

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. Richard Law-Nesbitt, SC

Mr. John O'Donnell, BL

Mr. Conleth Bradley, BL

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

FOR DENIS O'BRIEN: Mr. Eoin McGonigal, SC

Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FOR MICHAEL LOWRY: Mr. Rossa Fanning, BL

Instructed by: Michael Kelly

Kelly Noone & Co.

OFFICIAL REPORTER: Mary McKeon SCOPIST: Ralph Sproxton

I N D E X

WITNESS: EXAMINATION:Q. NO:

MARTIN BRENNAN Mr. Healy 1 - 264

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 4TH

FEBRUARY 2003 AT 11:00 A.M.:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Mr. Brennan, if you'd look at Book 43,

Leaf 186, for a moment, please.

A. Before I do that, if you don't mind, there is

something I wanted to clarify about Friday. And I

suppose my answer was incomplete or maybe inaccurate,

borne completely out of tiredness. But towards the

end, you were asking me about why it was, when we got

written information that IIU had become part of the

scene, that we didn't then announce that; and I said

it may have been a tactical decision or

something yeah, well, as soon as I had a cup of

coffee it occurred to me that that was a stupid

answer. What really was the situation, that triggered

two responses in the Department. One was to check

out, who are these guys, and are they good for it?

And the other was to trigger legal advice as to where

stood the application in the light of that

development?

So when you put it like that, it's clear why we

weren't in a position to make any announcement at that

stage.

Q. Can I just clarify that again, that you said that you think that firstly you were looking at it from the point of view of who are these people? That was the first thing that went through your minds at the time?

A. I didn't deal with it directly on a hands-on basis until sometime later than that. But they were the first two responses within the Department, was you know, who are IIU? Have we evidence as to whether they are substantial? And the other response was to get legal advice as to what the effect of this had in terms of the application.

Q. But that didn't in any way take from the fact that you were being told that these people were the consortium; isn't that right?

A. Yes.

Q. You were told they were the consortium. It's irrelevant, really, whether they were capable of keeping up their end or not. It was irrelevant who they were. If you were told that you know, it was Mickey Mouse was now going to be taking over the consortium, it didn't matter. That's who was going to be taking it over. That was or taking over that 20%. That's what the fact was; isn't that right?

A. Yes, but it would be very strange if we accepted that at face value without any inquiry whatsoever.

Q. But sure how could you possibly have failed how could you have taken any view other than it was the

fact that it was the solicitor for the consortium

who told you this; isn't that right?

A. I think it was, yeah.

Q. He said "These are the facts". The consortium had described itself in these terms. It was hardly a matter for you to write back to them and say "Well, we don't accept the way you describe yourself because we don't know who IIU are" or "We don't know if they have got the money to keep up their end of this". Surely you simply had an obligation to note or to record the fact and then to take whatever steps you felt were appropriate, but to record the fact that the consortium now consisted, as far as you were aware, of Telenor, Communicorp/Denis O'Brien and IIU, whoever IIU was?

A. Well, what I am seeking to clarify is that the Department's response then was to consider whether that was an acceptable situation in the light of the application, and to look at the financing. That's what actually happened. Whether it's what should have happened or what you believe should have happened or not, I don't know. It's what actually happened.

Q. What actually happened, as I understand it, is that on that day, the Minister made a statement in the Dail in which, as you indicated the other day, he probably said what he had intended to say regardless of what he was asked, and some short time subsequently, the civil

servants involved in the process made a public statement, the purpose of which was to dampen down the inappropriate innuendo and to provide a basis for informed comment, and neither in those situations was the true fact concerning the ownership stated. In fact, as I suggested to you the other day, there seems to have been a sensitivity about stating the true ownership and a complete avoidance of tackling the issue. I suggest there was some reason for that. Or was there a reason for it?

A. I don't believe there was any sinister reason for it, no, but obviously you will hear from other witnesses about it as well.

Q. I am interested in your view because you are one of the people who was, as you said yourself, most anxious to promote what was an unprecedented step for civil servants, to become involved in a press conference in which they, as it were, notwithstanding the fact that it was their Minister was under pressure in the Department, made a statement concerning a process which had become the subject of public controversy and Dail debate.

Now, surely I want to get your view on this. You took that unprecedented step knowing that the facts for which the public, in the form of the press and the Dail, had real appetite; and why did you why were those facts suppressed?

A. Well, I don't like to use the word "suppressed". I don't think suppression was what was at foot here. We had, at the time you are talking about, a situation where we had an application based on a certain set of information about its composition, and we now had new information which needed examination. Now

Q. You certainly sorry, I beg your pardon

A. If we had been forced to conclude, for example, that IIU didn't have the wherewithal and we had announced that they were a member of a consortium, it would have looked very odd indeed.

Q. Well, would it? How would it have looked odd? You had a job to do.

A. It's a bit hypothetical at this stage anyway.

Q. It's not hypothetical. You had a licence to negotiate. Prior to that you had a competition to conduct. You were being the Minister was being assailed in the House on the question of who owned this licence, and he was told or he told the Dail that this 20% or 25%, as we now know, of the licence, this 20% was owned by institutions or institutional investors whose identity he couldn't name or he couldn't give.

Now, you now know the true facts, that they are in fact owned not as to 20 percent but in fact as to 25% by IIU. That was a fact to which the public and the Dail were entitled; isn't that right? Regardless of

what view you took of it. If you subsequently took the view that, well, these people haven't the wherewithal, it was nevertheless a fact as of that moment; isn't that right?

A. That certainly is what the documentation is showing.

But you seem to be suggesting that there was a conscious decision to suppress information. What I am trying to get across is that there wasn't any great hurry to put out this information until we had considered all the relevant facts, all the relevant aspects.

Q. But Mr. Brennan, wasn't there savage pressure on you?

There was a great hurry. Mr. O'Brien was contacting the Department himself. Esat Digifone's managing director was virtually threatening proceedings. The Minister was issuing edicts effectively to say "Get this licence out". Civil servants were, as we know from the file, frustrated beyond belief at the pressure they were being put under to get out a complex document where the Minister didn't seem to have any time to listen to the complexities or to the excuses they had for the failure to get it out. There was a ferocious time pressure, wasn't there?

A. Again, that's a question that you'll have to put to the people who were directly involved leading

Q. No, was there ferocious time pressure or not?

A. I wasn't particularly conscious of it.

Q. I see.

A. I said at the beginning here, back in December, if I was in the situation of having won a competition and I was experiencing a long delay which looked like threatening the ability to capture the Christmas market, I would have been kicking down any door I could to see if I could accelerate it.

Q. Well, was there a pressure or not, then?

A. Was there pressure from Esat Digifone to get the licence finalised? Yes, there was.

Q. Was there pressure from the Minister?

A. I wasn't conscious particularly of it, but I was not the person dealing with the drafting and settling of the licence.

Q. Haven't we seen the documents here? You know from the documents there was pressure from the Minister.

A. Well, if you want to understand the extent, if any, to which there was pressure, or what was driving it, or what people's assessment of it was, there will be other witnesses who were closer to that part of the action than I was.

Q. The document I wanted to mention to you was a note, a handwritten note headed "Press Query"; do you see that?

A. Yeah.

Q. It looks like it must have come from the press office.

CHAIRMAN: What was the reference again, Mr. Healy?

MR. HEALY: Yes, Sir. It's 186.

Q. From Mario Hallrahan, Irish Times, query, GSM: "At the Public Accounts Committee this morning, Fianna Fail made allegations about how the GSM contract was awarded. Also there are protests from US-based companies who are going to leave because of bad decisions made by the Department in awarding the licence.

"Thirdly, it's believed the licensee did not have money for the contract.

"Can the Irish Times have a statement from the Department on the above?"

Do you recognise that document?

A. Not particularly.

Q. Do you recall issues like that arising at that time?

A. I'd say, as a general statement, there were queries to the Department from the press. But it's not something that you would specifically recall in detail. And a lot of the time this would be somebody at secretarial level in the press office writing down the query so the press officer could handle it, and the press officer would be more likely to come and talk to somebody about the answer than send out a query in written form like this. But I don't actually know what happened in this particular case.

Q. Do you know the answer to the final part of the query, where it says: "It's believed the licensee did not

have the money for the contract"?

A. I don't know what answer was given.

Q. If you now pass on to Leaf 190. It's a press statement from Persona indicating that they had submitted a complaint to the EU Commission. I don't think it's something that I need to detain you on.

The next document is a statement from the Minister saying that he was confident that the process would survive any scrutiny, I think is effectively what he is saying.

The next document, in Leaf 192, is a note of Mr. Fintan Towey's copied to you, Mr. McMahon and Ms. Regina Finn concerning a meeting with the Attorney General's office to discuss the disclosure of the information to unsuccessful applicants and the transposition of directive 96/2 and its impact on the award of the licence to Esat Digifone.

Again, I don't think I need to detain you on it. The point I was making earlier about the fact that the negotiations were overtaken by EU legislation I think is borne out by this document; do you see what I mean?

A. I do, yeah.

Q. In the process of negotiating the licence, there was a need to transpose or to give effect to an EU directive which had just come into play?

A. That's not something that I would be familiar with in detail.

Q. It's simply complicating the issue of drafting the licence.

The next document is a letter of the 24th April, 1994.

This is from Mr. Fintan Towey to the Attorney General's Office, and it concerns a number of issues, but one of which I think I might just highlight even though you didn't draft the letter.

It says "Dear Mr. McFadden/Mr. Gormley.

"Further to our meeting of the 22 and 23 April, I enclose the following

a report on the Department's assessment of the compatibility of the conditions of the draft GSM licence with Directive 96/2 and

a consolidated text of Section 111 of the P&TSA, 1983, incorporating amendments contained in SI 45 of 1992"

A. It's actually the main Act setting up An Post and Telecom Eireann.

Q. Of course, yeah, but post and telegraphs, whatever

A. It might be Services Act or something.

Q. "1983, incorporating amendments contained in Section 145 of 1992 and amendments proposed in the transposition of Commission directive 96/2."

In other words, a consolidation of all the up-to-date applicable law on the granting of the licence, both EU and Irish.

"I have also, as requested, consulted internally on

the question of consulting the EU Commission in relation to the terms of the licence. The Department is of the view that apart from the time constraints, it may not be prudent to invite the Commission's scrutiny at this point. The question of compliance with the provisions of Directive 96/2 will no doubt fall to be examined in detail by the licensee in due course, possibly in consultation with the Commission.

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone (relevant papers were provided at our meeting on the 22 April). In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of the licence, it is now considered that it would be preferable to seek warranties in relation both to the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent given the nature of the concession being given to the company. Perhaps you would also advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds.

"Finally, I will provide a brief for counsel on the proposed disclosure procedure as soon as possible but would, as discussed, appreciate your early opinion on the question of whether debriefing sessions should proceed in the shadow of a complaint to the Commission regarding the process".

Now, we know that eventually there were, if you like, if you want to call them debriefing sessions, or there were certainly meetings with disappointed applicants.

The third paragraph of or rather, I suppose, yes, the third paragraph of the letter refers to a legal opinion on the restructuring of the ownership of Esat Digifone. Do you see that?

A. I do, yeah.

Q. And the question whether the identity of the beneficial owners of the company could be considered incompatible with the ownership proposals outlined in the company's application must now be addressed. That shows, I suggest, that at least that issue, to some extent, you may have flagged at the outset of your evidence today, was being considered by the Department?

A. Mm-hmm.

Q. Although it doesn't seem that the opinion that was eventually obtained or pursued dealt with that issue; it seemed to be deal mainly with Section 8, if you have seen the advice.

A. I haven't looked closely at the advice.

Q. Section 8 is the section of the licence that deals with changes of ownership after the licence is awarded

and during the course of operation of the franchise.

One thing is clear from this letter, I think, if you

ignore the legal issues that were being identified,

one thing is clear: that Mr. Towey was in no doubt

that the identity of beneficial owners of the company

had been changed?

A. Yeah, I think that's right. And I suspect Mr.

Towey and Mr. McMahon can speak for themselves that

this letter was probably drafted jointly by them.

Just on its face, it looks like that, because Mr.

McMahon has legal training and Mr. Towey doesn't, and

I can see some of this coming through.

Q. And we know from other documents which I may allude to

later on that Mr. McMahon was concerned about the fact

that there was an apparent change in the consortium.

The next document is a letter, a draft letter from Ms.

Regina Finn to Mr. Peter O'Donoghue concerning a

number of technical issues in connection with the

drafting of the licence, on which I don't think I need

to detain you unless you want to say something about

it.

The next document is a handwritten note of Mr.

McMahon. I think it's dated the 29th April of 1996,

and it records, at the bottom of the first page, a

conversation with Mr. Jarlath Burke of Esat in which he says "Called me re two matters, 1 GSM, 2 routers."

If you look at the note of GSM: "I told him no major obstacle from my point of view to licence now accept AG as office anxious about corporate structure. It's not same as bid."

Underneath that, "I understand" rather the end of that line is "We are worried too"; then "He is happy with Section 111 approach."

I am not concerned with the rest of the memorandum, but again I think this, as I mentioned a moment ago, records Mr. McMahon's concern in and what he believed to be the concern of his office and the Attorney General's Office regarding the corporate structure and whether it was the same as the bid proposal.

The document in Leaf 196 is another note of Mr. McMahon's, and again, I don't think I need to detain you in relation to it unless you have any observation you want to make.

A. No.

Q. If you go to the next document. It's a memorandum of the 26th April of 1990 (sic) of Mr. McMahon's. It contains a diagram on the front page of a number of it looks like a corporate structure, with Esat Digifone on the bottom left-hand corner and then the other ownership interests feeding into it; do you see that?

A. Yeah.

CHAIRMAN: It must be 26th April, 1996, presumably.

MR. HEALY: 1996, presumably.

CHAIRMAN: It looks like a little bit like a zero, but that couldn't make any sense.

Q. MR. HEALY: It shows Telenor Invest, the Denis O'Brien and the IIU interests. But if you look at it, you see that there are some different shareholdings mentioned; and we may have occasion to refer to those in the context of some other documents.

Do you see where IIU are described as having a 10 to 12.5 percent exclamation mark interest. Then you have Esat Digifone with an arrow from Esat Holdings, and you have 37.5%, with an arrow up to 50%; do you see that?

A. Yeah.

Q. If you look at the Esat Holdings, if you like, ownership, arrow leading down to Esat Digifone?

A. Esat?

Q. Esat Holdings is in the centre of the diagram; do you see that?

A. Yeah.

Q. There is an arrow going down to Esat Digifone?

A. Yes.

Q. 37.5, with an arrow up to 50%; do you see that?

A. Yeah.

Q. Were you aware of any potential changes in the

configuration of the various shareholdings in Esat

Digifone around this time?

A. No. This documentation is completely new to me.

Q. I see. You see where it says "Denis O'Brien lead investor (First Boston)"?

A. Mm-hmm.

Q. "Lead said find solution to routers with Department.

Money will go into 'Holdings'." That's Esat Holdings.

"14 million on standby.

must find 26 million. Share capital 52 million

total to 65 million an addition of 13 million.

can write 15 million cheque for GSM.

4 million is to go into Esat.

"ME" I think that's Mr. McMahon "Why not cut Esat out of it? If that's the problem.

"Mr. O'Brien: Small losses but overflows losing customers".

Mr. O'Brien says "10 million turnover."

I can't quite read the next line.

A. "Not demanding even asking"

Q. "Full solution today"; is that

A. That's what it looks like.

Q. Then Mr. McMahon says "What are First Boston actually saying?

"Mr. O'Brien: That they won't fund Esat Digifone unless Esat gets more capacity. (He is shifting position)

First Boston recognises problem won't be regularised
short term.

