

A P P E A R A N C E S

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I N D E X

Witness: Examination: Question No.:

Fintan Towey Mr. Coughlan 1 - 379

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 16TH MAY,

2003 AT 11AM.:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: If we use Book 46 in the first instance, I am looking at the final report that's behind Tab 50.

Now, if you just go to Tab 49, just the preceding tab, it's just one page, and I'll just explain it to you.

This is a page from the second draft, the 18th version.

A. Okay.

Q. And this is Mr. Billy Riordan's writing. I can tell you there's been evidence of that, and we know it's Mr. Billy Riordan's writing. I am only drawing it to your attention there because we had looked at this paragraph previously, coming from the first draft into the second draft, and the inclusion there of A5's maybe weakest point remember how that evolved?

A. Yes.

Q. And you can see there that he noted "How does this stack up against a B for financial" I can't remember what he said again "for financial" whatever it is, anyway

A. "Strength".

Q. And you see the arrow "Change" and the word "Bankable"; do you see that there?

A. Yes, I do, I see that.

Q. Now, you remember the meeting of the 9th October, the minute of the meeting, and Margaret O'Keeffe's notes about the meeting, and you know that reference that the Minister doesn't want the report to argue against itself, I think, or words to that effect?

A. "Undermine" itself I think is the word that was used.

Q. Yeah, "undermine itself". Either a project is bankable?

A. Yes.

Q. Now, here again we see the word "Bankable" being noted by Mr. Billy Riordan. Now, Mr. Billy Riordan doesn't know whether he himself said this or whether somebody else said it and he noted it.

A. Okay, yes.

Q. On this particular document, but this particular portion, in the final report, which is at page 44, under the heading "Sensitivities, Risks etc.", has been amended; isn't that right? There is a new paragraph, in effect, put into position, and I'll

just if you see the second paragraph there.

"A critical factor in any consideration of the credibility or risk analysis of the applications is the capability of the principals to finance the project, including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded, having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, that the project is fundamentally robust, and after a licence has been awarded an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project. A potential financial weakness of one consortia member should not have a negative impact on the ranking of applications. It is important nevertheless to draw attention to the need to deal with this factor where relevant in the context of licence negotiations."

That's, I think, what you might describe as the bankability, or the "bankable" paragraph, if I might describe it, or the paragraph describing the

bankability of the matter; wouldn't that be correct to say?

A. Yes.

Q. And on the paper trail, and from what he have heard from anybody, the first reference to "bankable" appears to be that which is noted by Ms. O'Keeffe back at the meeting of the 9th, the term "bankable"?

A. I am not sure that that's correct. I mean, I think

Q. I think you can take it from me, in terms of the paper trail, it doesn't appear anywhere else that I have seen, anyway, and perhaps you have seen it somewhere else

A. Sorry, I think that you are attaching some I may be wrong, but I think you are attaching some significance to the term "bankable"; is that correct?

Q. Yes.

A. And something that struck me in re-reading some papers is that the term is used at a much earlier stage in the process.

Q. Where is that?

A. And I think if I could draw your attention to that. Could you give me a moment just to find it?

Q. Please do.

A. At the seventh meeting of the Project Group, on the 18th May '95, in dealing under the heading "Interconnection Regime", which was a point where we were considering a view that had been expressed by

Vodafone in relation to the interconnection rates.

Q. I remember that.

A. And I don't think it's necessary, I mean, I don't think it's necessary to read out the whole thing, but there is a sentence in it: "It was agreed that a commitment to limit the life-span of the interim regime, allowing for negotiating between the parties for one year maximum and for intervention as required by the Regulator, would be a bankable solution for applicants."

Okay. So that's really the only point I mean, I thought

Q. The term is used somewhere else in a different context.

A. Yeah, so while I am not sure it's a common term, if you understand what I mean. I think in the context of the group, there was certainly apparently somebody who used this term, or there was

Q. Right, very good. But in the context of this particular paragraph and what was being considered here, and that is the sensitivities regarding the financial risks attaching

A. Yes.

Q. the term "bankable" is mentioned in Ms. O'Keeffe's notes; there is no doubt about that.

A. Yes.

Q. It's mentioned by Mr. Riordan here, and there is a

paragraph inserted which is in fact the what we described, the bankable provision or explanation?

A. Okay, as a colloquial term, I understand what you are saying.

Q. Just that particular paragraph there on page 44, for shorthand purposes, I'll just call it "the bankable paragraph" for the moment.

A. No, I understand. Yes, that's fine.

Q. That was drafted by you, I think, wasn't it?

A. I am not sure that it was drafted by me.

Let me be clear. Saying it was drafted by me suggested that I produced this text here. My record of the events is that in response to the views of the Project Group, that we needed to deal with this issue of potential weakness of the leading applications, that we needed to put on paper our views in relation to and I'll use the same term, the bankability of the project. I proposed a draft reflecting my understanding of the views of the group. A draft was considered at the Project Team meeting on the evening of the 24th.

Q. The 24th?

A. Yes. And this it was revised; it was gone through word by word I remember a detailed discussion of it.

Q. Right.

A. And it resulted in a revised wording, which is this.

Q. Right.

Now, the concept of something being an attractive opportunity for corporate debt financiers. You prepared the text. Where did you get that concept from? Did you discuss it with any financier or accountant or

A. This view was arrived at by the Project Team in expressing our general understanding of the business opportunity here and the willingness of banks to finance it, essentially.

Q. That's the business of Esat Digifone?

A. Well, we were dealing, I think, with a potential weakness as well in relation to Sigma within the Persona consortium.

Q. I understand that. Sorry perhaps we are at cross-purposes an attractive proposition for corporate debt financing of the company which had the licence?

A. Yes, that's right.

Q. So it's in that context, that a company that had the licence it doesn't matter which company for the purpose of this discussion would be in a strong position or an attractive proposition for a bank to lend them money?

A. Well, I think there may be some difference in what you are saying and what my understanding was. My understanding is that the venture could be backed,

that banks would be willing to back this business

venture.

Q. Yes. Perhaps we are saying the same thing.

A. No, well, maybe not, because the impression I took from what you said is that Esat or Persona, if they got the licence, would be able to borrow money.

Q. No, no, I beg your pardon, no. I am saying Esat Digifone I am saying that's the venture, Esat Digifone.

A. Okay.

Q. That's the venture. They are the ones, or Persona, as the venture, would be able to borrow money?

A. What I am saying is that my understanding of the issue that we were dealing with here was that the backers of the consortia would be able to obtain debt financing to back the business venture. So you understand the difference that I am drawing attention to.

Q. Are you saying it's to fund the business, or to fund their equity? That's what I am trying to understand. You see, the position here was that, taking those two, one member didn't have sufficient funds to fund their equity.

A. May not have sufficient funds.

Q. Or may not have sufficient funds?

A. In a worst-case scenario.

Q. Well, you were operating on the basis of something you had been told at the presentation, that money was in

place and that there was an agreement to that effect and that it would give rise to a dilution of the share in Esat Telecom, that's the Advent money, the 300,000 or 30 million?

A. My understanding, from the application and what was said at the presentation, was that there was a funding commitment in place from Advent, funding was available in relation to Esat, yes.

Q. That's right. To fund their equity?

A. Yes.

Q. Right. I understand that. But in a worst-case scenario here what you were talking about in relation to something being an attractive venture, that was for, and as I understand it, it seems to be in the view expressed by any other witness that was a member of the Project Team, and indeed by Mr. Fitzgerald in his evidence, was that the venture that is, the business was always bankable to the extent that it would be an attractive proposition for banks to lend money to, but that that would never cure a problem relating to equity in respect of members of that venture?

A. Well, I don't know exactly what the evidence of other people is on this point.

Q. Well, then, it seems to be that you had a different view, so, to other members of the Project Group as to what this meant.

A. What we were trying to do here was to put on paper an expression of our assessment of the risk that had been identified by Andersens in their risk analysis. Now, the risk analysis conducted by Andersens suggested, in relation to Digifone, that in a worst-case scenario, in a worst-case scenario, if the company met with adversity, there was a possibility that the Esat side, the Esat Telecom side, would not be able to fund its equity requirements and that that could give rise to changes in the ownership structure within Esat; okay?

Q. Yeah.

A. Now, it's my understanding that our general assessment was that the prospect of meeting with adversity was quite remote as far as the mobile phone venture was concerned, and that to the extent that funding was required for the purposes of that venture, it would always be attractive to banks and funding institutions. That's what I understood was the assessment and that we were trying to capture in this text.

Q. As I understand the evidence of other witnesses and the analysis which Mr. Fitzgerald had carried out, and views he had from an early stage in this process, was that of course the mobile phone business was an attractive proposition once you had a licence, and you could it would be an attractive proposition to banks to lend money to, but that that did not and

could not solve the equity problem of a member if they didn't have the money. The business itself could borrow money if another partner was agreeable to that, but may not have been agreeable for example, take the case of Telenor; they may not have been agreeable to increasing debt to get Esat Telecom out of a problem if they didn't have the money to come up with an equity injection.

