

A P P E A R A N C E S

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FOR DERMOT DESMOND: Mr. Bill Shipsey, SC

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I N D E X

WITNESS: EXAMINATION:Q. NO:

Sean Fitzgerald Ms. O'Brien 1 - 383

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 4TH MARCH,

2003 AT 11 A.M.:

CONTINUATION OF EXAMINATION OF SEAN FITZGERALD BY

MS. O'BRIEN:

MR. SHIPSEY: I wonder, Sir, with your permission, if

I could just intervene for a moment. It is just in

connection with an observation that you made on

Wednesday last in connection with direct personal

contacts by my client, Mr. Desmond, with you, Sir. And

you may be aware that since that time when I confirmed

to you that it was my understanding that in fact some

direct contact had been made with you, there has been

unfortunately some ill-informed media speculation that

the nature of that contact was of a personal or

perhaps a telephone nature, and I would just like your

assistance, Sir, to confirm my understanding of

situation, which is that the communication directly

from Mr. Desmond was in fact in written form, in the

form of letters to you, Sir, and I would just be

grateful if you would confirm that my understanding in

relation to this is correct.

CHAIRMAN: That is indeed the case, Mr. Shipsey. Thank

you for your appearance. Very good. Good morning,

Mr. Fitzgerald.

A. Morning, Mr. Chairman.

Q. MS. O'BRIEN: Morning, Mr. Fitzgerald, thank you very much. When we finished on Friday, Mr. Fitzgerald, we had just disposed of the intervention by the European Commission.

A. Ms. O'Brien, could I request you perhaps if I I would like to go back to the letters that were discussed on Friday, if the Chairman agrees.

CHAIRMAN: Yes.

A. There are a few observations I would like to add to what I said.

Q. MS. O'BRIEN: If you could just bear with me for a moment, Mr. Fitzgerald, I don't actually have copies of those letters with me. I just need to obtain copies of that.

A. I would appreciate that.

CHAIRMAN: Will I take it, Mr. Fitzgerald, the couple of thoughts you have had about the letters, it would make it easier for you if they actually were to hand, would it?

A. Yes.

CHAIRMAN: We might make a little progress for a few minutes on, Ms. O'Brien, to the next line of questioning and then we can return to that.

A. Okay. Thank you, Mr. Chairman

CHAIRMAN: Thank you.

Q. MS. O'BRIEN: I think then, following the letter that

was received on the 20th of July, which was the official letter from the Commissioner, Commissioner Van Miert, the various persons who had indicated an interest in the competition were notified of the postponed closing date which was postponed to the 4th of August and on the 4th of August, I think the Department received six applications?

A. Yes.

Q. And I think at that stage the Project Group went into closed session from the 4th of August on, and I think we know that you ceased to receive any of the minutes of the Project Group meetings?

A. That's correct.

Q. And I think from then on you have indicated already in your evidence, that you were not in receipt of any information regarding the substance of the evaluation process from either Mr. Brennan or from anybody else who was a member of the Project Group, and that any information you had was confined to the progress that the evaluation was making and to issues which I think have been described as critical path issues?

A. Yes. Until he told me what the likely outcome might be.

Q. Yes. Now, during the closed period, during August and September, the Tribunal has been furnished with information regarding certain contacts between Mr. Lowry and members of two of the applicant

consortia, which contacts are not disputed by Mr. Lowry, and has also been informed of a discussion which Mr. Lowry had or is reputed to have had with Mr. AJF O'Reilly and Mr. Lowry does dispute that conversation or discussion and what I want to do now, Mr. Fitzgerald, to just bring that material to your attention to give you an opportunity to comment on it.

A. All right.

Q. Now, the first instance of reported contact and admitted contact between Mr. Lowry and a member of or person interested in a consortium, was on the 16th of August of 1995. And the Tribunal has been informed by Mr. Tony Boyle, who was I think Managing Director of Sigma Group, which was one of the members of the Persona consortium, that he, or that Group, I should say, used Barrett Hegarty Maloney as their Insurance Brokers; that the main contact within Barrett Hegarty Maloney was Mr. Colm Moloney and he introduced Mr. Tony Boyle to Mr. Frank Conroy. The Tribunal has been informed by Mr. Boyle that Mr. Conroy offered to request Mr. Lowry to meet with him, so that he could make a presentation to him. Subsequently a meeting was arranged with Mr. Lowry and Mr. Conroy in the Fitzpatrick Castle Hotel in Killiney, County Dublin. His diary indicates that this meeting was arranged for 6 p.m. on the 16th of August, 1995. Bids had already been submitted by this date. He had a general

recollection that the meeting may have been rescheduled but could not find any note to that effect in his diary.

Anyway, there or thereabouts on the 16th of August, 1995, the meeting took place with Mr. Lowry and Mr. Conroy in the public bar of Fitzpatrick Castle Hotel. Mr. Conroy introduced Mr. Boyle to Mr. Lowry and then attended a meeting which lasted approximately 30 minutes. Mr. Boyle introduced himself and explained that the purpose was to ensure that the Minister heard directly of their interest in the bid and the strength of their team. They had prepared publicity material which was to be shared with each member of the Oireachtas and with the various interested parties, which outlined the key elements of their bid. Among other things, that identified the members of their consortia and their credentials, their approach to marketing, their environmental approach, their proposed tariffing philosophy, their stated preparation for early launch, their funding, and various other items of information in their bid.

He has informed the Tribunal that Mr. Lowry listened intently to their proposals, and said that he was aware that the Persona consortium was a very strong contender.

In relation to that, Mr. Lowry has informed the Tribunal that he recalls having a short meeting in the

Fitzpatrick Hotel, Killiney, sometime after the competition was announced. The meeting was, he recalls, organised at the request of Mr. Boyle through Mr. Frank Conroy. In response to Mr. Boyle's general queries, he informed him that the object of the exercise was to bring competition to mobile communications with reduced call charges and handset costs to the customer. Mr. Boyle gave Mr. Lowry some outline of what he anticipated his consortium's call charges might be, and he recalls that it was indicated that Mr. Boyle's consortium charges were very competitive relative to the then Telecom Eireann charges.

And the Tribunal, I should just add, also took the matter up with Mr. Frank Conroy, and he has informed the Tribunal that he arranged a meeting effectively between Mr. Boyle and Mr. Lowry. He said that the Minister indicated his willingness to meet with Mr. Boyle. And the meeting took place at a time when the Dail was not sitting. The Minister was in town on business and was staying as Mr. Conroy's guest at his home in a penthouse adjacent to Killiney Castle Hotel. Mr. Conroy said at the day of the meeting he took the Minister over to the hotel, introduced him to Mr. Boyle and left them. To the best of Mr. Conroy's recollection, he would have adjourned to the bar where he would have had some refreshment. Again, to the

best of his recollection, the meeting lasted for something of the order of between fifteen or twenty minutes. Again, for the avoidance of doubt, he did not participate in the meeting in any manner. He had no knowledge whatsoever of what transpired between the then Minister and Mr. Boyle, although he was of course aware of the purpose of the meeting, which he understood to be a lobbying exercise on the part of Mr. Boyle on behalf of the company of which he was a Senior Executive. At the conclusion of the meeting, that is some twenty minutes after it commenced, he has a recollection that the Minister and Mr. Boyle shook hands and Mr. Boyle left. Mr. Lowry then returned to his, that is Mr. Conroy's apartment again. To the best of his recollection, the Minister stayed overnight and left on the following morning.

That's the information which has been made available to the Tribunal in relation to Mr. Lowry's meeting with Mr. Boyle on the 16th of August.

I wonder, Mr. Fitzgerald, if you could assist the Tribunal as to what your view would have been of a meeting of that type, had you known of it, because of course you wouldn't have known of it at the time or indeed until that information about it became available to the Tribunal?

A. I didn't know of the meeting or of any outcome of the meeting of any substance. So I don't know that I can

add a great deal to that, other than it was inadvisable that it should have taken place.

Q. And that would have been, I take it, in terms of the perception that it might create?

A. Yes.

Q. Now, the second matter which has been, has come to the attention of the Tribunal relates to a purported discussion or conversation which Mr. Lowry had with Mr. AJF O'Reilly on the occasion of the opening of the Arcon Mine in Galmoy and that was on the 15th of September, Friday the 15th of September. And just to place it in context for you, Mr. Fitzgerald, before I open the information that has been made available to the Tribunal. The Friday the 15th of September, we know, would have been the day after the presentations, the oral presentations to the Department had completed. I think they completed on the morning of the 14th of September.

Mr. AJF O'Reilly has informed the Tribunal that he believes his first meeting with Mr. Lowry took place at the opening of the Arcon Mine in Galmoy. This took place on the 15th of September, 1995, and was referred to in greater detail below.

And then Mr. O'Reilly continues as follows:

"I should mention that I did meet Mr. Lowry on one other occasion. This meeting, which I recall was the first time I met with Mr. Lowry, took place at the

opening of the Arcon Mine in Galmoy on the 15th of September, 1995. As mentioned at paragraph 3 above," he believes this to have been his first meeting with Mr. Lowry. As he recalls, after the official opening ceremony he was proceeding with a number of guests, including Mr. Lowry, whose constituency is approximate to the mine, towards the refreshment tent. His recollection is that Mr. Lowry made a comment to him along the lines of 'Your fellas didn't do too well today'. Mr. O'Reilly told him he did not understand what he was saying. Mr. Lowry explained to him that he was talking about the presentations which were being made by various applicants for the second mobile telephone licence. Independent was at the time an applicant for the second mobile telephone licence in a consortium with six other companies, including the American telephone company AT&T. Mr. Lowry explained to Mr. O'Reilly that the 'your fellas' which he was referring to were, in fact, the AT&T representatives, who had made a presentation to the Department panel in charge of selecting the successful applicant. Mr. O'Reilly had recently learn that had this presentation was made the previous day, the 14th of September, 1995. He can therefore only presume that his recollection is not 100% correct, and that Mr. Lowry must have said to him 'Your fellas didn't do too well yesterday'. The fact remains that such a

statement was made to Mr. O'Reilly by Mr. Lowry. He was aware that the Esat consortium was named as the successful applicant on the 25th of October, 1995. He wishes to emphasise that on the 15th of September, 1995, he neither raised with Mr. Lowry the issue of the GSM licence nor approached him about it. He in fact was totally unaware that his 'fellas' as he put it, had the previous day made a presentation to Mr. Lowry's department. Further discussion with Mr. Lowry about the matter was somewhat brief, to say the least. His personal awareness of PH, that is Princes Holdings, Mr. O'Reilly's holding company, involvement in the application was very limited indeed. As he recalls, the remainder of their conversation related to the Galmoy mine and its future.

And in fairness, I should also open the relevant portion of Mr. Lowry's supplemental statement of the 20th of June, 2002 and he has informed the Tribunal that in relation to Mr. O'Reilly's statement of the 24th of September, 2001, and in particular in relation to paragraph 15 of the statement, he accepts that he would have met with Mr. O'Reilly at the opening of the Arcon Mine in Galmoy on the 15th of September, 1995. He most certainly did not and could not have made the comment which Mr. O'Reilly attributes to him on that occasion.

He has stated on many occasions, and he again repeats, that he had no direct involvement whatsoever in the presentations which were being made by various applicants for the mobile telephone licence. This matter was handled by civil servants and outside consultants and he had no involvement in the evaluation or assessment process.

And that is the information that is available to the Tribunal regarding the events on the 15th of September.

What I want to ask you, Mr. Fitzgerald, is this: If what Mr. O'Reilly says is accepted as the truth, and if Mr. Lowry was in a position to indicate to Mr. O'Reilly on the following day the impression or apparent impression that Mr. O'Reilly's consortium made on the Project Team during the course of the presentation, would you agree that it appears that Mr. Lowry must have been in receipt of information as to the impression that the consortium made on the Project Group during the course of the presentation?

A. Ms. O'Brien, I don't know. All I can speak for is myself, that I wasn't given any information about the presentations as to who did well or did not do well.

Q. Yes.

A. So I can't say whether Mr. Lowry was given any information. I would doubt very much if he was. It is possible that he the only way he may have made

an inquiry on the basis that he was likely to meet Mr. O'Reilly at the opening of the mine, and would want to have some indication as to what was going on.

On the other hand, if this conversation did take place, as described by Mr. O'Reilly, it could have been simply Mr. Lowry chancing his arm. You do find situations where Ministers always like to give the impression that they know more than they actually do or are more involved in a process than they actually are. So that is nothing new. I can't, I think, go beyond that.

Q. Certainly what I think you can say is that if information was available to Mr. Lowry, you weren't the source of that information?

A. That's correct, because I had no information to give him, and I am not aware that he certainly didn't ask me for anything.

Q. Yes.

A. Whether he asked anybody else I wasn't at the presentation so I couldn't give him any information.

Q. I appreciate that, Mr. Fitzgerald.

The third matter I want to bring to your attention:

Information which has been provided to the Tribunal in relation to a meeting between Mr. Lowry and Mr. Denis O'Brien at Hartigan's public house in Leeson Street on the 17th, Sunday the 17th of September. So again just to put the timing in context, that would have been two

days after the reported conversation between Mr. O'Reilly and Mr. Lowry. And it was after the All Ireland final on that date. And just to indicate the manner which that information came to the Tribunal. The Tribunal initially raised a number of queries with Mr. Lowry back as far as June of 2001, as to contacts that he may have had with various named persons and in relation to Mr. O'Brien. Mr. Lowry, in response to that, indicated that he could recall meeting Mr.

O'Brien on one occasion at a Fine Gael fundraising lunch in advance of the Wicklow by-election in June 1995 and he also recalled meeting with Mr. O'Brien in September 1995 after the All Ireland Football Final, and he went on to say that any discussion that he had was of a general nature.

Thereafter, the Tribunal was furnished voluntarily with a copy of Mr. O'Brien's diary for 1995. And the Tribunal noted that there was an entry in the diary for Sunday, September 17th, "6:45 ML Harto's". And the Tribunal raised queries with Mr. O'Brien in relation to that entry. And

Mr. O'Brien informed the Tribunal that the 17th of September, 1995, was the day of the All Ireland Football Final. And Mr. O'Brien recalls being seated a number of rows behind Mr. Lowry during the game.

Mr. O'Brien spoke to Mr. Lowry briefly in the hospitality area, probably at half time, and

tentatively arranged to meet Mr. Lowry for a drink afterwards. They subsequently met at Leeson Street outside Hourican's/Hartigan's. Mr. O'Brien believes that Mr. Lowry was there with the late Mr. Sean Murray and others. Hourican's being extremely busy Mr. O'Brien and Mr. Lowry went across the street to Hartigan's where they discussed a number of matters, namely the match. Mr. O'Brien also took the opportunity to advise Mr. Lowry of the serious issues then affecting Esat's fixed line business which at the time was a considerable concern to the company. Mr. O'Brien does not recollect or believe that any other matters concerning Esat were discussed. The contact in Leeson Street lasted approximately 15 minutes to a half an hour. The matter was entered into Mr. O'Brien's diary along with several other entries for that week subsequent to the events taking place. There was no arrangement to meet with Mr. Lowry prior to seeing him on the 17th of September at the All Ireland Football Final.

The Tribunal brought that merely to the attention of Mr. Lowry, and Mr. Lowry informed the Tribunal, in response, that on Sunday the 17th of September, 1995, Mr. Lowry attended the All Ireland Football Final. He met Mr. Denis O'Brien in a hospitality area in Croke Park. Mr. O'Brien inquired as to where Mr. Lowry was going after the match and Mr. Lowry advised that he

was meeting friends in Hourican's licenced premises, which is located at the bottom of Lower Leeson Street.

Mr. O'Brien indicated that he would see Mr. Lowry there. Subsequently Mr. Lowry went to Hourican's licenced premises. Mr. O'Brien arrived, and the premises was extremely crowded. They agreed to go across the road to Hartigan's. In the course of a drink in Hartigan's some general chat took place, and Mr. Lowry does recall that Mr. O'Brien did engage in some conversation in relation to Telecom Eireann and the availability of leased lines, and he expressed, that is Mr. O'Brien, expressed his unhappiness and dissatisfaction at what was happening in that regard.

After some general conversation Mr. O'Brien left and Mr. Lowry went back to join his friends in Hourican's, who included the late Mr. Sean Murray, Mr. Denis O'Connor and his wife, and Mr. Sean Barrett.

And that's the information which the Tribunal has available to it in relation to the meeting of the 17th of September.

I wonder, Mr. Fitzgerald, would the fact of that meeting also cause you some concern in terms of perception and objectivity?

A. Some aspects, perhaps. But to the extent that it was not a prearranged meeting, that it took place as a result of meeting at the All Ireland, and the possibility that Mr. O'Brien had other matters to

discuss with Mr. Lowry relating to the telephone business, I just think, as distinct from the GSM, puts it in a somewhat different light, but certainly it would give an opportunity to raise matters, if they were raised, if it was done, concerning the GSM process. So it would have been preferable had it not taken place, certainly.