First Boston told me to get extra capacity in Esat,
Waterford and Cork (desperate) it's for legitimate
leased line traffic. Suggest:

1. Reply to Telecom Eireann on that basis.
2. Value added if it's genuine."

At the bottom it says "Accounts? Esat Telecom." (Have
they been saying "Esat Telecom" in this document?

I've changed it to "Esat" a few times)

What that seems to suggest is that Mr. McMahon had the
impression that First Boston were only prepared to
fund Esat Digifone if Esat Telecom itself had more
capacity on its - side of the business.

A. That's what I would interpret from those words, yeah.

Q. And if you go to the next page, an assessment is being
made by Mr. McMahon, and I think something along those
lines, where he says:

"Denis O'Brien is rattled, but his purpose is not
clear

he is evasive as ever

he is ambivalent on role of banks

lawyers haven't done due diligence yet.

he says that First Boston wants Esat in the loop

i.e. for finance package

he says they told him to get more capacity at

Waterford and Cork.

he may be trying A, to save Esat" and I think that means Esat Telecom "and get funds for it if banks want to cut it adrift", meaning I suppose something to that effect "Keep it tied to Esat Digifone or B, now that it is part of his pitch to the banks, he is being told to regularise it."

"Seems to realise that the Government has now spoken seems to realise that he cannot have all the DDIs all the direct dialers.

"Is pitching for just a few.

"He agreed to therefore adopt our suggestions answer or Telecom Eireann and satisfy them or find the true value added or shared leased lines or" and I don't know what the last

A. The words "Value added".

I am not going to comment on this document, because it's Mr. McMahan's assessment, but the words "value added" have a peculiar meaning in the telecoms business under law. And it's not the traditional "value added" one would use when referring to a business; it's about value-added services in telephony. That's just a clarification.

Q. Can you recall if you were aware at this time of Mr. McMahan's assessment that Mr. O'Brien may have been in some money trouble?

A. I doubt if I was.

Q. The next document is a memorandum from Regina Finn to Mr. Towey. And she is enclosing a draft of the licence on the 25th April 1996. She deals with two matters. Firstly, re Article 8 ownership.

"As discussed, Denis McFadden advises that the revised draft should not go out to Esat Digifone until the ownership issue is resolved. He will consider this further and may request a meeting to clarify the Department's request on this issue. I have informed Peter O'Donoghue (who had asked for the article) of the sense of revised draft but that until some questions about ownership are resolved I am not in a position to let him have the revised article."

Now, correct me if I am wrong, but I understand that to refer to disputes or if you like, debate, even between the Department and Esat Digifone on what would be in Article 8 regarding ownership changes post licence.

A. I think so, but it's not something in which I have a detailed knowledge, but it sounds reasonable. It sounds reasonable to suggest that that's what it's saying. I don't know whether it's reasonable or not.

Q. The next reference is to Article 11 and the issue of security. I think that's an issue that developed in the context of the extent to which the licence or an interest in the licence could be pledged. I may be wrong in that, but I think ultimately

A. I don't think it's that at all.

Q. Sorry; you are absolutely right. It's security to do with State security, I think.

A. It's to do with the ability to intercept calls

Q. There was an issue on security as well, but it was resolved much earlier, I think; is that right?

A. Yeah.

Q. Sorry, there was an issue on using the licence as security, but that was resolved much earlier?

A. It was somewhere. That was early, yes, but I am not sure.

Q. This is about State security?

A. Yeah.

Q. And the next document is a typed memorandum from Mr. McMahon, and it encompasses to some degree a lot of what we have seen in his handwritten notes. It says "Mr. Denis O'Brien came in to explain" sorry, I beg your pardon; it's a note of meetings with Esat Digifone 26th and 29th April 1996.

"Mr. Denis O'Brien came in to explain his company's claims to the provision of direct dial-in facilities from Telecom Eireann. Mr. O'Brien gave the background to his requests as follows:

a consortium of lenders is doing a due diligence on Esat Telecom and on Esat Digifone with a view to putting in about 26 million in total.

it's the bank's wish to bring the two concerns

together for financing purposes; the amount going into Esat Telecom is to be 4 million.

the banks will not go ahead until O'Brien "Finds a solution" to the question of routers with the Regulator.

Esat Telecom is making small losses on a turnover of 10 million and is losing customers as a result of its inability to provide overflow and backup.

(See below figures given to us later indicate a turnover of only 3.8 million)

"When pressed on the question of financing, Mr.

O'Brien said that the lead bank, First Boston, actually wants him to negotiate the additional circuits from the Department. To be absolutely clear on the matter, I asked him if this meant that the banks were not concerned about Esat's position vis-a-vis the Department and merely wanted him to get Esat Telecom on an even keel. The answer was yes. He said they would not fund Esat Digifone unless Esat Telecom got more capacity.

"O'Brien said that this was recognised by the banks, that the regulatory position was not likely to be decided in the short term. He claims that the additional circuits are for legitimate leased-line traffic only, but he is unable to say how he would ensure this.

We explained that making an exception to the rule

brought about by the Government decision would make that decision meaningless. We explained that as a matter of fairness, similar treatment had to be afforded to all value-added licensees and that the voice market will not be handed over to resellers before liberalisation in January 2000.

"There was some to-ing and fro-ing about the respective legal positions. It is clear that O'Brien relies on a very close relationship with certain people inside DG IV, who he claims have undertaken to consult Esat when the question of our derogation and a strategic alliance comes up. Esat has lodged complaints, he said, with DG IV concerning Telecom Eireann's behaviour on the provision of leased lines and discounting.

"We made the following proposals to O'Brien:

"1. If he is prepared to argue to us that the new circuits are for completely legitimate traffic, then he should have no problem in making that case to Telecom Eireann. We suggested that they reply to Telecom Eireann's request for information. O'Brien and O'Toole agreed to do this. They wanted us to help draft the letter. They will not concede that Telecom Eireann is entitled to the information requested. We suggested that we put that issue to one side until we see what is being proposed.

"2. We pointed to the Commission's report on progress

in open network provision where it suggests circumstances in which bypass (i.e. what Esat is doing) might be legitimate. This could arise where genuine and significant value is added to the service.

The sharing of leased lines between SME customers would also be considered, we said. O'Brien and O'Toole agreed to consider these proposals at once.

"3. We suggested to him that he should consider confining his services to genuine closed user groups.

We did not attempt to define these. We said we were prepared and had always been prepared to consider proposals.

"We suggested that the starting point for the Esat letter should be the one they sent us in December 1994 when they made a similar claim for DDIs. We said that there would however have to be real measures in place to assure us that any new circuits would not be used for voice telephony as we understood it. O'Brien agreed to examine this immediately.

"Finally, O'Brien gave us a page with condensed financial figures showing of accumulated deficit of 4 million on Esat Telecom on turnover of 3.8 million.

"Assessment:

"It's difficult to make a genuine assessment here.

Mr. O'Brien is clearly under some pressure from the banks, but I am left with an impression of evasiveness when he is pressed on these things. He says that the

legal teams have not started the due diligence yet.

We asked if he had not considered separating Esat Telecom out of the financing loop. If it's only a question of 4 million, why should he let it get in the way of funding a GSM licence? I am not satisfied with the answers to this. Apart from the name, the goodwill and some infrastructure, Esat's operation cannot be critical to this project. It appears that Esat Telecom and Esat Digifone were placed together. To unbundle them now would be troublesome, O'Brien says. On the 29th he told us that the finance for Esat Digifone is not a problem in the short term and that the financing in question is for the back end of the project.

"O'Brien now recognises that the Government has taken a position and that it is impossible for administrators to roll back on it. He also accepts that he cannot have 'all' the 31 DDIs he wants and is pitching for just a few he later mentioned 29."

Underneath that that's dated 1th May 1996 and signed by Sean McMahon. Underneath that, "Note: As a result of a further phone conversation today (1st May 1996) Mr. O'Brien gave us to believe that the 4 million planned to be put into Esat will in fact come from Advent and AIB."

Now, if you go to the front of that note, I think it has Mr. Fintan Towey's name on it?

A. In my handwriting.

Q. Your name and Mr. O'Conghaile's name; is that right?

A. That's right.

Q. Is that your writing on

A. The "F. Towey" is my writing. "F. Towey, MB, 8/5" is my writing. "Mr. O'Conghaile" is Mr. Towey's writing, and "Mr. M. Brennan to see" is Mr. McMahon's writing.

Q. So it was addressed by Mr. Brennan to you?

A. By Mr. McMahon to me.

Q. I beg your pardon, by Mr. McMahon to you. And then further sent on by you to Mr. Towey?

A. Correct.

Q. Is that a document you recognise?

A. To an extent, yes, but I have explained a number of times that my direct involvement in all of this was very hit and miss, and for example, the meetings that he talks about took place on the 26th and the 29th. I was in Brussels on the 1st and 2nd and again on the 5th, 6th and 7th. So I am just saying that as a matter of fact, so the report the document is dated the 1st May recording meetings of the 26th and 29th, but it's likely that I only saw it on the 8th because that's the date I passed it on, and I am not so sure how much consideration I gave it; put it like that.

Q. The next document, in Leaf 200, is I think a press release containing highlights of Mr. Lowry's speech in the Dail on the 30/9. I suspect this was prepared at

the same time as the speech was prepared?

A. It probably was distilled from the speech.

Q. Yes. If you go on to Book 44, in Leaf 201 we have the speech sorry, we have the draft of the speech; and in Leaf 202, we have the speech and the transcript of other proceedings in the Dail on the same day, including interruptions and exchanges across the floor.

A. Yeah.

Q. I think I am right in saying that the speech as drafted is the speech as given, although there are chunks of it that were, if you like, interrupted, and it wasn't given as one entire speech?

A. Yeah, it seems a bit like that, yeah.

Q. I think this speech has been read already as part of the Opening Statement, and there have been references I think already in your evidence, but I don't want to read the entire speech at this stage. I just want to mention parts of it.

If you go to the draft, it begins off as follows.

This is a draft prepared for the Minister, and can I first ask you, can you recall what role, if any, you had in preparing it?

A. I suspect I had a fairly significant role in preparing a lot of it, but there are parts of it that weren't written by civil servants. I don't know the extent to which Mr. Towey may have been involved in the

drafting, but I certainly had a significant input into it.

Q. There is, I think, towards the end of the speech, a rhetorical flourish referring to, I think, history of Fianna Fail on issues of industry and commerce and the development of the business in the country, which, am I right in thinking, you don't feel were drafted directly by civil servants?

A. I'd be fairly certain that they weren't I have never seen a civil servant write stuff like that.

Q. Yes. Can you tell me what, or do you recall what prompted the speech?

A. I don't recall, but it looks on the face of it as if the Minister may have requested to make a personal statement or something. But the headings in the Dail, if you had the actual book of published Dail debates, it probably would give a clue as to

Q. In any event, it's undoubtedly, if you like, it's of a piece with the fact that the issue was a burning issue on the 16th April, and a short speech or a short statement was made by the Minister. A press conference and a press statement was a press conference was given and a press statement issued by the civil servants sometime shortly afterwards, and also by the Secretary of the Department. And the Minister wrote a letter to the newspapers; isn't that right?

A. Yeah.

Q. And if you look at the first paragraph of the speech, I think it's clear, the first two paragraphs, it's clear that the purpose of the speech, it seems to have been to, as it were, dampen down public controversy and debate in the Dail on the issues.

It says: "I have made several statements in this House and elsewhere about the competition for the GSM licence. I have answered questions in the House on a number of occasions.

"I want to use this occasion to say on the record all that can be said about the issue. I ask your indulgence if it is necessary for this statement to be long in the interest of being comprehensive within the limits of confidentiality. I will answer any questions that arise at the end of the statement."

Can you give me some assistance as to how a speech like this would have been prepared, inasmuch as you didn't quite have the pressure of PQs driving the preparation of the speech. Can you give me some ideas of the mechanics as to how it would be prepared, or what the involvement of civil servants would have been, in a practical way, in preparing it?

A. I can't help you much with that. Depending on what the Dail record shows of the kind of statement that it was, I think it's likely that we had relatively short notice. But I have an idea that now, I don't know

what day or date it was delivered, but I am fairly certain that we knew before the weekend that it was required for maybe the Tuesday or the Wednesday. That's about the time-frame within which it was done. I know for certain, because there is a reminder in the speech that I was actually in Galway at a family occasion on that weekend, so it was likely, to the extent that I had a hand in it, that it was probably on the Monday.

Q. From the fact that the speech is, as the Minister himself said, is so long, and we know it runs to in draft form it runs to 27 pages, 27-and-a-bit pages, it was intended to put enough information within the bounds of confidentiality on the record to stem the public controversy; would that be right?

A. Whether to deal with public controversy or Dail controversy, I am not sure.

Q. Both?

A. Maybe, yeah.

Q. The Minister went on: "I want to say at the outset that I saw an urgent need to put an end to the monopoly need to ... competition can only succeed where the playing field is level. We have already seen major reductions in handset costs. I now want to see call prices drop too.

"The question of confidentiality of information needs to be fully understood because it is relevant to

various aspects of the matter. The way the competition was structured gave interested parties, who had paid their deposit of £25,000, an opportunity in the first four weeks to ask questions in writing about the process. It was agreed from the outset that these questions would be addressed in a memorandum to all competitors a couple of weeks later.

"Nine parties posed written questions. Of these, four who eventually became applicants raised subject of confidentiality of information supplied in applications. It was clear that confidentiality was an important issue for interested parties. Indeed it is somewhat ironic that Persona, which has been the most vociferous in relation to disclosure, was one of the consortia that originally sought a commitment to confidentiality. The failure to respond adequately to these questions carried the serious risk of frightening away consortia anxious to secure the licence.

"The response memorandum which was sent to all interested parties on the 28th April 1995 included, and I quote:

"All applications for the GSM licence, including the data provided in electronic form and any data sought during the course of the evaluation of submissions will remain permanently confidential to the Department and its consultants, Andersen Management

International."

"This was not a clever device invented by me or by my Department before or after the event as a block on transparency. It came, as I have said, by way of widespread concern by potential applicants before submitting applications and a considered response from those managing the competition. It is entirely understandable why confidentiality was necessary. Any competent application was certain to contain enormous detail on business strategy, marketing philosophy, pricing proposals, company ownership, financial standing, etc. You can get some idea of the sheer volume of information when I tell you that the applications ran to 350 pages plus appendices and supporting documentation.

"I also want to make it clear that I have a duty to protect the confidentiality of the strategy of Esat Digifone. To make such information available to Eircell would undermine the impact of the entry of the second operator into the market and would run directly counter to the spirit of my intention to create a competitive market based on a level playing field.

"There is a second angle to this which I want to mention briefly. Comparative bidding procedures for mobile licences did not start and finish in Ireland.

Such procedures are now common worldwide. Many of the members of the consortia which applied in Ireland will

be competing against each other elsewhere. If a Minister, anywhere or in any country, was considering the outcome of a similar competition and he or she was aware that the apparently successful applicant had come last out of six in a recent competition in another country and that this was public knowledge, what would he or she do? That angle alone would have to give disappointed applicants cause for reflection. I am not saying in this any menacing way. I am just stating the obvious."

I suppose the corollary of that, if you had come second or third in a competition in one country, you might regard as a feather in your cap in applying for a licence in another country; wouldn't that be right?

A. I suppose

Q. As it were if you were in the medals in one country you might like to rely on that in another country?

A. I suppose that is reasonable. I don't know to what extent evaluators would take it into account. There are various ways of looking at experience of applicants and so on. A lot of that text you have been reading out sounds to me like stuff I wrote myself, but probably bits of it may have been scissors and pasted from other things.

Q. "The putting together of a detailed application for a mobile licence is an expensive business. The total cost of the six applications which were received was

probably in the region of 10 to 15 million pounds.