You see, the

A. I think I understand what you are saying, yes.

Q. And as I understood this particular paragraph, and I think it seemed to be the view of other members of the PTGSM and of Mr. Sean Fitzgerald, that the venture itself is bankable, if I use that term, but that doesn't solve the problem in relation to any requirement for equity injection if one member of the consortium can't come up with it.

A. I understand what you are saying. Now, I haven't seen the evidence of others, and I am not familiar exactly with Mr. Fitzgerald's view.

Q. All right.

A. But I would say that my view was that the intention here was to record the Project Team's view that this risk identified by Andersens was not a risk that was of undue concern, not a risk that should cause us to worry about the ranking of applications or whether the licence should be awarded to Esat Digifone. That's my

recollection.

Q. Right. I think, in fact, Mr. Fitzgerald referred to this particular matter as, in fact, being a health warning in the report, and that he considered it unfortunate that such a health warning wasn't made known to the Cabinet members when they were informed of a result. I think his evidence was

A. I am not aware of Mr. Fitzgerald's evidence.

Q. All right. I am now going to ask you to look, if you could I have to ask you to have two books Book 43 also is a book, and I think it's Tab 140, and this contains the faxes. If you keep 46 at the final report, we'll be going between the final report and the second draft version.

And what this is, at Tab 140, it's Andersens' fax back to you of the suggested textual amendments; isn't that correct?

A. My fax to Mr. Andersen on the morning of the 25th; is that right?

Q. Yes, and his response

A. Oh, and his response; I understand.

Q. His response to the extent, and he sends back the entire of the fax; do you see that? Now, was there also a telephone conversation between yourself and Mr. Andersen, or a number of them that day, do you know, or was it just all done by fax?

A. There was certainly my fax to him, his fax in

response. I can't say for certain whether or not there was a telephone conversation in relation to his response; I think there may have been contact at some point, but I don't believe there was a number of contacts.

Q. Right. Well, was there if there was contact, with whom was the contact? Was it with you, or was it with Martin Brennan, do you know, I mean in terms do you remember having a telephone conversation with Mr. Andersen on the 25th?

A. I don't specifically recall, but I mean, I would expect that any such telephone conversation on an issue such as this would be would have involved myself and Martin Brennan on a conference-call phone; that's what I would have if that's what I would have expected.

Q. And it wouldn't have involved other members of the PTGSM on the 25th there wasn't any meeting of the PTGSM on the 25th, anyway?

A. No, there wasn't.

Q. Now, I suppose the best place to look perhaps we should go because these textual amendments related to the version of the report of the 18th October, isn't that right, the page numbers and the paragraph numbers?

A. They do indeed; that's right.

Q. So if we go to page sorry, Appendix 46 sorry,

it's Divider 46

A. Yes.

Q. And if you go to page 6 of that report, which is under the heading "Chapter 2.4, the Marking and Nomination of the Best Application"?

A. Yes.

Q. And the final paragraph reads: "It is the view of Andersen Management International that the competition process has been conducted in such a way that a comparatively high degree of transparency, objectivity and non-discrimination has been achieved."

And if you then go to Book 43 I am sorry to have to ask you to do it this way, but and it's Divider 140, and it is the second page of the document "Suggested Textual Amendments"?

A. Yes.

Q. We can see preceding that, Andersens ticking off things; obviously it's just where he is indicating an agreement, I suppose. A lot of them are just clearing up language and matters of that nature?

A. Yes.

Q. If you go to the bottom of that page, and it makes reference to "Page 6, final paragraph, replace with 'It is the view of AMI that the competition process has been conducted in a non-discriminatory way with a high degree of transparency and objectivity such...' etc..

A. Yes.

Q. And you can see that Andersen has crossed out "AMI"; do you see that?

A. Yes.

Q. He has also crossed out "as reflected in the report"?

A. Yes.

Q. And he has text written down below that: "Andersen Management International has followed the instructions of the PTGSM as to how the result should be presented in the report".

A. Yes.

Q. That's what he obviously was proposing?

A. Yes.

Q. Do you remember a discussion about that with Andersen?

A. I don't recall a discussion about that, no.

Q. It's not ticked off by Andersen; is that right? It's significant enough, isn't it, that what Andersen is saying here is that what is now being asked for is not "It is the view of Andersen Management International" but that they have been instructed by the PTGSM as to how the result should be presented.

A. Yeah, I see what he is saying, yeah.

Q. And you don't remember any discussion about it?

A. I don't recall discussing that, no.

Q. Now, one can perhaps understand Andersen's written note, in that what he is being asked to do now is to present the result in a different way to the one as it

appeared in the 18th and in the one of the 3rd, which he said was what represented the competition process; isn't that right?

A. I understand what you are saying, yes.

Q. And if you go then the reason I asked you was there discussion about it, and you don't recollect any discussion if you go to page 6, at Tab 50, which is the final report, "It is the view of Andersen Management International that the competition process, including the evaluation, has been conducted in a non-discriminatory way and with a high degree of transparency and objectivity, such that the result achieved is in our opinion a fair comparative evaluation of the six applications."

A. Yes.

Q. And in the copy of the report that I have, at Tab 50, I don't know if it's on your copy, there is lines drawn beside that particular paragraph in the final version. Are they on your one?

A. Yeah, on the copy I am looking at here on Tab 50, there are, yes.

Q. I don't know whose one this was. I can't read the shadow text on it.

A. Martin Brennan.

Q. Was it Martin Brennan?

A. Yes.

Q. And you don't remember any discussion?

A. I don't recall discussion of it, no.

Q. And if there was discussion, it certainly wasn't one that you were involved in. This is fairly significant, isn't it, what Andersen is suggesting here in this?

A. I see what you are saying, yes.

Q. It's a significant matter, and it presents a different a whole different understanding of what happened, or of what Andersen Andersen is saying what happened is what happened in my draft reports, that's the process that happened.

A. I understand, yeah.

Q. And what he is indicating here is that the report he is being asked to present now is not as he described it as happening, but that he has been instructed by the PTGSM to present the results

A. That's what he has written there, yes.

MR. O'DONNELL: Just one thing in respect of that. It appears, just looking at the drafts, that that handwritten paragraph is linked by two circles and a line. And if you look at the draft that Mr. Coughlan opened, and look at the text, it in fact appears that that handwritten addition is not to replace page 6, final paragraph, but is to be inserted after page 6, fifth paragraph; because if there is if you look at the text if you look at the fax, the fax has, at page 6, fifth paragraph, it has what looks like a

dog's bone at the bottom of the fifth paragraph, and there is the same dog's bone, if you'll allow, connecting the handwritten page of text. So rather than suggesting that the paragraph beginning "It is the view of Andersen Management International" be deleted, it is instead suggested that this paragraph, this handwritten paragraph, is added to the paragraph above.

MR. COUGHLAN: I take My Friend's points.

CHAIRMAN: I'll certainly bear that in mind.

MR. COUGHLAN: I take My Friend's point. But it's not included there either, is the only point I am making.

MR. O'DONNELL: But there is, in fact, a sentence, a new sentence that's added that deals with the concerns of Andersens.

MR. COUGHLAN: Well, I am just wondering whether it does, because I am grateful for My Friend drawing that to my attention, and it's something that the Sole Member will bear in mind.

Q. But what becomes even, I suppose, more significant, then, if that had been inserted behind paragraph 5 on page 6, you see that Andersen, on the document which he faxed back to you, wants to delete "It is the view of AMI"; he wants to delete "AMI". Do you see that?

A. I am not sure what's written alongside it.

Q. What is it?

MR. O'DONNELL: There is something else, and our fax

copy doesn't show it, because it appears to be

Q. MR. COUGHLAN: What is it, do you think?

A. I don't know what it is.

Q. And "It is the view that the competition process has been conducted in a non-discriminatory way" he wants to exclude "as reflected in this report"; isn't that right, that was what he wished to be included?

A. He has drawn a line through it. I mean, I can't understand why that might be the case. I mean, I don't really understand, I mean, the motivation behind the sense that

Q. All right.

MR. O'DONNELL: Sorry, I should just point out I am sorry, just it is difficult for this witness to comment on the deletion of "AMI" when there is clearly something written in the margin, and it is excluded from our copy and obviously from the Tribunal's copy also. But it is also clear, looking at the text, that "AMI" is replaced by "Andersen Management International". So it may be that something along those lines, either the words "Andersen Management International", or full name, or something like that, is inserted, but there is something on the margin. It is obscured because of the way in which the document has been photocopied, and it's difficult for this witness to be asked to comment what has been deleted if he doesn't know

what's been suggested.

