communications with any of the applicants.

to provide comments on draft letters from the Department to the rejected applicants as well as

commenting upon the Department's proposed meeting with each rejected applicant. AMI disagreed with the approaches chosen by the Department in this regard.

participation in one meeting with each of the disappointed applicants (i.e. Mobicall, Cellstar, Persona, ICT and Eurofone) during the period of 14 and 15 May 1996, at which meetings AMI provided only limited input.

provision of very limited oral advice with regard to a formal complaint filed with the EU Commission by Persona, being one of the rejected applicants.

"The security measures of the tender process:

"Generally speaking, the security precautions on the part of the Department were below the level of security that AMI has experienced with regard to prior tender processes to which AMI had provided its assistance to national regulatory authorities in other jurisdictions. One example is that it appeared to be fairly easy for interested parties to obtain information from the Department at least during the initial stages.

"Another example is that AMI was informed by the Department that a representative from Esat Digifone was "Found" in the meeting room where the applicant presentation meeting with each applicant took place at a time when he was not supposed to be there. We

understand that the man found was from Esat Digifone and he was found by civil servants from the Department, or similar. AMI consultants were not present but heard about this abnormal event, which caused AMI great concern. Therefore, AMI requested the PTGSM Chairman to write a letter to Esat Digifone solely on this particular matter. However, AMI does not know whether such a letter was sent.

"On the part of AMI, AMI continually stressed the confidentiality of the tender process. For example, concerning the evaluation document (i.e. the evaluation model), the first draft of this document was not presented by AMI to the PTGSM until its confidential nature had been emphasised, c.f. the minutes of meetings for the PTGSM meeting of 18 May 1995 according to which it was also decided to only leave three of the AMI copies of the draft evaluation model with three named persons with the Department, and to apply a "Lock and key security" at all times.

"AMI's awareness with regard to the sensitivity of the evaluation model document can also be seen from a fax from AMI to Martin Brennan, the Department, in which AMI suggests "... hand bring in the document for the scheduled meeting..." And after the discussion of the 'almost finished fully-fledged description of the quantitative and qualitative evaluation model' to '... collect all editions (except maybe for one edition

kept locked in your proprietary "GSM tender" cupboard). If you want an "Open" process without extraordinary confidentiality precautions, we would like to have instructions in writing, as we are then, jointly, increasing the risks of intended or unintended leakage.'

"AMI's overall assessment of the GSM II tender.

"First of all it should be noted that AMI's work in relation to the project was carried out in accordance with the tasks listed by AMI in the original proposal to the Department, which proposal was incorporated as the contractual terms in the consultancy contract between the Department and the AMI.

"In general, and based upon the information that then was and today is available to AMI, it is the opinion of AMI that for the part of the tender process that AMI was involved in, the process was in the main carried out in a professional and correct manner. This is, of course, subject to the reservations as to the security expressed in Section 11 of this document. This is also the opinion of AMI, that Esat Digifone objectively and after taking into consideration the issues of criticism mentioned below handed in the best application as against the other applicants according to the evaluation criteria and their descending order of priority. In AMI's opinion, the evaluation result nominating Esat

Digifone as the winner thus was and is the right result.

"There are, however, some issues in relation to the process prior to AMI's involvement as well as issues on the part of the Department, that based upon AMI's experience as consultant in other jurisdictions could give rise to some concern or grounds for criticisms.

Among these issues are the following:

"(i). the evaluation criteria listed in paragraph 19 of the RFP are not all suited to form the basis for an equitable comparison as they are too broad and vague and thus, to some extent, non-operable.)

"(ii). Part of the reason for some of the evaluation criteria being ill suited to form the basis for a comparative evaluation to be, that the Department and the consultants that had developed the RFP did not simultaneously to the RFP develop an evaluation model document. Had an evaluation model document been prepared in conjunction with the development of RFP, it is possible that some of the criteria listed in paragraph 19 of the RFP would have been modified or excluded prior to the release of the final RFP, as the criteria would have shown to be difficult to measure and compare on an equal basis, and thus be ill suited to be part of the basis of a comparative evaluation.

"(iii). AMI understands that the Department informed orally certain applicants that they could deviate in

their application from some of the tender specifications given. This which meant that the applications proved very difficult or impossible to compare on a qualitative basis with regard to the parts of the evaluation that were to be based upon the information provided in those parts of the applications.

"(iv). The RFP did not prescribe what the procedures and the consequences should be in case one of the minimum requirements in the RFP is not fulfilled, i.e. the RFP does not specify which minimum requirements may be fulfilled via a subsequent correction by the applicant within a certain deadline, and which minimum requirements will automatically lead to exclusion of the application in case such a requirement was not met in the original application as filed and without an option to correct the application. Also, in case of exclusion of an applicant on the ground of non-fulfilment of the minimum requirements, the RFP does not provide any guidance as to what the procedure for such an exclusion will be.

"(v). The exclusion of AMI as part of the licensing negotiations with Esat Digifone was unusual and may have led to a lack of continuity. In practical terms had AMI been fully involved in these negotiations, AMI would have endeavoured to ensure that the elements of risk concerning Esat Digifone mentioned in the

evaluation report were eliminated via the inclusion of terms and conditions in the licence agreement with Esat Digifone to sufficiently minimise or eliminate such risks.

"(vi). The budget constraint with regard to AMI's work, c.f. the description hereof in Section 2.1 of this memorandum, meant that some supplementary analyses that usually would have been part of a "Best practice" evaluation were not carried out. Also, due to the lack of budget, the Department did not save on a cursory basis consult and include AMI in the licence negotiations with Esat Digifone or in the handling of the disappointed applicants.

"(vii). The means of security during the process was on the part of the Department surprisingly lax, c.f. e.g. that the facilities in which the Department carried out work related to the GSM II tender process were readily accessible to the public as these facilities were not in any way separated from the rest of the Department's facilities, e.g. via a special lock-up system through which only certain named persons involved in the process could gain access.

CHAIRMAN: Thank you very much, Ms. Burke.

Continuation of examination of Martin Brennan by Mr. Healy:

Q. MR. HEALY: Mr. Brennan, in addition to what's contained in this memorandum, Mr. Andersen attended a

number of meetings with the Tribunal on a private basis prior to his decision with the Tribunal legal team, prior to his decision to cease further cooperating with the Tribunal, and the Tribunal in fact now proposes to make some of this information available to the Department and to other persons entitled to notice of this material, and I am going to try to do that over the lunch time adjournment. But just one or two aspects of this document I think I should mention, in fairness to the Department, at this stage.

And the first of these is the references at pages 5, 6, and 7, initially. To

A. I don't have a copy of this document.

Q. I am sorry. I beg your pardon.

(Document handed to witness.)

It's in Book 39, 1A.

In his introductory pages, Mr. Andersen refers to firstly, his expertise, and secondly, the contractual set-up between the Department and AMI, including the amount of money he originally agreed would be the cost of the evaluation work he was to carry out and the subsequent fixed fee he agreed.

Now, I should say one thing about that; the Tribunal is aware that in fact substantially more than that sum was paid to Mr. Andersen, and as yet, it has not been able to clarify the precise total of the money paid to

him, but that I think will be calculated in due course. It is not possible to get all that information from Mr. Andersen or from his former company, but I think it will be obtained in due course, because the Department can carry out their own tot in any case.

A. The Department can certainly tell you what monies the Department paid to Mr. Andersen.

Q. Yes, I appreciate that.

A. I thought from the Opening Statement you were interested in all of his earnings from Ireland, which is a different issue. The ODTR must be the only other outfit that employed him.

Q. The obvious source to begin with was AMI. That source, at least for the moment, has dried up. The Tribunal is confident that it can get from the Department a tot of the total amount paid by the Department and hopefully will ultimately get from the ODTR a full account of what was paid by the ODTR to Mr. Andersen's consultancy.

But the only point I want to draw your attention to at this stage is that Mr. Andersen, in his at page 5 draws attention to the fact that 25% fewer services, resources, etc. were retained by the Department from AMI than the Regulator in the Netherlands retained. And he gave an example of the Dutch Regulator as someone who retained AMI "to perform far more

preparatory work, to develop a higher level of confidentiality, to perform more supplementary analyses and to assist with the conclusion of the licence negotiations."

If you go to page 7 of this document, Mr. Andersen criticises the inadequate nature of the original tender documentation and suggests that "Andersen's initial involvement in preparing applicant-specific written questions and in developing a guide for applicants was due to the fact that he had difficulty coming to grips with" and he suggests that this was an objective difficulty, that anyone would have had difficulty coming to grips with the RFP, and that it was difficult for him I think this is a thread running through his entire memorandum difficult for him to conduct a comparative evaluation according to what he believed to be best practice where the evaluation model or an evaluation model had not been developed at the same time as the RFP had been developed. And he says that would have been a normal thing to do, to develop both at the same time.

Now, I may have something to say about those criticisms later on, but I do want to clarify one thing. I am right in thinking, am I not, that Mr. Andersen was aware of all of this before he tendered; is that right?

A. As far as I am aware, each of the people who tendered

for the consultancy were given copies of the competition documentation.

Q. Which consisted at that point of RFP?

A. Plus the information memorandum.

Q. And I think they were all aware that that was all that there was or had been put together at that point?

A. Yes.

Q. So in there are two aspects to this, and I think, in fairness to the Department, whereas I think I would I may need to canvass with you whether some of these criticisms were justified. Certainly some of them are as a matter of fact correct. Mr. Andersen was himself aware of all of this before he ever got involved?

A. Yes. And he makes two references to standard European practice. I doubt if any such thing ever existed at that time. I mean, we had six tenders; there was nothing standard about them.

Q. I think what he is suggesting, correct me if I am wrong, is that if he had been involved in the project from the beginning, he'd have developed a set of criteria and an RFP, and at the same time he'd have developed an evaluation model so that he could be sure that his criteria and his evaluation model knitted together or dovetailed into one another and so that when inviting tenders, he could be sure that each of those tenders, if it were in accordance with his

tender specification, would fit into his evaluation

model, which would fit into his list of criteria?

A. Yeah, that sounds it sounds to me what was going on

then and is going on in this report is that he was

trying to impose his own version of how to run a

competition on a competition designed without his hand

being involved. And I don't have a particular problem

with that. And I am sure if he had been in earlier,

it would have been different.