That is a lot of money leading to a lot of disappointment. But it was always known that there could only be one winner. The disappointment itself is understandable, but the way it is manifesting itself in terms of innuendo is a problem. This is something that the interested parties, and I do not exclude certain sections of the media, need to reflect over. How long are they going to keep this campaign up? What do they expect to gain? I want to emphasise again that I fully uphold the conduct and integrity of the public officials and consultants who conducted this exercise.

"I now propose to recite at length the history of the GSM competition."

And I think that's consistent with what I was suggesting a moment ago, that the purpose of the speech was to stem for once and for all the innuendo and the controversy that were developing not only in the Dail but, as the Minister said, in the media as well; isn't that right?

A. Yes.

Q. The speech goes on: "The Department of Transport, Energy and Communications has been working seriously on a GSM competition since late 1993. The preparatory phase included an "open door" consultation process with interested parties. This, to a large extent, was

a learning phase for the Department, where various options in relation to the process as a whole were canvassed with consultants and interested parties.

London-based consultants had a limited low-cost input in the design phase of the competition in 1994. My predecessor as Minister will know all about this initial preparatory phase of the competition.

I suppose it's only fair to say that the limited low-cost input in fact resulted in the fundamental design of the competition, didn't it?

A. Oh yes. It was low cost, but high value.

Q. Yeah.

"It fell to me, as a newly appointed Minister, to get the show on the road. The style of the competition and the rules which applied were approved by the Government and made known following the announcement of the competition to all interested parties. All parties accepted the rules. This is important because it shows that it was the Government who set out the rules for the competition. The parameters are a political matter.

"Once that decision was taken and announced by me on the 2 March 1995, the conduct of the operation of the competition within these parameters was carried out by the civil service; in other words, officials of my Department and the Department of Finance, with the aid of consultants.

"My announcement of the 2nd March itself is interesting. I am sure copies of my statement are readily accessible for those who care to read them, but to assist those who are not apparently interested in following up the facts, I want to read a few short quotations from as follows:

"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 a credible business plan to develop the market and provide effective competition for Eircell, choice of service and a good deal for consumers."

"In view of the controversy which followed, I wanted to particularly remind the House of this starting position with which I have been consistent ever since.

At an early stage I became acutely aware that rumours were circulating within the industry that the outcome of the competition was a foregone conclusion. I have no idea whether this was true or not, but I and my officials moved to assure all interested parties that it would be a clean and open competition.

"We set out at the beginning clear selection criteria which were fully known to all parties. Applications had to pass the first hurdle of demonstrated financial and technical capability. The criteria were clearly

stated to be in descending order of priority after

that, and were:

"One: Credibility of business plan and approach to market development.

"Two: Quality and viability of technical approach.

"Three: Approach to tariffing, which had to be competitive.

"Four: The licence fee.

"There followed a series of lower-priority criteria notably time-table for achieving roll-out of the system, international roaming plans, performance guarantees and spectrum efficiency.

"I have now made

in his I think November 1995 response to parliamentary questions, the Minister had I think made a statement similar to that, isn't that right, in which he set out I think the top three or four criteria and gave I think again prominence to the criterion of demonstrated financial and technical capability.

A. Mm-hmm.

Q. It's just there is a slight change in the wording here, and I wonder whether you meant something else by it in this speech, where you say "Applications had to pass the first hurdle of demonstrated financial and technical capability."

What was intended to be conveyed by that statement?

A. I don't really know at this stage.

Q. Do you see how a distinction is made between a slight distinction is made between that and "The criteria were clearly stated to be in descending order of priority"?

A. It's a little too subtle for me. I don't understand what point you are making to me.

Q. What does "Applicants had to pass the first hurdle of demonstrated financial and technical capability" mean?

A. In plain words, it means that they had to do just that.

Q. It's a reference, I think, to paragraph 9 of the RFP?

A. I think so, yeah.

Q. But there was no first hurdle assessment of demonstrated financial and technical capability. You may have thought there was.

A. Okay, we have several sessions of this now.

Q. I am anxious to establish it as a fact.

A. I can't add to the evidence I have given already in relation to the matter.

Q. What was stated here was not based on any documented assertion to that effect, isn't that right, in the process documentation?

A. I think that's fair comment.

Q. The Minister then goes on to say how the process was evolved. He talks about retaining consultancy advice. He talks about how interested parties were allowed to pose questions and how these were dealt with by a

composite memorandum, which we have already seen, in the course of reviewing the documentation. He emphasizes, at page 10, that following the launch of the competition, the chairman of the project team meaning you, presumably set out ground rules for contacts with interested parties which would ensure that no consortium could gain any advantage in terms of information.

He then goes on to deal with the licence-fee issue and the capping of the licence fee. And he goes over all that ground again.

And then on page 13, in the fourth paragraph, he says: "Six applications were received by the closing date, and details of the applicants and consortia members have already been publicised. The fact that six applications were received was in my view an endorsement of the success of the first phase of the process and of market confidence in the approach which had been taken. All six applications were from consortia which demonstrated the necessary financial and technical capability. In the event, each infrastructure proposed the maximum fee of 15 million, and therefore it had no impact on the comparative analysis."

Again, I just draw your attention to the fact that there is another statement on demonstrated financial and technical capability for which, as far as I can

see, there is no documentary support.

A. But you will understand that if I wrote it, and I probably did, between one or two of us the speech was written out, the relevant parts were written, that was what we believed to be the case at the time.

Q. It may have been believed to have been the case, but it wasn't the case. I think the this was intended to be a comprehensive statement, isn't that right, of what the process involved; and the Minister indicated, as no doubt the draftsman of the speech had in mind, that the speech would be a long one and that you'd have to go all around the House to explain what the process involved? And I suggest that that meant that you should have taken care to ensure that what you stated was supported by the documentation.

A. And I'd go further: I'd say that no civil servant would deliberately mislead the Dail or put words in a Minister's mouth calculated to mislead the Dail.

Q. On the next page, it goes on, under the heading "Ownership": "I would like to dwell for a moment here on the requirement that applicants provide full ownership details. The ownership structure of all the applicant consortia was examined by the project team. Four others along with Esat Digifone envisaged that the project would be financed, apart from debt financing, through equity participation going beyond the original consortia members. This wider equity

participation involved unidentified stakeholders arising either through private placement or through a stock market flotation.

"The consultants and the project team saw nothing exceptional in this for a project of this size.

Andersens had clearly been down this road before. It is impossible to expect that something envisaged by five of the six applications in some way damaged their applications.

"These equity arrangements were not considered, and rightly so, to be a negative factor in relation to any application. Indeed, if the evaluation process had marked down any application on these grounds, it would be impossible to defend, and I have already made it clear that this process can be fully defended.

"In the case of Esat Digifone the intention of the consortium partners to arrange a private placement with blue-chip institutional investors was disclosed. Letters of commitment from the investors for specified amounts were submitted. In addition to this, very strong expressions of interest in loan and equity participation in the consortium were available from other leading international institutions. Because of the confidentiality constraint, I cannot name any of the institutions concerned. The situation would be no different if any other consortium had won. The project team established that all of the consortia

were capable of funding the project."

If you look at the final paragraph in that section of the speech, it begins off: "In the case of Esat Digifone, the intention of the consortia partners to arrange a private placement with blue-chip institutional investors was disclosed." That's what was in the application?

A. Yeah.

Q. An intention to involve investors, the type of investor was an institutional investor; isn't that right?

A. Yeah.

Q. And I think, where they were described as blue-chip, they were undoubtedly blue-chip; isn't that right?

A. Mmm-hmm, yeah.

Q. And I think they were the representations made were that they were in any case of undoubted financial worth; isn't that right?

A. Yeah.

Q. "Letters of commitment from the investors for specified amounts were submitted."

A. Mm-hmm.

Q. And then you go on to say that "In addition to this, very strong expressions of loan and equity participation were available.

"Because of confidentiality, I cannot name any of the institutions concerned. The situation would be no

different if any other consortium had won. The project team established that all the consortia were capable of funding the project."

At the time that statement was made, at the time it was drafted and at the time that it was delivered in the Dail, these were not the facts; isn't that right?

A. These were the facts in relation to the application, and we were considering the the Department was considering changes and whether the changes were acceptable.

Q. But nobody wrote to you saying "Would you consider these changes?" You were told what the changes were, isn't that right, you were told that the consortium is a different consortium to the one that was envisaged? Isn't that right?

A. Yes.

Q. And presumably you were aware at this time that this issue had been ventilated in the Dail before, the issue of who the owners of the 20% were?

A. Yeah.

Q. It says "Because of the confidentiality constraint, I cannot name any of the institutions concerned". There was no institution concerned as of that moment. This was history.

A. I mean, the paragraph is a statement of fact about the application. The Department now had new information which it was considering. I can't say anything beyond

that.

Q. You knew there was an issue concerning ownership; isn't that right?

A. Yes.

Q. Why wasn't this the opportunity to scotch all the innuendo about it? This was what the purpose of the statement was, to scotch innuendo?

A. I can only assume we weren't ready to scotch it, to scotch that part of it.

Q. The fact was that you were considering changes in ownership?

A. Yes.

Q. Why didn't you state that?

A. I mean, I can't account now, seven years later, for why the speech was drafted the way it was drafted.

Q. If you go to the first paragraph of that section, the third sentence begins "The ownership structure of all the applicant consortia was examined by the project team". Then it goes on, "Fourth, others along with Esat Digifone envisaged that the project would be financed apart from debt financing through equity participation going beyond the original consortia members. This wider equity participation involved unidentified stakeholders arising out through private placement or through stock market flotation."

Haven't we already discussed the fact that apart from Esat Digifone, the equity participation envisaged by

four other consortia was an attempt to make their applications more attractive by suggesting that they'd share ownership down the road by way of stock market flotation? Isn't that right?

A. I don't recall the details, but there were different proposals from different consortia.

Q. What Irish Mobicall said, that was consortium A1, was, and I am quoting from the application:

"The application states an intention to make a flotation of 25 percent of the shares presently owned by the consortia members. The flotation will be initiated after three years of operation, depending on the success of the company and the market conditions on the Irish market."

There is no suggestion there that the company were going to use a flotation to fund the project. What they were going to do was extend ownership by way of flotation down the road; isn't that right?

A. Or some might argue extract capital by way of flotation.

Q. You could say that too, yeah. Take a pound of flesh when they went down the road. There is no suggestion that they were going to use a flotation or a placement to fund the project; would you not agree with that?

A. Yeah, looked at from here, I think that's fair, yeah.

Q. The evaluation report, in describing Cellstar, says this is A2 "The Irish ownership share could

increase by means of a flotation. If desired by the Government, the application states a willingness to offer up to 30 percent as ordinary shares at some time in the future, three to five years after launch."

Again I suggest this in no way suggests that this company was going to go to the market to fund the project; the opposite, in fact. They were only going to go to the market if this was desired by the Government. Isn't that right?

A. That's just what he read out, yeah.

Q. The Persona application didn't involve any intention to float.

The evaluation report, when referring to Irish Cellular, which is A4, says that "A flotation of approximately 25 percent of the shares is planned within three years of the licence award."

Esat Digifone, in their application, A5, said "It is the intention of the applicant to make 20 percent of the equity available to institutional investors during the period prior to the commercial launch, including 5 percent equity stake to Advent International.

Furthermore, the applicant states an intention to make 12 percent available for flotation within three years."

In relation to A6, the report states that "30 percent or more might be subject to flotation after the award of the licence."

From that summary, it seems to me that only one, only one project envisaged that there would be any involvement with third-party participation going beyond the original consortia members before the licence was operational or before it was commercially operational.

A. Well, the last one you read out, if I heard it correctly, talked about "on award of the licence".

Q. "After award of the licence".

A. Well, yeah, okay, that's proximate, I'd say.

Q. Mr. Brennan, I am suggesting to you that what was stated in this draft Dail speech was an attempt to give an impression that what Esat Digifone were doing was no different to what any other consortium was doing, and I am going to suggest to you that it's not unreasonable to conclude that that is misrepresenting what was in the evaluation report.

A. Misrepresentation implies deliberate. I think what we were trying to do was to give the facts as we understood them at the time. Now, I can understand why, seven years later, with the benefit of a forensic examination word by word, you would now challenge the words used in that speech. But I think that's it's probably a little unfair to people who were doing it if there is any suggestion anywhere that we were deliberately massaging the facts, because we weren't.

Q. Can I just put it to you this way: This didn't entail

any major forensic examination; it simply entailed placing one page of the draft speech on one side and the evaluation report on the other side and reaching what I suggest is the utterly compelling conclusion that the two simply don't match. Now, if somebody didn't know that or didn't intend at that at the time, does that mean that this speech was drafted off the top of people's heads?

A. It probably means it was drafted in a compressed time-frame.

Q. I am suggesting to you that to get the true facts simply required examining the report, the trumpeted report, which is a key feature of this speech. All you had to do was examine the report. Were you driven by a desire to make a statement which would justify the reticence of the Department on the ownership issue by suggesting that Esat Digifone was no different to anybody else?

A. I think that's overstating whatever was going on. I think we were trying to give the best answer we could in the circumstances, do the best statement we could in the circumstances.

Q. If you go to the final sentence in that section on page 15, it says "The project team established that all the consortia were capable of funding the project."

I suggest that that statement was put in because of

the degree of sensitivity that had arisen concerning the funding capacity of the members of or of the consortium behind the Esat Digifone project, because the true position in the evaluation report was that the conclusion that was reached was that Esat Digifone had members in its consortium who presently meaning at the time of the evaluation did not have the capital required to finance the GSM II network. And in fact, a strategy or an approach to the evaluation had to be adopted to enable a conclusion to be reached that they should get the licence subject to special conditions dealing with that issue. I am suggesting that that statement was, at the very least, a very real overstatement of the true position.

A. I don't know if you can go through a speech like this seven years on, sentence by sentence, and seek to establish what was in the mind of the person that wrote that sentence. I don't recall being of a mindset that was trying to mislead the Dail, which I would never do, or try to misrepresent what I believed to be the case.

Q. At that moment, leaving aside what was contained in the evaluation report, you didn't even know whether you'd run with this consortium; isn't that right?

A. I think there was some doubt, yes.

Q. But nevertheless, all hands were being were on the political deck, if you like, isn't that right, to

promote the competition and the result of the competition?

A. As I think we discussed at the beginning of this, I don't recall why exactly this speech was being made or why it was being made at exactly this time. I just don't know that. But I think it's possible for you to find out.

Q. Why was it being made in this form? Why couldn't the true facts be stated? Were you under some pressure, or was there some political sensitivity to stating the true facts, or saying nothing, which perhaps might have been the correct thing to do, if you wanted to consider the new information you had received?

A. If you are asking was there a conspiracy around this speech, the answer is a resounding no.

Q. I am not asking that question. I am asking you, was there some other pressure on you which is not what I mean by a conspiracy, or not what I think you mean by conspiracy either was there some other pressure on you to draft a speech which evaded or skirted or in some way fudged the real issues?

A. I don't believe there was any such pressure on me.

Q. At that time you were as close to this project as you could possibly be. Fintan Towey was even closer. I suggest to you that both of you must have known at this time that you were putting a complexion, at the very least, on the process?

A. I'd have difficulty with that in the sense of that's getting very close to suggesting that we were setting out to misrepresent or mislead Dail Eireann, which I have said repeatedly I would never knowingly do.

Q. We discussed earlier the role the Minister, or his political advisers, presumably, may have had in drafting the speech. Can you tell me how their input would have been integrated into the speech?

A. I can't tell you, but I can speculate realistically as to how I mean, I am hesitant about speculation, but the most likely thing is that the civil service version of the speech was emailed to the Minister's office and/or to advisers, and then that they probably added whatever they wanted to add on-screen.