Q. Yes. Of course, it clearly was not a meeting which complied with the protocol which had been adopted by the Project Group and which further the Project Group considered to be so important, that Mr. Brennan at the time sent you a memo, and I know you never advised the Minister in relation to it, but he also sent a memo to Mr. Loughrey and Mr. Loughrey's evidence has been that he brought that to the attention of the Minister and he cautioned the Minister not only in relation to the contents of the memo, the contents of the protocol, but also in relation to how the Minister should deal with social contacts that might arise?

A. So I believe he did.

Q. Yes.

A. And normally the source of contacts which are advised to the Minister would have been through Mr. Loughrey, so I didn't feel that it was necessary for me to do it.

Q. I fully accept that. I take it you would agree with me that this meeting certainly didn't accord with the

protocol that had been adopted and circulated by the Project Group?

A. Certain aspects of it did not, if the two met by themselves, I think.

Q. They actually removed themselves, did they not, in company they were in, it would appear in Hourican's public house and they removed themselves and went across the road to Hartigan's and met there in private for between 15 minutes and 30 minutes?

A. Well, I am not sure how private Hartigan's pub would have been on the evening of the All Ireland or on the night of the All Ireland Final.

Q. It mightn't have been that private on the night of an All Ireland. Both Mr. Lowry and Mr. O'Brien have informed the Tribunal that they did discuss matters in relation to Mr. O'Brien's fixed line business?

A. Yes.

Q. And that Mr. O'Brien registered his dissatisfaction in terms of his dealings with the Department. You were in overall charge of the telecommunications division. I think you already explained to us that you separated out the Regulatory Division so as to give, if you like, the Minister and his civil servants a perception of objectivity as regulator. Would you have had any views about Mr. O'Brien and Mr. Lowry discussing those matters in private?

A. No, I think they were entitled to discuss those

matters in private because Mr. the Minister was the de facto the official regulator.

Q. Yes.

A. And if Mr. O'Brien had complaints about Telecom Eireann, which is not surprising, that, or perhaps about some aspects of the Department, I think he was entitled to go to the Minister to discuss these if he so wished.

Q. Yes. It would of course be more usual, wouldn't it, if a party with whom the Minister is dealing in his capacity as regulator had a complaint to make, that he would make that in the course of perhaps a formal meeting within the confines of a department?

A. Yes, of course, that would be the normal way to deal with it, but one can't rule out the opportunity that might crop up on a chance meeting.

Q. Yes.

CHAIRMAN: Sorry, Ms. O'Brien, the form for discussions on fixed lines, in your view, Mr. Fitzgerald, would have been that although the Minister would have been entitled to talk to either Esat people or Telecom Eireann people, that in practice it would have been preferable that you or somebody else on the regulatory side would have been there, if only as a buffer?

A. Yes, that would be the normal. If the, if Mr. O'Brien had requested a meeting in the Department with the

Minister, he normally would have either me or maybe

Mr. McMahon or Mr. Loughrey in attendance as well.

CHAIRMAN: Yes. Thank you.

Q. MS. O'BRIEN: Then just a final matter I want to bring

to your attention, Mr. Fitzgerald, for your comment,

is, certain information with which the Tribunal has

been furnished by Mr. Per Simonsen; Mr. Simonsen was

an employee of Telenor, he appears to have been the

Telenor project coordinator for the application by

Esat Digifone. And in his Memorandum of Intended

Evidence which I don't intend I only intend to open

a small part of it to you, he was asked for his

knowledge, direct or indirect, of all meetings

discussions, dealings or contacts of whatsoever nature

between Mr. Denis O'Brien or any other person on his

behalf, and the Minister or the Department at any time

from the first involvement of Telenor in the Esat

Digifone consortium to the date of issue of the

licence on the 16th of May, 1996 .

And he answered in the following terms: "Mr. Simonsen

has no actual knowledge, direct or indirect of any

meetings or discussions or dealings or contact between

Mr. O'Brien or any other person on his behalf with the

Minister or the Department, other than the oral

presentation of the 14th of September and the press

conference on or about the 26th of October, 1995.

Mr. O'Brien informed Mr. Simonsen in the last two

weeks of September 1995 that Mr. O'Brien had happened to meet the Minister in a public house. Mr. Simonsen has no knowledge as to whether a meeting actually took place. Mr. O'Brien informed Mr. Simonsen that the Minister suggested that IIU should be involved in the consortium."

I take it, Mr. Fitzgerald, that if that was the position, and we don't know if it was, that you would agree with the evidence that Mr. Loughrey gave, that he would consider that had that action occurred, it would have undermined the entire process?

A. I wouldn't go so far as to say it would undermine the entire process. I don't know whether it occurred or not. Whether that Mr. Lowry would have sufficient knowledge of the process to suggest that IIU might improve the position of Esat Digifone or whether this was used as a pretext for the arrangements to get IIU and Mr. Desmond on board and get the consortium underwritten.

Q. Yes. No, no, that is not quite the point that I am raising with you, Mr. Fitzgerald. I am saying for the moment if we, and we don't know whether it happened, and there is no, nobody has reached any conclusion on whether it did or not. I am just asking you to accept for a moment, if it did happen it is a purely conditional question if it did happen, and if Mr. Lowry had urged Mr. O'Brien to bring IIU into the

consortium at that stage during the closed process,
what I am asking you is, would you consider that that
would have undermined the process?

A. No, I don't think it would.

Q. You don't think it would?

A. No, because it so far as it was related to the 20%
investment stake in the consortium, I think that was a
matter for the consortium themselves as to how it
would take up that place, that part of the
shareholding, if it was placed or not retained by
themselves.

Q. Yes. No, that is actually not the point that I am
trying to raise with you, Mr. Fitzgerald. If you just
bear with me for a moment. What I am trying to raise
with you is this: If it was the Minister who was the
person who ultimately had to recommend, make the
recommendation for Government, who went to, who met
Denis O'Brien and said you should bring IIU on board,
would you accept that that would have undermined the
process if you effectively had the Minister directing
the applicants as to what they should do?

A. I don't think I would see it as a direction. If it
did occur, I would suggest that it was a suggestion.

Q. I see.

A. And perhaps no more than that.

Q. And you wouldn't think that would be damaging to the
perception of objectivity and the perception of

fairness in the process?

A. Insofar as it had nothing to do with the content of the bid that was already in the Department at that stage and being evaluated, I would think that it shouldn't be regarded as just upsetting the process.

It might be undesirable if it did happen in the manner I have suggested.

Q. Well, the bid that was actually in the Department at the time, as we know and as you have indicated, was that it was to be 50:50 Telenor and Esat Telecom, and that in the run-up to the placement or in the run-up to the issue of the licence, 20% would be placed, and there were four financial institutions who were identified. I am not going to get into at the moment about whether there were commitments there or there weren't commitments, but that was proposed by the Esat Digifone consortium and that was the bid that was evaluated, but what I am asking you is: If, in the course of the process, the Minister suggested that IIU should be brought into the bid, would you not consider that that would have to be perceived as undermining the process?

A. Ms. O'Brien, I would carefully weigh it up. I don't believe that would insofar as it related to the percentage that was earmarked for investors. Could I put it this way: The four companies that were identified as possible investors did not have a

commitment to take up these shares, nor do I believe that Esat and Telenor were obliged to offer shares to these people.

Q. Yes.

A. Or there could be disagreement about the price or about anything else that would prevent it from happening. They had no input into the content of the bid that was being evaluated and therefore whether it was them or IIU or nobody at all or somebody else, I don't think had any bearing on the outcome, nor, to my mind, would it have any bearing on the type of make-up of the consortium to the extent that it wouldn't change any aspect of credibility or the ability of the consortium to carry out the contents of their bid if they were awarded the licence.

Q. And that is your answer to the question?

A. Yes, I would draw a complete distinction between that part of the shareholding that was earmarked for investment from the part that the main operators, if you want to call them that rather than investors, were obliged to put up. If that had been changed substantially or undermined, then I think the whole question of the credibility of the bid would have to be looked at.

Q. I see. And that's your answer to the question about the reported advice or suggestion given by the Minister?

A. Sorry?

Q. Is that your answer to the question about what the Tribunal has been informed that the Minister may have said to Mr. O'Brien?

A. Yeah. Well, I don't know whether he did or did not say it. Even if he did

Q. Even if he did, that is your answer?

A. I don't think it was of sufficient gravity to upset the whole process.

Q. I see. Now, Mr. Fitzgerald, in your reply to question 23, in your Memorandum, and indeed in your evidence, you referred to your conversation with Martin Brennan, when he informed you, as a recollected, that the initial evaluation of the group put three bids as qualifying for a licence and the other three as subject to reservations. And you explained to us on Friday, and the Tribunal has no difficulty with this, that initially you thought that this conversation took place in early September, but on considering the matter further and in looking at the documents, you believe it must have been towards the latter part of September?

A. Yeah, I don't believe there was enough information there in early September. And certainly not before the presentations which were an intrinsic part of the bidding process.

Q. Yes. And as I said, the Tribunal has no difficulty

with that at all, Mr. Fitzgerald. You then went on to say that there was, what you were told was that there was clear water between the third and the first and the second who were close. You were told that at that stage Esat Digifone were the likely front runners but more work was needed. You said that such a result, if upheld, was going to be controversial, and that the final decision of the Group had better be well-founded as it would be open to attack. You asked if the Minister was aware of the situation and was told that he was, and had not expressed any views. You then raised the question of Communicorp's financial status discussed in the next question. You discussed the situation with Mr. Loughrey, but not with the Minister or with anybody else.

Now, just in relation to that, just one or two more matters that I want to raise with you. You indicate in your answer that you told Mr. Brennan, in response to that information he was making available to you, that you thought that the result was going to be controversial, and in what way did you consider that the result would be controversial?

A. I must confess I had no idea that I would be sitting here eight years later discussing this matter.

Q. Yes, of course, Mr. Fitzgerald.

A. I would think because all the big, the other consortia had big names in the telecommunications business

Q. Yes.

A. and that what might be classified as a rank outsider in the perception both of the bidder, the other bidders and the public, would actually succeed in winning this competition

Q. Yes.

A. was certainly going to make waves, to say the least.

Q. So you anticipated that there would be public controversy over it?

A. There always is in such situations.

Q. But particularly so in this case?

A. Yes.

Q. And I think you said there as well that the group had better be sure that the final decision was well-founded as it would be open to attack. And was it from the media that you contemplated it would be open from attack or from anyone else?

A. There would be certainly a lot of media comment.

Q. Yes.

A. And okay, one has to put up with that

Q. Yes of course?

A. But that I was concerned also that there might be, as happened in other cases, litigation or challenges from some of the other bidders.

Q. Yes?

A. And that would be a more serious matter which would

require a robust defence.

Q. So you were concerned, naturally enough at the time, that the decision should be well-founded?

A. Yes.

Q. And that there would be some protection for the Department in terms of there being any legal challenge?

A. Yes. That would be my main concern, I think.

Q. Yes.

A. Also, one does not like a situation emerging in which the Minister and the Government were drawn into public controversy and that there are adverse media comments and so forth being made.

Q. And you anticipated that in this instance?

A. Well, I think

Q. In the instance of Esat Digifone?

A. I thought it was inevitable that that would be the case once this was publicly announced.

Q. Yes. You then went on to say that you asked Mr. Brennan if the Minister was aware of the situation, and you were told that he was, and that he had not expressed any views.

A. That is as far as I can recollect.

Q. That is as far as you can recollect?

A. That he was a kind of a person that, you know, didn't react very strongly to information or advice or anything, nor did he at any stage, so far as I am

aware, give any indication, properly so, that he wanted anything other than the result as soon as possible.

Q. Yes. It was certainly your understanding at the time on the basis of what Mr. Brennan told you, that the Minister had been informed that it looked as if Esat were coming out on top but that he had not expressed any views?

A. Yes.

Q. You then went on to state that you discussed the situation with Mr. Loughrey but not with the Minister or with anybody else?

A. I think I explained the last day that I if I did discuss I couldn't have discussed the matter at that point with Mr. Loughrey because he wasn't there.

Q. Not if it was before the 4th of October. I think we have evidence that Mr. Loughrey was out sick, he was on holidays and he returned to the Department on the 4th of October?

A. Yes. I would find it very surprising, although I can't recollect the exact circumstances, if I hadn't mentioned it to him on the, when he came back that this is the way things were shaping up when we were, you know, bringing him up to speed on what was going on.

Q. Yes, because clearly you would have had to brief him to what had occurred in the lengthy time that he was

out of the Department?

A. It would have been in very general terms because that is all the information I had to put out here.

Q. It was just the information that Mr. Brennan had brought to your attention?

A. Yes.

Q. Now, the next matter I want to refer you to, Mr. Fitzgerald, is a record of a divisional meeting that occurred in the Department on the 3rd of October. And if I could refer to you Book 42, you will find a handwritten note of Mr. McMahon's relating to that meeting. It is Book 42, Divider 116.

And that's a meeting with the T&RT, which I think is the Technical Division; T&RR, the Regulatory Division; and T&RD, the Development Division, and it is dated the 3rd of October, 1995. It doesn't actually record the attendances at the meeting because in fact this note, I think, came out of Mr. McMahon's's green book.

It wasn't intended to be a formal record of the meeting.

If I could just refer you to the second page of it,

Point 4, you see it reads:

"GSM.

Minister wants to accelerate process.

Legalities more complicated.

Draft report now imminent.

We need to discuss and digest.

Agreed one copy. We let it stay here 44.

Discuss it in confidence."

Now, when this note was opened to Mr. Brennan, the first matter that he queried was as to whether you might have chaired that meeting. I don't know, Mr. Fitzgerald, if you have any recollection of being present at that meeting or chairing it?

A. No, I have no recollection of being at this meeting.

Q. Yes. In fact there is nothing

A. From the matter discussed, I would have thought it would have been probably the heads of the divisions, Mr. Brennan, Mr. McQuaid and Mr. McMahan.

Q. An interdivisional meeting?

A. And they may have some people with them.

Q. Yes. In fact in the course of his note, I think that Mr. Brennan has attributed certain matters to various people and there is certainly nothing in that, in those attributions to suggest that you were at the meeting?

A. I think it would have been improper that I would be there if they were discussing matters relating to the internal workings of the process.

Q. Would it have been your usual practice to attend those divisional meetings or not?

A. On the occasions when they were held dealing with general matters of the Department, yes.

Q. Yes. But you have no recollection at all

A. But they were a rather infrequent event as far as I can remember.

Q. I see. The note there, "Minister wants to accelerate process." Did you have any information available to you at the time that would have suggested to you that the Minister wanted to accelerate the process as of the 3rd of October?

A. No, I had no information, nor do I recollect anybody ever telling me that he wanted the process speeded up. I thought it was well on time at that stage. This was only early October, and we had until the end of November to produce a result.

Q. You were well on time, you had another two months to go?

A. Yes.

Q. Now, we know that the first draft report, Mr. Fitzgerald, arrived into the Department on the 4th of October, which is the Wednesday, and it was dated the 3rd of October, and what I want to refer you to first, is the documents at Divider 119 of the same book, just to ask you if you can assist the Tribunal as to what purpose they may have been prepared for and as to whether you had any sight of them?

A. 119 seems to be a different matter.

Q. 119 is a letter, it starts with a letter to Ms. Patricia Cafferty from Miss Nic Lochlainn. I don't know if you have that in your Divider 119. You

have it, do you?

A. I have it, yes.

Q. And it reads:

"Dear Ms. Cafferty,

"Please see attached material on Government division/aide-memoire as promised. You will understand that this documentation is highly confidential. Please ensure that it is held under lock and key at all times."

And it appears to enclose a summary of the principal make-up of each of the applicants, their legal structure, their management programme, generally a summary of who the applicants were and what they were committed to doing in their applications?

A. Yes.

Q. You will see that the Esat Digifone summary, I think, is the last of the six summaries. And I don't know if you can assist in fact it is the second last of the six summaries. I think the last one is Eurofone. I don't know, Mr. Fitzgerald, if you can assist the Tribunal as to what purpose would have been served by preparing those summaries, or what might have been intended in their preparation?

A. I cannot say whether it was prepared for some other purpose or to give information to the Comptroller and Auditor General's office.

Q. Would it have been usual for the Comptroller and

Auditor General to raise issues about a process like this which was still in its closed stage during the course of the process?

A. It was unusual, I think. Usually the Comptroller and Auditor General would go through the, what we call the appropriation accounts at the end of the year and do his audit of those and raise matters related to them.

Q. Yes.

A. But there was nothing to prevent him from inquiring about on-going work at any stage. Now, I think the remit of the Comptroller and Auditor General had been broadened from being simply an auditor to looking at thing like value for money and administrative procedures and so forth, to ensure that things were done probably better

Q. Yes.

A. and properly. So it might have been in that context that he may have asked for information, asked what was going on. You will notice that it doesn't contain anything related to the bids as such, other than the make-up of the consortium and their experience and shareholdings and so forth.

Q. Yes. I can see that. I can see that. And I suppose they intended to put in their Shareholders' Agreement and matters of that nature?

A. Yes.

Q. In the covering letter you will see that Miss Nic

Lochlainn says, "Please see attached material on Government decision/aide-memoire as promised."