Q. Yes. I think if I could put it perhaps less

trenchantly than Mr. Andersen, and I think I have said

this, I don't think you've disagreed with me, it was

less than ideal that this was done this way. I simply

want to draw a distinction between criticisms made by

Mr. Andersen of the process as it evolved and

criticisms that might be made by somebody who was

obliged for instance, a civil servant who might

have been obliged to carry out process and would have

had to put up with whatever instrument he was given

from day one. Mr. Andersen was aware of all of this

before he became involved and before he offered his

services, and indeed, I think he made clear

representations that he believed he could carry out

the evaluation; isn't that right?

A. Yes. I think it's probably also fair to refer to a

document prepared much closer to the time, called "The

evaluation of the evaluation". It just in the

sense that it's more contemporaneous and it's not as critical as this, I think.

Q. It's not critical at all.

A. Well... And I am not defending

Q. I appreciate the point you are making, and we can if necessary refer to it and put it in evidence. Could I suggest that the evaluation of the evaluation is perhaps a document that might be viewed in the same way as the original tender by Mr. Andersen, in that the original tender seems to suggest that Mr. Andersen could provide all the services you needed to carry out the work you wanted to carry out, and it was a soft approach to the matter. The evaluation of the evaluation seemed slightly soft as well. This is harder and harsher, but I think should be viewed in the context where Mr. Andersen knew exactly what he was doing. Is that a fair summary of the documents?

A. Yes, I think that's okay. I mean, in general I wouldn't be troubled by this document at all, but there are points of detail, you know, different people would disagree with. I mean, if you want to go into it at that level, I could engage, but not on the basis of just hearing it read out.

Q. What I am trying to do at this stage is simply put it on the record. I think it is in the documents that were made available to the Department.

A. It certainly is.

Q. And I think we may be referring to passages in it from time to time. I simply want to get a few things out of the way at this point.

Just one small point. If you go to page 13; I think we have looked at it already. It was mentioned in the Opening Statement.

Mr. Andersen is giving a chronology. It begins on page 11. He calls it the major milestones in the tender process. And then, over a number of pages, he brings the process right up to, on page 13, the final evaluation report.

He says "On the 25 October 1995, the final evaluation report (hereinafter the evaluation report) with the PTGSM's recommendation of a winner of the tender was prepared and issued by AMI to the Department, upon which the Minister determined the applicant being recommended, i.e. Esat Digifone to be the winner, which decision was publicly announced in the evening of 25 October 1995."

Am I not correct in thinking that no final text of the evaluation report was in fact available on that day?

A. I think we were taking it that the previous version incorporating amendments which were agreed between the two sides represented the final report and that the final copy didn't come until the next day. That's something that can be checked.

Q. I think that's right, and we'll come to it when we

look at the chronology in more detail.

CHAIRMAN: It's probably close enough to the time to take lunch, Mr. Healy.

Just in very general terms, as regards your overall dealings with Mr. Andersen during your joint involvement in the project, I think you made it clear before Christmas that everybody wants to be paid for their services, but he was particularly keen on getting his full pound of flesh?

A. Yes, we did have a difference of opinion which is now on the record of the Tribunal. I mean, it was honoured in the end.

CHAIRMAN: Yes. Did he convey to you in the course of these discussions that there was a risk of the service he could afford being less than full value if there were financial constraints?

A. I thought when we renegotiated the contract that he was then in to finish the job.

CHAIRMAN: All right. We'll come back to it after lunch. Five past two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Last Friday, Mr. Brennan, one of the documents we dealt with was a note of Mr. Sean McMahon of a meeting of the 3rd October 1995 contained in Leaf

116 of Book 42. I just want to go back to it for a minute.

If you go to the second page of that document, you see that Mr. McMahon records under Point 4, heading "GSM

Minister wants to accelerate process."

And do you remember we, I think, confirmed last Friday that this was a meeting of the three divisions, a divisional meeting; Mr. McMahon was at it, obviously, you were at it, and Mr. Fintan Towey appears to have been at it. Isn't that right?

A. Yeah.

Q. And at the time I was querying with you where this information that the Minister wanted to accelerate the process had come from and who had conveyed it to the meeting, and I think you were you weren't clear about it yourself. Since then I have realised that the Tribunal sent requests I think to the Department seeking from Mr. McMahon what information he had concerning this entry in his journal, and he provided the Tribunal with a response in the form of a supplemental memorandum. I don't know what book it is contained in, but in any case, I am going to have to let you have a copy of the memorandum.

(Document handed to witness.)

Mr. McMahon's response is contained under cover of a letter from Mr. Shaw of the Chief State Solicitors

addressed to Mr. Davis, solicitor for the Tribunal, on the 13th November 2002, I think. It's in response to a letter from Mr. Davis of the 16th October 2002 in which Mr. Davis drew Mr. Shaw's attention to Mr. McMahon's handwritten note. And in particular, the portion to which I have just referred and in which Mr. Davis went on "In order to assist the Tribunal with its ongoing queries, I would be grateful to receive at your earliest convenience a written clarification from your clients of following points.

"1. Who conveyed the message to Mr. McMahon that the Minister wanted to accelerate the process?

"2. What discussion, if any, did the Minister have with either Mr. Sean McMahon or Mr. Martin Brennan or any other person which led him to give this instruction or which resulted in any statement indicating that the Minister wished to accelerate the process?

"3. What is meant by 'accelerating process'?

"4. What is meant by "Legality is more complicated"?

In his response, Mr. McMahon said, "I have looked at the copy of my handwritten notes furnished to me by the Tribunal, and in particular at item 4 on "GSM" as directed. It appears to me that that is a note of one of our regular interdivisional meetings at which we updated ourselves on developments in the telecoms area. The numbered answers below follow the questions

in Mr. Davis's letter. The questions themselves have been italicised and abbreviated for ease of reference".

And he then, under Point 1, refers to the first reference: "Who conveyed the message?" That is in answer to the question, "Who conveyed the message that the Minister wanted to accelerate the process?"

And Mr. McMahon goes on: "I did not put any initials in the margin, so I cannot be sure to whom the statement should be attributed, but it is a safe bet that I was recording the latest news from Mr.

Brennan's side (i.e. with either himself or Mr. Towey speaking). Mr. Brennan's division, with responsibility for 'development', had the lead role, and his staff provided the secretarial function to the GSM group. Updates, for example, on progress by, and communications from AMI came via him or his staff.

"Accordingly, I am quite certain that this information did not come through myself or through my division".

The next question was as to what discussions with the Minister could have prompted this remark or the conveyance of this message, and he says: "As stated in reply to my earlier answers, I believe I had no communications whatever from or with the Minister on the GSM assessment from start to finish. I am unable to answer the question insofar as it relates to Mr.

Brennan, but if the Minister had chosen to communicate

his anxiety for progress in the matter, I believe he would have communicated it downwards to Mr. Brennan's division as he seems to have done on the 23rd October.

I do not know by what means or via what channels he did this."

Next he was asked, "What does 'accelerating the process' mean?" And he said, "I believe the note speaks for itself. The Minister wanted the process speeded up. It seems he wanted a result. I do not know what the Minister's understanding was of the process of assessment or its time-frame at that time."

Lastly, Point 4 deals with the query concerning what was meant by "the legalities more complicated". "The reference to the 'legality being more complicated' is likely to reflect the views of all present, i.e. that it was not as simple as the Minister seemed to be suggesting. I believe we were all highly conscious of the need for secrecy at that stage, and furthermore, of the requirement that we give due consideration to all and any issues arising. There was, furthermore, at least in my view, the requirement to take whatever time was necessary to get it right. If the reference to the legalities does not indicate that there was a general agreement on the matter, then it is likely that I made the point myself in reply to the news that the Minister wanted an accelerated process. I certainly made that point later, when the draft report

came from AMI and when we met the Secretary. I note that there was an agreement to review the AMI's results in confidence at one location, i.e. in Kildare Street.

"If there is anything further, I shall be happy to oblige".

When we were discussing this the last day, you recall I asked you what you could remember of it and for your views as to how the message might have been conveyed, and you thought it might have been Mr. McMahon. You weren't definitively saying it was him or anything like that, but you did think that, I suppose, and as you no doubt rightly suggested, Mr. McMahon was one person who might have a better view on what the document meant. We now have his view, and could I just take up aspects of it with you.

Firstly, he says that he is certain that the information didn't come through himself or through his division. He says it's a safe bet that he was recording the latest news from your side of the Department and that it might have come from that it probably came from you or Mr. Towey. What do you say to that analysis?

A. I would say, in the absence of certainty as to whether Mr. Fitzgerald was at the meeting or not, if Mr. Fitzgerald was at the meeting, he would be another likely source. It could easily have come from me.

But then if it did, the next question is, where would I have got that information? And again it could be from Mr. Fitzgerald. Or from Mr. Loughrey. Because, I mean, they at least would have known the state of the evaluation at that point. I don't think we are ever going to achieve certainty in these kinds of

Q. I appreciate that. But I suppose if we want to try to find out what prompted these remarks, we want to make some efforts to try to identify who may have made them.

A. Okay.

Q. Mr. McMahon, in canvassing how the Minister's views were communicated, suggested that they came through you. That doesn't mean necessarily that he is suggesting you had a communication with the Minister, but he is referring, I think, in his note, to other communications that came through you. And remember, we discussed already a meeting or a discussion you had with the Minister in which you indicated to him the two front runners either with or without the ranking. So you were in discussion with the Minister concerning the progress of the evaluation?

A. I had a number of conversations which we have been through, yeah.

Q. Whether you got that information from Mr. Fitzgerald or from Mr. Loughrey, or from some direct contact yourself with the Minister, you were nevertheless

conveying it to the interdivisional meeting as an expression of the Minister's views as of that time.

A. Yes, if I was the one who did so.

Q. Yes. Regardless of who did so for the moment, one thing is clear, and it's that at this time the process was not behind schedule; isn't that right?

A. That's true, yeah.

Q. It was, if anything, bang on schedule and well within schedule to provide a result well in advance of, whether it was generous or not, ultimate expiry date for the whole competition at the end of the November?

A. That's true.

Q. And if anyone gave the Minister accurate information as to the state of play in the competition as it was in or around that date, anyone conveying accurate information would have presumably conveyed to him the fact that Andersens had indicated they were going to have a draft report in or around that day; that had been known from sometime around the 28th September, I think, isn't that right, if not the 21st?