Q. They would presumably have taken on board your draft as well?

A. I presume they would, yeah.

Q. And then sent that back to you? Maybe not?

A. That wouldn't be guaranteed.

Q. I see. What the Tribunal has is one complete draft.

A. Mm-hmm.

Q. Would that have come would that have been prepared, if you like, at the civil service end or at the political advisers' end?

A. What would?

Q. I am looking at the mechanics now you mention that had might have been emailed. Maybe it wasn't emailed; it

could have been faxed. The draft that I have, the complete draft that I have is a draft that came off a word processor or something like that. It doesn't look like it came through the email system; do you understand me?

A. Well, I mean, you email word-processed documents.

There is no big mystery there. All I can say

Q. Wouldn't I see some evidence of that?

A. There are pages in this speech, I think starting with page 23, but I don't know where it finishes, which are not in the hand of a civil servant and which I don't believe I was aware of until I either heard them read out or read the speech after the event or whatever.

Q. Would there have been any civil service input in the form of an overview of the political input?

A. Certainly not mine. This is the references to the history of Fianna Fail and Sean Lemass?

Q. Yes.

A. I wouldn't even think like that.

Q. I am not suggesting for a moment that the civil servants in any way redrafted it or recast it. What I am suggesting is, would they have expressed an overview, in case, for instance, it was inconsistent with the main body of the factual material contained in the statement?

A. All I can say is I didn't.

Q. I see.

The next heading is "Consultants' report". And it describes the evaluation process. I am not going to go into it in detail, save to point out that it doesn't contain in any way an account of the difficulty that arose with the quantitative aspect of the evaluation. Was that because there was a sensitivity that if any aspect of the evaluation was described as having been less than perfect, it might have fuelled speculation?

A. I don't believe it was. I don't believe a conscious decision was made to exclude material like that or anything of the sort.

Q. Go on to the next heading, which is "Tariffs". "The question has arisen as to whether Esat Digifone tariffs were the lowest among the applicants. The tariff analysis in the consultants' report is very thorough in this area. All the applications had different approaches to segmentation of the market and a variety of pricing packages and different metering and billing principles. Their evaluation is quite complex. Confidentiality is a specific constraint in this way. I can say at this stage that the application with the lowest tariffs was demonstrably weak in respect of other major selection criteria."

What was the application with the lowest tariffs?

A. I have forgotten.

Q. Am I right in thinking it was Persona, or did they

merely have lower tariffs than

A. It wasn't Persona.

Q. than Digifone or Mobicall?

A. It wasn't Persona. I could establish it by looking at the report, but it would take me some time.

CHAIRMAN: Was this perhaps one of the more awkward paragraphs of the speech to draft, Mr. Brennan?

Because it was the case that the Minister and to some extent yourself had been greatly emphasising the necessity of getting a good deal for consumers, bringing competition in, and it did transpire that in fact Esat Digifone were, I think, approximately 20 percent dearer than one of the other closer competitors on basic rates. So presumably, had Esat won that particular segment, it would have been natural that one would have trumpeted it.

A. I think that's true. I have forgotten, and it can easily be checked who actually had the lowest tariffs, but that was only one element in the selection criteria.

CHAIRMAN: Yes.

A. And it's actually clear in the report that an awful lot of detail was gone into, in terms of billing principles and so on, which bore on the eventual comparison of the tariffs.

Q. MR. HEALY: I am just trying to see whether I can establish briefly who's got the lowest tariffs.

MR. O'DONNELL: Mr. Brennan, if he wants, can look at the documentation and establish that for Mr. Healy, if that's

A. I don't think it can be done as quickly as that. I think it needs some time.

MR. O'DONNELL: Perhaps it can be returned to at some later stage.

MR. HEALY: It would be helpful if it can be done sometime today. I am happy to take some assistance at lunch time from Mr. Brennan and do it then.

CHAIRMAN: All right. We will press on.

Q. MR. HEALY: I think it may have been A6 had the lowest tariffs, which would be Eurofone?

A. We'll see.

Q. If you go to page if you go to the bottom of that section, section on tariffs, where the speech says "I did not interfere with the evaluation in any way.

Neither did any other member of the Government. I want to make it quite clear that the project team or the consultants were not influenced by any non-telecommunications factors. The consultants are specialists in advising in competitions of this kind, with a high reputation to protect."

Again, I am just concerned about your statement that the where the Minister says "I did not interfere with the evaluation in any way", in light of the fact that he seems to have been involved in accelerating

the process.

A. He seemed to be involved in what?

Q. He seemed to have been involved in accelerating the process.

A. I mean, I am fairly certain I wrote in a sentence based on what I considered to be the facts at the time.

Q. Well, is it completely consistent with the fact that he did have discussions with you, he did indicate that he wanted the process accelerated?

A. I have never accepted the strength of the view you have about the acceleration of the process. I have said before, and I will repeat, that as far as I was concerned, the process was at an end and it was time to move on. So I didn't see kind of acceleration in the sense that you have the negative sense in which you have been portraying it.

Q. The Minister seems to have suggested an approach to the drafting of the report specifically with reference to the notion of how you get over financial problems. In that he indicated that the report shouldn't undermine itself, and that a project is either bankable or not.

A. Yeah, we have had lengthy discussions about that in the past.

Q. I am only concerned that he made if he had those involvements

A. But I think I was suggesting that that was indirectly through Mr. Fitzgerald. And I mean, the sense in which I was writing this sentence was that we had conducted a process in accordance with the rules laid down. We had done it thoroughly, and we had done it without interference in terms of arriving at the result.

Q. On the next page, the first paragraph, the speech says "I believe that in a case" this is in connection with the suggestion of undue haste in relation to the announcement of the result "I believe that in a case as sensitive as this, there is great advantage in announcing the result as soon as possible to put an end to speculation which grows around such matters, as was the case on this occasion.

"There was no undue haste. In a plan drawn up by the consultants in July, it shows clearly that the final report was to be submitted in the week beginning 22 October. The consultants are to be congratulated for achieving this target. My commitment was to announce the result not later than end November. If I had not allowed some interval in case of slippage, I would have been open to criticism for not meeting my deadline."

The reference to "slippage" here is one that we have seen before. Isn't it in fact the case that in the original plan drawn up by the consultants, there was

no reference to slippage? The purpose of the interval, even assuming that it was a generous one, was for due consideration of the result; isn't that right?

A. Yes, and we have discussed this before, and I have indicated

Q. I just want to be clear about one thing so you'll understand my question. The consultants' report made no reference to slippage; isn't that right?

A. No.

Q. Well, why is the suggestion being made that in some way the consultant incorporated a time scale to take account of slippage, when the fact is he incorporated the time scale and an interval to take account of consideration?

A. I am not saying that the consultant had any view on slippage. What I am saying is what that speech is saying, that the consultants' report arrived in the time-frame within which it was promised and that the announcement was made promptly.

Now, I have said before, and Mr. Andersen I believe has said to you as well, that Andersens advised that the quicker the announcement could be made, the better for all concerned. And I specifically relayed that advice to Mr. Loughrey.

Q. I don't think that's what Andersen said. I think Andersen said the quicker the announcement is made

after the result, after the decision is communicated to the political arena, the better. I don't think he was in any way concerned that the result could be the subject of pressure or whatever before it went into the political arena.

A. I think that's probably reasonable, yeah.

Q. Just go onto the next leaf for a minute, now, Mr. Brennan. Page 11, pages 11, 12 and 13 of the actual report.

A. I can't see numbers on the pages.

Q. Sorry, in fact it's the fourth-last page.

Mr. Brennan: "It is obvious from what the Minister said on 22 June he wrote to Commissioner van Miert and proposed figure of 15 million. He could have proposed 50 million but he chose 15 million.

"The Minister stated that letters were submitted and names given; in other words, he got the information he sought about who owned shares in the company, but the names were not disclosed on the 22 November".

Mr. Lowry: "Nor will they be".

Mr. Brennan: "Why were names not disclosed on the 22 November, when letters were submitted, before the Minister made the award? Did he know who owned the 20 percent before awarding the licence? Did he mislead the Dail on this issue? Will he tell the House who are the beneficial owners of the remaining 20 percent of the winning consortium?"

Mr. Molloy: "25 percent".

Mr. Lowry: "No, I will not do so because of the confidentiality clause. I will put the matter in context."

Now, that's not part of the drafted speech, but the drafted speech makes no reference to the information with which the Department and the Minister presumably were armed from the 15, 16, 17 April. And the Minister says that he will not tell the House who are the beneficial owners of the remaining 20 percent; isn't that right?

A. Yeah. I don't know particularly whether the Minister was armed with that information that you talk about at this time, or not. Other people may be able to help you with that.

Q. But should he have been armed with it? Surely he must have been armed with it?

A. I just don't know.

Q. Here you had a major change in the consortium, so significant that you were going to consider it before you'd even announce it. Surely that was brought to the attention of the Minister, when this issue was a hot political issue and a hot public issue at this time?

A. I just don't know at what stage the Minister got that information.

Q. We'll deal with the facts first as stated we'll

deal with what's stated in the speech, and the facts,
and then we'll deal with the Minister's knowledge.

Firstly, there was no confidentiality clause, as I
understand it, governing IIU's involvement; isn't that
right?

A. No, there wasn't.

Q. So there was no confidentiality clause which would
have prevented the Minister from answering that
question?

A. I think that's true.

Q. Mr. Brennan goes on: "Selling public assets does not
come under the confidentiality clause".

Mr. D. Ahern: "The Minister should not have sold them
in the first place".

Mr. Lowry: "The Deputy is very liberal with his
accusations about misleading the Dail. It appears to
be the only tune he can play in the House".

Mr. Brennan: "The Minister should answer the
question".

Mrs. Doyle: "The Deputy should listen".

Mr. Lowry: "Deputy Brennan's comments are negative
and destructive. The Communicorp funding requirements
are underwritten by a party acceptable to my
Department. The intention of the consortium partners
to arrange a private placement with what can only be
described as blue-chip institutional investors was
disclosed by them to my Department. Stockbrokers were

named and letters of commitment for specified amounts from the investors were submitted. In addition, strong expressions of interest in loan and equity participation in the consortium were available from other leading international financial institutions.

That was the position when the decision was made."

Now, can I just look at that passage for a moment.

The Minister says "The Communicorp funding requirement was underwritten by a party acceptable to my Department."

Now, how could the Minister have had any information that the Communicorp funding requirement was underwritten by a party acceptable to his Department unless he knew of the IIU involvement?

A. I don't know whether that's a reference to that involvement or to the Advent involvement.

Q. I understand.

A. The last sentence suggests that he may have been aware that change was afoot.

Q. I am right in thinking, aren't I, that from all of the papers we have seen, Advent's involvement was not as an underwriter, but was, and was expressed to be from the outset, as a direct investor to the tune of 30 million, up to 30 million in Communicorp for the purpose of enabling Communicorp to fund its equity contribution to Digifone? Isn't that right?

A. That's certainly some of it, yeah.

Q. And the only time when the notion of underwriting came into play was in the context of the involvement of IIU?

A. I think, but it's very hard to be definitive about this, that we were using the expression "underwrite" to cover all of the institutional investors in the original application.

Q. We have seen a number of summaries of all the various applications, and I am quite happy to be corrected on this, but I do not think any of them describes the Communicorp/Advent relationship in those terms.

A. I wonder, do any of them describe the relationship between Communicorp, Advent and the other institutional investors in those terms? Because I suspect that they do, but it might be hard to find.

Q. Well, I certainly never came across it, and that's why this phraseology jumps out at me.

A. But I mean, you are talking now about a Minister on his feet in Dail Eireann. So I mean, I can't account for the words he uses.

Q. I understand.

If you look at the last line, the one you have drawn to my attention: "That was the position when the decision was made". Do you see that?

A. I do, yeah.

Q. I think you indicated a moment ago that suggests that the Minister may have been aware, but we can't be

sure, I suppose, without asking him, that the

situation was otherwise?

A. That the situation was changing at that point, yeah.

Q. Mr. Brennan: "The Minister is not telling us who the consortia were".

Mr. Finucane: "The Deputy should read the Minister's script".

Mr. Brennan: "Who owns the 20%?"

Mr. Lowry: "I reiterate there was nothing usual about the Esat Digifone application in this area compared with most of the other applicants. We are talking about an up-front capital investment of approximately €120 million. It is understandable that any business of that size would be financed by debt and equity, and the normal ratio is 50:50. That is precisely what happened in this case".

Mr. D. Ahern: "Someone must own it".

Mr. Lowry: "That is how at least five of the bidders proposed to fund it."

A statement we know to be completely incorrect.

Mr. S. Brennan: "Who owns it"?

Mr. B Ahern: "The man in the moon".

Mr. Lowry: "The principal function of my Department was to ensure that each of the six companies who sought the licence had the capability and the necessary funds in place to fund the project. We satisfied ourselves in that regard".

Mr. S. Brennan: "The Minister does not have the right to sign confidential agreements on behalf of the State. He cannot sell off State assets confidentially".

Mrs. Geoghegan Quinn: "Who owns it?"

Mr. Lowry: "There are confidentiality clauses".

Mr. S. Brennan: "The Minister should not have sold it".

Mr. Lowry: "Before the licence is signed, it will become abundantly clear".

Mr. D. Ahern: "For whose benefit are those clauses in place? Is it for the taxpayers' benefit?"

Mr. Lowry: "The company concerned is the only source from which information on the beneficial owners of the licence can emanate. We are granting the licence to Esat Digifone, and before it is issued, I will request the company to put on public record the composition of the consortium and from where the funding came".

Mr. Noel Treacy: "I refer the Minister to the selection criteria weightings. He states that his decision was taken in the interests of consumers. Why did he allocate only 18 percent of the approach to tariffing? In circulating revised criteria in July 1995, why did the Minister stipulate a minimum bid of 5 million and a maximum of 15 million and allow 11 percent in the assessment when everyone knows that he is disposing of a national asset worth 50 million?"

The Minister was ill-advised in putting in that condition. In the interests of better national investment in the country, will he appoint independent consultants to re-evaluate this process?"

Mrs. Owen: "Were 59 pages not enough"?

Mr. Treacy: "And consult with those who bid for the licence".

Mrs. Owen: "We would then have to appoint another set of consultants to examine the findings of those consultants".

Mr. Lowry: "I refer the Deputy to the statement I circulated, which answered all those questions in detail".

Mr. Treacy: "It did not".

Mr. Lowry: "If the Deputy refuses to accept the detail of that statement, I have wasted my time and cannot assist him any further".

Mr. D. Ahern: "The Minister wasted taxpayers' money".

Mr. Molloy: "The Minister said that the weighting was decided up front. Was there a change in the weighting after the cap was imposed? If all the consortia were deemed to be capable of funding the project, would have funds not been forthcoming? Will the full ownership of the licence be disclosed before the Minister signs the licence?"

Mr. Lowry: "As has been clearly stated in public on a number of occasions and confirmed by way of statement

of the company involved, Esat Digifone, the funds have been in place for a considerable period of time".

Mr. Molloy: "Does the Minister accept that, and is he happy?"

Mr. Lowry: "I accept that. I believe that when companies with a reputation such as Esat Digifone make a public statement of that nature, the onus is on all Deputies, unless they have information to the contrary, to accept and believe it".

Mr. Hogan: "What about Deputy O'Malley? Will he accept that?"

Mr. Lowry: "That information should also be passed to Deputy O'Malley. The ownership of the company is a matter for Esat Digifone. Before the licence is signed, it will make full disclosure in respect to how it has put the funding in place, the ownership of the company, and the stakeholders.

Mr. D. Ahern: "It is up to the Minister to dictate the terms".

Mr. S. Brennan: "It is obvious that the Minister gave a licence to people he does not know because he has not yet found out who owns it. Why was the timing of his announcement brought forward five weeks? Why did he bring it forward and rush it in an afternoon, with an hour's notice to the press?"