CHAIRMAN: I'll look at all the nuances, Mr.

O'Donnell, but it's all the more pity that the one

person who could tell us won't come.

A. I could speculate. That text is almost illegible, but

maybe he was suggesting the Project Group, or

something like that, which

Q. MR. COUGHLAN: The only reason I am asking you and I

didn't ask Mr. O'Donnell to get into the witness-box

about this, that was you were the one who received the

text. That's why I am asking you.

A. Yes.

Q. That's the only reason that I am asking you. It seems

like a reasonable reason to ask you, but...

Now, coming then to the heading "6. The Final

Evaluation" that is in the textual amendment document,

and you write to Andersen, or you fax to Andersen,

"Final chapter

"It is recommended that the final chapter be replaced

by the following two chapters," and those become "6.

The Final Evaluation". Do you see that? It's the

second-last page of the

A. Yes, I see it, yeah.

Q. And you enclose, effectively, the text and the

reference to the tables, isn't that correct, to

Andersen?

A. Yes.

Q. Now, you can see there that where there is reference to grades, that's crossed out, and "Marks" is included. And we can see that that is what is in the final report: "marks"?

A. Yes.

Q. That as a result of this particular process, the final report was produced; isn't that right?

A. Yes.

Q. Now, do you remember I asked you, and you referred to the minute of the meeting of the 23rd October of 1995?

A. Yes.

Q. And that was in the context of you having told us that there was you seem to remember, or you don't have a clear recollection, that the meeting on the 23rd adjourned, you didn't believe you had to work you knew you had to work on the 24th, but I mean, work in a pressurised fashion, but that on the 24th, you were informed that something needed to be done for tomorrow, the 25th; isn't that right?

A. I have reread the transcript of that particular evidence, which was at the end of Friday last, and in that exchange, I was trying to remember I was trying to see could I specifically remember anything in relation to the meeting at the 23rd whereby it was agreed that we would work on the following day. I couldn't recall a specific memory of that, and in the context of the manner in which you were putting the

questions to me, I agreed that I had no recollection of there being an intention that at the end of the meeting on the 23rd, that we would do further work on the 24th.

Now, I subsequently brought to your attention the official record. And my recollection I want to make it clear now that I have no recollection that would lead me to say that the record, the official record of the 12th meeting of the Project Group, is incorrect.

Q. You have no recollection which would lead you to believe that the official record of the 12th meeting of the PTGSM group is incorrect?

A. Yes.

Q. Do you have can I take it then that you cannot have a recollection as to whether it is correct, so?

A. I don't have a specific recollection. That's exactly

Q. You don't have a recollection. You don't know whether it's correct or incorrect; is that right?

A. That's

Q. Is that a fair way if you don't have a recollection, isn't that it?

A. I don't have a specific recollection myself, but in general terms, I take it that the reports of the meetings of the Project Group meetings are an accurate record.

Q. Now, as can be seen from that handwritten note of Mr.

Andersen's on the textual amendments, whether it is applicable to paragraph 5 or 6, it seems to nevertheless be recording the view of Andersens that they're saying that the process is as contained in the first two drafts; is that right?

A. Well, I am not sure from that comment alone exactly what he is saying. I know that it was Mr. Andersen's preference that what we had been calling Table 16 would appear in the final section, and I think in this, we were saying it should be in Section 4.

Q. Could we approach it this way: If it wasn't his view that that was what happened in the process, he'd hardly have produced the report, the first report, would he, or the second report stating that that's what happened?

A. If which wasn't his view?

Q. What was contained in the reports.

A. Oh, yes, yeah, yeah.

Q. I mean, that's what happened in the process?

A. Yes.

Q. And it was also clearly evidenced by Andersen that it was his view that how the results were presented in those two documents is what happened in the process; isn't that right?

A. That was his view about how it should be presented, yes.

Q. And you didn't demur from that view at the meeting of the 9th, did you?

A. I don't specifically recall doing so.

Q. And you don't specifically recall demurring from that view at the meeting of the 23rd?

A. I don't specifically recall it, no, but I am clear, you know, that my view was that when this process when we completed this process in Copenhagen and came back to the Project Group with our view of the final ranking, that my view was that the final ranking was determined by Tables 17 and 18.

Q. Right, I'll come back to those in a minute now, but I just want to ask you about it appears, I think from the evidence of Ms. Nic Lochlainn, that well, she is not specific in her recollection, that she may have been involved in the representation of documents which were furnished to the Department by the Department to the Tribunal, known as a briefing note for the Minister. That is to be found at Book 58, Tab 19, in a draft form, but it's in its final form we needn't we'll come back to if we need to, but what I want to do is look at it in its final form, and Book 43, which you already have there, 136 it's also in the final form in 58, but it's in final form in Book 43.

A. Divider number?

Q. Divider Number 136 in Book 43. Now, that's it in its

final form in Book 136. And I will have to go to the other book in a moment, but I just want to deal with one thing: Do you know anything about this particular document?

A. I didn't have a specific recollection of this document, but I have seen papers which show that I saw an earlier version.

Q. That's right. There is and that's the draft I was talking about in the other book; I'll come to it.

That isn't my main concern at all.

You did make certain suggested amendments to an earlier version?

A. Yes.

Q. And the earlier version wasn't in this snappy bullet-point sort of fashion?

A. That's right, yeah.

Q. But

CHAIRMAN: This is the document that I think Ms. Nic Lochlainn described as a Ladybird guide.

MR. COUGHLAN: Yes, yes.

Q. And I think Mr. Brennan erroneously well, according to Mr. Loughrey, he didn't have anything to do with it, Mr. Brennan thought because it was in the bullet-point format, that Mr. Loughrey might have suggested that it be put into that format, because that was a style he recognised being one which Mr. Loughrey liked. But Mr. Loughrey doesn't know about

it, I think, or doesn't have any recollection about

it.

A. I suspect that it was the preferred style of Mr.

Lowry; pretty short, snappy format.

Q. It's going to the Minister?

A. Yes.

Q. Sorry, it appears to be that's the intention. Do you

know if it ever went to the Minister?

A. I don't recall it doing so, and I have been trying to

recall when this was prepared or for what purpose, and

I have been unable to recall specifically what exactly

it was for.

Now, I mean, I do know that other documents were put

to the Minister, so I can't place this one as having a

role in the process, if I can put it that way.

Q. Right. Just in relation and I am only because

Ms. Nic Lochlainn has dealt with this, but I just want

to deal with it very briefly because there are other

matters that I want to deal with in the drafts

prepared; but just in relation to the first criteria

in this briefing document, I am trying to put this as

neutrally as possible, if I can put it this way: that

it is perhaps arguing very strongly for a position

which does not fully accord with the judgmental view

which you had of the first criteria, isn't that right,

where you took the view that they were both

A. I think that's true. I have read this document.

Q. And I am trying to keep it as low-key as possible.

A. I understand.

Q. We know about the technical side of matters?

A. Yeah.

Q. And we know about the other matters referred to. And

in fairness, and the reason I keep it as low-key as possible, is that you know, Ms. Nic Lochlainn, if she brought it into that final form, expressed the view you you know, sort of, if you had a result, you made it very strong for the Minister, so that when the Minister was if, you know, you had the result, you made things very strong for the Minister, or argued it strongly for the Minister, so that when he was dealing with it, if there was any sort of supplementary or unexpected question, that he'd have a snappy, sharp response to things. I think that was how she described it.

A. I understand what you are saying, yeah.

Q. Now, because this particular document only relates to two applicants that's A5 and A3?

A. Yes.

Q. Its purpose, or would you agree, the probability is that its purpose was to brief the Minister to brief the other members of the Cabinet, or Cabinet Subcommittee, if you want to call them that?

A. I mean, I can't say that specifically, that that was its purpose. I have been trying to figure out the

logic of why this might have been prepared. Now, I have seen other documents which set out, you know, next steps in the process, and

Q. Yes, I know that.

A. I wonder if perhaps it was prepared with the intention that it would be used for the purposes of putting a recommendation to the Minister. I have wondered if that was the purpose.

Q. All right. I understand.

A. Now, I don't know. I do know that it wasn't used for that purpose, because I know I recall that the initial recommendation to the Minister took place without any paper being put before him, with the possible exception of the evaluation report, and I can't specifically recall that

Q. I think we do have one piece of paper; don't we have Mr. Loughrey's minute, Mr. Loughrey's short minute?

A. That's correct, but my memory of the sequence of events, that a discussion took place with the Minister where he was briefed on the process and the outcome, and that it was after the recommendation had been put to him that Mr. Loughrey put the piece of paper to him for the purposes of the formal record, if you understand.

Q. All right. Who yes, I take your point.

Do you know who was involved in the oral briefing of the Minister? Were you there?