A. It was certainly known

Q. I think the 21st, in fact.

A. I am not sure exactly when.

Q. But that information in any case was known; you were expecting a report in or around the 3rd?

A. Oh, yes.

Q. You did in fact get it on presumably the afternoon of

this meeting or the day after; I think you got it on the 4th. Remember we looked at that document last Friday?

A. Yeah.

Q. So as I say, if anyone was giving the Minister accurate information as to the state of play at that time, he would have been informed that you were on, if not ahead of time, and that you expected a first draft report. Can you understand, therefore, why the Minister would have wanted the process accelerated or sped up?

A. I suppose the only honest answer to make is the best person to ask that of is the Minister. But one

Q. When he was saying it to you, what did you understand it to mean? If it wasn't being said to you, it was being conveyed to you; what did you understand it to mean?

A. I don't know. It could be that he had an external reason for wanting it. It could have been he just wanted good news for some purpose. I have no idea.

Q. If you speed up the process, or if the process is speeded up, then you are to some extent putting quality at risk, aren't you?

A. It depends on how much speeding up you do.

Q. Well, if you speed up your analysis or examination of something, or your scrutiny of it, then there is going to be less scrutiny, almost invariably?

A. Or sometimes what happens is people work longer hours.

Q. That's true. In other words, are you saying that if the Minister wanted the process sped up, you could interpret that as meaning that you'd have to put in more work in a shorter period of time to ensure the same level and depth of scrutiny?

A. In the normal course, if a Minister wants something done quickly, civil servants will stop at nothing reasonable to do it, including working late hours and working weekends or whatever is necessary. That's just the ethic of civil service.

Q. Yes, of course. But there is little doubt that no matter what stage a process has reached, if you are to carry out the evaluation process carefully, you can't sacrifice proper scrutiny or proper evaluation because the Minister wants to accelerate the process without a risk to the process; isn't that right?

A. I don't accept that the process was weakened by any outside intervention.

Q. There is no suggestion at this meeting as to how the process could be accelerated or as to whether you were prepared to accede to a request that it be accelerated. Can you recall conveying the message back to anyone to the effect that, "Look, we can't accelerate it; there isn't enough time to conduct the process properly if you want us to speed it up"?

A. I don't particularly recall that, but I mean, we had

an understanding with AMI as to a time-frame from I think maybe from the Copenhagen meeting, and it didn't accelerate it didn't shorten that time-frame as agreed then.

Q. Well, it didn't shorten the time-frame as you and Mr. Towey and maybe Ms. Nic Lochlainn, who were at the 28th September meeting in Copenhagen had agreed, but there had been no overall agreement concerning this matter with the Project Group?

A. No, I think it was AMI indicating the time-frame within which the process would be could be completed from where we then stood, and I think that that's the time-frame within which it was actually completed.

Q. The next document I want to refer you to is in Leaf 117; it's your sorry, we have referred to it already well, it's part of it; it's your letter or your note acknowledging receipt from Mr. Andersen of the first version, first draft version of the evaluation report dated 3rd October. I don't, as I said the last day, want to dwell on it, other than to refer to one aspect on page 10, where you see sorry, it's page 10, I beg your pardon, of Annex 3, which contains the evaluation model. You see the list of weightings contained in the table at the top of that page?

A. Yes.

Q. You see there is a list of indicators on the left-hand column of that evaluation matrix?

A. Yeah.

Q. And these are the indicators which, when put together, eventually go to make up the evaluation criteria set out in the RFP, paragraph 19?

A. Yes.

Q. Or the itemised evaluation criteria. Do you see the first two, Market Penetration Score 1, Market Penetration Score 2?

A. Yeah.

Q. These were being evaluated at this point according to the evaluation model or were to be evaluated as part of the quantitative evaluation. But if you look at it, you see that the weights attached To Market Penetration Score 1 and Market Penetration Score 2, at 3.75 and 3.75, were not the weights that were ultimately applied to those; ultimately they were weighted at 5 and 5. Can you throw any light on how this different weighting came about?

A. I can't now, on my feet. But there was a mismatch between the original Andersen list of dimensions, or I have forgotten which of them, indicators, and the RFP, they weren't grouped the same way, so there was an element of regrouping. I don't know whether that explains it or not.

Q. I don't think it explains it here, because they are

grouped here in a different way. Market penetration at 3.75 and 3.75 comes in total to 10 I beg your pardon, comes in total to 7. Do you see that?

A. Yeah.

Q. And if you go to the bottom of the page, solvency and IRR at 7.5 and 7.5, they were eventually reweighted to 5 and 5. There is a change, but no when you get to the version of the 18th, which we'll come to later, you see those changes reflect in that version; but there is no reference in any narrative to how these changes came about, although there are there is a significant amount of comment on each draft, as it goes through the Department, having been produced by Andersen.

A. I am trying to rationalise this rather than recollect.

But

Q. If you like, think about it.

A. There is issues on this. First of all, Andersens came to the Department originally with a proposed weighting, and following discussion, that was varied. And then following the change with Europe, it was varied again. Now, I am not sure that anybody checked as to which one appeared in the draft report under the evaluation model for the draft report. And it may be that further research would enable somebody to get to the bottom of it. But I notice, for example, that in this one, the licence fee payment is weighted at 14,

whereas ultimately it was 11.

So I would be unable to reconcile that here, on my feet. And I don't know whether I'd be able to reconcile it on my own. It may be I would need some assistance on it.

I don't know the answer, in other words. I'd be surprised if it was a major mystery about it at the same time.

Q. It's just that as I am sure you will, I think, acknowledge, Mr. Andersen tends to go out of his way to detail almost every change he makes in everything.

It wouldn't be an understatement to say that he'll overexplain, if you like, changes in the process as the process evolves, although, when it comes to the evaluation model, you'll see that the absence of any narrative explaining changes is somewhat striking.

But you might look into it and think about it.

A. Although I suspect when we came to consider the draft report and various draft reports, there would have been a tendency to take the evaluation model as read without checking it in detail.

Q. Yes, I accept that. Yes. The reason I am focusing on it is that, as you know, the Tribunal has had difficulty in understanding what ultimately happened to the quantitative evaluation, which, notwithstanding the references that Mr. Andersen made to it having withered away, was still a live feature of the

evaluation still up until this date, in fact.

If you now pass on to Leaf 120, this is the formal typed minute of the 12th meeting of the GSM Project Group, held on the 9th October 1995. There was a fairly full attendance from all the various divisions. Mr. Andersen was there, and Mr. Billy Riordan was there on behalf of Finance.

Opening:

"The Chairman opened the meeting by stressing the confidentiality of the evaluation report and discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top 2 applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.

"Discussions of the evaluation report:

"The draft evaluation report put forward by AMI was examined in detail. A range of suggestions in relation to the manner of presentation of the results were put forward by the group, and AMI undertook to incorporate these in the second draft. The agreement amendments included:

the inclusion in the body of the main report of the proposed appendix in relation to the evaluation methodology.

an expansion generally of the justification for

the award of marks to the various indicators.

a revision of the financial conformance appendix  
to a more explanatory format.

the inclusion of an executive summary and an annex  
explaining some of the terminology.

elaboration of the reasons as to why a  
quantitative analysis could not be presented as an  
output of the process.

"AMI also indicated that the supplementary analysis in  
relation to interconnection and tariffs which had yet  
to be provided did not suggest that it would be  
necessary to revise the award of marks.

"Future work programme:

"It was agreed that AMI would provide the first draft  
or parts of the report which had not been included in  
the first draft of the overall report for comments  
before submission of a complete second draft the  
following week."

Signed Margaret O'Keeffe. I can't see the date.

Sometime in October 1995.

Now, before referring to parts of that, if we just go  
on to the verbatim handwritten note of the meeting of  
the Project Group on the 9th October as approved by  
Margaret O'Keeffe on the 1st February 2002. A  
reference to the fact that the Tribunal obtained a  
copy of Ms. Margaret O'Keeffe's full manuscript note  
and then requested her to approve a transcription made

by the Tribunal of those handwritten notes.

And it begins off, first heading is "Confidentiality:"

Which tallies with what's in the formal note.

It says,

"Minister knows.

Shape of evaluation and order of top two.

Minister of State does not know.

Quick announcement.

"Agenda:

"Draft report future work programme: A, producing  
draft number two.

"Good working draft produced on time.

Annex should be part of the main report.

Object is to get feedback on content style of report,  
content accuracy.

"Report too brisk. Critically needs more elaboration  
and reasoning more significantly. Few lay readers but  
they will be critical terminology needs to be  
explained.

"Michael Andersen brought appendix on supply on  
tariffs and interconnections.

"Description of methodology still missing.

"Different groups examined dealing with commissions  
etc.

Relevance of annex dealing with conflict.

Full discussion needed on Annex 10.

Minister does not want the report to undermine itself

e.g. either a project is bankable.

Should be balanced arguments.

Michael Andersen. (Changes)." And there are references to changes on pages 23, 24, and the next heading is "Supplementary Analysis".

"Tariff analysis almost prepared when the report was done.

"A5 and A3 almost equal.

"Interconnection:

"No changes, A3 or A4.

Supply? Analysis will not change marks in the main report.

"Quantitative evaluation:

"View is quantitative evaluation should not be performed separately but are taken into account in main report.

"Already agreed that international roaming should not be used.

"Hard to score the block-out and drop-out rate.

"Tariffs well defined basket of tariffs.

Metering billing should be a score indication.

Data not reliable for comparison purposes.

To be left over for discussion.

If included it will give a false confidence in some figures.

"M. Brennan.

"Will proceed in the way Andersen suggests and will

strengthen report. The annex on methodology should cover this become main report."

"Sean McMahon:

"Would like to see more of a user-friendly overview confidence should ooze out of the report the document will be read by secretary and assistant secretary the Minister's programme manager (no technical) Department of Finance."

"John McQuaid:

"Page 44 correction okay evaluation model appendix.

Quantitative analysis a report based on qualitative analysis concluding remarks (page 44).

Are tables 16, 17 and 18 of equal importance.

"Weighting:

"Table 17 different from agreed weighting.

"Overall presentation:

"Details and summary results at end.

Should summary be at start?

Should do an executive summary.

"Michael Andersen:

"16, 17, 18 reflect discussions in Copenhagen. If different weighting used prove you get the same result with different approach.