Would that suggest to you that these summaries might also have been intended to either be appended to an aide-memoire or in some way brought to the attention of the Government?

A. No, nothing would have gone to the Government other than what was contained in the aide-memoire itself.

Q. Oh I know that, but I am just wondering if you actually look at the wording, it seems to contemplate that these documents were in some way prepared within the context of an intended or expected Government decision, or some aide-memoire in relation to the competition?

A. I cannot say. I think Miss Nic Lochlainn would have to throw some light on that.

Q. That is fair enough. Did you ever see these documents, Mr. Fitzgerald, before they were circulated to you by the Tribunal?

A. I have no recollection of seeing them.

Q. Right.

Now, the next matter that I want to refer you to, Mr. Fitzgerald, is the subsequent scheduled meeting of the Project Group, the GSM Project Group, the 12th meeting which was on the following Monday, the 9th of October of 1995. You will find the formal report of that Project Group meeting at Divider 120 which I will be

referring you to and I will be also be referring you to at the following Divider, a verbatim note or a verbatim confirmed handwritten note, which was kept by Ms. Margaret O'Keeffe, of the same meeting. In fact I think it was Ms. O'Keeffe, it was, who actually prepared the report and she must have prepared it on the basis of her contemporaneous handwritten notes and those notes were furnished to the Tribunal and they have been transcribed and typed up by the Tribunal.

You will see there, if I could refer you firstly to the formal report, the typed report, which again you were not circulated with, and you wouldn't have known about at the time, and it lists the attendances you see there is quite a full attendance at that meeting.

Mr. Michael Andersen and Mr. John Bruel of AMI were also in attendance, and under the heading 'Opening' it says: "The Chairman opened the meeting by stressing the confidentiality of the Evaluation Report and the discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top two applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the Evaluation Report."

That again seems to confirm, I suppose, what was in the handwritten note of the 3rd of October, and also what you had been told by Mr. Brennan, that the

Minister knew the ranking and that the Minister was disposed to announcing the result of the competition quickly after the finalisation of the Evaluation Report?

A. Yes, but there is no indication here of any pressure from the Minister to speed up the process or completing the evaluation.

Q. I see. Oh, yes, in relation to completing the evaluation. And on the next page then, if I can refer you to the verbatim note, just initially under the heading 'Confidentiality':

"Minister knows shape of evaluation and order of top two.

"Minister of State does not know.

"Quick announcement."

And what I suggest to you is that document would indicate that the Minister had been informed not only of the order and ranking of the top two, but the shape of the evaluation?

A. That seems to suggest that was, but this presumably was going to be in, you know, broad outline, maybe a rough outline of the kind of matters that would be covered within the report.

Q. We don't know, Mr. Fitzgerald, I am just asking you to comment on what is in the document.

A. Well, I don't know a great deal more than what is here either. I don't as far as I am aware, he was not

given the report, so...

Q. But you had no dealings with him?

A. No.

Q. And then if I could just draw your attention under the

heading which is 'Agenda' to the last three lines,

"Minister does not want the report to undermine

itself, e.g. either a project is bankable, should be

balanced argument."

That would, I suggest to you, indicate that the

Minister either had been it had either been

explained to him what was in the report or it had been

brought to his attention in some way, and that the

Minister himself had commented on an approach that

should be adopted in a report. And would you agree

with me that that appears to be what the document says

on its face?

A. Well, I think the view attributed to the Minister

would be in conformity with what I said to

Mr. Brennan, if this is the way it is going to come

out, it better be well-founded. It is quite clear

that he wanted a report that would stand on its own

feet.

Q. Yes. It would stand up to scrutiny?

A. Yes.

Q. And the report wouldn't undermine itself?

A. Of course.

Q. And I think also there the indication that the report

should be balanced?

A. Well, I think that is obvious that it should, that there shouldn't be bias in it.

Q. Yes. As he said, of course as you said, of course, you had no dealings with the Minister, you didn't know that this information was being provided to the Minister at the time, isn't that correct?

A. I am not sure of the full scope of what information was provided to the Minister, other than what Mr. Brennan said, that he had told him of the way things were shaping up at the time.

Q. Yes, yes. And of course what Mr. Brennan told you is that he had told the Minister that it looked as if Esat Digifone were ahead?

A. Well, I don't know what precise way he put it to the Minister, that is the way he put it to me, but it wasn't certain at that stage. That's the way

Q. I see. Were you aware at all that the Minister's views, albeit views with which you would have agreed, that the report would want to be strong and it wouldn't want to undermine itself, that those views were being conveyed back to the Project Group?

A. Well, I think it was very desirable that they were, because this was an obvious common sense comment. That the Project Team, in evaluating the process, the result and forming a report, it was going to be the basis of a decision

Q. I think what you

A. should be fair and balanced and complete.

Q. In fact what was being, the Project Team were being advised you would have supported that it shouldn't undermine itself?

A. I certainly would.

Q. But you would consider that that would be common sense in any event?

A. Yes, yes.

Q. I was going to come on now, Mr. Fitzgerald, to the Draft Evaluation Report which I think you had reviewed and on which you had made some annotations, and from the documents available to the Tribunal, it would appear that you may have been in error and it may have been the second draft report of the 18th of October that you reviewed and the Tribunal isn't criticising you for that at all, it is perfectly understandable that you might be in error in your own recollection as to which draft was available to you, but I understood that you wanted to have some time to consider that document before I raised it with you in evidence.

MR. O'DONNELL: Perhaps we could deal with it in this way: I understand there is a booklet of documentation which Ms. O'Brien furnished to me this morning. Maybe what we could do is Mr. Fitzgerald could have a look at that documentation and in the meantime, I think Mr. Fitzgerald wanted to clarify some remarks that he had

made earlier.

CHAIRMAN: Well, I was going to raise that it seems possibly if we have to harp back to the European letters, now might be as good a time as any.

MR. O'DONNELL: We might then, subject to you, Chairman, we might break at some stage in order to allow Mr. Fitzgerald to consider that report and I think there is another, there are two or three documents.

MS. O'BRIEN: There are two or three documents, yes, Sir.

A. Well, Ms. O'Brien if it was the second report, I stand corrected on what

Q. Nobody is criticising you for that at all, Mr. Fitzgerald?

A. I didn't have a copy of the documentation with me at any stage.

Q. I fully understand that you might want an opportunity to consider it.

I will just hand you up copies of these letters which we again discussed on Friday afternoon.

(Documents handed to witness.)

I think you indicated that you have had some further thoughts on them over the weekend?

A. Thank you for coming back to this, Ms. O'Brien.

Q. Not at all, not at all.

A. I did think quite a bit about it over the weekend, and

particularly when I read the transcript, that there were some matters that I might have thought of on Friday but sitting up here it is not always easy to do so.

Q. Of course. I understand that.

A. They may or may not be helpful to the Tribunal.

Q. Yes, thank you.

A. The question was as to where the document which ended up in Esat came from?

Q. Well, might have come from I think.

A. Or might have come from.

Q. Yes.

A. And I did say that it might have come from the document that Mr. Hoceped had faxed to Dublin.

Q. Yes.

A. Or from the original version of that in Brussels.

Q. Yes.

A. And I would like to add to that, possibly from some other document in Brussels, I don't know.

Q. Yes, some other document?

A. I don't know how many copies of that document were generated in Brussels.

Q. Yes, yes, that is fair enough. We know that clearly Mr. Hoceped had a copy of the document?

A. Yes.

Q. This is the document with no date, but with the legend "F/ft" and signed by Commissioner van Miert, because

Mr. Hoceped faxed it to the Department just before 3 o'clock on the 14th of July?

A. Yes.

Q. And we know that it appears that it is a version, a copy of that version or the front page of that version which was in Mr. Dermot Burke's files. We know that a copy arrived in the Department, but what we also know, I suppose, Mr. Fitzgerald, is that that isn't the official copy that is held on the files by the Commission. The official copy held on the Commission's files has the legend "F/ft" but it also has a date on the front of it?

A. Yes, I appreciate that.

Q. But your suggestion is that there may possibly have been other copies of this letter available within the Commission Office or within the Commission General, I think?

A. Which may be undated or may be unsigned, or, if you like, a copy of the document that went to Mr. Van Miert for signature.

Q. Yes.

A. I don't know, but that's not the point really I want to come to. It is just an observation. Now, if the document that was in Esat was copied from the version that came to Dublin

Q. Yes.

A. then there are two things I would, two observations

I would make in relation to that. If, and I am assuming it is the only document that was found, and if Esat had a source of information in the Department, it is rather surprising that there weren't more valuable documents than this particular one copied.

Q. I see.

A. Now, we don't know whether that was the case.

Q. Well, I suppose

A. The second point is: I find it rather surprising that if somebody copied the document in Dublin, why they wouldn't copy the second page also which authenticated the document as being the final version.

Q. Well, can I just raise two things with you in connection with that, Mr. Fitzgerald. I suppose, firstly, it was the first page of the document and not the second page of the document that contained information regarding the weighting of the licence element?

A. Yes, I am aware of that.

Q. There was nothing on the second page relating at all to the weighting criteria, was there?

A. Not on the weighting criteria but there was other information there that might be of value. I will come to that.

Q. We have the letter, the full letter here, Mr. Fitzgerald, and maybe you could point out to me what information you consider might potentially have

been of value which wasn't on the first page?

A. I will be pleased to do that, but before to do that, I would like to say that if this was copied in Brussels, I think apart from obviously muddying the water by cutting off the top and not indicating whether there was a fax number or anything else in it, and I think we were drawing some conclusions on Friday as to whether or not the document had been signed, because the second page was missing. I think that might have been the reason why it wasn't done. But there is also the information which is contained at the last paragraph of the document, particularly the last four or five lines

Q. Yes.

A. where Commissioner Van Miert is commenting on the Commission's attitude to international traffic, cross border traffic, and if you remember, the bid process required bidders to pass this on to Telecom Eireann until the 1st of January, 2000.

Q. Yes.

A. When the derogation

Q. And the inter-connect regime

A. ran out. I think this would have been of particular interest to the Esat Digifone consortium because of the Esat Telecommunications interest. They did have a network to the UK and access to international networks from there on, and would have

been quite interested in capturing such traffic, had it been possible.

Q. Right.

A. The reason I am suggesting, perhaps, the second page was left out is that given that the Commissioner was apparently turning a blind eye to the possibility that this contravened Article 90, was something that the Commission might feel embarrassed about if it went to a third party.

Q. I see.

A. And they would take action on foot of a formal complaint, which I am sure would have happened had Esat known about it.

Q. I see.

A. I can't surmise beyond that, but I think it is something that the Tribunal might bear in mind when, if they can't get a definite fix on where it came from.

Q. And is there anything else that you want to add to those observations, Mr. Fitzgerald?

A. I think that is about as much, as far as I can go at this stage.

Q. Yes. Thank you very much.

CHAIRMAN: I suppose the one other obvious point that is apparent, that the first two drafts, Ms. O'Brien, which I think you eliminated in discussion with Mr. Fitzgerald, that the typeface of those two documents

is utterly different to what thereafter emerged.

MS. O'BRIEN: Yes.

CHAIRMAN: On even the most obvious appraisal, they can be disregarded ab initio.

MS. O'BRIEN: Yes. I wonder, Sir, in relation to the time that Mr. Fitzgerald wishes to have to look at the documents furnished this morning, whether I am not clear on what time

MR. O'DONNELL: Either we can do it in one or two ways: either we can rise now for, say, twenty minutes to look at it, and if we need more time we can come back. Alternatively, if the Tribunal wants to pursue other issues, and we can try and do it over lunchtime.

MS. O'BRIEN: I don't think it is appropriate, Sir, to continue on with other issues until I have dealt with the draft report.

MR. O'DONNELL: Well, then I am anxious to make as much use of the time as you are.

CHAIRMAN: I am certainly you think 15 or 20 minutes?

MR. O'DONNELL: I would have thought so.

CHAIRMAN: Well, obviously Mr. Fitzgerald has to have that. We will do that, and then we will try to structure lunch as best we can. Very good.

A. Thank you, Mr. Chairman.

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

Q. MS. O'BRIEN: Thank you, Mr. Fitzgerald.

A. Thank you.

Q. As I indicated before the Sole Member rose, the Tribunal looked through the documents available to it and has been able to produce what appears to be a copy of the draft report on which you made marginal notes, and which appears to have been made available to you by Mr. Brennan, and I think which you discussed with him subsequent to a review of its contents. And it appears that the draft report which came to your attention was in fact the second draft report, it was dated the 18th of October, and which the Tribunal understands from the information available to it in documents, was received within the Department on the 19th of October, which was a Thursday, and which was circulated on that date. I think a copy of it is now available to you?

A. Yes, thank you Ms. O'Brien, thank you. And I think you are correct

Q. Not at all.

A. it is the report I saw.

Q. It is perfectly understandable that you could mix up the first and second draft report.

I am not going to go through it in any enormous detail with you, Mr. Fitzgerald, because in fact the markings you made on the report, the main body of the report and indeed on the appendices are fairly limited, but

can I refer you just initially to page 44 of the main report, and that is at Divider B of the small book, Book 53, which has now been produced by the Tribunal.

It is headed 'Sensitivities, Risks and Credibility factors'."

I am just going to open the first three paragraphs of that to you. It is clear from the marks that you made that this was something that you looked at fairly closely?

A. Yes, I have.

Q. It says: "Various analyses and investigation have been conducted in order to deal with the sensitivities, risk and credibility of the applications and the business cases behind the applications.

"In general, the credibility of A5" that was Esat Digifone "has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have the abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. A5's maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one of the consortium members, namely Communicorp,

which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worse case situation, turn out to be critical, in particular concerning matters related to solvency."

And I suppose that that summarises what were your concerns as well?

A. Yes.

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

And in fact I think that records the conclusion of the supplementary financial analysis which is set out in Appendix 10 and which I referred you to briefly and just one matter I want to bring to your attention; you wouldn't have known it at the time because I think you now agree that the first Draft Evaluation Report wasn't made available to you, is that the second paragraph in this report states "A5's maybe weakest point is not related to the application as such but to the applicant behind the application," whereas in the first draft that sentence read: "A5's weakest point". The term "maybe" had not been included in the first draft but you wouldn't have been aware of that at the time?

A. No, I wasn't. And obviously was corrected between the first and second draft.

Q. And you weren't aware of that?

A. No.

Q. If I just refer you briefly to the supplementary analysis, and if you go to Divider B, Appendix 10, page 1, and again I am just going to refer you very briefly to the relevant portions, or to some portions of it. In this case also you didn't make any marks on it.

"10. Supplementary Analysis and Financial Risks.

"10.1. Introduction."

"As stated in the main Evaluation Report "

A. Sorry, which page is this?

Q. Sorry?

A. Sorry, which page is it now?

Q. It is on page 1. There isn't internal pagination within the appendices. Each Appendix is separately numbered, but it is Appendix 10 which is towards, I think there is 13 appendices in all. It is behind the back. It is behind Tab C?

A. I have it, yes.

Q. You have it there, Mr. Fitzgerald?

A. Yes, I have it.

Q. "10.1: Introduction."

"As stated in the main Evaluation Report, the two top ranked consortia have members, who presently do not

have the capital required to finance the GSM II network."

And that would have come as no surprise to you certainly in terms of Communicorp?

A. Yes, and Sigma, I take it, in terms of the A3 consortium.

Q. Yes, and if you just go on to the final page of that appendix, it is page 7 within the internal pagination of the Appendix, you have underlined there, in fact if you start at page 6, the very bottom of the page, it states: "This equity commitment cannot be met by Communicorp today. According to a letter of commitment to the Department of Transport, Energy and Communications, dated the 10th of July, Advent has committed to fund up to $\frac{1}{2}$ 30,000 (sic) in support for Communicorp's 40% shareholding. The letter of commitment does not clearly state what the 'price' would be if the commitment should be brought into life, but according to the presentation, the price would be close to 75% stake in Communicorp. Furthermore, according to the information given in the presentation, the control will be in the hands of the Irish investor (Denis O'Brien), as his shares bear a three times higher voting power." I think you underlined there "three times higher voting power". I think that was one of your concerns, that Mr. O'Brien could lose control of Communicorp to

Advent?

A. Yes, indeed.

Q. I think in fact that may have been an inaccurate statement of what was intended in the bid documents.

I think from a consideration of the presentation and the bid documents, what was anticipated was that at most, Advent's share would go up to 48%, but nothing really turns on that, in terms of your analysis of

Appendix 10?

A. Well then

Q. Then finally if I could draw your attention to the paragraph at the end of that page:

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

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

" requirements regarding the equity of Communicorp."

And I think that conclusion was reflected in the

Chapter 5, 'Sensitivities Risks and Credibility

Factors'?

A. Yes, so I believe.

CHAIRMAN: Just at the risk of being pedantic, I think the Advent commitment may have been 30,000 in the transcript, it was 30 million.

MS. O'BRIEN: 30 million, of course.

A. I think it was also related to the point I referred to

earlier, when I got the letter about getting approval from the Mergers Monopolies Division in the Department of Enterprise and Employment.