A. I don't believe I was.

Q. And can we take it that any knowledge you have is something that would have been told to you by Martin Brennan or John Loughrey?

A. Martin Brennan, John Loughrey, Colin McCrea.

Q. Right, okay.

Now, Ms. Nic Lochlainn believes that she commenced work on this particular document prior to the meeting of the 23rd, perhaps the previous Friday.

A. Yes.

Q. The report would have been in then, wouldn't it, Thursday/Friday, whatever, the previous Thursday

A. Yes.

Q. And it is certainly presenting a result on a rationale, isn't it?

A. It is, yes.

Q. Before the PTGSM had its meeting on the 23rd, and anything that transpired on the 23rd and the 24th, this particular document is prepared. You don't know what it was used for, but at least it was being prepared?

A. But I can't say that it was being prepared.

Q. Ms. Nic Lochlainn says it.

A. But if you say Ms. Nic Lochlainn says that, then I am willing to accept that.

Q. I now want to look at the book which contains the draft you were talking about, where you have made

certain suggestions, and that's Book 58, and it's Tab 19.

A. I don't seem to have Book 58 at the moment.

Q. We'll get it for you now. It's Tab 19.

A. Yes, I have that.

Q. And I think that writing there, under "2", the handwriting, that's yours, are these suggested amendments, or suggestions you are making, anyway. I think that's your writing; is that right?

A. It is, yeah. I mean, the bit at the top is Maev Nic Lochlainn's, I believe.

Q. Is that "Aide-memoire bullet points", is that Maev Nic Lochlainn's?

A. Yes. And this is my writing.

Q. Now, again we have dealt in its bullet-point form what's contained at 1, and I don't want to go over that again with you. The only thing I ask you, you don't seem to make any corrections or suggestions in relation to that the first point?

A. That is correct, yeah. But I think it's important to say in this context, and you are suggesting that this document was prepared 23rd/24th

Q. No, no, I think Ms. Nic Lochlainn's evidence was that she started to prepare she prepared or started to prepare this document after the version of the 18th was received, the version of the report of the 18th, and it was before the meeting of the PTGSM on the

23rd, as I recollect her evidence. And I think I am correct on that.

A. I haven't seen her evidence, so...

Q. I think I am, and if not, I stand corrected, but I believe that is so.

A. The point that I wanted to make, actually, here is that what you are suggesting is that

Q. I am asking I am just asking, did you make any changes?

A. I am sorry, I want to try and make a clear statement.

And what I understand as the implication of what you say of Ms. Nic Lochlainn's evidence, it suggests that this document was being prepared on an anticipatory basis. That's what I understand from what you are saying. Now, I can't recall myself

Q. I don't know what basis.

A. Okay.

Q. You see, one page, it's headed "Briefing Note for Minister". Then I see at the top "bullet points", then I see "aide-memoire". So is it being prepared for Government? Is it being prepared that's what I am trying to understand. And you don't recollect specifically?

A. I don't recollect the timing, but the point that I want to make most specifically in relation to what you say, in that I didn't make any change to the first paragraph, is that we obviously had a discussion about

the need to present this in a bullet-point format, and what I am saying to you is that it would not be unusual for me to revisit the preparation of an important document in a number of iterations. I wish everything I produced was a one-hit wonder, but I am afraid that's rarely the case.

Q. And I understand that; I understand that. But in its bullet-point form, the same point is being made, and we have been over it with Ms. Nic Lochlainn, and I have dealt with you already just a few moments ago.

A. Yes.

Q. All right. So let's pass from that.

Now, I don't know if it ever occurred, but the Minister's diary contains an entry for 4.30 on Monday, 23rd October, for a briefing. That's in his official diary.

A. Okay.

Q. I don't know if ever such a briefing took place or not. But if there was going to be I take it that that would have been put in by his private secretary, would it?

A. I expect so. That would be normal, I believe, yes.

Q. For that sort of official business if there is going to be a briefing or something like that?

A. For any official business.

Q. Or any official business, and that would be arranged, perhaps, it would be arranged beforehand, wouldn't it?

A. Yes, yes.

Q. And we know, from what Mr. O'Callaghan told us, you informed him on the 17th, and from the note of Mr.

David Doyle's, I think, in the Department of Finance, file of what he was informed by Mr. McMeel, and he is sending a note up the line, I think up to his

Minister, that the Minister wanted to go to Government on the 24th with this?

A. Okay, yes.

Q. So just coming at it, taking all those matters into account, doesn't it seem probable that this document was being prepared for that briefing of the Minister?

A. That's a possibility. I mean, the scenario you are suggesting whereby there was an intention to go to Government on the 24th with a briefing on the afternoon of the 23rd with the Minister, you know, I can see the logic of that.

Q. It may fit into that time-frame?

A. Yes, and it may have been the case that a briefing note was being prepared for that purpose, yes.

Q. And also in the scenario of going to Government the next day?

A. Yes.

Q. The reference to bullet points, aide-memoire, might make sense in that context as well, isn't that right if the Minister

A. If it was going to Government, there would have to be

a piece of paper of some kind, an aide-memoire.

Q. Now, we were looking at Book 58, Tab 19, and the draft in relation to that. If you go on to the fourth page, at Tab 19, continuing "Briefing note for the Minister, GSM competition advancing the process further"; do you see that document?

A. Yes.

Q. And you can see that it has at the top, it seems to have I take it that Maev Nic Lochlainn's writing, "Aide-memoire Annex 2", it was being prepared on the basis that it was potentially an annex to an aide-memoire and that it would be Annex 2; isn't that right?

A. Yes.

Q. That would seem to be

A. Yeah, yeah.

Q. And then if you go over the page

A. Yes.

Q. you see "Briefing Note for the Minister"; again there is something at the top. "Bullet points, aide-memoire Annex 1". And again that appears to be prepared on the basis that it would be an annex to an aide-memoire going to Government?

A. Yes.

Q. First of all, is that Maev Nic Lochlainn's "Aide-memoire Annex 1 bullet points", is that Maev Nic Lochlainn's writing, do you think?

A. I believe it is.

Q. Do you see to the right there, "We probably need to mention the fee"; do you see that? Can you say whose writing that is?

A. That's my writing.

Q. That's your writing; all right.

Come down then, "licence fee, small paragraph", that's Maeve Nic Lochlainn's writing, I take it?

A. And that's my writing at the bottom.

Q. Can we take it, so, that you would have considered this document as well?

A. Yes.

Q. And those were the suggested amendments you were making to the document?

A. Yes.

Q. Very good.

Now this document sets out the evaluation methodology?

A. Yes.

Q. The licence fee, the GSM Project Group, the information phase; if I stop there, then, it says "The evaluation model".

A. Yes.

Q. And it reads "An evaluation model, expanding on the criteria listed in paragraph 19 of the tender document, was proposed by AMI and agreed by the Project Group in June 1995, prior to the closing date for receipt of applications." Isn't that right?

A. Yes.

Q. "This model agreed a relative weighting for the eight criteria in paragraph 19."

Then you continue, "Evaluation process:

"When six applications were received in the Department on the 4 August 1995, evaluation proceeded in line with the model agreed earlier by the group. The process involved:

initial examination of applications

qualitative evaluation by sub-groups

presentations by applicants, and

evaluation report by AMI

"These steps are described below.

"Initial examination.

"Qualitative evaluation by sub-groups", and that's set out.

"Presentation", that's set out, and then it goes on

"AMI evaluation report.

"Following further analysis of the risks associated with each application, the overall evaluation, incorporating inputs from the subgroups' deliberations was completed and a final ranking of the applications proposed. A draft evaluation report was submitted by AMI and discussed at a Project Group meeting on the 9th".

It goes on "unanimous support..." We have dealt with that in the support, because that's contained in the

report of the 18th, isn't that right, that particular paragraph about the unanimous support.

"And having incorporated comments from the Project Team in relation to the format of the report, AMI submitted a final draft evaluation report to the Department on the 20th October. The Project Group is unanimous in its support of the conclusions of that report."

A. Yes.

Q. Then the imprimatur.

A. Yeah.

Q. Where is there any reference there to the quantitative evaluation and what happened in relation to it?

A. There is no mention of it in that material we have just covered.

Q. And, might I suggest to you that it would be not unreasonable for anyone reading that to form the view that what was involved here in this process was an initial examination of applications, qualitative evaluation by sub-groups, presentations by applicants and evaluation report by AMI, and that's all?

A. Yes.

Q. Now, you read this document, Mr. Towey?

A. Yes.

Q. Can you assist the Tribunal as to why there is no reference here to the process at all?

A. You mean

Q. The complete process.

A. You mean to the quantitative evaluation?

Q. The complete process.

A. Well, I mean, I would have had the view that the quantitative evaluation was not an important part of the process; that it was rejected by the group; that it did not form part of the evaluation; and that that was not a significant matter in terms of this being put to the Minister.