"Paragraph 19 was regrouped to reflect that.

Have to apply a numerative approach.

"If 3 tables give a different answer Martin Brennan said further analysis would be required and seek to

re-examine".

"Michael Andersen:

"It is difficult to make a report with detail and easy to read. He would prefer to leave report in present format with a long letter on front rather than an executive summary.

"Executive summary will pull main report up to the front, give an overview of technical data."

"Billy Riordan:

"Methodology stitched back closer and

"F. Towey:

"Should we not include quantitative analysis up front.

Quantitative analysis too simplistic to give results.

1. The scoring.

2. Would like to stick to evaluation model.

"Should quantitative analysis be shown. Would have to open discussion again. Quantitative evaluation unfair and impossible. Figure impossible to compare. Chain of events, evaluation model 80% deals with quantitative evaluation.

Results of quantitative evaluation not reliable.

Quantitative analysis became less and less.

Should be explained in methodology report and wording is important.

"Billy Riordan:

"Are Andersen happy to go forward with the position as it is now.

They are sufficiently happy.

Aim is to conduct the evaluation in such a way that 10 more people would come up with the same results.

"Because of uncertainty cannot trust quantitative.

"Quantitative:

"Ranking is probably different now. (Annex D)

"5% of the weighting is lost due to scoring that cannot be used and quantitative analysis has been undermined.

"It is not necessary to publish. The original.

"Billy Riordan:

"Do we carry out any further assessment of the validity of the information presented?

"Martin Brennan:

"Some validation had been done.

"A3 and A5 have much evident information and are satisfied with what they have. Michael Andersen advises not to carry out extra analysis without risk to the process.

"Elaborate reasoning more.

"Holistic taken as subjective and interpretive skills.

"Number of dimensions, indicators should be given.

"Those who did Irish market research was not attributed enough to those who did.

"Fintan Towey:

"Should marketing be in the methodology.

Indicators selected and why...

"ANP will" then there is references to I think page changes or page changes and text pages in pages 15, 17 and 16.

Page 18 is a heading, then.

"Martin Brennan should have an introduction on tariffs and the difficulty in comparison and the amount of work done.

DK reference should have a footnote.

Axis to go from 200 to 700.

Fintan Towey page 19 B start at 1,000 minutes consumer ends at 1,500 minutes.

"Page 20.

Weighting should be given. Are indicators weighted

"Page 24

delete supreme, change lucky.

"Page 25

should A3 unique colour on graph.

"Page 28

performance guarantees?

"Fintan Towey.

What it hasn't looking for, guarantees was a comfort in the RFP for the licensees to increase the confidence.

"Page 30: Asked questions and they recalculated 200 channels provided as an answer that did not make sense.

"Page 32, (3.3.1)

"Should this experience be used?

Leave out detailed and stated it is from the  
quantitative analysis???

To be looked at.

Expand what they are doing..."

The next entries I think are technical.

"Page 38.

A6 to be looked at.

Page 39

"The ratio between profit to be looked at IIR figures  
were recalculated." Probably is a reference to IRR  
figures.

"John McQuaid.

"Without visibility of weighting it looks  
unreasonable.

It should be explained.

Stress that main focus was on capacity of network and  
infrastructure. More attention given to the point  
that weightings were used.

"Page 40:

"Should present in a more balanced way.

"Financial risk

"No doubt that A5 will survive.

"A3 have agreement that if one shareholder does not  
come up the others will pay.

"Put in requirements in licence conditions.

"If things don't go as planned a lot more expenditure may be required.

"Problem not unique to anyone.

"More balanced statement. The project will survive.

No one consortium is weak in itself. Each member of consortium brings different elements.

"Prequalifier.

"All the agreed dimensions indicators scored.

A3 Sigma

in credibility plan

A5 Communicorp would get a higher Mark than A3.

"Page 42:

Should offers outside the GSM be taken into account?

Do we make a clear statement that these were not taken into account?

"Page 43:

Content will change 5.6 should improve 9 format.

"The difference between A5, A3 and A1 should be made clear.

"Page 46 figures to be put in.

"Table 17 and 18 should mention selection criteria and subheading.

"Annex 4.

"Too brief, no complaint with content.

"Fax copy with grammatical errors.

"First draft of chapters on methodology along with 2nd draft of report."

Now, if you look at both the formal note and the verbatim handwritten note of Ms. O'Keeffe, there is a reference at the outset to the fact that you informed the meeting that the Minister had been informed of the progress of the evaluation and of the ranking of the top two applicants.

If you look at the formal verbatim note, it says "Minister knows, shape of evaluation and order of top two. Minister of State does not know, quick announcement."

Can you recall whether you would have referred to having informed or having become aware of the fact that the Minister had been informed of the shape of the evaluation?

A. I can't recall that. The reference further on in the verbatim note, the reference to bankability in particular, suggests to me that Mr. Fitzgerald may have been involved in the equation, but that's something I can't verify.

Q. Shape of evaluation is, I think, if I may say so, the type of a form of wording you might use, would that be right, looking at your other contributions to all of these documents?

A. Yeah, I mean, I may have used that in describing whatever I was describing to the meeting.

Q. I suppose if you were if somebody is informed of the shape of an evaluation, he is being given some

form of outline of where that evaluation is at or

where that process is at?

A. I mean, we have had a discussion before Christmas about whether I told him that it was down to two and that I named the two or whether I indicated which was ahead of the other. I don't think I am ever going to achieve certainty. I don't think I am even going to achieve certainty as to whether I told Mr. Fitzgerald and he relayed it on or whether I relayed it on myself. I just don't know.

Q. Presumably if Mr. Fitzgerald did know and did tell the Minister, if we assume the normal channels of communication up and down through the Department, you probably told Mr. Fitzgerald; would that be right?

A. Yes, I think we had evidence last week in some document where the reason I am mentioning bankability is at some stage in a document we were looking at last week, Mr. Fitzgerald, when he heard that Esat Digifone were on top, raised the issue of better make sure it's bankable.

Now, I can't surface that document now, but I can remember us discussing it last week. And I don't know in what time-frame, but I suspect it was in this time-frame.

Q. We were trying to fix a time-frame for that discussion but we weren't able to. Mr. Fitzgerald thought it was early September; remember?

A. And I said that it couldn't have been, yeah.

Q. Because if it entailed informing him of the top two, and the ranking of the top two, in any case, you mightn't have known that, or you wouldn't have known that

A. And the precaution with bankability of the project was first mentioned by Mr. Fitzgerald in the context of him having more knowledge of the state of Esat's business than, say, I or others might have had. That's why I am suspecting, but not confirming, that Mr. Fitzgerald was involved in this information loop.

Q. Well, one way or another, whether it came from whether what you were conveying was the result of conversations with Mr. Fitzgerald, and presumably conversations he had with the Minister, what you were conveying to the meeting, I suggest what it appears to me to suggest, in any case is that the Minister was informed of where the evaluation was at; that you had got or were close to getting a first version of the draft report; that from your discussions which you had had in Copenhagen, you had a good idea who the top two were. You had a good idea who was in pole position, who was in second position, and some indication must have been given of what work was now being done or what problems had come up that would have prevented you from giving your imprimatur there and then to that version?

A. I used the language before, anything I would have said at that time had to be surrounded with health warnings because of the various things that were still going on. And there is nothing further I can add to that, really.

Q. That seems reasonable, that you would have said, "Look, we have got this result, but there are" you might have given a few health warnings?

A. Mmm.

Q. Or that the Minister was given health warnings, and if one of the health warnings was given by Mr. Fitzgerald, he might have given the health warning that he mentioned to you?

A. Yes, he may well do.

Q. If you go on to the next item in the verbatim note headed "Agenda", and you go down to the last I won't call it "paragraph", but grouping of points. "Different groups examined dealing with commissions" is where it starts. The next is "Relevance of annex dealing with conflict.

Full discussion needed on annex 10."

Now, I think Annex 10 is headed "Supplementary analysis on financial risks". And while we look at Annex 10 in the final draft ultimately, I don't want to go through every element of every draft; we'll be here forever. But I don't think that the opening lines in the first paragraph of Annex 10, which is

contained, it's in Leaf 17 Leaf 117 of the book we are at.

The opening lines say "As stated in the main evaluation report, the two top-ranked consortia have members who presently do not have the capital required to finance the GSM II network."

And the purpose of the analysis is to discuss the risks that this poses for the consortia as a whole, due to lack of funding.

Now, the body of the analysis goes on to suggest ways of dealing with these risks. They are firstly described, and then it suggests ways of dealing with them. But the opening line is fairly stark, and it's clear that having been brought to the attention of the members of the project team at the meeting, it's not surprising that a full discussion was required.

But the next note is "Minister does not want the report to undermine itself, i.e. either a project is bankable". That suggests that that probably whoever said that probably went on to say "Or not"?

A. Presumably, yeah.

Q. If you look at what's contained in those fairly stark opening lines of Annex 10, I'd suggest that maybe it's that sort of language which prompts the next line in the verbatim report "Minister does not want the report to undermine itself".

A. Are you going on to suggest

Q. I am suggesting

A. Then you are going to suggest that the Minister had this copy of the report, which is not the case.

Q. Or that the Minister was told that there were these problems which are highlighted in the report, and that the nature of these problems was brought to the attention of the Minister in those fairly stark terms, which I'd suggest reflect or echo to some extent what Mr. Fitzgerald was saying, that there are real problems with Communicorp's finances?

A. Yes, but from the point of view of the evaluation team or the project team, and in particular the people who examined the finances, they were looking at an application where it was and I know you have raised doubts about the validity of the application, where was the consortium with two 50%ers, 20% to be placed, and Advent, I think it was, committing to support the Communicorp side of it. So I mean, that context has to be borne in mind in examining this issue.

Q. Yes, but be that as it may, what's recorded here is that the Minister didn't want the report to undermine itself. And I think the last time we discussed this, we indicated that we put off detailed discussion of it until we came to these documents.

A. Yeah.

Q. But I was trying to canvass with you the last time we discussed it, what would have prompted the Minister to

say to you or if he didn't say to you, to say it to somebody else higher up in the line or chain of command that he didn't want the report to undermine itself.