Mr. Lowry: "In respect of the Deputy's snide comment that I gave a licence to people I did not know, if he

understood the process"

Mr. Brennan: "I do".

Mr. Lowry: "I have gone to great lengths to try to inform him of it over the last six months, but he is obviously not listening".

Mr. Brennan: "The Minister will not tell us to whom he sold it".

Mr. Lowry: "Five of the consortia decided that in one form or another, whether by placement, flotation or an input from a financial institution, we are placing 20 percent aside for that particular purpose".

Mr. D. Ahern: "It is the Minister's duty to know".

Mr. Lowry: "The Deputy does not expect me have to a crystal ball"

Mrs. Geoghegan Quinn: "We thought you had".

Mr. Lowry: "to look into the future and decide as a result of a public placement who in fact would win it. That is not my business. My business in the Department was to ensure that the winning consortium was capable of funding the project which was undertaken on behalf of the State. I satisfied myself as to that, and I'm confident, without contradiction, that Esat Digifone has the funding in place and will proceed on target to give us the roll-out and competition with Eircell before the end of the year".

Mr. Brennan: "Why did the Minister bring forward the announcement?"

Mr. Lowry: "The competition and the time span for the competition was clearly outlined. We made the announcement as soon as the consultants and the project team reported. No sooner. I was very happy that they met the deadline set by them, and I believe the consumers of Ireland are very happy that we brought forward this element of competition to public mobile telephony at the earliest possible date".

Mr. O' Keefe: "Why, when the Tanaiste was having discussions with one of the groups the day before the announcement was made, did he indicate that this decision would not be announced for a month? Given the Taoiseach's espousal of openness and transparency and the fact that this was the sale of a public asset, why did he not insist that matters pertaining to ownership would be in the public view? Will the Minister accept that perhaps it was a mistake, given that we now have press speculation that 20 percent could be owned by people such as Mr. Desmond and others? The confidentiality has now led to speculation throughout the press. Will the Minister make public the full ownership of Esat Digifone before the licence is signed"?

Mr. Hogan: "He said that".

Mr. Lowry: "I will not speculate on what the Tanaiste said".

Mrs. Geoghegan Quinn: "It is safer".

Mr. Lowry: The Deputy has missed the point. I stated clearly that all five of the participants in this competition had various ways and means of raising funds to fund the project. I will not speculate at this stage or cast aspersions on the credibility of others. The Deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this project and is acceptable to Esat Digifone, and if it means that this project is up and running, so be it. That is their business. It is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the necessary funds are in place to fund the project and get to roll-out on time. It is very simple".

Mr. D. Ahern

CHAIRMAN: The next bit is not important.

Q. MR. HEALY: It goes on,

Mr. D. Ahern: "What is the whole process about?"

Mr. B. O'Keeffe: "What about the points system?"

An Leas-Cheann Comhairle: "That concludes statements".

Mr. Molloy: "I did not get an answer to my question."

If you look at the previous page, or if you look at that whole exchange, I think it's clear from that exchange, and surely you must have anticipated that ownership was going to be a major issue of contention once that speech was given?

A. Yeah, what seems to me from listening to the speech as you were reading it out is that and I don't know whether I can verify this; I can't, whether it can be verified. It is likely that the Minister had briefing notes in addition to the speech, and I don't have access to them. If he had them, and I think it's likely that he did, then I'd be interested in seeing them in the context of commenting. Because Mr. Lowry was, I would say, very highly reliant on his prepared speech and briefing material when he performed in Dail Eireann. So it's an interesting question.

Q. Is it possible to get access to those briefing documents now, since the Tribunal certainly hasn't come across them?

A. I have never involved myself in the relationship between the Department and the Tribunal about documentation. That's left entirely in the hands of others. And if the documentation exists, I am sure it can be provided. I don't actually know whether it exists or not.

Q. It's clear that at the time that speech was given, Mr. Desmond was involved in the company; isn't that right?

A. Yes.

Q. Isn't it obvious, not only from what you may have seen in terms of the way the answers were delivered but from what you must have anticipated at the time, that questions on ownership and therefore questions

affecting the up-to-date position on ownership were going to be asked?

A. That's why I commented that it seems to me that there were supplementary briefing notes, and I would like to see them and to have an idea of who might have written them. And it is important in understanding this, because I am quite certain that Minister Lowry very seldom ad-libbed in the Dail or ad-libbed to a significant degree.

Q. One thing is clear, that your view at that time was that Mr. Desmond was involved, undoubtedly. There was no question of if he might become involved; he was definitely involved. Isn't that right?

A. There was certainly information in the Department at that time to the effect that he was involved.

Q. There was a statement

A. Now, what I don't know is what stage then was the Department's evaluation of that information.

Q. Whether they were evaluating it or not, the information from the consortium, which Mr. Lowry was anxious to say was the source of information about ownership, was that Mr. Desmond was involved; isn't that right?

A. I think what Mr. Lowry was saying, and I suspect that somebody had briefed him to say so, was that "I will ensure that all that information is put into the public domain before I sign the licence". Now, I am

assuming that somebody briefed him accordingly.

Q. But if that is so, it means that the speech was drafted in the knowledge that this information was not going to be communicated in the course of the speech, but that it would have to be fudged in some way?

A. I mean, you are asking me to comment in the absence of documentation which I am fairly confident was around the place. But what I don't know at this stage, is if there was briefing material in addition to the speech, who might have written it.

Q. Do you remember you told us and this is the last question I want to ask you about this speech at the moment you told us that one of the jobs that you attended to after a speech like this was given was to see whether any promise was made by the Minister which might have to be attended to in the future. And I think it's clear the Minister has said that he would put on the public record the composition of the consortium and from where the funding came, on a number of occasions; isn't that right?

A. Yeah.

Q. Do you recall examining those issues after this speech was made?

A. I think, when I referred to that, I was very careful to say that somebody would do that. I don't think I ever said that I would do it myself. I certainly did it as a junior civil servant. I don't believe I did

it at that stage.

Q. Can we take it that somebody would have been doing it in this case, or if they weren't, they should have, anyway?

A. I think normally somebody I would expect that somebody in the division would read the blacks to see if there was anything we should be looking out for or anything we should be following up, but I can't guarantee that that happened this time or every time.

CHAIRMAN: Well, I have gone on a little bit to see if we could conclude the Dail speech. I think we probably now have, so we'll take up matters at ten 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: Thank you, Mr. Brennan.

Just to go back for a moment to that Dail speech and the way in which it was put together, I am surprised that or am I right to be surprised that in putting together a Dail speech, civil servants wouldn't actually do research to check that the factual statements made were absolutely as correct as could be?

A. It would certainly be your intention to be as accurate as possible. But in most cases, speeches of this

nature, and I suppose the single exception is probably a second stage of a bill, but in most cases speeches are prepared under fairly tight time pressures. So you do the best you can, bearing that factor in mind.

Q. You didn't have the pressure of a parliamentary question here, merely the pressure that the Minister obviously wanted a speech to deal with these issues?

A. Well

Q. Would that not make a difference, that you'd have some degree of control over the timing?

A. I don't know without checking, and I don't know even how to go about checking. But some event must have caused this speech to come in place. Now, whether it was a Government decision or an informal discussion among Ministers, or whether it was arising from within the Dail itself, I just don't know.

What I think I recall is that we were aware on a Friday that the speech was for delivery on the following Tuesday. And I wouldn't even like to say for certain it wasn't the Wednesday.

Q. If, as you suggest, and it seems to me to be only reasonable to assume, the Minister must have had some additional information, which we are trying to locate and which I think the Department are trying to locate, to enable him to answer other questions that arose, that would suggest, would it not, that the issues surrounding ownership and the involvement of Mr.

Desmond had in fact been debated amongst the civil servants, and the question of whether to answer them or whether to deal with those issues by putting them in the speech must have been considered, and as a fall-back, information must have been put together to enable them to be dealt with in the event of, as it were, supplementaries arising?

A. I would prefer to say "could well have" rather than "must have", because I just don't know. And I am hoping that the record will show one way or the other.

Q. This information was available, at the very latest, from around the 16th April.

A. Yes.

Q. Now, which was two weeks before this speech.

A. Yeah.

Q. And I am right in thinking, am I not, that there is no evidence of any correspondence between the receipt of that information and the giving of the speech to suggest that the Department were considering this matter?

A. I don't know one way or the other whether there was documents, letters, telephone calls. What I am fairly confident about is that I wasn't involved in a hands-on way with that part of the activity at that time. But I do know that later I was asked for to intervene with, say, Michael Walsh, and I was probably asked to follow up one or two other points; but I

don't recall being involved in detail in whatever type of consideration of the evaluation was going on in the Department about this information at that particular time.

Q. But it is from you that we have obtained the information this morning, the first piece of information that you provided to the Tribunal this morning was to the effect that on receipt of that letter, the Department set about considering this new development. I can see no evidence in the documentation that the Department considered it at all, and so that you'll understand what I am trying to get at, it seems to me that the only consideration given by the Department was how to present this information and that the decision was made not to present it, or to fudge it if at all possible.

A. I don't I don't know, first and foremost, what exactly was going on. I know that

Q. Nothing, as far as I can see

A. I know that at a later stage, I was asked to intervene in relation to the financial issues, and I know that there was direct contact with lawyers about legal advice. So the issues were around. Now, what I don't know is the extent, if any, to which the people who were dealing in a hands-on way with the preparation of the licence at that time, how quickly they responded to the information and what inquiries they made. I

just don't know.

Q. If we just go on for a moment to the next document, it's a document in Leaf 203. It's a letter of the 1st May, 1996, to Mr. O'Connell.

"Dear Mr. O'Connell,

"I refer to your letter dated 17 April concerning the restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirements of the GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award, the ownership would be as follows: Communicorp Group Limited 40%, Telenor Invest 40%, institutional investors, 20%. The application also provided details of the ownership of the operational partners and identified the probable institutional investors and the broker who would be responsible for placement of equity with institutional investors. In the case of Communicorp, it was indicated that it was 66% owned by an Irish investor (Mr. Denis O'Brien) and 34% by Advent International.

"In view of the information contained in your letter of the 17 April 1996, it would be appreciated if the following could be clarified:

the nature of any difference between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or

asset strength and

full details of the ownership and categories of all shares of Esat Telecom Holdings, including in particular by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any changes in the effective ownership, both direct and indirect, of Esat Digifone since the submission of the application.

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence:

"1. The precise equity ownership of Esat Digifone, including the identity of all institutional investors

the identity and financial commitments of providers of debt financing.

"It is essential that these matters be cleared up before the issue of a licence. We also need to discuss the public presentation of these matters.

"I am available for any discussion you may require of the foregoing."

Now, that letter, which is signed by you, it may not have been drafted by you?

A. Probably not.

Q. It may have been drafted by Regina Finn, since she seems to have been handling this element of the

process.

A. Yes.

Q. But could I suggest that what that letter looks for is details of changes in the Communicorp/Denis O'Brien side of the project?

A. Certainly the two indents

Q. Pardon?

A. The two indents, the two bullet points are to that effect, yeah.

Q. The next paragraph seems to me simply to underline the request for information by saying how important it is.

A. In the effect of ownership of Esat Digifone at that point.

Q. It says Esat Digifone, I appreciate that. But after all, you did know about the other changes of which Mr. O'Connell had provided details on the 17 April, and there is no reference to those in this letter. So far as the award of the licence is concerned, all you are looking for is a certification of the precise equity ownership of Esat Digifone and the identity of all institutional investors. There is no question at this stage of you saying, "Thank you very much for your letter informing me that Mr. Desmond is interested. We are going to have to consider this and his involvement".

There is no question of that; isn't that right?

A. As it's drafted, there doesn't seem to be.

Q. I just want to look for a moment at what is happening on the other side of this process. I won't be able to look at it in great detail, but if I could refer you to Book 49, if you have a copy of it there. I am sure you can be provided with one.

If you go to I think it's Leaf 101. This is an agreement, or a memorandum of understanding, rather, between Advent International and Denis O'Brien dated 24th December, 1995. And as I mentioned, I think last week, this was the ultimate this recorded the ultimate resolution of the dispute, I think, between Mr. O'Brien and Advent concerning Advent's right to 5% of the company Esat Digifone.

A. Okay.

Q. I don't want to go into the detail of it. That was the end of it. They accepted they wouldn't get a 5% direct investment, and in return, they were given certain rights to a limited indirect investment through Communicorp, which at that time was being restructured into Esat Telecom Holdings, and it was envisaged going to take its shareholding in Esat Digifone through Esat Telecom Holdings.

A. Mm-hmm.

Q. This document also records that the $\frac{1}{2}$ 30 million investment from Advent into Communicorp was not going to proceed and instead, Advent were going to support the completion of the arrangements with Credit Suisse

First Boston, who had in fact been involved from a very early stage, I think from in or about June of 1995, notwithstanding what was stated at the presentation.

Now, that was just to orientate you. I think it was roughly around there we finished looking at these documents.

If you'd go on to the next document, which is a memorandum which is dated 8th January, 1995, it's Mr. Gerry Halpenny's note to his own file. It seems to involve an attendance on Mr. Richard O'Toole, and it begins off as follows:

"Concern re IIU, obstacle to getting things sorted.

Licence issues about to be raised again.

Acting as a strategic operator/investor

30% versus 25% issue IIU not coming in Esat and

Telenor go ahead make the capital calls option

to come in but price goes up as time goes on".

What this seems to record is two things, as far as I can see. Firstly, some tensions between the three partners, Esat Telecom, Communicorp and IIU, as they try to tie down the way they were going to go forward with the project. You'll see from other documentation that they were trying to tie down the terms of a shareholders agreement, but there was foot dragging, perhaps strategic or tactical foot dragging by one party or another. There is a reference to IIU's role,

but also a reference to what's described as the 20% versus 25% issue. And this was in January of 1995, and I think we clarified last week that you, anyway, had no, as far as you can recall, involvement in discussing any such issue?

A. That's right.

Q. As of that date.

MR. MCGONIGAL: I think, just for the record, Mr. Chairman, I think that letter may be '96.

CHAIRMAN: It is indeed, yes.

MR. O'DONNELL: The context of it makes it clear it was 1996.

Q. MR. HEALY: Sorry, I should have said '96. It's a mistake, obviously, people frequently make when the year turns; they forget to change the year.

The next document is a letter of the 9th January, 1996, from Mr. Halpenny to Mr. Richard O'Toole, and it refers to the discussion they had the previous day and the document that I just mentioned. It says

"Dear Richard

"I refer to my telephone conversation with you yesterday and set out hereunder a summary of my views on the current position given the somewhat slow progress with IIU. As the meeting with IIU has been rescheduled for Wednesday afternoon, hopefully it will not be necessary to consider taking any of the steps set out below.

"I have reviewed again the agreement executed on 29 September 1995 and the letter from IIU to Denis O'Brien in connection therewith. As you will be aware, under the agreement, IIU has agreed to underwrite the obligations of Communicorp and to take up any shares which Communicorp fails to take up under any issue of shares by Digifone. In consideration of having undertaken this obligation, IIU has been granted the right to take up 25% of each tranche of shares issued by Digifone, subject of course to its obligation to procure that payment is made for such shares.

"There is a condition stated in the agreement in clause 1(a), but this has been satisfied. In addition, there are conditions stated in the agreement, one of which is that Communicorp, Telenor and IIU shall have signed a shareholders agreement containing protections in favour of IIU which would be reasonable for a shareholder subscribing for 25% of a private company.