Q. This is in relation to the mergers acquisitions and takeover which was when it was subsequently taken over?

A. But I was insistent that approval shouldn't issue until I was satisfied that Mr. O'Brien could retain control of the company in the worst situation.

Q. Can I refer you to now to page 47 of the main report, draft report again, behind Divider B, and it is page 47 of the internal pagination.

A. Sorry, which page?

Q. Page 47, Mr. Fitzgerald, behind Divider B, so you are going to the previous divider, it is the main body of the Draft Evaluation Report?

A. I am getting rather lost in this.

Q. It is under the heading 'Summary, Concluding Remarks and Recommendation.' It is a difficult report to get around. There is no rush.

A. Sorry, I had gone back to Tab B.

Q. Yes.

A. Yes.

Q. Now it just appears from the markings that you made on this section of the report that this was the section, I suppose, that you looked at most closely?

A. Yes. It was at that point, I think, the whole thing

was being, all the bits were being put together.

Q. Yes, yes. It states: "It has been clearly stated in the tender document that the licensing methods in the so-called 'best application' with the application of this method the evaluation has been based on the evaluation criteria outlined in paragraph 19 of the RFP document.

"This reports aims at nominating and ranking the three best applications on the basis of the evaluation.

This has been conducted by way of four different models, which can be briefly be summarised as follows:

"1. The result is on the basis of the evaluation of the marketing technical management and financial aspects (qualitative award of marks.)

2. The result is on the basis of business case sensitivities, risks and credibility issues (qualitative assessment.)

3. The result is on the basis of regrouping of the criteria (qualitative award of marks)

4. The result is on the basis of the application of quantitative scoring model (conversion of marks to points).

"In addition, a last comparison of the best applications is provided at the end of this chapter.

It goes on then, 6.1: "The result based on the aspects, dimensions and indicators.

"Prior to the closing date, the criteria outlined in

paragraph 19 of the RFP document were grouped as marketing aspects, technical aspects, management aspects, and financial aspects, as a logical and consistent continuation of the tender documents, including the requested structure laid down in the tender specifications. In addition, a number of dimensions were identified in order to properly cover each aspect. Furthermore, a number of so-called indicators and sub-indicators have been defined in order to cover the dimensions."

It then sets out a table and below that states the marks awarded under each aspect in each dimension are outlined in table 16. That is the table immediately above. Whereas the award of marks to the indicators and sub-indicators appears in chapter 3.

"As seen from table 16 the evaluation has produced the following results concerning the three best applications:

1. A5.
2. A3.
3. A1.

"With the indicated ranking. The differences between A5 and A3 is approximately the same as the difference between A3 and A1."

It appears from the markings, Mr. Fitzgerald, that you considered closely that table at table 16 above?

A. It looks as if I did.

Q. And it looks like that you have ringed there experience of the applicant for the case of A1, A4 and A5, each of them scored Cs. And you seem to have ringed those, presumably you looked at those more closely or you

MR. O'DONNELL: A6

Q. MS. O'BRIEN: A6 is a C. Perhaps you had some questions you wanted to raise with Mr. Brennan or something of that nature?

A. Well, I suppose I was putting down something there, that if the applicants didn't do well in experience, that they would deserve a much closer look than those who had more experience. And I don't think that that was, that that particular circling was any more than that.

Q. I see. What it did though, it signified that you had some question to raise over the

A. I think I would have gone through that document with him and raised the issues that I would have had.

Q. That would be a useful way of approaching it?

A. A discussion, yes.

Q. Then you have just at the grand total there is B, D, B, B/C, A/B and C. Again you have ringed the 'B' under A3, so again presumably you had some question-mark in your mind or there was something that you wished to raise with Mr. Brennan?

A. Yes, if you see there are little scribbings

underneath where I subdivided the thing into sort of groupings As and Bs and Cs together.

Q. Yes.

A. To see was the A/B and the B rating justified, and on the basis that A5 got one and a half As and two and a half Bs, I think that is obviously better than one A and three Bs.

Q. Yes.

A. To my mind, to justify the A/B as distinct from the B+, if you want to put it that way, as distinct from just a B.

Q. You were effectively trying to add up the gradings, the A, B, C, D gradings?

A. I think I was trying to get into the mindset of the overall summary there, because it is not described in the document how they did it.

Q. And then below that, where it comes to the ranking,

1. A5,

2. A3,

you have a mark beside A5 and a mark beside A3, and you seem to have written the words "very close"?

A. Very close, yes. And I did put a question-mark over the statement that the same, that the difference was the same as between A3 and A1.

Q. Yes.

A. Which I thought was a bit more than very close.

Q. Yes.

A. It was a clear enough difference there.

Q. Between A3 and A1?

A. Yes.

Q. Then the next heading was, "6.2. The results based on business case sensitivities risks and credibility."

"The assessments of the credibility, the sensitivities and the risks of the applications generate a ranking among the applications, and it has been concluded that difference do in fact exist, for example, within the group of the three best applications, between this group and remaining applications, as well as internally among the non-nominated applications, with A2 as the least satisfactory application.

"As the intention has been to nominate the three best applications, the following has been included:

"1. A5.

"2. A3.

"3. A1.

"with the indicated ranking.

"The risks identified among the three best applications might turn out to be general business-type risks, whereas some of the risks identified for A4, A6 and in particular, A2, with the indicated ranking are more serious.

"Some of the risks have been subject to supplementary analysis which are summarised in Appendices 9 to 13."

And we have just looked at Appendix 10. You have

written something there beside A5 and A3,

Mr. Fitzgerald, and we are not entirely sure what it reads, but it seems to read or perhaps you can indicate what it reads?

A. I can read it clearly, I think, perhaps other people mightn't. It is: "Where is the back up?"

Q. "Where is the back up?"

A. Where is back up for this conclusion?

Q. I see.

A. That is what I mean, I think, that is what I think I would have been asking Mr. Brennan to see that there was a bit more information put in here to justify the ranking that emerged.

Q. I see.

A. Or at least referred to the supplementary analysis or the appendices or something of that kind.

Q. Yes.

A. Because there is no table here

Q. Yes.

A. to illustrate the matter.

Q. So it wasn't apparent to you how they had arrived at that conclusion?

A. Yes, that seems to be the case.

Q. "'6.3. The results based on regrouping of the criteria.'

"In order to investigate whether conclusions of the evaluators are consolidated on the basis of paragraph

19 of the RFP document, the evaluators have carried out a separate conformance testing.

"The basis for the conformance test is the agreed interpretation prior to the closing date, where the 7 indents of paragraph 19 were operationalised into 11 dimensions."

And I will just skip over the next page which seems to have been some handwritten workings of yours which I will come back to, to continue on to the next page of the report itself. And there is then a table, table 17.

"The award of marks regrouped", and below that it continues:

"As the 11 dimensions are essentially the same as in table 16, the only distorting effect of table 17 could be the scoring of the aspects, which was also agreed, prior to the closing date, it appears, however, that the scoring of the aspects has not had a distorting effect during the implementation of the evaluations, since the end results remain the same."

It then continues: "From this, it can be concluded that the three best applications are the following:

"1. A5.

"2. A3.

"3. A1.

"with the indicated ranking."

If we look first the table above that,

Mr. Fitzgerald, again you have made quite a few manuscript entries on the copy and perhaps you could explain to me what you were doing there?

A. I think what I was trying to do is to perhaps that there was, perhaps anticipating the next table to some extent, checking whether the conclusions were correct.

I notice that the I am not quite sure how I arrived at these numbers without taking some time to go over them, but the bottom line is that A5 scored 87 and whatever basis arrived at these, and A3 scored 83 and this is where I had probably wrote them very close as the position that A5 were still ahead but not by a great deal.

Q. Yes. Again you wanted to see a result more clearly, is that right?

A. Mmm. If I may say so, I did do out another table, I think, more recently to try and get a better picture of this. Now, I haven't seen this at the time I did it.

Q. Yes.

A. Which would more clearly show that A5 were ahead possibly by more than would be indicated here.

Q. Yes.

A. But it is of no great importance.

Q. Do you have that table with you? Is that a table you have done since?

A. I do.

Q. Maybe we could look at it at lunchtime and discuss it with you after lunch?

A. Okay.

Q. The difference there, I think, was, as you say, 83 and 87 and the entry you made is very close.

Then 6.4, "The results based on a conversion of marks to points.

"Also a weighting mechanism was agreed prior to a closing date for quantitative purposes as evident from both table 17 and 18. If the marks (A, B, C, D and E) are converted to Arabic points (5, 4, 3, 2 and 1) it could be calculated which applicants came out with the highest score measured by points, although such a calculation distorts the idea of a qualitative evaluation.

"In order to check the results, this quantification of the results has been carried out."

And we can see then the table on the next page. table 18, conversion of marks to points.

Then it continues as illuminated by table 18:

"The quantitative scoring of the applications generates the same ranking of the applications. Thus, also this method led to the following nomination of the three best applications:

"1. A5.

"2. A3.

"3. A1.

"With the indicated ranking."

And you have made, I think, a small entry there, a manuscript entry "scoring points". I am not quite sure what that signifies?

A. Looking at that now, I think the text which follows in paragraph 6.5, I said this is more persuasive than the tables, the commentary.

Q. Yes. And you found that narrative conclusion more persuasive than the tables?

A. Yes, I think the narrative brings out the quality of the applications and the risks associated with them perhaps more clearly than the tables.

Q. Yes.

A. But obviously is based on the tables.

Q. Yes. Can I just ask you to come back to page 48, Mr. Fitzgerald, and the table there, table 16. You will see just at the very top, you will see it more I think if you go to the hard copy before you it will be easier for you to follow?

A. 48.

Q. Yes, page 48. Table 16 at the top of the page. You have written something at the top there, the top of the page above the table?

A. I looked at this during the break.

Q. Yes.

A. And I cannot be clear on what it is.

Q. I see.

A. It seems to me like "evaluation model".

Q. Yes. That may well be.

A. That is the best stab I can make at it. I don't think it means very much anyway.

Q. Yes. Can I ask you now just to go to Divider A in the book, Mr. Fitzgerald?

A. Yes.

Q. And there is two documents behind that divider, the second document comprises handwritten notes that were made by you and appear to be attached to a calculation, a working that you perhaps did at the time when you were reviewing the report, because it appears to mirror, I think, table 18?

A. Yes.

Q. The last table we have just looked at?

A. It is to my mind, I think, a clearer version of table 18.

Q. Yes, yes.

A. In that I have put the total marks for each category in, rather than the way they did it in substituting, say, a 5 for an A and a 4 for a B and so forth.

Q. I think that's the way they actually did it in table 18 as well?

A. Yes, it shows how the bottom line results were arrived at, I think, it does nothing more than that.

Q. Presumably you were just verifying what was in table 18?

A. This was, I think, to satisfy myself that the

Q. That the sums were correct?

A. That they were correct, yes.

Q. And that the correct weightings were applied. I think on the left-hand margin, in fact we can see it there, you have applied the weightings, 30, 20, 18, 11, 7, 6, 5, 3?

A. Yes, I see it.

Q. I think you indicated on Friday this was in fact the only time really that the weightings were ultimately used?

A. This was the first time that I saw the actual numbers. All I knew before that was this had been done prior to the bids coming in and some modification has been carried out following the capping of the fee.

Q. Yes.

A. I know what the modifications are, and I did, I think, at this point.

Q. Attached to that then, also that document, Mr. Fitzgerald, are some handwritten notes that appear to be in your handwriting?

A. They are, yes.

Q. And what the Tribunal has done to assist you has best it can, is to transcribe and reconstitute those handwritten notes, really just for ease of reading them and for ease of looking at them on the overhead projector, maybe if I could refer you to those now?

A. Yes.

Q. So if you just go to the first document behind Divider

A to the second page of that document. It is headed

"Note on the Left" below that "the GSM award and regulation of competition."

On the left-hand side "Present Position", and the word "position" is underlined.

"1. Esat Telecom has a value added service to provide non voice telecommunication services to the public.

That includes data, fax, voice mail and any 'added value' service. By applying a very narrowly defined set of circumstances, it can also include 'voice telephony' which falls outside the 'public voice telephony service' reserved exclusively by law to Telecom Eireann, where the voice services is originated or delivered over a private leased line and not over the public network.

"2. Telecom's lease line charges favour Esat's operations, in that the two categories of line they require are priced below," I think that is "cost"?

A. That should be "cost".

Q. "Cost, i.e. local lines to connect a customer to Esat's own system and large capacity (2 megabyte) lines to transmit large traffic volumes over long distances within Ireland and London."

Then below that underlined, "Proposals to rebalance" there is a question-mark there "leased lines

would remove these anomalies.

"3. Esat, in our view, have gone outside the terms of this licence," and you underlined those words, "and are now offering a voice telephony service to customers that is clearly within the definition of service reserved to Telecom. They use devices called auto diallers and routers to connect customers not over leased lines but over the public network. This opens up a much greater field of customers in small or medium size businesses or residential customers with significant long distance or overseas calls. The potential business damage to Telecom is significant. What is worse is that the law is not being upheld."

And you underlined those words. "And the regulatory process is shown to be ineffective. The lesson is not lost in other operators who are likely to move into this area also, but may feel constrained as long as they are potential candidates for the strategic alliance process."

Then there is some words there that you crossed out?

A. Yes.

Q. Then, "4: Award of GSM licence.

"Strict conditions to ensure fair competition will apply to both the second GSM operator and to Eircell. If the winning consortium includes Esat, which is perceived to be immune from any regulatory action up to now, it will strain credibility in the process. It

will also open another door for non-licenced activity.

The GSM winner will have the right to build its own infrastructure to carry GSM traffic, but only GSM up to the 1st of January, 2000."

Then there are some further words that are crossed out.

"It is also required to hand over international traffic to Telecom up to the 1st of January, 2000.

Esat would now have both an internal infrastructure and its international link for licenced traffic. Is it credible that without strong regulatory enforcement that licenced restrictions would be complied with?"

Then the next page, the heading is: "5. Impact on Telecom Management and Unions.

An award to a consortium including Esat without concurrent action on leased lines and regulatory enforcement will be seen by the company management and unions as consolidating Esat's position as a formidable competitor in a privileged position with apparent Ministerial and Government backing. We have so far managed to persuade and restrain Telecom's management from initiating operational or legal action to restrain or disrupt Esat's operations. It has also been very difficult to get operational staff to provide even legitimate facilities to Esat. Early unilateral action by management or industrial action by unions is a distinct possibility. Equally there

could be political, legal or industrial action

directed at the Minister to enforce his

responsibilities on regulation."

The next page the heading is: "Effect on Strategic

Alliance Outcome."

"The mandate for the strategic alliance approved by

Government preserves the current 'privileges' of TE"

I presume that is Telecom Eireann "(public voice

telephony and infrastructure) until the 1st of

January, 2000, and promises strict enforcement of

licence conditions. This (?) is very important to

determining the business plan of TE, the valuation of

the company, and the likely price to be realised for a

stake in the company. Consolidating Esat's position

as a strong competitor will have an effect, but this

cannot be avoided. Coupled with an unwillingness to

enforce regulatory and legal obligations it could

seriously undermine the process and bring the

credibility of the Department and the Government into

question. The Government will have to set out clear

regulatory principles, procedures and structures as

part of the process, what will it be worth?"

Then the next page is headed: "'Action Needed'.

"1. The outcome of the GSM competitive process must

be respected.

"2. The credibility of the regulatory system both in

relation to mobile competition, the strategic alliance

process and the plans and actions of all existing and potential operators must be upheld, a public announcement to this effect must be made.

"3. Esat could be invited to review the nature of the their voice service and indicate how they will comply with licence conditions both as regards existing customers and future promotion.

"4. A failure to get a satisfactory response from Esat will bring as consequence:

"(a) Legal or operational action to enforce compliance.

"(b) A review of the desirability of concluding GSM licence negotiations with a consortium containing" I presume that should read "containing a party which is not in compliance with existing licence conditions.

It should be noted that failure to reach agreement on licence conditions with the first recommended bidder allows for opening negotiations with the a second placed bidder."

And on the next page, the final page of that document, Mr. Fitzgerald, you appear to have just sought out the ranking, and then on the left you have a question-mark beside A3, I wonder what that might signify? Sorry, I am corrected, I think that is in the transcription of it. Then on the left you have

A. Maybe it relates to looking at that time there. I wasn't quite sure what the shareholding of A3 was

between Sigma, ESB, there is a total of 47 but not a breakdown. I am only surmising at this stage.

Q. I think it actually has been pointed out to me, Mr. Fitzgerald, it is not in the actual document itself that you prepared, it must have been a note put in when it was being converted.

Below that then you have a list of each of the five applicants, and an indication as to their make-up.

Now, can I just ask you about this document, generally, when you would have prepared this note?

A. I am trying to remember when I did prepare it. It looks as if it was an aide-memoire to myself about the state of play at that stage.

Q. Yes.

A. And what had to be done and the implications and the repercussions of it, with a view to then planning how we would tackle it and approach it.