A. If and this is speculative, and I am slow to speculate up here if Mr. Fitzgerald was the one to tell the Minister that Esat Digifone were making a strong run for this licence, and he relayed his own concerns about the financial status of one member of that consortium, and then we got back a message that said "Make sure the report demonstrates that this project will stand up", that wouldn't be at all surprising.

Q. I accept that. And that seems a likely message to have come back as a result of the conversation that you have just described or speculated as one that might have occurred. But the message that came back isn't that, or isn't simply that the Minister thought the project was bankable; it's that the Minister thought the report shouldn't undermine itself. And I am suggesting to you that that would seem to indicate that not only was the Minister merely told, if he was told at all that Mr. Fitzgerald or somebody else had doubts about Communicorp's finances, but that the report or that the report in addition had drawn attention to Communicorp's finances, that in other words, something that may have been known in the

closed or narrow world of telecommunications business, that Communicorp's finances were in difficulty, was something that had been picked up in the evaluation as well, and that it was something like that, or a discussion involving something like that, that would have prompted a remark from the Minister that he did not want the report to undermine itself?

A. I can't offer you any further explanation.

Q. Isn't that what, if you were a Minister, you'd need if you wanted to convince your colleagues in Government that the report at this stage of this draft report, we all saw that it was a weak report and needed a lot of improvement. This report why did it need improvement?

A. Well, the first draft of the report was written in Danish English and, as is clear from other parts of the manuscript note we are talking about, there was lots of suggestions for things that needed to be presented better in it.

Q. What were what I am talking about is not the whole report at the moment, but merely the part of the report which highlights fairly serious problems with the top two.

In the case of the top or the front runner at that stage, it was a problem that afflicted or potentially afflicted 50% of the project, and I am suggesting to you that somebody must have brought that to the

attention of the Minister, and his response must have been, "I don't want a report that undermines itself; this project is bankable or it's not".

That in other words, he wanted a report in which these problems were either argued out of the way or in some way not highlighted in the ultimate conclusions of the report.

A. Well, are you suggesting that we were going to airbrush the problems

Q. No, argue them away. I am suggesting that the Minister was given at this point, at a time when he wanted the process sped up notwithstanding that he had plenty of time, he still wanted it sped up he was told he had a top two, he was told who they were, he was told that there was a problem, that it was a financial problem, and his response was "I don't want a report that argues against itself; either this project is bankable or not".

In other words, that he wanted a solution argued into the report for this. And the solution he was proposing was bankability. Whether it came from him or from Mr. Fitzgerald, that was the solution to the problem, or to be the solution?

A. I am having difficulty finding any better way of expressing myself today. I really don't see it in terms of the Minister wanting to ^bolster the result, because the result was going to be the result. I

think we were all of a mindset to improve the report in the way it presented the result. Now, whether Mr. Fitzgerald or the Minister had a view on that as well, it seems that one or other of them did.

Q. Well, whether one or other of them had a view or not, the view that was conveyed to the committee and to a full, if you like, a full house of the committee of the Project Group, rather was that the Minister wouldn't want the report to undermine itself. That was the Minister's wish that was being conveyed. I think you were saying that you didn't really see it in terms of the Minister wanting to bolster the result, because the result was going to be the result.

A. I don't think I used the word "bolster".

Q. I thought well, that's what's picked up. Maybe you said

A. It's not a word I use.

Q. The Minister had a view on the result, didn't he, in the sense that he wanted to make sure that the report supported the result?

A. Yes. And I presume that would be his position no matter what the result was.

Q. At this particular time, this result, if it was conveyed to the Minister as the other documents we have showed us, it was conveyed to him long before the 9th. It was conveyed either immediately after the 3rd or perhaps after the meeting in Copenhagen?

A. Yeah, I couldn't put a date on it.

Q. So the Minister, in fact, was one of the few people who knew, prior to the 9th, what the result was?

A. We have argued this a number of times before as to whether he knew the exact result. He knew who the top two were, he knew the rankings, but had health warnings. I can't be more definitive than that.

Q. Is there any reason to doubt the note?

A. On which date, either.

Q. Well can't we be clear of this that he must have known prior to this date, if you reported to this committee, that the Minister knew the order of the top two.

There is no reason to doubt the note, is there?

A. Except that when I started with this Tribunal, my recollection was telling me something slightly different.

Q. Yes, I am not suggesting that your recollection is deliberately inaccurate or anything, but the fact is you were not recalling what had happened then without the benefit of the note, or with the benefit of the note, were you?

A. That's true.

Q. What I am suggesting to you is that the note indicates that the Minister was more deeply involved with the project to the extent of suggesting a way could be brought to a conclusion than merely a request for a progress report would indicate.

A. I have no recollection of the Minister wanting to follow the details in detail or anything of that sort.

Or even, for that matter, fully understand at any time, even after he saw the report, whenever that was.

I don't think the Minister was interested in that level of detail.

Q. If you go to the next document for a moment, to the document contained in Leaf 122, it's Mr. a note in Mr. McMahon's journal of the 9th October 1995 meeting.

It says at the top of the note "We have Draft Number 1 report of AMI which recommends A5, A3, A1 in that order."

Then in a bracket on the right-hand side "Only limited number of copies. We've not had a chance to read in full."

And we discussed this before, and it as you suggested, or as you indicate, it doesn't necessarily mean that Mr. McMahon only got his copy that morning, but he's certainly indicating that for one reason or another, his side of the house hadn't had a chance to read the report in full?

A. Am I not right in recalling this is from Mr. Andersen's report read out this morning, but I think it's also a fact that there were only two copies, and it was agreed that they would be left in 44 Kildare Street; and Mr. McMahon's office wasn't in 44 Kildare Street.

Q. It was in Ely Place

A. So I mean, he had access to the report. Whether he had time or whether he made the effort to read it in full, I just can't account for that.

Q. If you go now to Leaf 137, which is in Book 43, for a minute, you'll come to a the first document in Leaf 137 is a typed transcription of a handwritten memorandum prepared by Mr. Ed O'Callaghan around the time of the award of the second GSM licence in October of 1995.

A. Yeah.

Q. And I think, unless a problem arises, we'll stick with the typed transcript.

The heading is "Chronology:"

And that is the only heading on the manuscript.

Paragraph 1. "I learned that AMI had forwarded a first draft of final report in week ending" that should be "6th October 1995." There is a mistake in the typescript.

"I asked Martin Brennan who they had recommended, and he refused to tell me on the 6th October. The report was not concluded that week. Sean McMahon told me the order of preference later that day.

"2. Did not see copy of first draft final report until 9th October 1995. I raised question of what happens if there is disagreement and MB" Martin Brennan "said that most of the project team had

been involved in the assessment which led to the ranking. Martin Brennan said that the Minister already knew the winner.

"3. Remainder of week taken up entirely with" it looks like "Convention on strategic alliance" or something like that.

A. I think it's "Consultants Re Strategic Alliance".

Q. I see. "Consultants Re Strategic Alliance".

I'll just read the entire document, though I am not at this point going to deal with every aspect of it.

"4. 17 October 1995, informed by FT that Minister wanted to announce winner by end of October, go to Government the following Tuesday with the winner.

Meeting of project team for 23/10 at 11:30.

"5. Went to Brussels on the 10th October, returned 19th October. Read second draft report on the 20th October but no appendix. (18th October returned 19th)."

What's in square brackets was not in the original. I think that is the reference to Appendix 2, and there was no Appendix 2 with the first draft, I think.

"4. Informed at meeting of 23rd that Minister wanted to go to Government on the 24/10 and get clearance for winner. Sean McMahon and I said that we couldn't sign off on it as the report was deficient and had not been fully read. Martin Brennan, Sean McMahon, and John McQuaid met secretary and a further week was agreed to

consider report. Meeting went on until 7.30pm."

"7. 23/10. Informed that Taoiseach had requested Secretary to expedite the position with a view to clearance of Government the following day. I went through drafting changes with MB between 4 and 5.

Meeting at 5:00pm, left at 7.15 drafting changes still be discussed and to be faxed to Michael Andersen.

"8. Minister met Sean McMahon and Martin Brennan and Secretary and Sean Fitzgerald. He was to meet Party Leader's re the winner. Heard at 4.45 that the Minister was holding a press conference to announce the winner. We did no signing off on report we had no final report. No consensus asked for. No vote effectively no decision by project team."

Now, I just want to go back to the first two paragraphs for the moment in which Mr. McMahon or Mr. O' Callaghan records that he learned that AMI had forwarded a first draft of the final report in the week ending 6th October, 1995. He says he asked Martin Brennan who they had recommended, and he refused to tell me on the 6/10.

Now, just firstly in relation to that, have you any comment to make in relation to that?

A. I think it was a question for Mr. McMahon to consider whether to tell him or not.

Q. Sorry, it is a question for Mr. McMahon?

A. Mr. McMahon was his boss. It looks like Mr. McMahon knew the state of the play.

Q. No, but he says he asked you who they had recommended, and you refused to tell him. I just want to know, firstly, is that correct?

A. I have no idea. I mean, if he records it, I don't know when he recorded it, because this is a note recording events over a period.

Q. It is.

A. So I don't know when the note was written. I can't I can't account for what somebody else wrote, whether immediately contemporaneously or the following week. I don't know whether he asked me; I don't know whether I refused to tell him. But assuming that I did, and I said "Well, that's confidential information; ask your boss", or something like that, that wouldn't be unusual.

Q. How could it be confidential if he was a member of the project team?

A. I have always said that the project team was the division leaders and one or two others, that that "others" were their deputies. And Mr. O' Callaghan, in particular, was a very late joiner of the project team.

Q. I think that when we looked at the membership of the project team in the very beginning, I think there was no doubt that Mr. O' Callaghan was a full member of

the project team and not simply a deputy for Mr.

McMahon. I thought we agreed that before Christmas.

A. I never agreed that. I don't think you can find any early report of the project team where Mr.

O' Callaghan was in attendance, and I have always said, here and elsewhere, that the project team was made up of the heads of divisions. But there was a deliberate decision, because it was across the holiday period, that each one would have a Deputy. And in the beginning, my recollection is that Mr. McMahon brought Mr. Eugene Dillon to the meetings, and then at some stage it became Mr. O' Callaghan.