"You questioned whether Communicorp and Telenor could simply proceed on the basis that the company was owned as to 50% each by them and have an initial issue of shares to which they alone would subscribe. In that case, IIU would be given the option to participate in further issues but upon terms which might not be as favourable as those attaching to the first issue. I

would have to say that the structure of the agreement at the moment would not allow Communicorp and Telenor to proceed in that way, but there is a relatively slight variation in your suggestion which could have the effect of achieving a similar result.

"If Telenor and Communicorp have agreed all outstanding points on the shareholders agreement, there is nothing to stop them entering into an agreement immediately on the basis of a 50/50 arrangement. This agreement could be presented to the Department as evidence of the fact that a legally binding shareholding agreement was in place. The current draft agreement could probably be tailored very quickly to meet this requirement, and indeed many of the provisions could remain the same. However, the parties would indicate to IIU that notwithstanding that a shareholders agreement had been entered into governing the position between Communicorp and Telenor, they would still undertake to negotiate in good faith a revised agreement bringing IIU into the equation. If all outstanding matters had been agreed between Communicorp and Telenor, they could take quite a firm position that, as far as they were concerned, the agreement being put to IIU was in terms which satisfied the condition set out in IIU's letter, although it would be advisable to have a few further concessions which they would be prepared to make.

"Concurrently with the above steps, the company would make a call on its shareholders to subscribe for shares. The notice given should be as long as possible in the circumstances, and we discussed a period of 30 days. Communicorp and Telenor would undertake to negotiate in good faith the terms of the agreement with IIU during the period to the time of the cash call. I realise that the time of any call is dependent upon extraneous factors and in particular the date of signing of the licence and payment of the fee. At the expiry of this period, the shares would be issued, and if IIU did not elect to take up its shares, Communicorp and Telenor would presumably take up the balance between them. Alternatively, if IIU were to take up its shares, it would have to choose either to do so on the basis of no shareholders agreement having been signed, therefore relying on its rights under company law, or else enter into the shareholders agreement. One assumes that they would elect to do the latter, given the rights which they would enjoy under the shareholders agreement are greater than those which would be available under company law.

"While the position is reasonably similar even if Telenor and Communicorp have not agreed all points on the shareholders agreement, I am of the view that it would be greatly preferable to have such agreement, as

it enables those two shareholders to adopt a much firmer line with IIU. However, even if final agreement has not been reached on all points, they can still agree to have a cash call by the company. Once again, an undertaking can be given by Communicorp and Telenor to negotiate in good faith with IIU to reach agreement on a shareholders agreement, but no such agreement would be a precondition to the cash call.

As in the case mentioned above, IIU would then have three options. The first is to elect not to subscribe for shares. The second is that they subscribe without signing the shareholders agreement. And the third is that they subscribe and sign the shareholders agreement. However, in all cases Communicorp and Telenor are the parties who are effectively in control of the situation with IIU being forced to commit themselves one way or another.

"The wording of clause 3 of the agreement is also helpful in that while it effectively constitutes a right for IIU to have shares allotted to it or to subscribers procured by it, it also has an obligation to procure that such subscribers anticipate such allotments and make payments in full. The question then arises as to whether the failure by IIU to perform this obligation is a breach of the agreement allowing Digifone to terminate. I have not given a great deal of thought to this particular question, on

the basis that I think it is unlikely to arise, but it may be necessary to revisit this issue if matters do not proceed satisfactorily.

"There is one other issue which I should mention.

Clause 8 of the letter signed on the 29 September 1995

provides that the terms other than the amount of any

issue of any tranche of shares governed by the

agreement will be subject to the prior approval of

IIU. However, by definition, this approval applies

only in respect of an issue in which IIU is

participating. If they choose not to subscribe for

any particular tranche, I do not believe that they

could exercise any control over the terms of the

issue. I would also understand the reference to the

terms of the issue really to mean the issue price,

although arguably it could also refer to matters such

as the mix between share capital, capital contribution

and subordinated loans anticipated in the shareholders

agreement. I would have thought that this issue

should now fact be covered in the shareholders

agreement if signed by IIU so that Clause 8 in the

letter would become redundant.

"I trust that this is in order".

And that letter is copied to Peter O'Donoghue.

I think you'll agree with me that what that letter

shows is that as of the 9th January 1996, there was no

shareholders agreement in place where this consortium

was concerned. There was in fact no coherent integrated consortium in existence at that time, but merely a group of people who had an agreement governing their consortium but where that agreement gave rise to certain continuing tensions which hadn't been resolved?

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

Q. Now, around the same time, I think a day later, I think, Mr. O'Brien wrote a letter to Mr. Michael Walsh, or Dr. Michael Walsh of Esat Telecom, of the 10th January 1996. And this is in Leaf 104.

A. When you say Dr. Michael Walsh of Esat Telecom, it was of IIU, surely?

Q. I think this was the same Michael Walsh. Sometimes called Professor Walsh, sometimes Mr. Walsh, sometimes Dr. Walsh. And this letter, it's called Dr. Walsh, anyway. I beg your pardon, of IIU. Sorry.

10th January 1996 from Denis O'Brien.

"Dear Michael".

This is headed "Subject to contract."

"I refer to recent discussions and in particular of our conversation of this afternoon. My proposal is that IIU will place with Esat Holdings 12.4 percent of the 25 percent of Esat Digifone to which it is entitled. In return, Esat Holdings will pay subscription amounts due on the 12.4 percent remaining

to IIU as they fall due, up to 6.448 million (i.e.

12.4 percent of IR 52 million)".

52 million I think was the value that was being put on

the licence as well at that point.

"I would also require your support in negotiating a

satisfactory shareholders agreement to include

effective board control for Esat Holdings. As part of

the arrangement, Esat Holdings would have to procure

the release of IIU's underwriting obligations.

"The proposal is conditional on the following:

"1, a satisfactory contract for the above, and a

satisfactory shareholders agreement be negotiated and

settled.

"2. Government consent or at least satisfactory

assurances that the proposal will have no adverse

effect on the GSM licence.

"3. Satisfactory conclusion of the CS First Boston

financing of Esat Holdings and consequently, the

actual receipt of funds thereunder.

"4. Such other consents being obtained as Esat

Holdings feels are necessary to be incorporated as

conditions in the contract at 1 above.

"If all of this is acceptable in principle, please let

me know, and I will begin to make arrangements for

drafting and implementation."

If you go on for a moment to Leaf 106, there is a

document headed "Key points re IIU Holdings in Esat

Digifone".

This is I think an IIU document, and it, I presume, is related to either the letter or the discussions

referred to in the letter we discussed a moment ago.

It describes the current situation as 37.5, 37.5, 25%

as between Esat Holdings, Telenor and IIU.

Then it refers to the revised proposal and main

conditions. And in brackets, "(IIU's agreement is

totally conditional on Telenor confirming directly to

DFD that they are happy with the revised proposal.)"

Then there are a number of bullet points.

"IIU to place with Esat Holdings 12.6% of Digifone.

In return Esat Holdings will pay subscription amounts

due on IIU's remaining 12.4% as they fall due, up to

6.448."

We saw that reflected in the letter. In other words,

in return for buying 12.6% from IIU, Esat Holdings

would pay the subscription amounts due on the balance

of IIU's holding of 12.4%. So that IIU would

effectively have their share for nothing?

A. I can't say that I fully understand or follow this

now, to be honest.

Q. Well, if you have 25% and you agree to sell

effectively 12.6% of it to Mr. O'Brien, Mr. O'Brien is

saying that in return, he will pay the calls due on

the balance of the 12.4% up to 6.448 million. They

valued the licence at that time at 52 million

A. Is this you mentioned that when you were reading out the letter. I am not so sure whether it's a value of the licence, or whether it's a capital requirement, or whether it's the equity portion of the capital requirement. I don't know what it is. But I don't think it's the value of the licence.

Q. If you go down further on in the document, you'll see that's how they see it, in any event. They regard it as having been based on the valuation of the licence at 52 million.

A. I see, okay.

Q. Obviously it's not suggesting that all capital calls thereafter would be paid by Mr. O'Brien do you follow me? in that his obligation to pay is limited to 6.448 million. In other words, he is only buying 12.6% of the licence from Mr. Desmond at that stage.

A. Yeah.

Q. Esat Holdings will procure the release of IIU's underwriting obligations. A satisfactory contract for the revised proposal will be put in place.

Satisfactory shareholders agreement to be completed.

Confirmation to be received that the revised proposal will have no adverse impact on the GSM licence.

Satisfactory conclusion of the CS First Boston financing of Esat Holdings and the receipt of funds thereunder.

all necessary consents and confirmations being

obtained."

Then it says "IIU to provide a loan of up to 3 million to be fully repaid by the end of May 1996, the coupon on this loan to be DIBOR plus 2%.

Next bullet point: "The revised proposal has been based on the evaluation of the licence of IRI_{1/2}52 million. CS First Boston to confirm this valuation. Should this valuation be revised upwards, IIU will expect to receive proportionate recompense to be paid by the end December 1996."

Then we come on to a point which may have prompted you to make your suggestion.

"The agreed capital subscriptions to be made by the parties are 52 million. The structure as to how this capital should be structured (equity v. debt) should be agreed between all the parties. If less than 52 million permanent equity is required by 31 December 1996, then IIU is to receive the balance of the monies not subscribed on its behalf."

A. By the way, that didn't prompt me. I was just trying to understand what was going on. I hadn't read that, and

Q. I am not suggesting that prompted you. It's the figure. The figure is the figure we have heard already as being the required equity contribution.

A. Okay. I mean, I am not pretending to understand this. I am not sure what we are looking at is a finance

issue or a control issue or both. I have no idea. I

mean, they mention 12.6 added to 37.5

Q. Let me just clarify one thing, Mr. Brennan. I am not

trying to catch you out at all. The 52 million is

something that occurred to me when I first read this

document as being related, as you did, to the capital

requirement. I think it's perhaps coincidental that

the licence was valued at 52 million. In fact, it's

clear that IIU were anxious to ensure that they

weren't short-changed, because they felt that if the

licence was valued at a higher figure and that

could be the case they wanted to protect themselves

to make sure they got paid more money for it.

I think this is a finance issue, but it's clearly, as

we'll see as we go on, a control issue as well.

The next bullet point: "In general terms, IIU is

comfortable with the 'operating' shareholders carrying

on the day-to-day running of Digifone. It is

important, however, that any issues which may have a

material impact on the value of IIU shareholding are

approved by all shareholders.

"Full protection to IIU and all shareholders against

actions or financial structures which would erode

value.

"Any transactions between Digifone and any shareholder

will be on an arm's-length basis and will have prior

approval by board members other than the

representatives of the relevant shareholder.

Director's fees also to be approved by the board.

each shareholder is entitled to participate pro rata in the issue of any instrument designed to effect the capital raising of i_c^1/252 million.

Furthermore, no new shares, loans or other financing instruments can be issued to any shareholder without prior agreement to all shareholders, and all shareholders to participate pro rata in any such issue.

no amendments can be made to the memorandum and articles of association of the shareholders agreement without the prior agreement of all shareholders. All shareholder resolutions are to be approved by all shareholders.

all shareholders are to be entitled to participate on a proportionate basis in any transfer of shares made by any shareholder under pre-emption clauses."

Now, it's important to bear in mind that this is, and it never went further than being a proposal. What I am seeking to do is to give you an idea of what the document suggests was actually going on on the other side of this process at the time. And we should bear in mind that to some extent, as I have indicated already, a lot of this type of problem was anticipated by Mr. Andersen. As I suggested to you, one way of

solving it would have been to have clarified the financial issues day one.

A. Mm-hmm.

Q. Now, if we just go back for a moment to Leaf 105; I skipped over this because it's the Telenor side at around the same time.

It's a Matheson Ormsby Prentice memorandum of the 10th January 1996. It's an attendance of a meeting. The attendance is made by Mr. Arthur Moran. You see his reference in the top in the middle box.

It says: "At William Fry, Gerry Halpenny, Peter O'Donoghue, Richard O'Toole, with Per Simonsen and Knut Haga.

"14.2 still difficult"; obviously a reference to some clause in the shareholders agreement.

"Chief Executive matter.

IIU points

"1.6" a reference to a section of the shareholders agreement.

"They can have budget later."

There is a reference to Clause 1.8. A reference to Clause 8.5.

If you go down, then, to the reference that begins

"Department still believes in 40:40:20 split.

"Cash call likely soon 12 million", and a date of the 20/1/96. Then there is a reference to "Michael

Walsh, John Baits and Neville O'Byrne", I think "Sonia

Pace". Then it says "Recital E, on whose behalf are

IIU acting?

"IIU Nominees need to talk to Department."

On the next page

A. Is there something inserted there? "IIU Nominees";

there is an insert

Q. Which I can't follow. The last three letters appear

to be "LED".

A. Or it could be "Noted, needs to talk to the

Department". I don't know what it is, but there is a

word there.

Q. I agree. Maybe ultimately Mr. Moran may be able to

help us in relation to it. It's very hard to

decipher.

On the next page you have a heading, the last heading,

I think, on the document, "Participation in Digifone

35.5, 37.5, 25". Underneath that a reference to the

bid description.

"40%: 40%: 20%."

Now, there have been references already to your to

the impression that Mr. Moran had, that there had been

some contact with the Department and specifically with

you concerning this, but you are satisfied that no one

mentioned any of this to you?

A. I have no recall of anything like that.

Q. And I have to say, in fairness to you, the documents

that I referred to earlier, which suggested an

involvement on your part, are of course inconsistent with the statement here, "Department still believes in 40:40:20 split. Unless they mean that you have a conviction in favour of a 20:40:40 split".

Now, the document I showed you earlier, the note from Mr. Halpenny to Mr. O'Toole concerning the contents of their meeting, dealt not only with how they would put a shareholders agreement together at a time when IIU were obviously not playing ball, if I can put it that way, but also with how this would be presented to the Department; and the suggestion was made that the Department would be told that there was a 50/50 shareholders agreement and that by way of some side arrangement, IIU would be given an opportunity to come in later.

If we go on to the document in Leaf 109. Now, we see references again to some of these issues. This is a memorandum to Denis O'Brien from Richard O'Toole, copied to Owen O'Connell and Paul Connolly.

Subject, Esat Digifone shareholder agreement.

"Denis,

"Following a discussion yesterday afternoon with Owen O'Connell and Gerry Halpenny on how we might handle the shareholders agreement in the light of the current position vis-a-vis Telenor and IIU, I propose that we now proceed as follows:

"1. Conclude the shareholder agreement between Esat

Holdings and Telenor on a 50/50 basis and inform IIU that we will do so, leaving open the possibility for IIU to sign up at any time on the basis of the agreed Telenor Esat Holdings draft. We probably should have an early combined Communicorp/Esat Telecom board meeting to approve the terms of the agreement and to assign Communicorp/Esat Telecom interests to Esat Holdings. We would then proceed to conclude discussions with the Department on the GSM licence on the basis of this agreement. It would also be desirable to resolve quickly with Telenor the outstanding management issues (replacement of Jan Edward Thygesen, Barry Maloney etc.) We would also proceed to document the Telenor bridge facility on a binding basis.

"2. Continue (assuming IIU does not sign up immediately to become a party to the Telenor/Esat Holdings draft shareholder agreement) to negotiate in good faith with IIU, in parallel with the discussions with the Department, to conclude a satisfactory "trilateral" shareholder agreement on the basis of 37.5:37.5:25 ratio. We would inform the Department that we are in discussion with IIU and that we envisage that IIU would subscribe for up to 20% of Esat Digifone plus a further 5% that we would allocate also to IIU (c.f. line worked out by Owen O'Connell and Pdraig O'hUiginn to be consistent with the bid

document), and that could entail revisions to the shareholding agreement in order to accommodate IIU's participation. As capital calls become necessary, each party would be required to subscribe its share. IIU would face the choice of subscribing its proportionate share (with or without the protection of the shareholder agreement) or else permit itself to be diluted progressively."