Q. I see. It looks from the wording that it must have been prepared prior to the announcement of the result?

A. Sorry?

Q. It appears from the wording of it that it must have been prepared prior to the announcement of the result?

A. Oh yes.

Q. Yes.

A. I would think this was done when I learnt in detail, probably around the same time as I went through the Evaluation Report or after, immediately thereafter,

when I had full information as to what the state of play was.

Q. So it would have been around the 19th or possibly the 20th of October, that would be

A. Yes. Now I would point out that some of these things were incorporated in the Government decision which was on the 26th of October.

Q. Yes, absolutely?

A. I mean, we must have moved very quickly

Q. You must have moved very quickly?

A. on these matters. It would have been prior to these dates, certainly, and could only have been written after I had gone through the Evaluation Report.

Q. That is what I was trying to get at?

A. Yes.

Q. Can you tell me, do you recall did you circulate this document to anybody else within the Department?

A. I can't remember that I did.

Q. Yes.

A. Because it was in manuscript form and if I was to circulate it, I should have got it typed up because it is not the easiest thing for other people to read in the format that it is in.

Q. No, it isn't. And do you recall

A. But I probably would have spoken about the content of it to Mr. Brennan, Mr. McMahon and so forth and said

I knew Mr. McMahon had misgivings about the situation also.

Q. Yes.

A. But it is quite clear when I say that the outcome of the GSM competitive process must be respected, I meant that regardless of what consequences it had for regulatory matters and so forth, that it, that was not a basis for interfering with the outcome.

Q. Yes. And you feel you would have discussed this with Mr. Brennan and certainly with Mr. McMahon who you knew shared your concerns as expressed in this document?

A. Yes.

Q. Now, can I just refer to you one or two matters in the document that, the document itself, Mr. Fitzgerald.

Page 2 at paragraph 3. You stated: "Esat in our view have gone outside the terms of this licence" and you have underlined those words, and can I take it that whatever the rights and wrongs of it were, that was your view at the time?

A. This is page 2 of the manuscript version?

Q. No, sorry, of the reconstituted part, if you go to page 2 of that, I think it is easier to read it.

A. Okay. Yes, sorry, can you repeat it please?

Q. You say: "Esat in our view have gone outside the terms of this licence" or "their licence"

Mr. O'Donnell suggests. Do I take it that whatever

the rights and wrongs of the matter, that was your view at the time?

A. Yes, but could I put this into context?

Q. Yes.

A. Where the legal basis for the licence was, in effect, I think, unenforceable as a regulatory matter.

Q. Yes.

A. The directive that came from Brussels had no clear dividing line between the parts of the market that were open for competition as regards voice telephony, and those that were, that part that was reserved for Telecom Eireann. There were three criteria, I think, to define that, but it was a very esoteric division.

What was happening in practice was that once Esat got a customer, I think the net outcome of it was that certainly parts of the business was fully legitimate, all above data and computer links, Internet, even though it was very small at the time, was they were perfectly entitled to do that

Q. Perfectly entitled under their value added service licence?

A. Any value added service like call waiting or answering service or anything of that kind.

Q. That was all entirely legitimate?

A. And then certain types of voice telephony between Head Office or its branches or between a supplier or distributor and manufacturer and its main customers or

agents would have been in the exempt or, you know

Q. In the exempt category.

A. How you can segregate that out of the matter of practice between all sorts of other voice traffic.

What was happening in practice was that once Esat captured a business as a customer for legitimate reasons, Telecom noticed that all its long distance or international voice telephony just simply disappeared.

Q. I see.

A. And establishing whether a particular call was on the right side or the wrong side of the line was just impossible.

Q. So what you are saying was that it was very, very difficult to distinguish between calls that were legitimate and within the Commission directive and those that weren't?

A. I think it was virtually impossible. Now, I think we had discussed this with the Attorney General's Office on numerous occasions how this could be done, but from a legal point of view, and the, I think, advice was that if we moved to stop or suspend the licence or anything, because it covered legitimate entitlement, that we would probably be enjoined from proceeding with it.

Q. I see. Can I just continue on there. You say, "The use of devices called auto dialers and routers to connect customers over leased lines, but over public

network, this opens up a much greater field of customers in a small or medium size business, or residential customers with significant long distance or overseas calls." That was the point you were making?

A. Yes.

Q. You say: "The potential business damage to Telecom is significant. What is worse, the law is not being upheld and the regulatory process shown to be ineffective." It was your concern at the time, wasn't it?

A. It was. It was a concern that there was no easy solution to it.

Q. Yes. Continuing down that page under the heading of the 'Award of the Licence', you say: "Strict conditions to ensure fair competition will apply to both the second GSM operator and to Eircell."

We knew that because the regulator was coming in and the licence was going to be drafted by the Regulatory Division.

You go on to state that: "If the winning consortium includes Esat which is perceived to be immune from any regulatory action up to now, it will strain credibility in the process." I just wondered which process you were referring to there?

A. I think I was referring to the regulatory process and not the GSM process.

Q. And not the GSM process. Just over the page, page 5, under the heading 'Impact on Telecom Management and Unions' and you had a concern about that as well because you were heavily involved in the strategic alliance process?

A. Yes, where indeed, you know, the impact on employment, work practices and so forth was a very, very sensitive issue.

Q. I can understand that. You state: "An award to a consortium including Esat without concurrent action on leased lines and regulatory enforcement will be seen by the company management," that is the Telecom Eireann company management, "and unions as consolidating Esat's position as a formidable competitor in a privileged position with apparent Ministerial and Government backing."

And presumably that was your view as to what the perception was within Telecom Eireann at the time?

A. Yes, it was not necessarily my own perception but it was, I thought, the view that was being taken from Stephen's Green.

Q. I see. And in fact when it came to preparing the aide-memoire for Government on the 25th and 26th of October, you tackled these matters and there was a reference in the aide-memoire to a stricter approach being taken in relation to enforcement issues?

A. Yes, I thought it was necessary to have a Government

commitment to that, to make clear that regulatory provisions should be enforced insofar as it was possible to do so.

Q. Yes.

CHAIRMAN: Twenty past two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AS FOLLOWS AT 2.10PM:

CONTINUATION OF EXAMINATION OF SEAN FITZGERALD BY MS.

O'BRIEN:

Q. MS. O'BRIEN: We have already dealt, Mr. Fitzgerald, with the events of the 23rd October, and indeed the events of the 25th October, and we dealt with those on Friday last in the course of your evidence.

Can I just refer you now, and I don't know if you have it in the box with you, to Book 43, Divider 145, which was the aide-memoire to Government, dated 26th October, 1995. Do you have it, Mr. Fitzgerald? It's at Divider

A. Sorry, give me the tab number again, please?

Q. Yes, Tab 145. And we referred to this and discussed it already on Friday. And there is just one aspect of it that I want to draw your attention to, and that's paragraph 17, the last paragraph numbered paragraph of the aide-memoire. You see it's headed, "Enforcement Issues." The subheading is, "Reason for the decision."

"1. Voice telephony infrastructure provision

comprising the only remaining aspect of Telecom Eireann's monopoly privilege.

" the legal restrictions prohibiting the provision of such services by others are being openly flouted by a number of telecommunications service providers.

" the purpose of the derogation on full liberalisation of the sector until the 1 January, 2000, agreed by Government, is to provide for an orderly transition to full competition by Telecom Eireann in the market for voice, and especially the lucrative international voice services.

" the orderly transition will not be possible if the law in this area is not fully enforced.

" bigger market players are now poised to enter this market if no effective action is taken against the principal offenders.

" the Minister is satisfied that there is a serious threat to Telecom Eireann's revenue if breaches of conditions continue.

" the value achievable for a sale of a 35% stake in Telecom Eireann would otherwise be seriously reduced.

"18. The Government has agreed mandate for Telecom Eireann to enter into negotiations with potential partners. The mandate commits the Minister to full

enforcement of the law in this area, and he now wishes to inform Government that action is imminent in this regard."

And I think the provisions of paragraph 17 would reflect the concerns which you had, and as you set out in your handwritten note which we referred to before lunch?

A. Yes, they would. The concerns I think the staff in the Regulatory Division had also.

Q. Yes, of course the Regulatory Division staff shared your concerns.

A. Yes.

Q. And if I can just refer you to the next document, which is, in fact, a copy of the Government decision, that's at Tab 146, dated 26th October. It reads:

"I am to refer to the aide-memoire, dated 26th October, 1995, submitted by the Minister for Transport, Energy and Communications concerning telecommunications issues, and to inform you that at a meeting held today the Government:

"1. Noted the proposal to award a licence to Esat Digifone to provide and operate GSM mobile telephony within Ireland under the Postal and Telecommunications Services Act, 1983, with the statutory consent of the Minister for Finance and agreement of appropriate licence terms with Esat Digifone.

"2. Noted that, in the event of a failure of the

licence negotiation process, the Minister proposed to seek agreement of licence terms with the second and subsequently if necessary, third ranked applications.

"3. Agreed to the proposal to approve under Section 90 of the Postal and Telecommunications Services Act, 1983, a range of tariff increases by Telecom Eireann for leased lines, subject to consultation with the Minister for Enterprise and Employment in regard to future adjustment in these tariffs.

"4. Noted the proposal to enforce strictly the law and regulations concerning the provision of telecommunications services, particularly as they relate to the voice telephony and infrastructure services reserved to Telecom Eireann until January, 2000."

And I think that fourth paragraph would have met the concerns which you had at the time?

A. Yes.

Q. Can I just ask you as well, Mr. Fitzgerald, in that regard, on Friday last you recall at the end of your Memorandum of Intended Evidence when we were discussing it, you referred to a meeting in December of 1995, that you were called to in the Minister's office between the Minister, Mr. Denis O'Brien and Mr. Leslie Buckley. You recall we discussed that on Friday?

A. Yes, I do.

Q. I think you indicated that after that meeting, the Minister asked you to go easy on monitoring until after Christmas?

A. Yes. I think this was some substantial time after the Government decision, sometime the following year.

Q. Yes. And would I be correct in thinking that the monitoring that was then being put in place by the Department, that that was in order to assist the Department in ascertaining whether these leased lines were being used legitimately as the Department saw it in accordance with the VAS licence or whether they were being used for other purposes?

A. Could I explain perhaps?

Q. Yes, of course.

A. In case there might be any disquiet about it, this was not a case of listening into conversations or anything of that kind, because that was only permissible when backed by a warrant by the Minister for Justice.

Q. Yes, of course.

A. It was simply a means of identifying whether the traffic on a line was voice telephony or non-voice telephony, such as faxes or computer links or Interneting. That's all it did. What it would do is give you a breakdown between the total voice telephony and other non-voice telephony on a particular line or with a given operator. Now, it did not distinguish between permissible voice telephony and

non-permissible. That would have to be a valued judgement or subject to inquiry. I think the sort of strategy that was running through my mind was, we had given a batch of lines to Esat Telecom in particular, and to others as well, that before they could establish a case for more, they had to tell us what the proportional voice telephony and non-voice was. And if what we found out didn't accord with that, then it would be probably, if there was, say, considerably more voice telephony than you might expect, then it was an indicator that the lines were being used for traffic that should have gone via Telecom Eireann. It could do no more than that.

Q. But it was a, I suppose, a tool in the Department's armoury in terms of putting into place the policy of enforcement which had been noted by the Government of that decision?

A. Yes. I think what I intended it to do is to sort of ration the capacity that was available to the licensed operators, rather than give them as much as they wanted.

Q. I see.

Now, in responding to certain of the queries, Mr. Fitzgerald, that were raised by the Tribunal in the Memorandum of Intended Evidence, you stated that you had no knowledge of any involvement or potential involvement of IIU Limited or Mr. Dermot Desmond on

the date that the result of the competitive process was announced, and I think you further stated that information that you gleaned in relation to that was either from Mr. Brennan or from Mr. Loughrey, and that your state of knowledge was progressive, in that initially you understood that IIU Limited and Mr. Dermot Desmond were coming in as arrangers for the placement of the 20% shareholding referred to in the application, and it was only subsequent to that, and I think there was quite a gap between that state of knowledge and your subsequent state of knowledge, that you learnt that these shares were to be taken directly by Mr. Dermot Desmond?

A. Yes, that is correct. And I may add, I knew nothing of the underwriting letter which had been sent to the Department in September.

Q. You have made that clear.

Can I just refer you now to two articles which appeared in the daily newspapers on, I think it was Saturday, the 18th November of 1995. I can hand you up copies.

(Document handed to witness.)

The one on the top there, I'll refer you to first, Mr. Fitzgerald. That's the one that appeared in the Irish Times, the Business and Finance section. And it's headed, "Desmond Company to Handle Esat sale." And the by-line is, "Tom McEaney," and I think it

should be on the monitor now.

"Mr. Dermot Desmond's financial services company has been appointed to handle the sale of a 20 percent stake in Esat Digifone, the company which won the second mobile phone licence.

"The Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International Investment and Underwriting Limited, IIU, has been appointed as advisers for the sale of the stake.

"However, he would not comment on industry sources' belief that Mr. Desmond or one of his companies has purchased a portion of those shares.

"When the 20 percent stake is place, Mr. Denis O'Brien's holding company, Communicorp, will have a 40 percent stake in the company, the remainder will be held by the Norwegian telecommunications company, Telenor.

"Esat Digifone is estimated to be valued at $\text{£}100$ million.

"Last month Mr. Desmond paid $\text{£}14.5$ million for London City Airport. Given that the airport was originally on the market for $\text{£}30$ million, Mr. Desmond is seen to have driven a hard bargain in the deal.

"Mr. Desmond is perhaps best known as the man behind NCB Stockbrokers. He sold his stake last year. He has since invested $\text{£}4$ million in Glasgow Celtic Football Club. Esat expects to begin providing a nationwide

mobile phone service by the end of next year."

That's the article which was in the Irish Times.

And the article below it, the second article, which you have a copy of it there, Mr. Fitzgerald, was in the Irish Independent on the same day, November 18, 1995. And it's headed, "Desmond Firm Advising Esat Digifone on Share Placing." And the by-line is to Shane Coleman.

"A financial services company owned by financier, Dermot Desmond, is advising Esat Digifone on the placing of 20 percent of the consortium's shares with institutions and other investors, it emerged yesterday.

"A statement from Esat Digifone the winner of the second GSM (Global System Mobile Phone) licence said that Dr. Michael Walsh of IFSC based International Investment and Underwriting (IIU) has been appointed to advise the consortium on this aspect of its financing.

"A spokeswoman said IIU would arrange the placing of 20 percent of the group's shares, but she declined to comment on reports that Mr. Desmond's company would be underwriting this sale.

"There was speculation last night that Mr. Desmond himself or some of his companies was likely to take up some of these shares.

"IIU was established by Mr. Desmond to deal with a

limited number of clients in selected investments, and probably trade its own capital. The spokeswoman said the identity of the investors would be revealed in a few weeks time.

"The day after winning the GSM licence, Esat Telecom Chairman, Denis O'Brien, said the shareholding in Esat Digifone was 40:40:20 between Esat, the Norwegian State phone company, Telenor, and unnamed investors. He said the overall investment was underwritten by Esat and Telenor. Mr. O'Brien has consistently refused to be drawn on the identity of the other investors in Esat Digifone. He said on winning the licence, the funding was there but that "institutional investors don't write cheques until they see the terms of the licence.'

"It is not clear what the present market value of a 20 percent stake in the consortium would be worth.

"Mr. O'Brien has said the group will invest around $\text{€}100$ million in building a network.

"Given that he also said that the debt equity ratios in the business usually ranged between 50:50 and 40:60, a 20 percent stakeholder might be expected to invest a minimum of $\text{€}10$ million in the group.

"Any investors are likely to have a pay a premium to reflect the expected revenue generating potential of the licence. The consortium has also said it would consider floating 20 percent of its shareholding in

about three years time, depending on the state of the market, giving investors an opportunity to cash in their gains if the licence proves as successful as expected.

"The news that IIU will be advising Esat Digifone comes only a couple of weeks after the announcement that Mr. Desmond had purchased London City Airport in a Stg 23.5 million deal. He has also made a i2 million investment in Glasgow Celtic for a 10 percent shareholding."

And it appears that the both of these articles were in those newspapers on, I think it was Saturday, 18th November. And I suppose the Tribunal is somewhat puzzled that the contents of these articles didn't come to the attention of the Department.

A. Perhaps that might have been the source of the knowledge that IIU were now replaced Davys as the placers of the investment. And if you notice, that is all it says. It still maintains the 40:40:20 share ratio.

Q. Yes, indeed it does.

A. And any involvement by Mr. Desmond personally as an investor, or through any of his companies, was not dealt with.

Q. Well, it was speculated upon?

A. Speculation to that effect, yes, but it was neither confirmed nor denied, or not commented on, I think, by

Mr. O'Brien, isn't that so?

Q. Yes. When that information became available to you, whether it was from Mr. Brennan or Mr. Loughrey, and indeed whether the source of their knowledge of this newspaper report or anything else, would that not have caused you some concern, given that you had already expressed concerns about the financial capability of the consortium? Would you not have been puzzled as to why Davys as such substantial stockbrokers were being replaced by IIU Limited as arrangers for this 20% placing?