Q. Therefore, does that mean that the project team was much smaller than the list of people we have seen in the minutes?

A. No, I think the people who attended were all part of the effort, but formally the project team as originally set up

Q. Was Mr. Towey a member of the project team?

A. I think Mr. Towey was.

Q. Well, let's not say "think", now. Can we be sure?

This was, I think, one of the most significant pieces of largesse conferred by the Government on anyone in the past maybe 50 years. This was a process which was described, I think, in the Dail as a very high-class process. Can we find out who the members of the team were, just that much?

A. You can in a moment. But using the expression "largesse conferred on anyone by the Government" I think is a disparaging term of the process.

Now, as regards the make-up of the team, I believe that in the presentation meetings, of which you have listened to some of the tapes, on each occasion I explained that there were more people present that were on the project team, and at the same time, the people present are the same people who attended the Project Group meetings.

Q. But who are the project team? If you like, go to any set of the minutes could you tell me who was on the team and who was not?

A. I believe that myself and Mr. Towey, Mr. McMahan, Mr. McQuaid actually originally Mr. McMeel was not a member of the project team; Mr. David Doyle was, and Mr. McMeel was his Deputy. I believe that originally Denis O'Connor and Billy Riordan were members of the project team. I don't believe that the other people who attended meetings of the project team had the exact same status. These were people like Maev Nic Lochlainn, who was a member of some of the sub-groups but not of the project team. Ed O'Callaghan, Eugene Dillon.

Q. I understood at all times that Ms. Nic Lochlainn was a member of the project team. How could she be a member of the sub-group and not be a member of the team?

A. Aidan Ryan was a member of the sub-groups. John Breen was a member of sub-groups. They were representing their divisions.

Q. Isn't this somewhat unsatisfactory at this stage, Mr. Brennan, that it now appears that there is no record of who the project team members were? If somebody wants to examine this decision, whether from the point of view of a Tribunal carrying out the work of examining Terms of Reference from the Dail, or anybody else examining this, that they couldn't say, or couldn't find a document saying who the project team members were?

A. I have been consistent about this for a very long time. And in a way, it's surprising it's being presented in this manner today.

Q. The reason is maybe it's extremely surprising for me, Mr. Brennan, that after this many days, evidence concerning this matter, we are now told that Mr. O' Callaghan was purely a deputy, or a nominee. Because I have a clear recollection of dealing with this matter at a very early point where I referred you to a document containing a list of the membership of the Project Group in which you are described as the Chairman; Mr. Pat Carey of T&RT was a member of the team; Mr. Ed O'Callaghan was a member of the team; Mr. Denis O'Connor, as you pointed out yourself, was a member of the team; Mr. Conan McKenna was a member,

although his role was taken over by Mr. Towey

eventually. This was in the very early stages.

A. This is 1993 now.

Q. Mr. Sean McMahon or nominee was a member. Mr. Jimmy McMeel, Department of Finance; Mr. Aidan Ryan, T&RT; and Mr. Sean Tipper, Secretary.

A. That's now back in '93, and several personalities had moved on before the project became live.

Q. Of course several personalities moved on, but I think you'll have to agree with me that it's absolutely clear from that document that Mr. Ed O'Callaghan was a member of the team, and Mr. McMahon or his nominee was a member; and that would seem to suggest to me and I think that was my impression at the time I first drew it to your attention, was that that meant that Mr. McMahon and Mr. O' Callaghan were full members, but that Mr. McMahon could bring a nominee?

A. I don't remember.

MR. ROSSA PHELAN: Mr. Chairman, I am reluctant to interject, but I just think it would be helpful at this stage, it's the role of Mr. O'Callaghan that's been primarily focused on, to refer to the statement of Mr. O' Callaghan which is being sent into the Tribunal where he states, in the very first answer to the question on his involvement, that he joined the Department in August '93 and was assigned to The Telecommunications and Radio Regulatory Division.

"At that time I would have been aware that the Telecommunications and Radio Development Division had been given primary responsibility for organising the GSM licensing process. I do not consider myself to have had a significant role in the process. From my perspective, the division's lead role would have been taken by the head of the division, Mr. Sean McMahon, Principal Officer. I missed a number of subsequent meetings due to my mobility difficulties at that time. I think that most, if not all the meetings of the project team that I did attend were in the company of the Principal Officer of my division."

CHAIRMAN: Well, that's pertinent, Mr. Rossa Phelan, and I'll take it on board.

But it is, Mr. Brennan, a perplexing development, insofar as you do not seem to primarily take issue with Mr. O'Callaghan's more specific statement in relation to the events of these days; might it not seem that it could have been, you used the phrase "disparagement" a while ago, could it have seemed disparagement of a trusted civil servant whom you declined to impart this information?

A. Mr. Chairman, I have been using the phraseology of members and their deputies since I first came in contact with this Tribunal in informal session, and I am a little surprised that it's being put in a sort of confrontational way today, since it's not new

information.

CHAIRMAN: No, I don't want a confrontation at all, Mr. Brennan; that's the last thing that we are aiming at in this process. But I'd just be anxious that you deal with the specific matter, that you feel you don't take issue with Mr. O' Callaghan's recollection that no doubt we'll hear in evidence in due course, that you declined to state to him who the front runner was and may have said "Ask your boss".

A. I don't take issue with that statement, no. I don't see what the problem is around that statement.

CHAIRMAN: Well, why was this? Even if he was a lesser member of the Project Group, you were a tightly knit group; he had been involved in some degree since the very early days, and he asked you, presumably in the course of his official duties, for information.

A. I am actually assuming that it was a casual conversation, perhaps in the corridor, or even in the street. I don't know where the conversation took place. I think I said from the beginning I have no accountability for this note. I don't know when it was written. There are things in it with which I would take issue, but that's not particularly one of them.

Q. MR. HEALY: In relation to what Mr. Rossa Phelan said a moment ago concerning Mr. O' Callaghan's memorandum of intended evidence, can I just say that this was in

response to a query from the Tribunal which went as follows: "Mr. O'Callaghan's involvement, direct or indirect, together with his knowledge of the involvement of any other person at the early stages of the GSM competition process in the devising of the evaluation criteria."

It was in response to that question that he said "I joined the Department in August 1993" paraphrasing for a minute "and was assigned to the Telecommunications and Radio Regulatory division. At that time I would have been aware that the Telecommunications and Radio Development Division had been given primary responsibility for organising the GSM licensing process. Both I and my division would have had very much a secondary role in relation to that process. To the best of my knowledge, at no stage was I involved in the devising of the evaluation criteria. I recall that staff of the Telecommunications Radio Development Division and Roger Pye of KPMG were involved in devising the criteria."

I think I am right in saying, and I am basing this on recollection, that nowhere in his statement does Mr. O'Callaghan say that his role in the Project Group was that of a deputy merely. In the portion of intended evidence read by Mr. Rossa Phelan, I think he is recorded as having said that he attended with Mr. McMahan.

So just to come back to the question that got us off on this issue, do I take it that you are not disputing that you refused to tell him? Your response simply is that he wasn't entitled to know, and you are saying he wasn't entitled to know because he wasn't a full member of the committee?

A. I am not putting it as so long as that. I am saying that taking at face value this conversation took place, I don't know where or when, I don't know whether it was in the corridor, or in the canteen or wherever, and I was obviously guarded.

Q. Why do you say you were obviously guarded?

A. Well, if I refused to give him the information, it may well have been the circumstances in which he was looking for it. I don't know.

Q. Well, are you saying, then, it had nothing to do with his role, as you saw it, or as at least as you are suggesting, as a non-full member of the committee?

A. Again, it's asking me to explain after conversation about which I don't have a context right now.

Q. It's a fairly stark statement by Mr. O'Callaghan. He was a member of a committee set up with a very strict confidentiality protocol where a result was to be achieved by a group, all of whom were, according to the minutes, to have an overview of the entire process and to try to involve themselves even on a remote basis with those aspects of process on which they

haven't have any particular expertise and wouldn't it be only reasonable for somebody in those circumstances to be interested to know what the result set out in an evaluation report was, and wouldn't it have been your duty to tell him, so as to ensure that as many people as possible in the committee had as much knowledge as possible as early as possible?

A. I don't really believe there is an issue around this.

It's the absence of context that is causing this almost acrimony. It could be, for example, that he asked me across the coffee table in the canteen with other people present; I have no idea how it came about. But I didn't have any ulterior motive in not telling him, that's for sure.

Q. If your desire not to tell and was due solely to the fact that you weren't in as private a location as you would want to convey information or transmit information of that kind, isn't it likely that you'd have said, "Look, I can't tell you; I'll tell you later on when we are a bit more private", or "Not here"?

A. That comes back to, I didn't write the note.

Q. You didn't, but the note is in fairly stark terms. It says "He refused to tell me". It doesn't say "He refused to tell me or tell me later because it was private".

A. There is lots of things in this note in stark terms,

in particular at the very end, "No consensus asked for. No vote, effectively no decision by the project team."

In over 30 years in the civil service, I never attended a group where a vote was taken so I couldn't ground that, but that's his way of writing it.

Q. In your 30 years in the civil service, how many times did you preside over a process like this? And I want to make it clear that I am not intending in any way to make any pejorative remarks about the process when I talk about the conferring of largesse; it's the conferring of a privilege on somebody as a result of a process which is designed to involve non-political independent technical evaluation of applications.

How many times in your 30 years have you been involved in a process which was set up as, if you like, profoundly as this to carry out such an evaluation?

A. By definition, never on that scale. But I mean, I also take issue, by the way, with no consensus asked for. That's not an accurate reflection of what happened.

Q. I appreciate that. And to some extent we touched on it before Christmas, and we'll come back to when it becomes more relevant in the chronology when we get to that part of October, but I note what you are saying about it, that you disagree with it.

Just go on to Document 127. There are two documents

here, and I only want to refer to one of them. The first one simply records the date of the second version, described as the final draft version. But that did get us into confusion; we'll call it the second version of the draft report on October 18th.

And presumably you received it in presumably by fax, initially, or certainly within a day or so of the 18th?

A. Mm-hmm.

Q. The next document is in page 128, or Leaf 128, and it's the cover page of the final version of October 25th. And I want to have a look at one or two aspects of the evaluation report in a little more detail. The first thing I want to do is to refer to the final version. And you'll find that in do you have Book 46?

A. No.

Q. It's the easiest place to find these. They are contained in other books as well. I think maybe somebody will let you have a copy of Book 46.

(Book handed to witness.)

Book 46, in Leaf 46, contains the October 18th version and in Leaf 50, contains the October 25th final version.