Q. No, no, could I just ask you now and I understand your view about quantitative. I understand entirely.

A. Yes.

Q. This is a draft which appears to have been prepared as an annex to an aide-memoire which was intended to go to Government. This is a very serious document.

Sorry, I beg your pardon

A. It had the potential to become a serious document.

Q. An annex to an aide-memoire is a very serious document because it is a matter going to Government?

A. It is, yes.

Q. You considered this particular document in its draft form; you may have certain notations on it. You told me you have read it. The document is information now, this didn't go to Government, but it was intended to go to Government?

A. Yes.

Q. And going to Government, if it had gone to Government,

the Government would have been informed that there was an evaluation model, and the model was adopted; the model agreed a relative weighting. Isn't that right?

That's what it says for the eight criteria in paragraph 19.

Then it says "Evaluation process.

"When six applications were received in the Department on the 4 August 1995, evaluation proceeded in line with the model agreed earlier by the group."

A. Yes.

Q. Now, the model which had been agreed earlier by the group involved a quantitative evaluation; isn't that right?

A. I understand the point you are making, yes.

Q. And then the process which is being stated in this document proceeded in line with the model is then outlined in four bullet points, and it omits the quantitative evaluation; isn't that right?

A. Yes.

Q. This isn't easy for me either, Mr. Towey, I can assure you.

How, how could that document have been prepared in that form, considering what it was intended for?

A. Considering what it was intended for?

Q. Considering what it was intended for, to go to Government.

A. Well, we have already covered the ground where I have

made it very, very clear that I didn't think that the quantitative model formed any kind of a basis on which to form a decision.

Q. I understand that I understand the point.

A. Yes, and the quantitative all the quantitative indicators were taken into account in the qualitative model. So my view my view is that we took account of all of the proposed indicators in the evaluation model document.

Q. I understand that as well. I take all of those points, and I am giving them due consideration. But this document was being prepared, and it was intended to inform the Government that the process proceeded on the basis of the model agreed, and it omits, it clearly omits

A. I understand what you are saying, yes.

Q. what the process involved and how it proceeded, doesn't it?

A. I understand

Q. There can't be any doubt about it?

A. I understand what you are saying, yes.

Q. Now, after this document, in the normal course of events in the preparation of matters for the Minister, but more particularly for the Cabinet, Ms. Nic Lochlainn prepared the draft, perhaps in discussion with you, perhaps not. You looked at the draft; you made certain suggested alterations or inclusions or

amendments or whatever.

A. Yes.

Q. What would the next step in the process where would it go after you?

A. In the normal course of a process of preparing an aide-memoire for Government, it would pass from me it would pass through the line of superordinates; therefore from me to Martin Brennan, Mr. Fitzgerald, Mr. Loughrey. On an important matter such as this, the Minister's programme manager would also have seen a copy, put it that way. I mean, he wouldn't have seen the copy as a potential contributor, but it would have gone also to the programme manager.

Q. Now, we know the way the matter went to Government was this: that the Minister, in the first instance, went to the Taoiseach; the Tanaiste; the Minister for Social Welfare as he was at the time, Minister de Rossa; and the Minister for Finance was probably also was also present. And he informed them of a decision, and he got their permission to announce the result.

Perhaps not unreasonable in a coalition Government, you have the leaders of the three parties there?

A. Yes.

Q. As I also understand it, if the Taoiseach is behind something, it tends to carry a considerable weight at

Cabinet.

A. Yes.

Q. And then what happened the next day was that a very short interestingly enough, I think, in the context of all we have seen in this process a very short memorandum to Government, which was the more official way of bringing matters sorry, I am not saying an aide-memoire is not an official way, but a more formal way of bringing the matter to Government went to Government noting the decision; isn't that right?

That's the way it went to Government?

A. Yes.

Q. If these particular documents were being prepared at a time when the Minister intended or had indicated an intention to go to Government on the 24th, there must have been some discussion about the way the matter eventually went to Government and as to why these particular documents should not be used, was there?

A. I don't recall; I don't recall a particular discussion. But I think my view would have been that the decision was reached more quickly, more quickly than I would have anticipated. So my working assumption, I believe, would have been that the decision would be made at a Government meeting, and in fact, what happened, it all happened very, very quickly.

Q. Was that your impression, the whole thing happened

very quickly?

A. Yes.

Q. Much quicker than you anticipated, anyway?

A. Yes.

Q. I know you have expressed the view that you believe that there was a copy of the final version in the Department.

A. Yes.

Q. And I think you also accept that nobody ever seemed to be able to put their hands on such a copy?

A. Yes, I accept that.

Q. Again, bearing in mind the point you have just made that things happened very fast, or more quickly than you anticipated, it would be, I suggest, normal that or sorry, the usual practice that a Minister, in going to Government for a decision based on a report of some group or team, whether he had read the whole thing himself or not, would be always safeguarded by his civil servants by at least having the report put on his desk or stuck into his hands to make sure, if he was asked the question if he had seen the report at the Cabinet, he'd be in that position.

That's the way things happen?

A. That's true, yeah.

Q. Now, Mr. Loughrey said that it's his understanding that there was no report when the recommendation was made to the Minister, and the Minister made the

announcement. And I am just trying to understand, in relation to this process, bearing in mind what the usual practice would be, what was or did anyone state to you why this needed to be done in such an anticipated quick fashion, from your point of view?

A. Well, yeah, it was clear that the Minister was anxious to bring a finality to this process as quickly as possible after the report was done. And my understanding my understanding of that was that it was better to do that as quickly as possible in order to avoid the development of intensive lobbying, which would place the Government in a more difficult position in making a decision. That was my understanding of it.

Now, I mean, I know Mr. Brennan has testified that that was the advice of Mr. Andersen. I know that Mr. McCrea has given evidence that the Minister wanted to get a good news story out and that Mr. Loughrey, I think, has expressed the view that it was his political instinct that it was the thing to do. I accepted at the time that I could see that it was a good idea. I believe that it was the right advice in public administration terms, but I can't personally take any credit for the advice.

Q. That's if you had the report?

A. Yes.

Q. That's based on the premise that you had the report,

because the Minister had a safeguard there if he had the report; isn't that right?

A. Yes.

Q. Nobody expects the Minister to sit down and read through every portion of every report and every annex; that's what civil servants are there for, to advise and to perhaps advise him in what it contains and bring certain matters to his attention, and if he wants to, he can read the whole thing, if he has all the time in the world to read every document?

A. Yes.

Q. But his safeguard is that the report is there and he has it. It's in the context of the evidence of Mr. Loughrey, who was the Secretary, that he didn't have the report at the time?

A. Yes, I understand.

Q. You

A. My belief is that we had the report. We have been through this morning the exchange of faxes with Mr. Andersen, and we had been working quite late the night before, and it's my recollection that I came you know, after working late, I came to the office early the following morning in order to get our view of the the Project Group's view of the amendments into a computer and to Andersen and so on. So my mission in life on that day was to get a final report.

Q. I understand what you were doing, and I understand

your view in relation to proper public administration in the context of having a report, that it might be appropriate to give the advice, "Move fast now, Minister." I can understand that.

A. Yes.

Q. I am trying to understand it in the context that the Secretary has given sworn evidence that he didn't have a report

A. Okay.

Q. when he advised the Minister, and the Minister didn't have a report. I am just trying to understand the, as you considered it, unanticipated swiftness of or speed of matters. You can't remember anything else?

A. Well, again, my view is that we had the final report.

I have a mental image of inscribing "Final" in the top right-hand corner of it, but obviously that copy of the report hasn't been traceable. But at minimum, I mean, the Secretary would have been informed that the report had been finalised.

Q. The final report, which I have already told you Mr. McMahon has given evidence that he never saw, and that he subscribed he would have subscribed to it if he had seen the final report, he would have subscribed to the report, but he didn't see the final report.

Now, was there any meeting of the PTGSM when the final report came in?

A. After the final report came in, no.

Q. So there was no consideration of it by anybody?

A. My understanding, my understanding when we concluded our work on the night of the 24th was that we had the basis, subject to the agreement of Andersens, to conclude a final report. In other words, it's not my memory that there was a further step in the process beyond that.

Q. Well, the document you sent to Andersen was suggested textual amendments?

A. Yes.

Q. You didn't know whether you would necessarily get agreement to the amendments?

A. I understand what you mean, but I think our view, based on the discussions that we had and we had had discussions, obviously, on the 9th and the 23rd October, you know, I think it was our view that we weren't proposing anything in those textual amendments that would be likely to give rise to a concern.