A. It didn't at the time. I think I regarded it as a matter for Esat Digifone to pick their own arranger. For all I know they might have had a falling out with Davys or whatever. It wasn't of a matter of importance as I saw it.

Q. Anyway, as far as you were concerned at that stage, they were purely acting as arrangers?

A. That's what the gist of that article suggests, and we had no information to the contrary.

Q. Can I refer you now, Mr. Fitzgerald, again to Book 43, to a Dail statement that was made on the 22nd November. And it's Book 43. I think it's Divider 156, Tab 156. And the Dail speech was in response to a series of parliamentary questions that had been raised, and in particular, parliamentary questions by Mr., or including, I should say, parliamentary

questions by Mr. Moloney or Deputy Bobby Molloy, as he then was, and Deputy Willie O'Dea.

Now, can you assist the Tribunal, firstly,

Mr. Fitzgerald, as to whether you would have had any input into the preparation of the speech given by Mr. Lowry?

A. In the normal course of events, of course the draft replies, when completed by the divisions concerned, would come to me and I would send them on to the Secretary. I cannot remember in this particular occasion. Can you give me the date again, please?

Q. The 23rd November?

A. 23rd November

Q. 22nd November, I think.

A. The 22nd?

Q. Yes.

A. I have no precise recollection of being involved in this particular occasion.

Q. In the usual course, do I take it from what you said that the division would have prepared the speech, so that would be, in this case presumably, it was the Development Division?

A. Yeah, insofar as the questions related to the Development Division, yes. But anything regarding policy or the GSM process, or anything of that kind would have been prepared in that division. And anything involving regulatory matters would have been

done in Mr. McMahon's division.

Q. Of course, that would make sense. So in this case, insofar as it involved the GSM process, it would have been Mr. Brennan or Mr. Towey, or a combination of the two of them?

A. Yes.

Q. And then the draft would have come to you in the ordinary course

A. In the ordinary course of business, yes.

Q. And then you would submit the draft up to Mr. Loughrey?

A. Yes. Of course this is not a speech as such, it is replies to specific questions which have been grouped together so as to give an overall reply.

Q. Yes. Can I just refer you to the questions that were raised by Mr. O'Dea and Mr. Molloy.

The document behind the tab firstly comprises the report taken off the Internet. The second portion of it actually listed the Dail questions. I don't know if you can see that there before you?

A. Yes.

Q. And if you could go to the third page of that portion of the document. It's not numbered. I can't assist you with numbering, Mr. Fitzgerald.

A. Yes, I have the third page.

Q. And it records at the top the question put by Mr. O'Dea, and it states, "To ask the Minister for

Transport, Energy and Communications the number of"

A. Sorry, the third page is part of the reply.

Q. You must have the wrong section, Mr. Fitzgerald.

That's, the first section of the documentation behind

the tab is the report which was taken off the

Internet. It's the next section I am referring to.

A. Starting with the question by Mr. Molloy?

Q. Exactly. If you could go to the third page of that

portion of the document.

A. The third page?

Q. Yes.

A. There is a question down at the bottom, but this

is this is debate rather than a question as such.

Q. It's asked there just at the very top, "To ask the
Minister for Transport, Energy and Communications, a

number of applicants for Ireland's second GSM mobile

phone licence, the dates on which submissions were

received and the number of times he met the

principals, directors, consultants or representatives

on behalf of any of the applicant companies? The

dates on which he met them and the locations where he

met with them, and if he will make a statement on the

matter?"

You see that question?

A. Sorry, I can't find it on my version.

Q. Perhaps Mr. Shaw can assist you. Do you see that

there at the top of the page?

A. Yes.

Q. It's a bit faint I am afraid, the initial lines. And if I could just refer you further on behind the tab to the draft that was actually prepared, the draft reply. And within the draft reply, I think it's six pages from the end, there is a heading, "Meetings with Consortia". I don't know if you can pinpoint that page, or perhaps Mr. Shaw can assist you.

A. There is a heading, a big heading, "Meeting with Consortia".

Q. That's it. And if I could just refer you to that, it says, "The question regarding meetings I held with principals or representatives of applicants is virtually impossible to answer precisely. The applicant consortia encompassed at least four State companies, two of whom are within my aegis, five companies with significant Irish content, as well as an additional number of individuals in their personal capacity, at least 11 foreign companies, and indeed, there is some degree of overlap with parties interested in the strategic alliance with Telecom Eireann.

"I would, however, wish to make it clear, from the launch date in March I was acutely aware of my duty not to interfere with the selection process. I had brief meetings with representatives of several consortia, but these were strictly in the nature of

courtesy calls and opportunities to reinforce the message that this was an objective process designed to find the best applicant. I did not discuss the contents of applications which I had not seen, or the evaluation process with any representative of applicants.

"I am quite sure I came in contact socially with promoters of or business interests connected with the applications or prospective applications on a small number of occasions." And that was a fairly orthodox answer that was drafted by the civil servants?

A. Yes. On the basis of the knowledge they had.

Q. Absolutely. On the basis of the knowledge that they had, and you couldn't fault that.

And I don't know, you probably weren't aware of it at the time, Mr. Fitzgerald, but it seems that Mr. Lowry, in making his speech in the Dail, and in replying to the answers in that form, did not actually address that material, but I presume you weren't aware of that at the time?

A. I wasn't. If I could say so, once the Minister stands up in the Dail, he is on his own. There is nothing you can do about it if he doesn't answer a particular question.

Q. Of course.

Now, Mr. Molloy, Deputy Molloy, as he then was, asked questions in relation to Article 3 of the Department's

GSM competition licence document: "Were they complied with in the awarding of the licence, and identify the and ultimate beneficial ownership of the institutional investors who will own 20% of the successful bidding company." And that was the matter raised by Mr. Molloy. And that's actually on the last page of the list of questions. And if I can just refer you, then, to the actual report of the proceedings in the House, which is the first document within that group of documents behind the tab. And if I could take you to it is actually paginated, there is internal pagination on that document, and it is page 5 of 9. It's the first document behind that tab, Mr. Fitzgerald.

A. Sorry, could you repeat, please?

Q. Sorry, Mr. Fitzgerald. The first document behind the tab is the report of what actually transpired in the House. If you go to that firstly, and if you go to page 5 of that document. And you will see just at the top right-hand corner of each page, there is internal pagination.

A. Yes, I have

Q. Do you have it?

A. Yes.

Q. If I could take you, just after Mr. Molloy is recorded to what Mr. Lowry said, and he said, "All aspects of the established criteria were scrupulously

adhered to and monitored closely by my Department, the consultants and the project team. None of the six who submitted applications to the Department was rejected because of the absence of technical and financial ability to deliver the service. Examination of those aspects was an integral part of the evaluation process.

"Paragraph 3 of the bid document to which the Deputy referred relates to full disclosure of ownership.

That was adequately dealt with in the evaluation of all applications, including the successful one. The majority of the applications contained indications of probable changes in the ownership of minority interests by way of flotation, institutional investment, after licence award, and the level of such proposed changes considered acceptable. The intentions of the willing applicant in this regard were fully disclosed.

"Mr. Molloy: Were the names of investors disclosed?"

"Mr. Lowry: The names of investors were not disclosed in respect of a number of applications because that did not contravene the criteria set down.

"Mr. Molloy: The article states that the full ownership details must be given.

"The Ceann Comhairle: Let us hear the Minister out.

"Mr. Lowry: A number of investors stated that minority shareholdings would be available through

various mechanisms, such as by way of flotation or institutional investment. The winning applicant clearly stated that Esat would have a 40 percent ownership, Telenor 40 percent ownership, and the other 20 percent would be available to institutional investors or other interested groups. That was clearly stated publicly as well as privately.

"Mr. Molloy: The Minister did not know who they would be.

"Mr. Lowry: It would be impossible for any of the applicants to determine who would buy the minority stakeholding until applications were processed and an applicant had received a commitment from the Department that its application was successful in securing the licence, and therefore it had a minority interest to sell."

And that, of course, would have reflected your understanding at the time?

A. Yes, I think that was a very reasonable answer.

Q. In the early months, then, the latter months of 1995 and the early months of 1996, the negotiations proceeded with the Esat Digifone team and the Department team towards negotiation of a licence?

A. Yes.

Q. And I think that there were quite a number of technical matters that arose. The entire process took probably longer than you had anticipated. And there

was substantial advice and input sought from the

Office of the Attorney General?

A. Yes. I think the amount of legal work that was required was substantial.

Q. Now, can I refer you also, Mr. Fitzgerald, to an article which appeared in the Irish Times, I think, it was the Irish Times, on the 28th February. And that's an article which appeared under the by-line of Mr. John McManus. And which Mr. McGonigal brought to the Tribunal's attention.

It's stated, "Communicorp, the parent of Esat Telecom, is seeking to raise $\text{€}1/230$ million in debt to fund its share of the $\text{€}1/2100$ million cost of launching the second mobile phone network. The company is hoping to raise the bulk of the money in the US, and its chief executive, Mr. Denis O'Brien, is understood to have been making presentations to US investors over the last two weeks. Communicorp is a 37.5 percent shareholder in the winner of the second licence, Esat Digifone, through its holding in Esat Telecom.

"The Norwegian State phone company, Telenor, owns another 37.5 percent, while Mr. Dermot Desmond's company, International Investment and Underwriting Limited, holds the remaining 20 percent.

"Under the terms of the planned fundraising, Communicorp will be reorganised. A new company, Esat Holdings, will be created as the holding company for

Esat Telecom and for the group's stake in Esat

Digifone.

"Communicorp's other interests, including the Dublin radio station, 98 FM, and radio stations in Prague and Stockholm, will be held separately.

"Esat Holdings will be 88 percent owned by Communicorp and 12 percent by outside investors on Esat's board, including the former Secretary of the Department of the Taoiseach, Mr. Pádraig Ó hUiginn; the former senior partner of KPMG/Stokes Kennedy Crowley, Mr. John Callaghan; and the management consultant, Mr. Leslie Buckley.

"Communicorp is 65 percent owned by Mr. O'Brien and 35 percent by the US venture capital company, Advent.

"The €30 million in debt will be raised through Esat Holdings, and will mainly be used to fund its share of the cost of starting up of the new network. However, some of the money may be used to fund Esat Telecom's planned expansion. It is understood that Esat Holdings wants to raise the €30 million through loan notes. The notes will be split into €15 million of loan notes with convertible stock warrants, and €15 million convertible into second preference shares.

The US bank, CS First Boston, is advising the company.

"A spokeswoman for Esat Digifone said last night, the project would be financed through a mixture of equity put up by the consortium members and debt raised by

Esat Digifone itself. The equity finance was committed and underwritten, she said.

"AIB and ABN-AMRO banks were organising the debt portion, and had already committed $\text{€}125$ million in bridging finance at this stage, she said.

"Esat Digifone won the competition to operate the second mobile phone system in October last year.

However, the company has not yet been officially awarded the licence. The Department of Transport, Energy and Communications said yesterday that the negotiations were at an advanced stage.

"Esat Digifone plans to spend $\text{€}100$ million over the next five years developing its network. The investment will include an up-front payment of a $\text{€}15$ million licence fee to the Government."

Do you recall, Mr. Fitzgerald, whether this article came to your attention at the time it was published?

A. I cannot recall the article. Normally press cuttings were circulated to staff every morning. As well as that, the papers would have been supplied to me. I don't know whether this was published on a working day or on a Saturday. I don't know if you can enlighten me on that?

Q. I am afraid I can't assist you as to what the 28th was.

A. If it's a Saturday it is possible I mightn't have seen it at all, or it could be, it would be included in

cuttings circulated on Monday, but sometimes if one is busy, Saturday's news is gone by Monday.

Q. Because this would have indicated to you a very significant change, wouldn't it, in what the Department had known?

A. If reading through it, as I do now, of course it would. It is obvious from the article, I think, that a great deal of information was supplied by either Communicorp or Esat Digifone, including the reference to the 37.5% instead of 40, and 25 instead of 20. I am wondering whether it was testing the waters to see what the reaction might be to the change in the shareholding.

Q. If we just look at it more closely. Effectively it's telling you firstly that the share structure had changed from 40:40:20 to 37.5:37.5:25. It's telling you now that the consortium is to be made up of Communicorp, Telenor and IIU/Mr. Desmond?

A. Yes.

Q. It's telling you effectively, by inference, that the financing of $\frac{1}{2}$ 13 million from Advent was gone?

A. Yes.

Q. And it's telling you also that Communicorp now intended to fund its equity participation in Esat Digifone through private placements through CS First Boston?

A. Yes.

Q. And it's also telling you that Communicorp intended to restructure its radio and telecommunications interests into two separate holdings?

A. That seems to be the case.

Q. And wasn't that effectively the substance of everything that the Department was told in the letter of the 17th April from Mr. O'Connell?

A. I accept that. I think virtually all the information that we subsequently got was in this article. But somehow or other it escaped attention as far as I remember, because there was no discussion or no concern in the Department at that stage until April.

CHAIRMAN: Mr. Fitzgerald, obviously there was the Project Group, there were senior persons on the fringes such as yourself, there was the Minister's media advisers and his programme manager. Would it not seem extraordinary, given that it appears that the journalist did make contact with the Department for the purpose of preparing the story, as appears from the last paragraph or so, that it would not have become the currency of discussion or consideration within the office?

A. Mr. Chairman, I share your amazement that it didn't. Now, the contact with the Department I think would simply have been an inquiry to find out what was happening in the licence negotiations, and may not have gone beyond that. But nevertheless, I cannot

explain why it went unnoticed. But the matter seems to be that it did. Sorry, the fact seems to be that it did.

Q. MS. O'BRIEN: Can I ask you just in connection with what the Sole Member raised with you, Mr. Fitzgerald.

You will see in the penultimate paragraph that it states, "That the Department of Transport, Energy and Communications said yesterday that the negotiations were at an advanced stage."

Who was likely to have been the spokesperson for the Department in the context of an inquiry of that nature?

A. Inquiries will always be addressed to the press officer in the Department.

Q. And was that Mr. Jennings at the time?

A. It was Mr. Jennings, I think, or there was a, I think Mr. Moon came later. Mr. Jennings, and it was Ms. Sheeran.

Q. It's likely to have been either Mr. Jennings or Ms. Sheeran.

A. Well she would, or he would normally make inquiries with the division concerned before coming back with an answer.

Q. And who would he normally have made the inquiries to?

A. In this case either to Mr. Brennan or Mr. McMahon, but it would probably be only in relation to what stage we expected the licence negotiations to conclude.

Q. We don't

A. And I don't think there mightn't have been any other information conveyed to the Department in the course of that inquiry.

Q. We don't know that at the moment, Mr. Fitzgerald, but I am sure some other witnesses might be able to assist us.

A. Perhaps.

Q. I can just tell you for your assistance, that in fact the 28th February was a Wednesday. You said just there at one stage that it occurred to you, just reading the article now, that it might have been Esat Digifone putting out a flyer, and can I just refer you to the fourth column in the article, because you will see there that this appears to be the only portion of the information that's actually distributed to Esat Digifone. It states, "A spokeswoman for Esat Digifone said last night that the project would be financed through a mixture of equity put up by the consortium members and debt raised by Esat Digifone. The equity finance was committed and underwritten, she said." That does seem to be the only portion attributed to a spokeswoman?

A. Well, that would it's presented that way. But I don't know where Mr. McManus could have got all the other information

Q. Because it's very detailed information, isn't it?

A. - if it didn't come from Esat Digifone or Communicorp.

Q. And of course

A. The reference there to underwriting, of course, is to the belief that the letter of the 29th September, I think, did in fact underwrite the Esat Digifone consortium, even though that was not the cause of the Department's concern at the time, or the Evaluation Group's concern.

Q. But of course, that statement itself in the final sentence of that paragraph was inaccurate because the equity finance wasn't committed at that stage, was it?

I mean, we know that the equity there was no equity finance available to Communicorp or Esat Telecom Holdings, as it became, until the end of July, after the private placement?

A. Yes. I think they didn't have the money prior to the private placing becoming successful.

Q. No. And of course the underwriting referred to there, as you suggested, maybe the underwriting that was the subject matter of the letter of the 29th September, but that was not the underwriting which the Department was ultimately prepared to accept when it issued the licence on the 16th May?

A. No. They wanted I think there was a bit of a misunderstanding on the part of Esat Digifone or Communicorp on what the Department really wanted, which was not an underwriting of the Esat Digifone

consortium, which was what was given, but an underwriting of the Communicorp part of it.

Q. And of course, what the Department insisted on in the end, and again I think you may not have known this because you were tied up in other things at the time, but what they wanted and what they got is, they got a one-third underwriting from IIU/Mr. Dermot Desmond, and they got a two-thirds underwriting from Telenor?

A. Yes, I am aware of that.

Q. Now, could I just refer you to Divider 172 in the same book that we have been working from, which is Book 43.

You see, Mr. Fitzgerald, that's a letter from

Mr. Lowry to Mr. V. M. McCann of the Electricity

Supply Board?