Now, you recall from the Opening Statement that Mr. Coughlan drew attention to some fairly significant changes in the drafting of Section 5, the heading

"Sensitivities, risks and credibility factors" in the October 18th or between the October 18th and October 25th versions of the draft evaluation report. And I want to look at them in a little more detail.

Now, we discussed in brief I think on Friday whether sensitivities, risks, and credibility factors were intended to be scored or not scored. And you drew my attention, although you recall you couldn't pinpoint it to a reference in the evaluation model, where Mr. Andersen seemed to suggest that there might be an option not to score these.

Now, your attention was drawn presumably this morning when reading his report to the slightly different language he uses. It's not clear to me, at least, that there was always an option not to score these.

He seems to suggest in the report he prepared this morning that these should always be evaluated, but one way or another, I think we can agree that when the application goes in, the applicants put their best they respectively put each one puts his best foot forward?

A. Mm-hmm.

Q. He tells you what his strengths are, how he proposes to do what he wants to so, he puts in his business plan and so forth. He is not going to give you a road map to his weaknesses?

A. Mm-hmm.

Q. So when you are evaluating the applications, you are evaluating them according to how the applicants see their various proposals as meeting the criteria that you have outlined in your RFP. But in looking at sensitivities, risks, and credibility factors, what you are seeking to do is to look at the aspects of the applications that the applicants haven't highlighted, the weaknesses, in other words; what are their sensitivities, what are the risks associated with them, and is there a really acceptable degree of realism about their applications?

A. Mm-hmm.

Q. Would you agree with me that anyone could go to the best application designer in the world and get a stunning application, but if he didn't have money behind him, or if he didn't have technical expertise behind him, it wouldn't matter; there would be no reality in his application?

A. Mm-hmm.

Q. So while the approach adopted to evaluate these applications was what's called the best application report, and is therefore based on the best set of documents you get in, it entails, in addition, looking behind those documents to look at the individuals or the entities that put them in to see whether they can stand over them and carry out what they say they are going to carry out?

A. Yeah.

Q. Now, in the October 18th version, this analysis begins at page 44, and I think I am going to have to read it all to draw your attention to the changes and to deal with them in more detail.

The heading is "Sensitivities, risks and credibility factors:

"Various analyses and investigations have been conducted in order to deal with the sensitivities, risks and credibility of the applications and the business cases behind the applications.

"In general the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. "

"In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. A5's maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one of the consortia members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst-case situation turn out to be critical, in particular concerning matters related to solvency.

"Although being assessed as the most credible application, it is suggested to demand an increased degree of liability and self-financing from the backers if the Minister intends to enter licence negotiations with A5.

"The A3 application has also been found highly credible as well, although not reaching the same degree of documentation and evidencing as A5. In addition, the supplementary investigations concerning tariffs indicate that there might be a lack of consistency between the marketing and the financial plans as the projected usage revenue per call minute exceeds the normal call tariffs by far, and not substantiated solely by the non-time through metering principles suggested by A3. For this reason the difference in the level of tariff between A3 and A5 is not substantiated by the projected revenue streams where A5 projects a lower revenue per call than A3.

"In addition A3 has a similar type of problem as A5, namely the extremely small equity of Sigma Wireless. It is questionable whether Sigma Wireless can bridge the gap between the weak degree of solvency and the general liability of a comparatively big shareholder in a business that requires "Patient money" and a high exposure.

"Furthermore, A3 has expressed such strong reservations concerning the draft licence, which was

circulated as part of tender documents, that the Minister will formally have an unfavourable starting point. However, should the Minister wish to enter into licence negotiations with A3, both these reservations and the Sigma Wireless issues should be solved satisfactorily as these are necessary but not sufficient conditions in order to conclude the licence negotiations.

"Finally, it has not been taken into consideration at all during the award of marks in the evaluation that Motorola and Sigma have interests with and links to the incumbent operator whereby could in theory be questioned whether some of the consortia members of A3 could be exposed to conflicts of interest, thereby weakening the competitive edge of the GSM II operator (or the incumbent)

Andersen Management International clearly views this as a risk. This risk should be dealt with at the political level as has been the case in other European mobile tenders most recently during the DCS 1800 tender in France where the French Government abstained from the nomination of a consortium with conflict of interest between the incumbent and the potential status as a second mobile licensee."

"A1 is assessed to be a credible application, although not reaching the heights of A3, and in particular A5. No dramatic sensitivities related to the IRR earned

have been identified. Like A3 but less gravely, A1 might have a lack of consistency between the tariffs offered and the projected revenues.

"A risk factor may be found in the commitment from one of the backers and in the composition of the consortium as a whole. Notwithstanding the fact that Deutsche Telecom throughout the A1 application from time to time is presented as consortium member, Detecon is the true consortium member. Detecon is only 30% owned by Deutsche Telecom, the remaining part being owned by 3 German banks. Deutsche Telecom has only stated intentions no, commitments to back Detecon and A3. In addition, having three similar types of operators in the same consortium without presenting the decision-making rules in the applications could pose a risk.

"If the Minister intends to enter licence negotiations with A1, these risk factors should be taken into consideration."

I don't want to deal with the risks where the other if you like, non-, we'll call them short-listed, you can have a short list in the formal sense, short listed applicants are concerned.

If you go onto the next page.

"In total, the evaluators have arrived at the conclusion that the other aspects investigated under the dimensions credibility, sensitivities and risks

widen the gaps between the applicants and thus confirm the results of the award of marks presented in chapter 4, in particular concerning the difference between on the one hand A1, A3 and A5 and on the other hand, A2, A4 and A6.

"The evaluators have also concluded that it has not been necessary to score the so-called "Other aspects" contained as an option in the agreed evaluation model, since the mandatory part of the evaluation generates results that discriminate among the applications, and since it has been concluded that the general credibility of the applications is equal to the ranking of the applications. As such, it has been assumed that the risks identified can be handled satisfactorily during the licence negotiations.

"It should be remarked that the effect on the Irish economy to which some attention has been paid in some of the applications has not been scored at all since the scoring of this dimension might intervene with EU considerations. Besides Appendix 8 reveals that a short supplementary analysis of the effects on the Irish economy will not generate sufficient differences. Direct effects on the national economy are difficult to measure, and even if a measuring was to be carried through the resulting effects of such an analysis might never materialise in the projected manner."

Now, for one minute I want to refer to a similar passage in the October 3rd version, if only to deal with one change highlighted by Mr. Coughlan in his Opening Statement. I don't think I need trouble you; it's cumbersome for you to find it. I can refer you to the exact change. I am now reading from page 40 of Leaf 34, which is the evaluation report October 3rd under the heading "Sensitivities, risks, credibility factors."

In the second paragraph, the fourth sentence is as follows: "The weakest point concerning A5 is not related to the application as such but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity."

When you come to the October 18th version, that passage has been changed, and it reads: "A5's maybe weakest point is not related to the application as such but to the applicant."

Do you see that?

A. Yeah.

Q. If you look at the supplementary analysis that I referred to a moment ago, I think there is no doubt that that is described as a weak point. I am just wondering why somebody said of it "maybe a weak point", seeing as in the supplementary analysis, it's clearly described as a weak point.

A. I have no idea beyond saying that the way it's expressed is Danish English, not English English. So it may be as simple as Mr. Andersen was reacting to a discussion and revisiting the drafting. I can't explain it, because putting the word "maybe" where it is in the sentence wasn't written by anybody on my team, that's for sure.

Q. Isn't it clear that the change in meaning whether it's Danish English, English English, or Irish English, or any English you like in the first draft it's a weak point, and in the second draft it's only maybe a weak point?

A. What I don't know what significance to attach to it.

Q. I am wondering what significance was attached to it. Why was the change made?

A. Well, you no doubt have found that when we were suggesting changes, they were written down and handed over, and that's not one that was written down and handed over because Mr. Towey or I wouldn't express ourselves like that. So I am still suggesting that perhaps Mr. Andersen, having listened to a discussion about the report and the need for the report, throughout the report to be clearer in the way it presented the results of the evaluation, had another look at language and inserted this word. I don't know.

Q. This was your report. I want to be clear about this because it's going to come up time and again. It was definitely your report, wasn't?

A. How do you mean?

Q. The report of the Project Group as a whole.

A. It certainly became that, in the sense that we suggested a fair amount of changes to various drafts of it. So in that sense, yes. In the sense of what did we contract with Andersens to do, he'd have to look at the tender. But I am not backing away from the report.

Q. If you look at that page in any case, page 44, the second paragraph describes

A. Are we now on the

Q. We are still at the October 18th; right?

A. Yeah, okay.

Q. Page 44 describes, if you like, the weak points of the various applications as perceived by the evaluators?

A. Yeah.

Q. In relation to A5, the conclusion is that "Should the consortium meet with temporary or permanent opposition, this could, in a worst-case situation, turn out to be critical, in particular concerning matters related to solvency."

If you go to the final draft, you see that the second paragraph has been changed completely. And the paragraph that we were referring to, the one that

deals with the weaknesses of A5 and then A3, A1 and so on, has now been mainly put into the bottom of the page and onto the next page. And there is a whole new introductory paragraph. The original Section 5 dealt with and introduced immediately the weaknesses in the various applications. But by the time you got to the final draft on the 25th, a whole new paragraph had been put in prefatory to dealing with those weaknesses.

And it's as follows: "A critical factor in any consideration of the credibility or risk analysis of the applications is the capability of the principals to finance the project, including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded, having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, that the project is fundamentally robust and, after a licence has been awarded, an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial

weakness of one consortium member should not have a negative impact on the ranking of the applications.

It is important, nevertheless, to draw attention to the need to deal with this factor where relevant in the context of licence negotiations. These aspects are subject to further elaboration in Appendices 9 and 10.

"The assessment of credibility and risks has also taken account of management proposals.

presentations in relation to the development of distribution channel.

preparations in relation to site acquisition and equipment procurement consistency of penetration usage etc. with financial figures.

"In general terms, this assessment has sought to identify factors which may have the effect of undermining the projected development of the business plans proposed by applicants."

Then it goes on in the form of the original draft.

Now, in order to understand this section, I think we have to look at Appendix 10 and the portion of Appendix 10 which deals with A5, A3 and A1. Appendix 10 is in the same book.

MR. HEALY: And I think, if we go through it in any case, and try and get it out of the way, Sir, before

we finish up.