I don't want to refer for the moment to any other part of this document, but again you can see that attention is given to the presentation issue. And on this occasion, what is suggested is that the Department would be informed of the IIU involvement, but only to the extent that the Department would be told that IIU would subscribe for up to 20 percent of Esat Digifone plus a further 5 percent and that a line would be worked out by Owen O'Connell and Padraig O'hUiginn to be consistent with the bid document.

Can you recall any involvement of Mr. O'hUiginn in Esat Digifone business as of this date? We know of his involvement on the ESB side, but any involvement on his part in relation to the configuration of the share capital?

A. I don't recall ever having dealings with him about it.

Q. Do you recall, or had you any have you any awareness of his having had dealings with anyone else in the Department concerning the matter?

A. I have no idea.

Q. If you go on to Leaf 113, there is a letter from Mr.

Denis O'Brien to Knut Digerud as managing director of

Telenor Invest; I am not sure that's correct, but in

any case he is writing to him as representing the

Telenor Invest interest on the 27th February, 1996.

He says:

"Dear Knut,

"I want to thank you for getting back to me so

promptly on the suggestion which I put to Telenor

Invest through you and to IIU through Michael Walsh at

our meeting on the 9th of February that you might

consider selling a portion of your share in Esat

Digifone to Esat Telecom Holdings. I have noted your

response that Telenor Invest has no interest in

reducing its shareholding in Esat Digifone at this

time.

"As I mentioned when I talked with you and Michael

Walsh, our financial adviser, CS First Boston, have

told me that prospective investors in Holdings would

be more attracted to our current private placement

offer if Holdings could consolidate its investment in

Esat Digifone on the basis that it would own more than

50 percent of the company. This has been confirmed to

me even more strongly during my current meetings with

prospective investors in the course of our roadshow in

the United States. I believe that such an adjustment

would also be acceptable to the Department of Communications. Accordingly I will pursue the matter further with Michael Walsh of IIU and keep you informed if it should emerge that IIU might be willing to do an acceptable deal with Holdings to this effect.

"In the meantime, we shall continue to work with Telenor Invest and IIU on the basis of the existing shareholding proportions."

You see in that letter where Mr. O'Brien says that he believes that an adjustment

A. Would be acceptable

Q. of shareholding, where the balance of power, if you like, would shift to Communicorp, would be acceptable to the Department. Can you recall if a proposal like that was ever canvassed with you, or to your knowledge, with anyone else in the Department?

A. I don't recall, but I'd be very surprised if it was so canvassed.

Q. It would have, whatever view was being taken about of the evaluation report, that would have flown in the face of it, wouldn't it?

A. It would, yeah.

Q. Now, if you go on to the next document, in Leaf 114, and it gives an indication of the thinking on the IIU side concerning this matter. It's a letter from Mr. Arthur Moran to Mr. Per Simonsen of the 1st March, 1996.

"Dear Per

"Further to our meeting yesterday, I attach revised draft agreement for your review before I send to the other parties.

"I have put square brackets around a number of provisions, including Clause 4.5 and the various provisions referred to in Clause 11.1.3, as I do not think that final decisions have yet been taken into relation to these provisions.

"In Clause 7, I have not inserted the provision for seven days' notice for board meetings which we have discussed because I think you are adequately protected by the provision of Clause 7.9, which requires that a Telenor-nominated director be present.

"I should glad to receive your comments when you have had a chance to review the draft.

"In relation to the letter from Denis O'Brien dated 27 February 1996, I believe that that letter is putting you on notice of the fact that Holdings wishes to increase its interest in Digifone above the previously agreed figures. I believe that Telenor must respond to the letter to remind Holdings" that is, Mr. O'Brien "of the fundamental understanding that Holdings and Telenor would hold equal interests and that you would require to retain the option at all times of achieving that objective. That would of course mean that Holdings cannot have more than 50%

without your agreement to take rather less than 50%.

"In relation to IIU and Dermot Desmond, I expect that you are aware that Mr. Dermot Desmond is at all times a dealer and accordingly, if the price is right, he will be quite happy to deal with Denis O'Brien; and indeed, it is not inconceivable that there is already an understanding in place as to what would constitute an acceptable deal.

"For this reason I think it extremely important that in the articles of association of Digifone we provide that it will amount to a transfer of shares of Digifone if the beneficial interest of any shares registered in the name of IIU Nominees changes, so that we should require IIU Nominees to let us know the parties on behalf of whom they hold shares and how many shares they hold for each such party, to ensure that there is no buildup of shares in any person (especially Holdings) which is not known to us. I will consider whether this point should also be put in the shareholders agreement as well as in the articles"

I think that should read "I will consider whether this point should also be put in the shareholders agreement as well as in the articles."

Now, I just want to contrast for a moment the attitude of Telenor at this stage with what I suggest was the less-than-prompt attention by the Department to the same point a short time later. Telenor, through its

solicitors, was clearly conscious of the fact that there could be marked changes in the overall configuration of the shareholding in this company and in the, if you like, the disposition of power in this company as a result of what was happening and as a result of a failure to know what really owned the 25%.

I suggest to you that the Department weren't as alive to that issue, or if they were, it wasn't being handled properly.

A. I don't know. The Department couldn't have been alive to what looks like gaming as between the various parties in the consortium if they weren't told. You talked about less-than-prompt attention to what they were told. I can't comment one way or the other, because there were other parties in the Department dealing with the matter in addition to myself. So you will eventually hear the evidence of those parties.

It's not for me to agree with you that it was less than prompt, because I don't know.

Q. We see here from the documentary evidence that Mr. Moran realised that one of the key things his clients needed to know was who owned the 25% that was in the name of IIU Nominees and where it would be going.

It's interesting, perhaps ironic, that that is the issue that was also being ventilated in the press and in the Dail. And from the documentation, I don't see that the Department were as energetic, perhaps, as one

would have expected in getting to the bottom of it.

A. I don't know the extent to which what was going on in the Dail or in the media

Q. You know

A. was informed as to the amount of detail that's in these exchanges between the parties. It's not something for me to comment on. I just don't know enough about it.

Q. Are you sure you mean that, when you say you don't know what was going on in the Dail? The question that was going on

A. Sorry, I don't know what was behind you were suggesting that the people in the Dail knew a lot of the details of the stuff that you have been ventilating in the last twenty minutes.

Q. Not at all.

A. That's the sense I picked up from it.

Q. What I am suggesting, they were asking a simple question. They were asking who owns they thought it was 25 percent they thought it was 20 percent.

Mr. Molloy thought it was 25 percent. They had been saying, from much, much earlier, "Who owns this?" And here we have Telenor, who are in the middle of it, also saying, "Who owns this?" This was a hot issue.

The information was available, or some information was available to the Department and, I suggest, to the Minister; and wouldn't you agree with me, it wasn't

being made available, for whatever reason?

A. Okay, you'll eventually hear from other witnesses. I

said that the information that we had needed some

work, and the work was underway.

Q. I just draw your attention I am not going to ask

you for a comment on it to another attendance of

Mr. Moran's, in Leaf 119, where in relation to the

shareholders agreement, Mr. Moran asks you see the

two numbered points "Shares held by whom?" In

which the same issue seems to have been raised, or a

related issue.

If you go to Document 123, a letter from Mr. Moran to

Mr. Neville O'Byrne, who was the solicitor for IIU.

Mr. Neville O'Byrne of William Fry. It says:

"Dear Neville" dated 16 April 1996

"Further to my letter of yesterday attaching Draft 12

of the shareholders agreement, I attach suggested

wording for the resolution of the board pursuant to

Clause 4.3.

"I think you were to draft a side letter in relation

to IIU's initial involvement in the company and to

permit a transfer to the four investors without

triggering the transfer and pre-emption provisions.

Can you let me have a draft of the side letter."

I think you can understand the point there, a

reference to the need to insert a clause in any fairly

standard articles which would present pre-emption

provisions coming into effect where a nominee shareholder was going to transfer shares to the people on whose behalf he was holding, and assuming that everybody in the circle, or in the loop, if you like, knew who they were.

A. Mmm.

Q. I want to pass over the next document or two to go to Leaf 125, which relates to this issue, and it appears to be a letter from IIU Nominees, if you like, certifying or at least the draft letter certifying the beneficial ownership of shares held by IIU Nominees.

"Dear Sirs.

"We refer to the agreement and in particular the provisions of clause 12.2

A. Sorry, which leaf?

Q. 125. If you go to the final document. I don't want to take you through the letter, which is again dealing with aspects of the shareholders agreement.

A. Yeah.

Q. With the letter, this document seems to have been faxed as well. It says "In accordance with our discussions, we are writing to you to confirm" this is a draft, mind you now "we are writing to you to confirm that the shareholding of 25 percent in Esat Digifone Limited held by us is beneficially owned in the following manner.

"IIU Limited and Bottin International Limited."

Now, had you ever I think did I mention Bottin International to you, I think, last week?

A. You did some week; I don't know at this stage which.

Q. I think you indicated that you had never heard of that company?

A. I don't believe I did, no.

Q. Bottin International is a company to which all of IIU's rights and obligations under the agreement of the 29th September 1995 were assigned. It is effectively a Dermot Desmond company as well.

I want to go back now to Book 44 again. We were at Leaf 204. Leaf 204 is a note of Mr. McMahon's. I don't think that there is anything on it I want to draw to your attention.

The next document is a report of a meeting with the EU Commission. This was in relation, I think, to Ireland's draft submission to the Commission seeking a derogation to 2000 in respect of liberalisation measures in the telecommunications sector and also in relation to the Persona complaint. I don't think there is anything particularly important there.

Go on to Leaf 206, and what we have is a typescript, which is the first portion of the documents in this section, followed by a handwritten note of Mr. Owen O'Connell's. It's his attendance or memorandum of the 3rd May 1996 in which he records his client as Esat

Digifone and the subject matter as licence

negotiations.

It's easier, I think, to go through the typescript.

It seems to be a meeting at the Department of Transport, Energy and Communications attended by KD, which I take to be Knut Digerud; POD, Peter O'Donoghue; AJ, which I think is Mr. Arve Johansen; MW, Michael Walsh; P. Connolly, Paul Connolly; OO'C, Owen O'Connell, on the Digifone side. On the Department side: yourself, Fintan Towey, Regina Finn, and the "Eanna" seems to be a reference to Mr. Eanna O'Conghaile.

Underneath that the various entries, and I think I'll go through them all first, and we'll come back to one or two on which I want you to comment.

The first line is "Clear political football.

"Identity of each shareholder, legal and beneficial ownership. Esat Digifone changes relative to bid.

"Institutional investment replacement of Advent and Davys by IIU.

"Need detailed information/quality/about IIU.

"Confirmation that Telenor is same as at bid date.

"Differences in detail as to expertise in asset strength between Communicorp and Esat Telecom Holdings.

"Numbers re IIU.

"Telenor 'backdrop' statement as operator as last

resort.

AJ that's the way we see it anyway. "We'll never abandon this one".

Not requesting statement, but would be helpful per MB.

"Project finance POD bank 60/equity 40.

ABN and AIB appointed co-providers.

25 million bridging committed.

Thought to presentation. More the better provided agreed in advance.

"Donal Buggy and Billy Riordan. Maybe Andersen.

"Better than 50% chance that Commission will send us

Persona complaint; Department would already have replied and would like us to coordinate response.

When Telenor and Esat began to talk? (Ref: complaint)"

It seems that you had come into the fray in a more central way at this point; is that right?

A. I am not so sure about that, bearing in mind that I came back from Brussels only the evening previous to that, so I don't know how well informed I was in participating in this meeting. But clearly I was at it, and clearly I played a role in it.

Q. I am anticipating other documents as well in saying that you were again playing a more central role.

Maybe this was the commencement of it, but I think you am I right in thinking you attend at or clearly, from the documentation, seem to be aware of a number

of other meetings from around this date in May right up to the 16 May 1996, when the licence was formally signed off, if you like?

A. I certainly was in attendance at a number of meetings.

Q. Can you recall what prompted this meeting?

A. I can't say that I do, no.

Q. Having seen the note of the meeting, were you able to form any impression as to what the purpose of the meeting was?

A. I suppose the first question is, was it held at our request, or at theirs? And I don't know the answer to that. Clearly this was part of the process of understanding what now is the consortium and so on.

Q. Yes.

A. I am taking the reference to Donal Buggy and Billy Riordan and maybe Andersens is, whenever we get the full facts, they'll be the people who will be looking at it. But I don't know; it's reasonable to suggest that might be

Q. From what we know of the other documents, doesn't that seem to be reasonable?

A. Okay, okay. As regards the Persona complaint, that's only banter well, that's not banter, that's dismissing it too much; it's a relatively light exchange, I suppose. And the last sentence, I think, now, you'd need to have the actual complaint, which is on the file somewhere, and I haven't read it for

years, but part of the media speculation and perhaps part of the complaint and I don't know; the complaint can speak for itself there was a suggestion running through that the only reason that the competition was postponed was because Esat Telecom or Communicorp, whoever, had fallen out with one party and needed time to find another.

And all I can say is that that was something we didn't know anything at all about and had nothing to do with the motivation for postponing the competition. The competition was postponed for the reasons we have discussed a number of times, to facilitate getting clearance from Brussels. But that's the sense in which I believe that last bit is there.

Q. It seems to have been a fairly important meeting in that, am I right in thinking, this is the first time that you had a meeting either in the Department or anywhere else at which senior executives from Digifone were present, both sides of Digifone all three sides of Digifone, in fact looking at the list of it's Mr. Digerud and Mr. Johansen from the Telenor side; Mr. O'Donoghue, Mr. Connolly from the O'Brien side; and Mr. Michael Walsh from the IIU side; and Mr. O'Brien's solicitor and Digifone's solicitor, sorry, also Mr. O'Brien's solicitor.

It was there was a very full representation at the meeting, wasn't there?

A. You have canvassed with me in the past as to why there is no Department record of the meeting, and I think I told you I can't account for that.

Q. Ms. Regina Finn, as you know from the note, the reference to clear political, "clear a political football", I take the view that this was intended to describe the issue concerning ownership.

A. I have no idea. I mean, it could just be Owen O'Connell's interpretation of the discussion.

Q. Well, would it not be consistent with the exchanges in the Dail from the previous month, no more than two months beforehand, I think sorry, three or four days beforehand and also two weeks beforehand? Isn't that right?

A. I don't know where you are coming from. If you are asking did somebody on our side use that expression in the meeting, I have no idea.

Q. Would you agree it was a clear political football?

A. What was a clear political football?

Q. The issue of who this consortium was.

A. Certainly there was that kind of discussion in Dail Eireann.

Q. Yes.

A. I mean, what does "clear political football" mean in those terms?

Q. Well, I am suggesting to you that in some way the sense of the meeting as recorded by Mr. O'Connell

he doesn't say who said that, but that the sense of the meeting was that the issue, the next issue he describes, of ownership, was a political football, possibly a source of embarrassment either to the Department or to the Minister.

A. I don't know where you are coming from or where you are going with this one. I mean...

Q. I am only asking you, what does it mean?

A. I suggest you ask Owen O'Connell what it meant.

Q. I see.

I don't know if you are aware what Ms. Regina Finn has said about this meeting. When she was asked about why this meeting, which the Tribunal assumed to be an important meeting, she said, at page 10 of Divider of Book 35, Divider 4A, she says "I note the file note of attendance of Mr. Owen O'Connell, solicitor, of William Fry, of a meeting at the Department on the 3rd May 1996 in Schedule 26 your correspondence, and I note that my name is included on the first page of this note. I have no recollection of this meeting or of being present at such a meeting. If I was at such a meeting, it is likely that I would have prepared a note myself recording the portion of the meeting that was relevant to my role. If such a note exists, please forward this to me to assist my recollection. In addition, it would be normal that if a senior member of the Department attended such a meeting, a

Department note would be made of the meeting. If so, please forward this note to me, again in order to assist my recollection. However, in the absence of these, I cannot even recall attending such a meeting."