So in other words, my expectation was that we would reach agreement with Andersen on that basis. I didn't anticipate there being any issue that would give rise to a grave concern on the part of Andersen. If that had happened, then

Q. But we still

A. the sequence of events would have been different.

Q. We still don't know what that handwritten note is

about of Andersens on the textual amendments, about the presentation of the result. Andersen always said that the process was as described by him and that the result was as described by him. That is on Table 16, the old Table 16, isn't that right, and that the old Table 17 and the old Table 18 were conformance, were a conformance test. That's

A. Well, I mean

Q. What Andersen was going to do here was something completely different; isn't that right?

A. Well, I believe he had a view that the Table 16 should be presented at the end of the report as distinct from within Section 4.

Q. Right.

A. But I don't believe that he had a view that there was a reservation of substance.

Q. Well, if he had that view, he acquiesced to your suggestion that it be contained in Section 4 of the final report; isn't that right?

A. He acquiesced, yes.

Q. Notwithstanding his view.

You see, I am trying to get a picture of Mr. Andersen now as the consultant, and how strong he was when he expressed a view, or whether he invariably or almost invariably acquiesced in relation to the view which was being presented by your side of the house.

A. Well, I mean, I would need to reflect on that. But

you know, Mr. Andersen was a man of some experience and expertise in these matters, and having been hired as such, I imagine that he put his arguments strongly.

I mean, I would need to reflect on the point you are putting...

Q. Because we have a situation which arose in Copenhagen where he opposed what you and Martin Brennan were proposing. You and Martin Brennan got your way on that.

A. But we elaborated good reasons. I mean, this was a discussion. I don't think there is any question of Mr. Andersen simply rolling over because we made a suggestion to him.

Q. I am not suggesting he was rolling over, but he was, as you say, the expert with the experience of these matters. You didn't accept his position, or his view, and your view was the one which carried the day in Copenhagen.

A. Well, we reached an agreement, was my understanding.

Q. Now, we have a situation where and it's only for the first time I now understand that Mr. Andersen did not want to include Table 16 in Chapter 4 of the final report

A. Mm-hmm.

Q. He wanted it at the end of the report, because he was always of the view that that's what represented the result; isn't that right?

A. He saw that as being an important part of the result.

Q. He saw that as the result. And can I take it that Mr.

Andersen only ever viewed Table 17 and Table 18 as

being conformance tests for that particular table?

A. The arguments for Table 17 and 18 were that we were

bound to produce a result which respected the

evaluation criteria as laid down by Government. We

could have done that in the context of the format of

Table 16, but had we done so, my view is that it would

be more opaque.

In other words, in order to ensure that we were

portraying demonstrating that we were reaching this

result in full conformity with paragraph 19, it was

essential that we have Tables 17 and 18. But we could

have done it in the context of Table 16, but in a more

opaque way, because at the end of the day, we were

talking about three basic elements here. We were

talking about the marking of the three dimensions; we

were talking about the descending order of priority;

and the weighting model.

Q. I understand that. What I asked you was, it was

always Mr. Andersen's view from what I now

understand, that he didn't want Table 16 put into

Chapter 4, it was always Mr. Andersen's view that that

is what represented the result and that Table 17 and

18 were conformance tests, were conformance tests of

that?

A. No. I think he saw Table 16 as being the output of the qualitative model.

Q. It's clearly that.

A. But in order to arrive at a decision transparently related to paragraph 19, he agreed with the approach that we suggested.

Q. I just want to ask you I'll ask you the question again: Mr. Andersen, clearly, in the first draft and the second draft, says the result is on Table 16; isn't that right?

A. Yes.

Q. And that Tables 17 and 18 are conformance tests, in effect?

A. That's the way he describes them.

Q. That's what he says?

A. That's the way he describes them.

Q. You have now told me, and it is helpful, and the Tribunal now knows for the first time that in relation to this final version, that Mr. Andersen was opposed to putting Table 16 into Chapter 4; isn't that right?

A. I think that's the case, yes.

Q. So therefore, there must have been a discussion with Mr. Andersen, either on the night of the 24th or the morning of the 25th about that, if he agreed to it and you remember him being opposed to it?

A. I mean, I don't recall a discussion, but I mean, what we were doing here was reflecting what we had agreed

in Copenhagen, as I understood it.

Q. Mr. Towey, is it your view that there is no difference between the final report and the two previous drafts, in terms of the expression of the result which was arrived at by reason of the evaluation process, and that that was subject to conformance tests?

A. I see the difference that you are pointing to, yes.

Q. Now, we now know for the first time that Andersen didn't want it to go into Chapter 4. This is the first time the Tribunal has ever heard about this.

A. Okay.

Q. He was the expert.

A. Yes.

Q. Being paid, as we know, a good fee, and there had been disputes about it.

A. Yes.

Q. And he had always expressed the result of the comparative evaluation for the quantitative model on the qualitative model as being Table 16; isn't that right?

A. He wanted

Q. He had always done that?

A. Yes, yes, I understand what you are saying.

Q. I want to know now what discussion took place, which is not recorded anywhere that I have seen, and which we have heard about for the first time, whereby Andersen informed you or Martin Brennan, I don't know,

but clearly not the whole of the PTGSM

A. Yes.

Q. that he did not want this table going into Chapter 4? Now...

A. I don't have a specific I have a general recollection that that was his view. I don't have

Q. You and Martin Brennan were on a conference call to him?

A. I suspect

Q. At this time?

A. Yes, I suspect that it would have been discussed in that context, yes.

Q. Well, if that be the case, it must have been around one o'clock on the 25th October of 1995?

A. Yeah, I think I know how you are deducing that.

Q. Looking at the times on the faxes.

A. Yes.

Q. How long were you and Martin Brennan on a telephone conference with him?

A. I have no idea. At this remove, I couldn't say.

Q. Was any note kept of it?

A. I don't believe so.

Q. Where did Andersen want to put that table?

A. I understood that they wanted to retain it where it had been. This is my general recollection.

Q. Right. As representing the result of the comparative evaluation on the qualitative; isn't that right?

A. Yes.

Q. Because it was Andersens' view, obviously, that historically that's what had happened?

A. Yes, I think that's the view, yes.

MR. COUGHLAN: Perhaps I'll

CHAIRMAN: Yes, two o'clock.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. FINTAN TOWEY BY

MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: I am sorry, Mr. Towey, I just wanted in the context of the discussion we were having before lunch about what transpired in the telephone conversations between yourself, Mr. Brennan, and Mr. Andersen.

A. Yes.

Q. And I think you must be correct in your recollection; there must have been some telephone contact, because Mr. Andersen, when he faxed back the suggested textual I should say before I commence, the Tribunal intends finishing at 3:30 today because of some further work that needs to be done by the Tribunal.

A. Okay.

CHAIRMAN: There are a couple of other fronts. Mr. Towey, I am conscious that you have to commute with your family and job, so I am sure you won't object.

A. Thank you.

Q. MR. COUGHLAN: And Mr. Andersen, when he faxed back your text, suggested that there would be a telephone communication, and you go through them line by line; isn't that right? I think that is in the fax.

A. Okay.

Q. Now, but what I and you have, you say, a recollection of Mr. Andersen in the first instance wishing that this table, Table 16, would be at the end of the report, where it would always be?

A. Yes.

Q. And there must, then, have been some discussion between Martin Brennan, yourself, and Mr. Andersen, because it doesn't appear at the end of the report, does it; it appears in Chapter 4 of the final report?

A. Yeah, I think that was the view of the Project Team.

Q. Yes, I understand that.

I see that from the notes I was asking you specifically about Mr. Andersen as the consultant and the expert expressing his view to you. There must have been a discussion between yourself and Martin Brennan and himself about it?

A. I don't specifically recall at that stage. There may have been, but I mean, I now know that it was clearly discussed at the Project Group meeting, which Mr. Andersen was in attendance at.

Q. Well, you see, the question I want to look at those particular notes because Mr. Fitzsimons very helpfully

drew something to my attention before lunch.

And I think in particular we have of assistance here

Mr. McMahon's notes in the first instance where there

was, he of course if there was, there must have

been some discussion about it because it should be on,

I think, Table 17 as opposed to Table 16. He may have

been arguing such-and-such a position before Mr.

Loughrey, according to his note.

A. Sorry, can I

Q. Yes.

A. Can I see that note? Sorry, I am not

Q. You weren't familiar with that particular note?

A. No. Over lunch I saw a note which I believe is

Mr. McMahon's.

Q. Yes.

MR. O'DONNELL: It may not be in his book.

(Document handed to witness.)

A. Thank you.

Q. MR. COUGHLAN: This is the Tab 135A. This is the note

that Mr. Fitzsimons brought to our attention before

lunch, isn't that right, the comments of the AMI draft

evaluation report?

A. Yes.

Q. And then there is appendix, there are other pages at

the back of it which contain the textual amendments;

isn't that right?

A. I have a note that refers to four appendices, but I

have an Appendix III only. It seems the document is incomplete.