A. Yes, I have it.

Q. Sorry, Mr. W. M. McCann, I apologise. I'll read it.

" Dear Chairman,

"Esat Digifone has contacted me concerning

difficulties in securing planning permission for mobile phone masts in key sites around the country.

Planning authorities are reluctant to consider

multiple masts in sensitive locations. The message is clear, there are substantive reasons why co-location

is not practicable, and that every effort is being

made by the relevant parties to reach agreement. It

is Government policy to support co-location wherever

feasible, and I am writing to all State companies and

Government agencies who own or operate communication sites to urge maximum co-operation. Indeed, if this cannot be achieved by voluntary means I will have to consider whether there is a role for the regulatory and licencing process to address these issues in the overall interests of developing communications infrastructure.

"I understand that you feel precluded by your remember parts passion Persona consortium from agreeing arrangements with other parties. I cannot accept that this is a valid justification for not cooperating on the matters which would overcome planning difficulties possibly on a reciprocal basis. Indeed, many such arrangements would only come into play in practical terms in circumstances which released you from your Persona obligations, i.e. the formal issue of a licence to Esat Digifone.

"I trust that the ESB can reconsider its position and adopt a constructive approach to the single issue of mast sharing with all interested parties.

"Yours sincerely,

"Michael Lowry."

And do you recall the preparation of that letter, Mr. Fitzgerald, and the circumstances in which it arose?

A. I believe I do, but not in detail. But I am certainly familiar with the letter when I saw it.

Q. Yes. Were you aware that the ESB had not been informed that the Persona consortium, of which the ESB was a 26% shareholder, had been second ranked in the competition?

A. None of the other bidders had been informed, I believe, of the place that they achieved in the ranking. So they would not, I think, have been certain that they were the next in line if these negotiations failed.

Q. Of course, they were in a slightly different position, weren't they, to the other four applicants, because they were the consortium that were going to come into play if the negotiations with Esat Digifone broke down?

A. That is so.

Q. So they would have had a particular interest in the outcome of those negotiations?

A. If they were aware particularly if they were aware that they were in a position. I don't know that they were or

Q. Well, on the basis of the documentation available to the Tribunal, it seems that they weren't aware.

A. Yes.

Q. Now, the Minister at the time, I suppose, was the ultimate shareholder in the Electricity Supply Board.

Wouldn't that be the position?

A. Yes.

Q. And would you agree with me or would you agree with the proposition that I am putting to you, that it appears that the Minister was in something of a conflict of interest in writing this letter, in the following way, and I'll just suggest it to you and you can comment on it; in that effectively what the Minister was asking the Electricity Supply Board, of which he was the ultimate shareholder, was to deploy the Board's assets in a manner which would have assisted Esat Digifone in finalising its position where, if it couldn't do so, the ESB, through Persona, would be the next consortium with which the Minister would open negotiations?

A. Yes, but there were two separate issues. I think the process or the co-locating aerials on the same sites or the same masts was separate from the question of whether or not they would be in the ownership of the consortium. If I could put it this way: The ESB, as well as all the other State bodies, was expected to facilitate whatever consortium won the GSM competition. And I think it could have been done in a way that would not give Esat Digifone any proprietary rights over these sites, if the negotiations failed, and they would not be the people who would be utilising the sites. In that case, then, the ESB's position was preserved as a member of the Persona consortium, and they could proceed to enter into

whatever agreements was intended with the Persona consortium.

Q. Well, of course the ESB were really in a different position, weren't they, to any of the other Semi-state bodies that were members of the consortia, because they were second ranked. If things didn't work out with Esat Digifone, the report had recommended to the Minister, that he should open negotiations with Persona?

A. Yes, to that extent, yes. But that was not knowledge that they had. But Bord na Mona and RTE were members of our consortia, and I think maybe CIE, I can't just recollect offhand, and they could have sites and facilities which would be of use also.

Q. I appreciate that, but they weren't going to benefit directly, were they, Mr. Fitzgerald, if negotiations with Esat Digifone broke down?

A. As I suggested, I think it would have been possible to reach a provisional agreement or a conditional agreement with Esat Digifone on the use of these sites, so they could factor it into their planning process and know that if the negotiations on the licensing were successful, and they get the licence, then they have access to certain sites. Otherwise they would have to go and start looking for other sites and rearrange the layout of their network. It was to facilitate that and not slow up the process, I

think, that this letter was intended to address. It was not intended to deprive the ESB of any legitimate benefits they might get from ownership of these sites.

Q. But it was intended to confer a benefit or to assist in conferring a benefit on Esat?

A. On whatever consortium won the auction, and it was not I think it happened to be, happened to be Esat.

The situation could have arisen if any other consortium had won the competition.

Q. Yes. Can I refer you now, and move on, Mr. Fitzgerald, to Tab 184 in that book, which is the letter of the 17th April of 1996, from Mr. Owen O'Connell to Ms. Regina Finn, who I think at that stage was part of the Regulatory Division, and reported to Mr. Sean McMahon?

A. That's correct.

Q. And that's the letter we have referred to in the course of your evidence. And that, in fact, prompted you to take matters up with the Department of Enterprise and Employment in relation to the impact of the Mergers Monopolies and Takeovers Act?

A. No, that wasn't quite the way it was. In or around the same time, and I think it was subsequent to this letter being received in the Department, that the Department of Enterprise and Employment wrote to our Department, and the matter got sent to me. So that's how that particular originated.

Q. That arose through their action, not yours?

A. It enclosed as part of the backup documentation, a copy of this letter.

Q. I see. Could I just refer you to the portion of the letter, I don't intend to delay you by referring to the restructuring of Esat, because that's really a separate matter, but the portion that's headed, "Esat Digifone Limited." It states, "There are 3 million ordinary shares of i¼1 each in issue in this company. They are held as to 1,125,00 shares by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 750,000 shares by IIU Nominees Limited.

"It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased by i¼15 million to i¼18 million (all comprising shares of IR i¼1 each), held as to 6,750,00 by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 4,500,000 by IIU Nominees Limited.

"The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional investor holding of 20%, with a further 12% in short and medium term stages. Of the anticipated 12%, 5% is being

pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors."

And that was the formal notification to the Department of the 17th April. And as I already indicated to you, on the following page are details of the restructuring of Esat Telecommunications Holdings.

A. Yes.

Q. I think you have already confirmed to me that really what was in the article of 28th February was the substance of the information that was in this letter?

A. Yes.

Q. And at that time, I think, Mr. Fitzgerald, that you were very heavily committed in the strategic partner process and the securing of a strategic partner process for Telecom Eireann?

A. Yes, that is so.

Q. And looking at the documents that are available to the Tribunal, it would appear to the Tribunal that you really had no, or very little, involvement in any of the negotiations between the Department and Esat Digifone from the middle of April to the 16th May?

A. That is to the best of my recollection, I did not have any direct involvement.

Q. You were probably aware that the Department had concerns and very real and deep concerns arising out

of the contents of this letter?

A. Yes. And I would have the same concerns myself.

Q. You would have had the same concerns?

A. And I am sure I had expressed them to Mr. Loughrey or Mr. Brennan or Mr. McMahon, as the case may be.

Q. I don't think there is any doubt about that. I mean, on the basis of Mr. Loughrey's evidence and

Mr. Brennan's evidence, it appears there were three principal concerns. The first concern was that the shareholding should be aligned back so that it was in conformity with the application. It should be returned from 37.5:37.5:25 to 40:40:20.

A. I fully subscribe to that view.

Q. The second concern I think was in relation to the financial capability of the consortium, and in particular, the financial capability of Communicorp, and in turn, that of IIU and Mr. Dermot Desmond, both to contribute to the cap and also to meet its underwriting obligations?

A. Yes.

Q. And we have heard at length from Mr. Loughrey in relation to the analysis which he required, and which was, in fact, undertaken by Mr. Donal Buggy?

A. Yes.

Q. But again, you weren't involved in any of that aspect of the

A. Only to the extent of having a general knowledge of what was going on. There was nothing much I could add to that analysis anyway, in any event. I regarded Mr. Loughrey and Mr. Buggy between them as the repository of financial knowledge in the Department.

Q. And then, I think, the final matter which was causing concern to the Department, was the issue of ownership, and the impact of this news in terms of paragraph 3 of the RFP document?

A. Yes. I think we had to ensure that the final shareholding was consistent with the paragraph 3, insofar as the identity of the owners was clearly established and compatible with the content of the bid, insofar as the shareholding of the two principal operators was substantial, and in accordance with the proposals put forward in the bid.

Q. And I think in fact, the assistance of the Attorney General's Office was called in to aid with regard to that issue?

A. I believe that that was the case, although I was not involved in the decision to seek legal advice.

Q. And I think from the documents the Tribunal has seen, these matters were really left to Mr. Loughrey, Mr. Brennan, Mr. Towey, and to a lesser extent, Mr. Buggy?

A. Yes.

Q. And they appear to have been the persons dealing with

the Esat Digifone personnel and Esat Digifone solicitor, Mr. Owen O'Connell, during this period from the 17th April to the 16th May?

A. Yes. It was mainly a matter that was primarily run by the Development and Policy Division, because I think it clearly fell into their area as the successors of the Evaluation Group.

Q. There is one general matter, Mr. Fitzgerald, which is causing the Tribunal some concern in relation to this period, and particularly the period from the 3rd May to the 16th May, on which I would ask you, if you can assist the Tribunal as Assistant Secretary, as you were at the time, and as person in overall charge of the Telecommunications Division. It appears to the Tribunal that from the 3rd May to the 16th May, when there seemed to have been frequent important meetings, significant meetings between Departmental personnel and Esat Digifone or Esat Digifone's legal advisers, that there is no documentary trail whatsoever within the Department in relation to these meetings?

A. I have since become aware of that. And I think it's very regrettable and should not have happened. I wasn't aware at the time, because I wasn't involved in the day to day of it. I would think, probably, things were moving at such a rate at that time, that perhaps people decided they'd write up the reporting at a later stage, maybe tomorrow, and then tomorrow didn't

get done either. I don't know.

Q. You would consider that regrettable?

A. I think it was regrettable that there wasn't a proper record kept as matters went along.

Q. You see, the difficulty, I suppose, the Tribunal had,

Mr. Fitzgerald, is that it appeared from a memorandum

of Mr. Arve Johansen, who was Chairman, I think, of

Telenor Invest, that he had had a meeting, a

significant meeting at the Department on the 3rd May.

And this was apparent from a memorandum which he

prepared on the 4th May, and was produced to the

Tribunal some many months ago, in fact probably over a

year ago, by Telenor, through their from their then

solicitors, Matheson Ormsby Prentice. And the

Tribunal took the matter of that meeting up with

various Departmental officials, and none of them

appear to have any recollection of it. And it was

only when the Tribunal subsequently received documents

from Mr. Owen O'Connell, who was the then solicitor of

Esat Digifone, that the fact of that meeting was

confirmed, and indeed the fact of a series of

subsequent meetings of equal substance came to light?

A. I am sorry, I cannot explain how that happened. I

would have thought that at least the participants

would have remembered the substance of the meetings,

and what was discussed, because changes or conditions

in the licence or in the proposed licence had not been

fully settled at that stage. And it is extraordinary to me that this wasn't either recorded or recollected.

Q. I take it that the lack of recording would be a departure from the usual practice, which you would not support?

A. I certainly would not support it, and I regret that it happened. But I can't

CHAIRMAN: It obviously could have been a difficulty, given that there were high powered and exacting meetings had by Department members with members of the consortium on an almost daily basis, if somebody had changed their position the following day. It would have been very unfortunate if a Department representative had not had a record of what had been discussed earlier.

A. I would have to agree with you, Mr. Chairman.

Q. MS. O'BRIEN: Can I just refer you now to documents in the same book at Divider 187, I think it is sorry, 188 and 189. And they relate to the press conference which was held by Departmental officials on the 19th April. And can I ask you firstly, Mr. Fitzgerald, what was what is your understanding of the matters which prompted the Departmental officials to hold a press conference of this type?

A. I am trying to recollect at this stage, but there had been a whole lot of articles in the media which seemed to have gone beyond criticising or beyond commenting,

fair comment on the process, to criticising the participants in it, and those involved, and almost suggesting that it was a ready-up or a fix of some kind, and if I could remember, I may be wrong in this, I think in particular there was an article by Mr. Sam Smyth which seemed to create a lot of aggravation in the Department at the time. I think Mr. Brennan has stated that he pushed to have this matter cleared up in public, and that this was the idea behind the holding of this press conference. It had been cleared with the Minister, and then went ahead.

Q. And do you recall, then, whether the initiative came from Mr. Brennan?

A. Well, there was I think everybody concerned was expressing annoyance and frustration at the situation that had emerged.

Q. That's understandable. But wasn't it quite a unique thing for civil servants to call a press conference and to issue press statements?

A. I don't think I have ever heard of such an experience before in my 40-odd years in the public sector.

Q. And can you recall, though, who it was, if you like, who was driving this suggestion?

A. I think it was a collective feeling at the time that something had to be done about it, to get our point of view across, that as far as we were concerned we ran a clean and ethical process, and had no interference

from anybody in arriving at the decision that emerged.

And that was all we were concerned with. It wasn't a matter of any concern to us whether the decision was popular or unpopular or anything of that kind, but that it was arrived at in a proper manner.

Q. I see.

A. And was not a contrived result, I think this was the main issue, and that was certainly, as far as I was concerned, was the main issue.

Q. So far as you were concerned and the civil servants were concerned, they wanted to put the record straight on their side of the house, if you like?

A. Yes, and stand up and be seen to do it.

Q. Did you have an input at all, Mr. Fitzgerald, in the preparation of the two statements that were actually issued, do you recall? You may not have because I know you were tied up in other matters?

A. I was present at the press conference. I spoke and dealt with questions that arose. I don't recollect dealing with the drafting of this press statement.

Q. Can you assist the Tribunal at all as to why there doesn't appear, again, to be any record of what transpired at that press conference, or even any note within the Departmental files? There are obviously copies of the press releases and, in fact, there is a copy of the draft release, but there is no note at all as to what happened? You just indicated to me there

that you actually dealt with some of the questions that were asked, and the Tribunal is just a little surprised that there was no record kept, or a note, even, of the general questioning at this, as you say, unprecedented occasion?

A. I don't recollect that I kept any notes, and maybe everybody else who was there felt the same, that there was no need for it, it wasn't part of the official process, if you call it that.

Q. I know. But it's effectively the civil servants for the first time were coming out in public within the public domain and were making statements to the media as to what had occurred in the course of this process.

A. I suppose if you collected all the media reports together, you might get a flavour of the total content of the press conference.

Q. Can I take you, then, to the statement made by Mr. Lowry in the Dail on the 30th April. You'll find that actually in the next book, Mr. Fitzgerald. I am sure a copy of it can be handed up to you. It's Book 44. And the draft speech is at Divider 201.

A. Sorry, can I get...

Q. It's Book 44, Tab 201. I suppose before I go into this speech in any detail with you, Mr. Fitzgerald, could you tell me, did you have any input into the preparation of the draft speech?

A. To the best of my recollection, I didn't.

Q. We know it was produced under some pressure in fact, over a three-day period, I think by Mr. Brennan and Mr. Towey.

A. Yes.

Q. And perhaps you can assist me, then, with regard to the following: Do you recall at all what prompted the delivery of this speech?

A. This must have come from the Minister and the political process. I don't think there was any suggestion within the Department that such a speech should be made. The reason I say I was not involved, I think there is a note somewhere which Mr. Brennan sent to the Secretary after this event, in which he complains about the pressure that was brought to bear in preparing this speech, and my name was not mentioned as having any involvement whatsoever in it.

Q. That's quite correct.

A. So that would probably reinforce my recollection that I wasn't involved.

Q. Now, we know that on the 16th May the licence was issued, Mr. Fitzgerald. And I take it you would have been at the formal press conference that was arranged to coincide with that issue?

A. Yes, I believe I was.

Q. And during the period from April, May, coming up to the issue of the licence, did you have any direct dealings at all with the Minister in relation to the

various issues that had arisen in the course of the negotiation?

A. Not to my recollection, no. Usually the way the Department operated is that on most issues the Secretary dealt with the Minister, Mr. Loughrey.

Q. Yes, of course.

A. Unless occasions where he wasn't available, or perhaps occasions in which I, myself, might have been the person most involved in dealing with an issue, and they would mainly be on the I think almost all on the regulatory side.

Q. And finally, Mr. Fitzgerald, can I just take you to Divider 239, Tab 239 in that book, which is a copy of a letter of the 6th December from Mr. Dukes to Mr. Bobby Molloy.

A. I think I have it now.

Q. And I'll just open that to you briefly.

"Dear Bobby, there appears to be considerable confusion abroad about the precise situation regarding ownership and investment in Esat Digifone. I hope the following information will clarify the matter for you:

" the Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Limited (the holding company for Esat Telecom.) The application disclosed that, if it was successful, 20% would be placed with financial investors. A list of potential investors was

submitted, all of whom are 'Blue-chip' institutions.