Is there some reason why a note would not have been kept of a meeting like this?

A. I think I said before, I just can't account for why a note wasn't kept of the meeting. It could simply mean that people concerned were operating under substantial pressure at the time. I just don't know.

Q. Isn't that all the more reason why a note should have been kept of it, because there was pressure?

A. I can see where you are coming from. And I think I said before, of course it would be preferable if there were a note.

Q. If you go to the second page of the note of the typescript, where Mr. O'Connell records "Not requesting statement but would be helpful per MB".

Can you recall an exchange like that?

A. It looks as if Telenor might have been suggesting that they would be the sort of fall-back position of last resort. I suspect they were volunteering the information, but I don't know.

Q. You were saying

A. The manner in which it was written suggests he volunteered the information and then I commented back something along the lines that "I am not in a position

to ask you to confirm that, but it would be helpful if you did".

CHAIRMAN: I think that was a theme that I think you previously told us you returned to at the subsequent pre press conference meeting, am I right, that you held in Frys.

A. I am not a hundred percent sure of that now, Chairman. I'd have to I don't recall the context in which this came up.

CHAIRMAN: I think the last meeting in Frys perhaps I should leave it until Mr. Healy comes to it, but that you had I think urged the need for Telenor, as the strongest of the consortium members, to, if needs be, stand over the entire financing.

A. Yeah, and it may well be that I was informed by this previous conversation.

Q. MR. HEALY: If you go to Book 49, the book you had in your hand a moment ago, to Leaf 130 have you got that document?

This a note of Mr. Arve Johansen, a reasonably contemporaneous note of the 4th of May 1996 concerning a number of things, including this meeting. And if you look at I think I have already opened most of this note to you, if not all of it; can you recognise it?

A. I recognise the note. But whether from the Opening Statement or when, I don't know.

Q. If you go to the second page, paragraph 6. It says "As we go along, we learn more, but it all serves to disclose more details which again more and more prove the above scenario."

This was Mr. Johansen's impression, that he had been induced into agreeing to dilute his shareholding in favour of IIU for a consideration which he felt was not in fact coming.

He says "In the meeting with the Department of Communications Friday May 3rd, it became evidently clear that IIU was not a favourable name from a "Irish public" point of view. On the contrary, the Ministry basically asked for help for how to explain why we had substituted Advent, Davy Stockbrokers and the other recognised named institutional investors in the bid (AIB, Investment Bank of Ireland, Standard Life Ireland).

"Eventually the project coordinator from the Ministry, Mr. Martin Brennan, actually appealed (off the record) to Telenor to write a letter of comfort that we would serve as a last resort for the Digifone company for funds and operational support. My feeling was that if Telenor had owned it alone, he had been more comfortable than with the current shareholders.

"I think it would be a very prudent thing for Telenor to do especially since we then effectively underwrite the whole project, both Communicorp and

IIU, after already having paid Communicorp's price for the first underwriting, which now appears to be useless.

"But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable and made it clear that Telenor would not accept anything but equal partnership. Either we buy 6.2% of the IIU-held shares each or Telenor will take the other 12.5% of the IIU-held shares.

"I have now seen the letter of agreement between Communicorp and IIU which strongly supports the scenario outlined above."

Then he has a number of bullet points.

"IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price agreed is a little cryptic, but it looks as though any advances IIU has to make for the disposed 12.5% before the transaction's effective date (31 May 1996) is seen as cost. It will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised.

"The return favour from Communicorp is to release IIU from all of its underwriting obligations in

Digifone. Does Digifone have an opinion on this, and what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to), releasing IIU from all of its underwriting liability (which Digifone "paid" 25% for), and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the licence (if we get it at all), but with some cash? And 12.5% of the shares of Digifone which effectively have deprived from Telenor, at the same time as the Department and our honoured partners gently ask us to underwrite the whole project.

"Fortunately, IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the cooperative spirit shown by disclosing the letter may signal a hope for a sensible solution to this mess."

Could I suggest, Mr. Brennan, that that letter is not consistent that memo is not consistent with any suggestion that Mr. Johansen volunteered to underwrite or stand over the project as a supporter of last resort?

A. This note was clearly written by Mr. Johansen for some particular purpose. And it's laced with irony and so on. I don't think that I used any language I don't know, but I don't think I would have used any language

which could be recorded as appealed off the record.

That's very strong language, which I doubt.

Now, when I responded earlier to you, it was we are talking about Owen O'Connell's manuscript note, and I was presuming that he wrote the note in the order in which things were said, because it would be most unlikely he would do it in any other way. So I don't know who is constructing text for what purpose around here now.

Q. Well, maybe we'll just look at it, take it step by step.

The first thing Mr. Johansen says is that it became evidently clear that IIU was not a favourable name from an Irish public point of view. He said that this was in the meeting with the Department of Communications. And on the contrary, he says, the Ministry basically asked for help for how to explain why we had substituted Advent, Davy Stockbrokers and other recognised institutional investors in the bid.

Now, was there any reference to whether IIU was a favourable or an unfavourable name from an Irish public point of view?

A. I can't confirm that there was. That's the first point.

Q. Or Mr. Dermot Desmond?

A. I don't know. I mean, it's there is nothing exceptional about the fact that we were looking for a

proper explanation as to why Advent and Davy Stockbrokers were being substituted. Now, whether the rest of this is Mr. Johansen's interpretation of the discussion or words that were said, I just have no way of knowing.

Q. Well, was there anything said at the meeting that you recall that could have warranted the interpretation by Mr. Johansen that IIU was bad news from an Irish public point of view?

A. I have already said I don't have much recall of the meeting, so it's very hard for me then to come out and say I can recall somebody said something. I just don't have that kind of recall.

Q. I am trying to stimulate your memory. Was the public at that time the Irish public would have known very little about IIU, but they might have had a view or there at least might have been some view regarding Mr. Dermot Desmond's involvement in this, and it had been mentioned in the Dail already. Do you recall if there was anything said which could have caused Mr. Johansen to form the impression that Mr. Dermot Desmond/IIU was bad news from an Irish public point of view?

A. I don't recall that. But it wouldn't be unusual if we were to say "We need a better explanation as to why there are changes", and that he was to conclude that we were driven by an adverse feeling about Dermot Desmond and IIU.

But I mean, you are asking me to sharpen my recall. I don't have any recall.

Q. Had any consideration been given to the fact that Mr. Brennan sorry, Mr. Brennan; that Mr. Desmond's name could cause problems for the Minister, having regard to the fact that he had been the subject of unfavourable comment in the Glacken Report?

A. You canvassed the Glacken Report with me before Christmas. The Glacken Report wasn't in my personal stream of consciousness. I wasn't a party to it. I may have even not been in the country when it was carried out.

Q. Are you serious? You weren't aware of the Glacken Report?

A. I was generally aware of the events surrounding the Glacken Report. I can't say that I know for sure I didn't read it. I didn't consider its contents at any time. So if there was a feeling that the Glacken Report was relevant to this licence decision, it wasn't my feeling.

Q. The Glacken Report

CHAIRMAN: I don't mean to harp on this, Mr. Brennan, but it had been a matter that there had been a great deal of journalism about. There had been the Glacken Report. Might it not have been reasonable to assume that somebody in the Department's side may have alluded to this in some context that Mr. Desmond had

been, to some degree, a controversial figure as a result of a previous State inquiry?

A. It is certainly reasonable to take that view. What I don't recall is I don't actually know when the Glacken Report was, but bear in mind that I lived in Brussels from the end of '89 to August/September of '93, and I think it must have fitted into that time-frame, which might explain why it was low in my scale of things. But I don't know when it was actually done.

Q. MR. HEALY: In the period between April 16/17, 1996, and the date of this meeting, when, as you say, the Department was giving consideration to this matter, did anyone in the Department allude to the Glacken Report, which I think was no more than a year or two old at that stage, a few years old?

A. I have no specific recall of that.

Q. Are you now aware of what the Glacken Report contained?

A. I haven't actually read the Glacken Report. Somebody who has been following these exchanges suggested to me while this part while this public hearing is going on that the Glacken Report didn't make any adverse recommendations about anybody. And that's the sum of my knowledge about it. And I deliberately refrained from going out to get a copy because I can't see what relevance it has to my participation here.

Q. What Department were you working in in 1993/94?

A. Let me see ... When I went to Brussels, I think it was from the Department of Energy; and while I was out there, it was merged, it must have been in '92, into Transport, Energy and Communications.

Q. Did you ever work for O'Malley around this time as Minister?

A. O'Malley?

Q. Yes.

A. I only worked for O'Malley as Minister in '78/'79, sometime like that, '77 after the Cosgrave Coalition for a short period before we became the Department of Energy under Mr. Colley. As far as I know that's I know that's the only time I worked for O'Malley.

Q. Who told you this report wouldn't contain anything that would be of relevance

A. I don't

Q. You said somebody told you, one of your colleagues told you.

A. I think it may have been in the margins of the Tribunal here, and it may have been Mr. McMeel. I am not sure.

Q. Did Mr. McMeel know about the report? Had he read it, to be able to tell you that?

A. If it was he, and I think it may have been, I assume that he must have read it.

Q. To get back to the period I described between April '96 and this date, there were people with whom you were dealing: Ms. Finn presumably, Mr. Towey, Mr. McMahon maybe, and Mr. Loughrey.

A. Yeah.

Q. Do you recall if they mentioned it?

A. I don't have any particular recall of that. If it was mentioned, it would be more likely it would be Mr. Loughrey than any of the others that you mentioned, because I can't see how Mr. Towey came later to Communications than I did from I mean, you can ask him from what; I think from an Energy background. But I am not sure.

Q. Are we to take it that senior and even very senior civil servants at this time were not familiar with even the main themes of this report?

A. All I am asking you to take it is that I wasn't familiar with it.

Q. But I am asking from you the discussions which the Department or the consideration, as you put it, which the Department was giving to this matter, from the 16th April 1996, did not include any reference from senior and very senior civil servants to this report?

A. I can't see why you keep asking me this question. I just don't remember the word "Glacken" being mentioned in the context of any discussions that were going on.

Q. One of the things that I think you yourself said needed to be done, and this also seems to be reflected in the note of that meeting, is that detailed information/quality about IIU was required.

A. Mm-hmm.

Q. And I think you agreed with me that that was something that you felt was needed anyway; isn't that right?

A. I felt we absolutely had to know that they were good for what they were committing to.

Q. Right up to the end of this process and your involvement in it, am I to take it that at no time did anyone mention to you or draw to your attention the contents of the Glacken Report?

A. I am as near certain as certain can be that I did not see the Glacken Report or discuss its contents with anybody.

Q. Or hear of anyone else discussing it up until the date the licence was issued?

A. I have no recall of that, and it's something I mean, if somebody had said to me, you know, "The Glacken Report is very relevant to this", I think I'd have got it and have looked at it.

Q. Do you not remember the exchange to which I referred earlier where, in the Dail, Mr. O' Keefe I think referred to Mr. Desmond's involvement, and the Minister responded; and in his contribution, Mr. O'Keefe referred to Mr. Desmond's involvement in the

Telecom site? Do you not remember that?

A. I remember you referring to it in the speech.

Q. But did you not think at that time or wonder what was that all about?

A. I don't think I ever gave you reason to believe that I read the exchanges in the Dail

Q. I am not saying you did; I am just wondering, did you?

A. I think, the way my mind works, if the Glacken Report was looming large in a dialogue, I would have got my hands on a copy and I would have read it. I think I said before, I commute on a train for two hours every day, and I am good at reading things on the train.

And that's the kind of thing "I better get that", and that didn't happen.

Q. Mr. Johansen also says and I know you have commented on this in general, but I want to deal with it specifically that "The Ministry basically asked for help for how to explain we have substituted Advent", etc. Then he goes on to say "Eventually the project coordinator from the Minister, Mr. Martin Brennan, actually appealed (off the record) to Telenor to write a letter of comfort that we would serve as a last resort for the Digifone company for funds in operational support."

Now, leaving aside the word "appeal" or anything like that, Mr. Johansen is clearly suggesting, I am sure you'd agree, that the suggestion that Telenor would

support Digifone as a last resort came from you.

A. But if you go back to Owen O'Connell's note, you could draw the exact opposite conclusion.

Q. I am not sure that's correct. It seems to me, if you look at Mr. O'Connell's note, the first entry is "Telenor backdrop as operator as last resort. Arve Johansen, that's the way we'll see it anyway, we'll never abandon this one." It seems the suggestion was made first, and then Mr. Mr. Johansen made a contribution to the discussion.

A. It's just another way of reading it. I don't know which is the correct one.

Q. Does it not indicate that at this time, if there was such a discussion, that there was a degree of apprehension on Mr. Johansen's part that Communicorp or the Communicorp side, whether you call them Esat Telecom, Communicorp or Denis O'Brien, had financial troubles?

A. Sorry

Q. Was there not did you not get the sense from the meeting that there was an apprehension on the Telenor side that the Denis O'Brien side, and maybe even the IIU side, were financially weak?

A. I am not so sure that I was particularly attuned to that part of the discussion. It's very difficult to recall that level of detail. And I mean, I have tried from the first day I have come here not to be evasive.

I mean, I am here to tell you what I do recall, but it would be wrong of me to sort of invent recall. I can't do that.

Q. Go on to the next leaf for a moment; I don't think I need to detain you on it. It's points for a meeting with van Miert.

A. Are we back on 44, then?

Q. I beg your pardon, sorry, back on 44, yes. I am simply flagging these for you. I don't want to delay on them.

A. Mm-hmm.

Q. I am sorry, Mr. Brennan, I should have stayed with 49 for a minute, but I won't ask you to open it again, because you'll be juggling too many books. Although it may be the last item I am going to refer to, but... Leaf 129 of Book 49; I'll put it on the overhead projector.

This is a note, Mr. O'Connell's file of the 3rd May, 1996. And judging from the contents of the note, it appears to be a task list that he compiled after the meeting of the 3rd. The first thing is

"Directors certificates by 3.

Auditors certificates by 3.

Comparison between the bid versus now.

IIU versus Davys, explanation.

Telenor "backup statement"

"backdrop statement", is that what that says?

A. "Backup", I'd say.

Q. Next is "Detailed information re IIU quality"

if Esat Telecom Holdings confirmation re strength

bank letter

when Telenor and Esat began to talk

if Communicorp how subsequently to get Holdings in

Digifone/IIU agreement re 5% (if 20%)

GSM operator of the year award for Telenor."

I don't know the note on the left seems to be

missing. That statement again would suggest that the

backup statement was something required by the

Department, the Telenor backup statement?

A. I mean, you could to go back to the Owen O'Connell

note, it could be interpreted either way. And I mean,

if Telenor volunteered such a note, of course I'd say

"Thanks very much". But I don't know whether they did

or not.

Q. Did you need it?

A. Did I need it?

Q. Yeah.

A. I would say the answer to that is contingent on the

evaluations that were going on in the Department about

where now stood the consortium in financing terms.

Q. Well, anticipating what ultimately happened, don't we

know that you got it eventually? And I suggest you

got it because you needed it.

A. I am not going to take that suggestion now. Maybe

when we come to documents.

Q. Well, we'll come to it tomorrow, so I think I'll leave it, then.

CHAIRMAN: You will end this week, Mr. Brennan, win, lose, or draw, even if we whatever way we have to constitute our sittings. And tomorrow at eleven o'clock.

A. Is that guaranteed, Chairman?

CHAIRMAN: Whatever hours we sit. Yes.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 5TH FEBRUARY 2003, AT 11AM.