CHAIRMAN: All right.

Q. MR. HEALY: Appendix 10 is headed "Supplementary analysis on financial risks" and it begins off

"Introduction."

"As stated in the main evaluation report, the top two consortia have members who presently do not have the capital required to finance the GSM II network. The consortia members who thus need capital for the funding of the GSM II consortium have "Secured" this capital by various instruments, including the shareholders agreement and letters of commitment from investors. This analysis discusses the risks due to lack of funding. It further suggests means to close the uncertainty related to financing.

"The risk analysis includes a brief assessment of A2, A4 and A6 and a more detailed of top three ranked consortia, A1, A3 and A5."

I think we can pass over A2, A4, and A6 and go on to the assessment of A1, A3, and A5.

"Assessment of A1. The consortia members of A1 and their shared contribution are as follows:

"25% Southwestern Bell Corp; 25% Detecon; 25% Tele Danmark; 25% three Irish investors; 10.5 % Martin Naughton; 10.5% Lochlann Quinn, and 4% Kieran Corrigan.

"The application states an intention to enlarge the

ownership base by flotation of 25% of the shareholdings held by Mobicall's members. This will be initiated after three years of operation, depending on the success of the company and on stock market conditions.

"In the financial plan, the base equity contribution is stated to be 71 million with a debt financing of 32 million. The application does not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases numerically from minus 104 million to minus 136 million in the event of a two-year delay of subscriber uptake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation where the need for finance is 40% higher than the base case.

"If the ownership ratios are used as an indicator for the finance requirements, the following equity requirements hold:"

And there is a table then setting out the equity requirements at the base case and at the estimated worst case.

"The concern in this consortium could be placed on Detecon. Although Detecon has an equity capital of 77 million deutschemarks equivalent to 50% of the

worst-case equity commitment the commitment may place a too-big burden on Detecon. According to Detecon, the minority owner Deutsche Telecom will act as backer. Considering, however, that the equity capital does exist, we do not assess Detecon as an investor which will not be able to fulfil its commitments.

"With the intention of flotation, an escape clause is left for the three Irish investors if they have problems with the equity capital. If the presence of the three Irish private investors is seen as an important asset to the consortium, this must be addressed in the licence agreement.

"Assessment of A3.

"The consortia members of A3 and their distribution is as follows:

26.7 percent Motorola.

26.7 Unisource.

26.7 percent Sigma Wireless.

20% ESBI Telecoms Limited.

"The initial shareholding of Irish investors will be 46.7 percent. The application includes no intention of share flotation.

"Sigma Wireless was formed in 1991 following a management buyout of Motorola's Irish distribution activities. The principal activities of the company are the exclusive distribution and sale of Motorola

radio communications products and systems in Ireland.

"Motorola is 49 percent shareholding in a joint venture with Telecom Eireann called Airpage which provides the only nationwide paging service in Ireland.

"In the financial plan, the equity contribution is stated to be IR39.935 million with a debt financing of 42.403 million. The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases numerically from minus 102 million to minus 255 million in the event of a two-year delay of subscriber uptake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation where the need for finance is twice as high as in the base case.

"If the ownership ratios are used as an indicator in the finance requirements, the following equity requirements hold" and there is a list of the equity requirements in the base-case scenario and in the worst-case scenario. In the case of Sigma, the equity requirements jump from 10.649333 million to 21.298667 million.

"Although the financial strength of ESBI is not revealed in the application, the shareholders

agreement states that ESBI will get all the necessary backing from the other company, ESB; therefore the financial strength of ESBI seems well secured.

"Unisource and Motorola are both financially strong companies with ample funds for this for them small project.

"Sigma is the weak partner with an equity capital of only IR£1 million. The application does not state how Sigma is going to provide the necessary funds, but the presentation revealed that they have a letter of commitment from an Irish investment bank, AIB. As a matter of tender procedure, this piece of information can only be interpreted as a willingness to secure the necessary capital. Furthermore, nothing definitive about the price of such commitment with respect to gaining equity in or control of Sigma has been stated.

However, Sigma's existing shareholders cannot be expected to give away a majority part of shares. This is because the shareholders agreement, (see text box below) leads a way out of the funding problem. It states that if one of the shareholders is not capable of providing a required guarantee for a loan, the other shareholders may provide the necessary backing.

"The shareholders agreement thus provides Sigma with a tool to guarantee Sigma's funding. Sigma may still decide not to use this opportunity due to other reasons. One reason could be that the financial

burden imposed by the ownership of Persona is of such magnitude that it might cause Sigma's bankruptcy.

This may happen if Sigma does not increase its equity capital to a level which will cover the initial losses in Persona during the period of first years.

Therefore, there is a need for an injection of further capital in Sigma if it shall persist as a stable partner in the consortium. This aspect is not addressed in the application, and it leaves an uncertainty about the ownership of Sigma.

"If Sigma is not able to provide the necessary funding, the shareholders agreement states that 'failure by a shareholder to subscribe to its pro rata share in a subsequent share capital increase shall result in dilution of the proportionate shareholding percentage of such shareholder'. Thus the consequence is Motorola, ESB, and Unisource get a higher stake.

This may lead to a situation where Persona is controlled by non-Irish partners."

Then there is a box containing notes on the shareholders agreement. There are five bullet points, which I don't think I need to go into in detail at this stage. The main point is that if a shareholder fails to subscribe to his pro rata share and subsequent share capital increase, this will result in a dilution of the proportionate shareholding percentage of such shareholding.

"To conclude, the weak financial position of Sigma will not lead to financial problems for Persona but may lead to a different ownership structure of Persona, either directly, through the division of its shares, or indirectly, through the ownership of Sigma.

This uncertainty cannot be limited by a proper set of licence conditions. As examples, the following types of conditions are suggested:

requirements for minimum equity capital of Sigma  
requirements regarding the voting power in Persona  
requirements regarding the loans to Sigma and  
share conditions."

Next heading, "Assessment of A5. The 9 consortia members of A5 and their share distribution of existing corporation Esat Digifone is as follows:

50% Telenor AS

50% Communicorp. (34% held by Advent International).

"At present Telenor has with current assets of IRi;½550 million the financial strength to provide the necessary financial backing of its wholly-owned subsidiary of Telenor Invest.

"Communicorp is a new company which has invested heavily in telecommunications infrastructure and has a very weak balance sheet which needs capital injection before it can support the shareholders equity commitments stated in the shareholders agreement".

There is a note on the shareholders agreement. I

think the main part is "Provided the consortium wins the licence, the two consortium members have agreed to reduce their stakes to a minimum of 40% by allowing 3 to 5 institutional investors to hold a maximum of 20 percent of the shares.

"In the period after a licence award, Communicorp will have between 40% and 50% of the shares. This may be diluted to 34% at a later stage where up to 32% of Esat Digifone equity is made available to public or institutional investors. Even with only 34 percent shareholding, the financial commitment of two original partners will be high. The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases numerically from minus 108 million to minus 156 million in the event of a two-year delay of subscriber intake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation where the need for finance is 50% higher than the base case. IR i<sub>0</sub><sup>1/2</sup>52 million are used as the base-case requirement, and if 1.5 by 52 million is used as the worst-case equity requirement, the individual equity commitment for Telenor or Communicorp amounts to" in the worst-case scenario, at 50%, it goes from 26 million to 39 million. At

40%, from 20.8 million to 31.2 million. And at 34%,  
from 17.68 million to 26.52 million.

"This equity commitment cannot be met by Communicorp  
today. According to a letter of commitment to the  
Department of Transport, Energy and Communications,  
dated 10th July, Advent has committed to fund up to 30  
million in support of Communicorp's 40% shareholding.  
The letter of commitment does not clearly state what  
the "price" would be if the commitment should brought  
into life. But according to the presentation, the  
price would be close to a 75% stake in Communicorp.  
Furthermore, according to the information given in the  
presentation, the control will still be in the hands  
of the Irish investors (Denis O'Brien), as his shares  
bear a three times higher voting power."

You may wonder about the arithmetic of that.

"The legal basis for this commitment has not been  
included as part the application's supporting  
material. Taking into account the very high  
proportion of Communicorp as intangible assets (most  
of this is goodwill) the risk of a dispute about the  
share ratio between O'Brien and Advent seems evident.

"This may result in a situation of instability or a  
situation where the control of Communicorp is  
transferred to Advent. It could also lead to a  
situation where the commitment of Advent cannot be  
fulfilled.

"The size of commitment by Advent does not cover our worst-case estimate of the equity requirements (at a constant 50 percent ownership for Communicorp). In a worst-case scenario the requirement for further funding is expected to arise two to three years in the project. At this stage Advent will have invested the committed figure, and it is judged to be very unlikely that Advent will retreat, as this could lead to a hundred percent loss of the invested funds.

Therefore, it can be concluded that the major risk is related to possible instability of Communicorp or to the transfer of power to a non-telecommunications investor.

"This uncertainty can be limited by an appropriate set of licence conditions. As examples, the following types of conditions are suggested.

requirements regarding the share ownership and voting power in Communicorp requirements regarding the equity of Communicorp."

MR. HEALY: Unless you want to go on, Sir

CHAIRMAN: I don't think it's fair to ask Mr. Brennan any questions about it today, but we might as well conclude this fairly turgid piece

MR. HEALY: It's concluded.

CHAIRMAN: Yes, I think, Mr. Brennan, you have had two hours, and I think in fairness we ought to defer taking up any aspects arising from that until you have

had a little more chance to distil it.

MR. BRADLEY: I wonder, could I make an inquiry through you, sir. Counsel for the Tribunal very helpfully suggested at lunch time that we would receive documentation and correspondence appertaining to the AMI to January 2002 document that was read out this morning. It was suggested and indicated that we would receive that at lunch time.

Now, it may be through no fault of the Tribunal, but we haven't received that documentation yet. And we of course are anxious to look at whatever documentation is there as quickly as possible, and I wonder, could you perhaps give an indication when that documentation would be forthcoming to the Department? And of course we are very appreciative of any assistance in that regard.

CHAIRMAN: Well, I am obviously anxious that I think if you have a word with Mr. Bradley, it emphatically has my blessing that you give him the maximum assistance within the soonest possible time available.

Eleven o'clock.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
WEDNESDAY, 29TH JANUARY 2003, AT 11AM.