The Minister and Department are specifically precluded from naming these, but there was no room for doubt as to either their bona fides or their financial capacity.

"I can, however, confirm that the names being speculated upon in the last few days were not on this list.

"At the licensing stage, several months later, Esat Digifone was in a position to announce that it had placed the 20% with IIU Nominees Limited. And it was certified to the Department at that time that Mr. Dermot Desmond was the sole beneficial owner of the 20%. Adequate evidence of his capacity was disclosed. Mr. Desmond is still the exclusive beneficiary of the IIU shareholding.

"On the 19th April, when the Department held a press briefing, the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges. My information is that when the licence was issued shortly thereafter the precise situation was clearly stated.

"If I can be of any further assistance to you within the constraints of the binding confidentiality agreements, I would be delighted to do so.

"Yours sincerely,

Alan Dukes, TD,

Minister for Transport, Energy and Communications."

Of course, we know at that time, I think it was on the 3rd December, that Mr. Dukes was appointed Minister, Mr. Lowry, having resigned in fairly confidential circumstances controversial circumstances, I should say?

A. Yes, indeed, that was the case.

Q. And Mr. Dukes has informed the Tribunal that following his appointment, he was conscious of the controversy that had surrounded the grant of the licence, and the controversy there had been in the media, and that he asked to be briefed on the matter by Mr. Loughrey and two other officials, I think, within the Department. And I wonder did you have a role in that briefing, Mr. Fitzgerald?

A. It is possible, but I can't remember any specific time at which it was. Now, there was quite a lot of discussion with Mr. Dukes when he came into the Department, and for sometime afterwards, to get him up to speed in what was going on and what the major issues were. I suppose this would have been more or less, I think, water well down the river at that stage, unless a specific issue came up.

Q. I suppose you wouldn't have been the best placed of the officials really to be briefing Mr. Dukes as to what occurred in the course of the evaluation process

in any event, would you?

A. No, I think that would have been done probably by Mr. Brennan, if he was interested in finding out what happened during the evaluation process.

Q. Yes. Now, in relation to the letter, Mr. Dukes has informed the Tribunal as follows:

"The Tribunal has furnished me with a copy of the letter dated 6th December, 1996, which I sent to the then Deputy Robert Molloy. In that letter I gave the then Deputy Molloy information relating to the financial composition of the winning consortium, both at the time of the application and at the time of the granting of the licence. I cannot now recollect whether that letter was sent in response to a letter from the then Deputy or in response to a statement by him in the Dail or outside it. I did not personally draft that letter. I do not know who drafted it. As a general rule, my concern would have been with the content, rather than with the identity of the drafter.

It was not my practice as Minister to concern myself with the identity of the drafters of letters submitted to me for signature, but rather to satisfy myself that I could stand over the content. I do not I did not know then, nor to the best of my recollection had I been advised by my civil servants that prior to May, 1995, the date on which the licence was issued, the capital configuration of Esat Digifone involved the

holding of shares as to 37.5% each by Esat Telecom and Telenor, and 25% by IIU Nominees Limited.

"To the best of my recollection, I believed at the time of my letter to the former deputy Molloy that the respective constituent shareholdings in the Esat consortium was 40:40:20. To the best of my recollection also, I was not aware of any suggestion that this configuration had come about at the request of either the previous Minister or of the Department in a way that would maintain the conformity of the capital configuration of the applicant consortium."

Now, could you just assist me, Mr. Fitzgerald, do you have any recollection of having any input into that letter or to review its contents?

A. At this stage, I cannot recollect that I had. But I can't be certain either that I did not. Given the letter as it stands, it seems a reasonable request, but I suppose I would have needed to know in what context it was issued, what Mr. Molloy's query was or how it originated. What is here doesn't seem to indicate that.

Q. Well, it says, if we just

A. It's not a reply to another letter of Mr. Molloy's obviously, from the terms.

Q. If we just look at the letter a bit more slowly, Mr. Fitzgerald. It says: "There appears to be considerable confusion abroad about the precise

situation regarding ownership and investment in Esat Digifone." And that seems to be the terms on which the information was being provided to Mr. Molloy, do you see that?

A. Yes, but it still doesn't convey to me the reason why Minister Dukes would have written to Mr. Molloy at this particular time.

Q. Well, we can take it that there must have been some very good reason, because I am sure Minister Dukes wasn't in the habit of writing letters that were unnecessary?

A. No. Certainly not.

Q. Now, if you look at the letter, you'll agree that what the letter doesn't state is that the configuration of the Esat Digifone Esat Digifone Limited and the Esat Digifone consortium as of the 17th April and probably dating historically further back from that, was 37.5:37.5:25, does it?

A. No, it doesn't deal with that aspect. Perhaps whoever drafted the letter didn't see as important that that be inserted into the letter, unless there was a particular reason for it.

Q. Mind you, you didn't draft it, Mr. Fitzgerald, or you have no recollection of drafting it, have you?

A. I have no direct recollection, no specific recollection of drafting it. That is not to say that I didn't see it at some stage.

Q. But you can't know what was in the mind of the person who actually drafted it?

A. Without knowing, I think, the circumstances in which the need for this letter arose, it is very difficult to comment on whether or not the 37.5 percent issue should have been called. If you were dealing with the consortium as it was at the time the bid was lodged and at the time that the licence was granted, well then the ratios were 40:40:20, admittedly the 20 was a different

Q. What it doesn't give sorry, Mr. Fitzgerald

A. I think that was all I was going to say. Unless there was a specific reason for adverting to the 37.5:37.5:25 ratios in whatever was bothering Mr. Molloy, I wouldn't have seen a need to refer to it in a letter.

Q. I see.

A. But I may be mistaken in that, I don't know.

Q. It doesn't certainly, would you agree with me, set out fully what the position is in relation to the capital configuration of the consortium from the date of the application to the date of the licence?

A. No, it doesn't. But I don't know whether the query was in relation to a full history of the development of the consortium between those two dates or not.

Q. You had, I think, fairly considerable dealings, did you not, with Esat Telecom in relation to its fixed

line business?

A. Yes.

Q. And we know from everything you have told us in evidence that you had grave concerns as to Communicorp and Esat Telecom's ability to fund its large equity participation in this company?

A. Yes, I think I have made that very clear on a number of occasions.

Q. And I think you stated in your memorandum that at that time Communicorp was not a profitable company?

A. That was my belief at the time. Now, I hadn't seen accounts or anything of that kind. But to develop a business from a very small scale, you know, required a substantial organisation, higher costs and turnover initially was fairly limited. As well as that, I think the tariffs and prices applied by Esat Digifone had to be competitive to say the least, to get business, and also, you know, the costs of running a network based on leased lines and dealing with international traffic rather than local traffic, the costs direct costs are much higher.

Q. And you were, I think, concerned that in order to fund these activities, Mr. O'Brien was having to cede more and more shareholding in Communicorp to Advent International?

A. I think if you look at the Communicorp setup at the time, the amount of money that was invested either in

equity or in loan notes by Advent was substantially more than Mr. O'Brien's stakeholding and he maintained control only by having his stake invested in shares which had three times the voting power of Advent.

Q. Yes. And I take it you were conscious of the fact that when it came to the private placement, that Mr. O'Brien was running through Esat Telecom to try and raise funding for Esat Digifone, that this was a two pronged approach; that he was relying on the fact that Esat Telecom had an interest in Esat Digifone, which was the licence, and also that it had a fixed line business on foot of its Value Added Services licence?

A. Yes.

Q. And were you conscious of the fact and you must have been, because it's clear from the documents that were available to the Tribunal from the Department, that Mr. O'Brien was pressing the Tribunal, or pressing the Department for additional capacity on that side of his business?

A. He obviously wanted to show that he had as big a business as he could possibly manage in order to boost his chances of raising the capital that he needed.

Q. In the course of examining Mr. Loughrey, I think Mr. Fitzsimons, for Telenor, suggested that without this additional capacity that Esat Telecom might well have gone bankrupt "would have collapsed" is the words he used?

A. Well, that may have been Telenor's view, and I hadn't enough information to make a judgement on whether that was the case or not. If he hadn't succeeded in getting the licence, I think it would have been much more difficult to keep the Esat Telecom phone business in place and growing as he wanted it to. He might have been forced to sell out or relinquish control of it. That could have been a possibility, but we are into speculative territory now.

Q. Yes, of course we are. And that would have arisen because of the need for additional capital?

A. Yes. There was no doubt before the GSM issue ever arose, he was in need for additional capital from time to time, and had to raise substantial amounts.

Q. That was to fund the fixed line side of the business?

A. Yes.

Q. Thank you very much, Mr. Fitzgerald.

A. Thank you, Ms. O'Brien.

CHAIRMAN: Mr. Shipsey?

MR. SHIPSEY: I have no questions.

CHAIRMAN: Mr. Fitzsimons?

MR. FITZSIMONS: I have no questions.

CHAIRMAN: Mr. McGonigal?

MR. MCGONIGAL: There are a few matters, Mr. Chairman.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: Mr. Fitzgerald, in the first instance, can I take you to Book 53 which was the one we got

today. That's the book which contains your own handwritten notes and also the Draft Evaluation Report with the annexes attached.

A. Yes.

Q. What I want to understand, try and understand in the first instance, Mr. Fitzgerald, is, when you got hold of the report to read it and go through it, was there a particular purpose in your mind in doing this?

A. The Evaluation Report?

Q. Yeah.

A. The purpose would have been, I think, to satisfy myself that the consultants and the group had done a proper job in arriving at the result that they had put forward, and that it stood on its feet as well as could be, and that there were no inconsistencies or loose ends that might cause doubt or uncertainty about the outcome.

Q. And can I take it, or is it the position that that was something that you would have done naturally because of your position within the Department, or was it done partly by reason of the concern which you had when you heard that Esat Digifone had won?

A. No. I didn't ask to look through the report. Mr. Brennan brought it to me. I think, although I am not sure of this, that his motivation may well be, look, I'll run it past him, because he would have known that I had a reasonably good capability to go through a

report of this nature with a view to at least checking its consistency and it was not my function to approve or disapprove of the outcome as long as it was well established.

Q. I see. So that, in effect, what Mr. Brennan was doing was borrowing your experience and knowledge and saying "Here is the report as we have drafted it, can I have your view on it?"

A. That was effectively it, I think.

Q. And in reading it and surveying it, to use that word, as you say, your purpose was to ensure that when the report was finalised, that it would stand up on its own two feet?

A. Yes.

Q. In the course

A. Sorry, that would be irrespective of what the running order of the bidders was.

Q. I appreciate that. In the course of that, and as part of the survey, it appears that you actually checked the tables and did some of your own workings on those tables?

A. Yes, because it wasn't quite clear to me from looking at the tables, that the bottom line conclusions were correct, so I did some, I think, re-examination and re-jigging around to satisfy myself that the overall grading was, at least, on the face of it, a reasonable conclusion.

Q. And the methodology that you use in relation to those tables was in part, appears, if I understand you correctly, was one of your own?

A. No, I followed, I think, the methodology that was in the report. If you are referring to a table which was there in my handwriting, all that did was to recast one of the tables in the report in the way that, to my mind, was clearer, shall we say, and if you add up all the numbers, they come to the same bottom line as was in the body of the report.

Q. I was actually referring to page 50, Mr. Fitzgerald, and the marks that appears on that. I understood that that might have been some system that you had introduced yourself?

A. Now, I was puzzled by those marks this morning, Mr. McGonigal, and I had a look at it over lunch time, and I can't say that it was a very satisfactory result.

What I seem to have done, instead of taking the 5, 4, 3, 2, 1 weightings converting the As, Bs, Cs, Ds and Es into numbers, I tried a 1 to 10 score, but I didn't seem to apply the weightings to it, so the outcome would not be simply adding them as I did there at the bottom of it, it should have been done on the other basis but this was only to find out whether a 5, 4, 3, 2, 1 weighting was a reasonable one or not.

Q. Just the only one actually that I didn't understand, I have to confess, but it may be in fact, now that I

look at it, in fact I probably do it seems the marks seem to have, taking the 10 in the first few categories, taking the 10, you seem to have given an A to 10, an 8 to B and a 6 to C. So descending order by 2?

A. Yes.

Q. And then on the tariffs you appear to have taken A as 18, the B as 15 and the C as 11.

A. I can't understand why I did that at this stage. But I don't know if there is any great significance attached to the whole thing.

Q. But you seem to only have focused pretty well on A5 and A3?

A. Yeah.

Q. On that table?

A. Sorry?

Q. You seem to have only finished or focused on A5 and A3?

A. Yes, because they were the two leading

Q. I appreciate that. But the result of the work that you did, Mr. Fitzgerald, in relation to the tables, was to show that A5 was the winner of the competition?

A. I wanted to be as satisfied as I could that that was the case.

Q. And that was in fact the case when you finished your work?

A. I am satisfied that that was the case.

Q. And apart from attempting to strengthen areas of the report, certainly insofar as the final section of the report was concerned, you felt that it was more persuasive than the tables?

A. That was my impression at the time, and reading it again, I would, I think, stick with that view, that the way the winning consortium is described and the reasons why they won, is, I think, perhaps clearer from the text than it is from the tables.

Q. Isn't it also clear is it fair so say, Mr. Fitzgerald, that it's very clear from reading the report that whoever put it together, that it was put together, the contents of it, resulted from work of a large number of people?

A. That is so, I believe.

Q. And clearly it's equally clear from the report, is it not, that it would have been impossible for one person to bring about the result that was achieved at the end of the day?

A. Yes. I think it would have been impossible for any individual to stretch things to the point where it wasn't justified by whatever evidence that they based it on. Also, there were members of the Evaluation Group who weren't members of any of the sub-groups that performed the detailed work, and they would have had to be satisfied that what came out of the groups made sense. So I would think that between them,

between all the skills and all the individuals concerned there, that they were all, as far as I am concerned, people of the highest of integrity, that and of good judgement, that they would have spotted any attempt to try and massage or rig the results and that could only have been done on a very particular area.

Q. But isn't that in fact the case, Mr. Fitzgerald, that in fact, if you look at the process in its detailed methodology, that there were accidental or deliberate checks and balances by each section on what had happened before?

A. I cannot say that I have gone into the process in such detail that I could comment on that.

Q. No, but you may be aware that you had the subcommittee meetings, and then you had the project meetings, and each was looking back at what had been done by previous people?

A. Yes.

Q. So that in that sense, you had a check and a balance going on all the way through right up to the end of the final Evaluation Report?

A. That is a broad understanding of how the system worked, that there were sort of checks, revisions, are we sure we got this one right? etc.

Q. And that even to the extent, as you have indicated, that Mr. Brennan goes to you as a person with

significant experience and seeks your advice, to read the report and put your comment on it?

A. Well, he gave me the report. He didn't say anything.

He said "Have a read through that," and I think he wasn't inviting me to look at any particular aspect of it or with any sort of predetermined result. I think he was seeking assurance that the report stood up, that there was nothing glaringly missing from it or that any conclusions that were in it were well founded.

Q. And at the end of the day when you had carried out that process and made your comments, you yourself were completely satisfied that the process had been a proper process, a good process, and had arrived at the result that the process presented?

A. Yes, I am absolutely satisfied on that score.

Q. And in an odd sort of a way, it added to the annoyance, I take it, and the frustration of the civil servants when the newspapers were making their comments and why you had the necessity for this unprecedented press conference, that an attack had been launched against the civil servants which, in all of their views, was totally unjustified?

A. I think that was the general feeling, certainly from the tone of some of the press comment at the time, not all of it I would say; there were people I think who wrote objective articles and I wouldn't like to

detract from their objectiveness.

Q. But so significant was it, that the view of the civil servants was for the first time they felt they should come out and state their position?

A. That's what it led to, and looking back on it, I think I would stand over the exercise as being a worthwhile one in that we have to, on issues of this kind, be given some platform other than the traditional one of the Minister defending civil servants, much as we appreciate that, where we have been asked to do a job of evaluation at arm's length from the political process and come up with the result. I think we were in the same position as all the regulatory bodies that have now been established independent of the ministers and the Government of the day to do this kind of work, and we were in no different a position from the existing regulatory commission.

Q. And even looking at and looking back on it now, Mr. Fitzgerald, you have absolutely no doubt in relation to the integrity of the process and the integrity of the persons who were involved in that process?

A. I have absolutely no doubt whatsoever about the integrity of the persons and that the process that they were entrusted with was carried out without any external influence or pressure and that from within the process, it was done fairly. I don't think I can go beyond that.

MR. MCGONIGAL: There are a number of other matters, Mr. Chairman, that I want to take this witness through but it would be of some assistance if I could call time-out at this stage, because it might be able to shorten it in the morning if I had a chance to pull it together a wee bit.

CHAIRMAN: Well, there is still the question of Mr. Fitzgerald's own counsel, so it's not realistic to seek to finish today. In the light of what you say, Mr. McGonigal, we'll resume as eleven o'clock and it will be taken as a certainty that your evidence will conclude tomorrow. Thank you very much, Mr. Fitzgerald.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 5TH MARCH, 2003 AT 11AM.