Q. Yes?

A. But okay, maybe that is all you want to focus on.

Q. All I want to focus on, first of all, is I think you wanted to your note, this was, or the first note, isn't that right, "Comments on AMI draft evaluation report"?

A. Yeah.

Q. Now, going down through it, I think the third point is the one, "The addition of Table 16 to the end of Chapter 4 (Text suggested at Appendix III)"?

A. Yes.

Q. Now, was that note made by you?

A. I can't say for certain, but I suspect it might have been. I mean, judging by the kind of note it was, it suggests that it emerged from the Secretariat, so myself or the Secretariat for the GSM process, myself or Ms. Nic Lochlainn.

Q. Okay. Now, can I take it, then, that what then transpired on the this is a recorded I don't know what it is for "F. Towey" "By F. Towey, 24/10/95, following discussion of PTGSM 23/10/95."

Whose writing is that?

A. I don't know the writing.

Q. All right. I think it is Ed O'Callaghan's; is that right?

A. It may well be, now that you actually say it.

Q. Now, there was a meeting on the 24th; isn't that right?

A. Yes.

Q. And the suggested amendments were considered by the people present at that meeting on the 24th?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. The textual amendments; isn't that right?

A. Yes.

Q. And as a result of the output of that particular meeting, you then text Andersen with the textual amendments?

A. Yes.

Q. And they represented the output of the meeting of the 24th?

A. That's right, yes.

Q. Following on the meeting of the 23rd?

A. That's right, yes.

Q. And those suggested textual amendments, as far as you were concerned, represented the views of the PTGSM?

A. Yes, that seems to be the case.

Q. Now, nowhere before that is it recorded we know Mr. Andersen was at the meeting of the 23rd; nobody seems to know when he left. Mr. McMahon can't remember if he was still there when he arrived back,

having gone to see

Mr. Loughrey. He knows he was there at some stage, but nobody seems to be able to put a time on when he left.

A. I have no reason to believe he wasn't there for the entire meeting.

Q. Yes. It is nowhere recorded in the any, Mr. McMahon's notes or in well, the minute is a very short minute, but it is nowhere recorded there that Mr. Andersen is expressing I use a neutral term for the moment a preference that it shouldn't appear in Chapter 4 or in a position different to where it was in the other reports; do you understand?

A. That there is no record of Mr. Andersen expressing that view, yes.

Q. But you did have a telephone conference with him on the 25th after the textual amendments were sent; isn't that right?

A. I think so, yes.

Q. And it is in the textual amendments that it is set out clearly that Table 16 should be included in Chapter 4, and then that two further chapters, I think it is Chapters 6 and 7, would be included, and we have been through those.

A. Yes.

Q. And those represented the output of the PTGSM or such members as attended on the 24th which went through the

matters line by line; isn't that right?

A. Yes, and that followed what seems to have been agreed on the 23rd.

Q. But Mr. Andersen, the consultant, didn't want to include it; you have informed us of that position.

A. Yes.

Q. He wanted it to be included where it had always been in the report?

A. Yes.

Q. And that that represented the result of the output of the comparative evaluation; isn't that right?

A. I believe that was his that was his preference, yes.

Q. And the only point I was making before lunch is, that's the first time that the Tribunal has heard that.

A. Okay.

Q. So therefore, there must have been a discussion between you and Martin Brennan and Michael Andersen, and I am just trying to understand how you came to persuade Michael Andersen that it should be included in Chapter 4.

A. Well, I believe there was a discussion at the Project Group about how this decision should be made, and this suggests that there was clearly a discussion at the Project Group about the roles of Tables 17 and 18, and the primacy of those tables seem to have been

explained. So, obviously this suggests, also, that we had a very detailed discussion, as I suggested I think, yesterday, that I would expect to have been the case, although I couldn't recall the discussion; but I would have expected that we would have a detailed discussion about the process we had followed in Copenhagen. And clearly the Project Group decided that Tables 17 and 18 were the appropriate basis on which to make a decision.

Q. No, the appropriate basis for recording the result; isn't that right?

A. I don't think that is true. I mean, this report was for the purposes of putting recommending to the Minister and Government a decision in accordance with the evaluation criteria, and Tables 17 and 18 are the ones that clearly do that.

Q. Mm-hmm.

Now, just looking at this document now, this is 135, Tab 135A of Book 43. You can see that the second bullet point is that, "There would be a more detailed explanation of the mechanism by which the award of marks to the dimensions was determined (A revised text is suggested - see Appendix II)?

A. Yes.

Q. Now, I don't believe we have seen, and we don't see it in the report, we don't see a detailed explanation of the mechanism by which the award of marks to each

dimension was determined.

A. Do you have the appendix to text?

Q. I am asking, is it in the report, first of all?

A. Well, I don't know what was in Appendix II.

Q. Could we look at the report. I don't have Appendix II at the moment.

Yes, it is just to see if we can understand for the moment and we will see if we can find other documents.

You see there the third bullet point, "The additional of Table 16 to the end of Chapter 4 (Text suggested Appendix 3)"?

A. Yes.

Q. Then, "Various textual amendments generally of a minor nature (See Appendix IV)." Now, the document we have here that's described as Appendix III, it in fact appears to be Appendix IV, because it seems to be the various textual amendments, generally of a minor nature, and we don't seem to have an appendix, the addition of Table 16 to the end of Chapter 4. Do you know does this relate the top document, that is with the four bullet points, does that or could that relate to a different set of documents? In other words, were there a number of iterations?

A. I mean I can't recall that.

Q. You can't recall. All right. Well, we will check anyway to see if there is another set.

A. Okay.

Q. You can't you can't remember at the moment?

A. I can't, no.

Q. We will have a look over the weekend and see if we can turn up anything about those.

A. Okay.

Q. And we can return to the matter, so, again.

Now, of course and I accept that it was something that you had no control over; we know there was no meeting of the PTGSM after the 25th?

A. Yes.

Q. And of course there was probably no reason for it, seeing as the Minister had announced the results that afternoon?

A. Well, I think I indicated earlier that it was my understanding that the Project Group had reached a final agreement on the 24th subject to the agreement of Michael Andersen, so my recollection is that there wasn't any intention to have a further Project Group meeting.

Q. Right. So anyone who thought that they had to consider the final report were in your view, at least erroneous in their view?

A. My view, my view was that it was clear we had agreed the basis for the final report, and I think I have said earlier there was no further step in the process other than to agree the changes with Andersen.

Q. And the textual amendments as sent by you to Andersen?

A. Yes.

Q. Of the output of the agreement of members of the Project Group, as you understood it?

A. Yes, yes. Line by line, as my recollection.

Q. Line by line?

A. Yes.

Q. And if there was to be any alteration or change of that, of course it would have necessitated a meeting of the Project Group, wouldn't it?

A. If there was any substantial issue, yes.

Q. Right. Now, and I'll come back to it, because I want to just check and get someone to check through the papers again to see if there is anything else

A. I understand, yes.

Q. about those, and I will come back to the whole question again, I hope briefly, after the weekend.

A. Okay.

Q. If I might just proceed for a moment and just deal with a few other matters for the rest of the afternoon.

And in dealing with the memorandum which went to Government, did you have any participation in the preparation of that? It is fairly short; it doesn't matter one way or the other...

A. I think I did.

Q. Right.

A. I think I prepared some material on our part, because

the other two parts were done by the Regulatory

Division.

Q. There are two parts. There are only about four paragraphs in it, two of it relate to the GSM and two of it relate to the regulatory side of matters, insofar as they relate to fixed lines, the autorouters?

A. Leased lines and enforcement I think are the two other issues.

Q. Now, I think the I just want to find it now if I can. The Minister made a number of speeches in the House?

A. Yes.

Q. About the PTGSM; isn't that right?

A. Yes.

Q. And did you participate in the one on the 30th of April is something I will come to in due course, because we have a note which shows that the Secretary and the Minister were having an input into something. But first of all I think there was one in November of 1995; isn't that right?

A. Yes.

Q. Would you have participated in the drafting of that particular...

A. I believe I did, yes. This was a response to a series of parliamentary questions.

Q. Yes?

A. Yes.

Q. And if I can just come to it for a moment. I am sorry; I will have to go to a different book for a moment.

Yes, sorry, I beg your pardon; I have it here now. It is in the same book, Book 43, and it is Tab 156.

Now, we know how the questions would be put down; they would arrive in the Department, and they may be grouped together and replies drafted for the Minister, and then they would be then there would be a discussion, and you would try and anticipate supplementaries and prepare replies for the Minister to use in those circumstances; isn't that right?

A. Yes.

Q. Now, the particular and it is really the you know, the you can see that the questions on this occasion, I think, first of all related to the question of ownership; isn't that right? Mr. Molloy took over, "Question No. 85. Mr. Molloy asked the Minister for Transport, Energy and Communications if Article 3 of his Department GSM competition licence documents were compiled with in the awarding of the Licence"; and the identity of the ultimate beneficial ownership.

A. Yes.

Q. And I think on the previous page, No. 42, Mr. O'Dea asked the Minister for Transport, Energy and

Communications a question whether the Minister had met principals of the applicants and matters of that nature.

Now, I think whilst the Minister indicated that he was, as you can see, grouping together a number of questions and delivering a reply there, and a response had been drafted, if you go to the drafts under the heading, "Meetings With Consortia"?

A. You are moving to a different divider, are you?

Q. No, it is just behind, the drafts are behind.

A. I see, I see it.

Q. They are in big just "Meetings With Consortia."

A. Yes, I see it.

Q. You can see that. And that reply, you had no knowledge, of course, that the Minister had met with Mr. Boyle,

Mr. O'Brien or Mr. AJF O'Reilly?

A. I think that we consulted the Minister's Office in relation to what meetings he may have had.

Q. I see. Before you prepared the draft. Do you think you did?

A. Well, I don't think we prepared the draft without any knowledge, if you understand.

Q. And I can understand that as well, in case you prepared a draft and you were completely wrong?

A. Yeah.

Q. So you believe that you would have consulted the

Minister's Office?

A. I think so, yes.

Q. Before you prepared that?

A. Yes.

Q. And you would have inquired "Did you have or did the Minister have any meetings, and if so when, and the circumstances", or words to that effect?

A. Yes.

Q. Is that the way?

A. Yes.

Q. So this particular draft, so it would have been done, you believe, as a result of consultation with the Minister's Office?

A. Yeah. I mean, for example, I see in the draft, "I had brief meetings with representatives of several consortia, but these were strictly in the nature of courtesy calls."

Q. Yes?

A. I mean, that's not something that we would have you know, that we would be able to draft without consulting.

Q. Yes, I understand that.

Now, so that draft was prepared as a result of that information. Now, in fact it was never used by the Minister, in that he didn't whilst the question was grouped together, he didn't use it?

A. He terminated his reply before reaching the end, yes.

Q. Were you conscious of that at the time, or would you have seen the blacks?

A. Yes.

Q. You were conscious that he had not answered this particular question?

A. Not that he had not answered this, but I mean, I watched him as he delivered his reply on the monitor, not in the Dail but in the monitors in the Department; so yes, it was clear to me that he had decided that he would sit down without reaching the end of it.

Q. Right. Okay. Now, in his reply and I will deal with it first of all in the draft, because that is what was prepared by the civil servants; isn't that right?

A. Okay, yes.

Q. The Minister replies: "I am pleased that deputies have put down questions on the GSM competition because it gives me an opportunity to detail what I believe is a landmark competition in terms of the process, its objectivity, its fairness, and the speed at which it was carried out.

When I announced the competition for the second GSM License last March, I was determined to put in place a selection process that, like the process for Telecom's strategic partner, would be fair, impartial and objective. This was done. Clear selection criteria were set, published to the interested parties and

rigidly adhered to. International consultants with specialist experience were engaged to advise. An Evaluation Team lead by my Department was set up and included the consultant and officials from my Department and the Department of Finance.

"The terms of the competition were specifically approved by the EU Commission. The selection criteria included demonstrated financial and technical capability, the credibility of the proposers' business plans and their approach to market development, their pricing policy, which had to be competitive, and the timetable for achieving a roll-out."

So that, those bullet points again here reflect, perhaps, your own view, the three headline ones are there, aren't they? Featuring the financial and technical and the credibility of the business plan and the pricing. So we have the first criteria, the technical, the second one, and the pricing and the tariffs?

A. Yes.

Q. "The contenders were each required to supply an immense amount of detailed information in regard to financial matters, technical matters and business development matters. All this material was examined exhaustively by the Evaluation Team, which worked intensively over a period of more than two months after the closing date. The consultant, and

subsequently the full Project Team, came unanimously to a single result. I am very pleased with the way the process worked, and I am completely satisfied with its integrity."

And over the page: "No political or other extraneous considerations whatever entered into the selection, which was made totally on the basis of the objective criteria laid down in advance and made known to all. This exhaustive and patently fair process can now serve as a model for future decisions of a similar kind in other areas."

Do you know who drafted that particular paragraph?

A. No, I don't. I don't.

Q. "It is an example of the standard of decision-making that I wish to see to become the norm across the whole spectrum of Irish public life.

"If the import of Deputy Kenneally's question is that I should have awarded the licence by reference to factors other than the selection criteria which were announced in advance, and known to the applicants, then I reject that. It was not open to me to follow such a course and I would have exposed myself and the Government to legal redress if I had done so. Esat Digifone won because the Project Team determined, after meticulous comparative evaluations, that they had submitted the best application. The decision to grant the licence and to whom is statutorily that of

the Minister with the consent of the Minister for Finance under Section 1(11) of the Post and Telecommunications Services Act, 1993.

"Of the importance of this particular decision, I and the Minister for Finance discussed the result of a competition with the leaders of the parties in Government on the 25th of October. The matter was put before the full Cabinet for noting on the following morning. I believe that in a case as sensitive as this, there is a great advantage in announcing the result as soon as possible, and thus put an end to speculation and media hype which grows around such matters, as was the case on this occasion. The formal decision made makes it clear that the licence will be awarded to Esat Digifone, subject to satisfactory conclusion of discussions leading to a licence which incorporates as binding commitments the relevant contents of the application which led to its selection.

"The Government agreed the detailed selection criteria and their order of priority in advance of the opening of the competition and agreed to the appointment of consultants to carry out the evaluation.

"It was clear to me and to the Minister for Finance, who was representing the Project Team throughout the competition, that the thoroughness of the approach taken left no room for doubt as to the clear-cut

result contained in the consultants' report.

"Bearing in mind the foregoing, the Government had no difficulty in agreeing to my recommendation in relation to the result.

"There was no undue haste. In fact, a flowchart or GANNT diagram prepared by the consultants on the 14th of July in the context of the relaunch of the competition following consultation with the European Commission shows clearly that the final report was to be submitted in the week beginning the 22nd of October. The consultants are to be congratulated for achieving this target. My commitment was to announce the result not later than the end of November. If I had not allowed some interval in case of slippage, I would have been open to criticism for not meeting my deadline and the media hype would certainly have been worse."

Then "Confidentiality" under that.

"At an early stage of the competition, four of the six applicants requested that all were given assurances that the information in their bids would be kept confidential on a permanent basis. It would be impossible to have detailed disclosure of the comparative analysis without breaching this confidentiality. This dilemma is one of the reasons why reputable independent consultants are engaged in competitions of this type. The competition (sic) acts

as guarantors of objectivity."

A. The consultants.

Q. I beg your pardon, the consultants. "The consultants

act as guarantors of objectivity."

"The question of detailed feedback to applicants as to

the reason why one applicant was successful and the

others were not therefore presents me with a

difficulty. Furthermore, disclosure by me at this

time of significant elements of the winning

application, which would arise in any comparative

feedback on public discussion of the outcome, could be

of considerable competitive advantage to Eircell. I

would like to be as helpful as possible to

understandably disappointed applicants, but the

constraints on me are severe. I want to state again

the involvement of reputable consultants was intended

to be a guarantee of fair play from the outset, and

the clear-cut result from them was the one which I

announced."

I am not sure there whether that is to be intended

that the clear-cut result was from the consultants. I

am just unsure; perhaps it is just a little bit of

A. Yes. I mean, I can't shed any particular light on it.

Q. Did you draft this particular portion, do you believe?

A. I can't say with any certainty. I may have done.

Q. Now, "I am at a loss to understand what is meant by

Deputy Pat (the Cope) Gallagher when he refers to "The

seriousness of the situation' in reference to non-EU membership of Telenor. Five of the six applications had significant participants which were not of EU origin but the origin of any of the participants has no place in the selection criteria, it was a competition open to all."

Then he sets out the role of the consultants.

"I have been asked to elaborate specifically on the role played by consultants. Andersen Management International, a highly experienced company who have a particular expertise and experience in the evaluation of GSM tenders, were retained by me following a competitive selection procedure which fully respected EU procurement rules. They, in close liaison with the Project Team, led by my Department and which included representatives of the Department of Finance, designed and carried out a full comparative evaluation of all of the applications. The consultants' report on the outcome of the evaluation makes it clear that the approach to the evaluation, including the relative weighting of the selection criteria, was settled in detail and documented before the closing date. It is clear that the consultants played a full role in the evaluation process, and their involvement was necessary to ensure that the process would be accepted as fair."

Do you know who drafted that?

A. Well, in all of this, I mean, I could have prepared a draft.

Q. Which went up the line?

A. To any part of it, but then it would have been subject to modification as it went up the line. Now, it may well have also been that given the number of questions involved, that Mr. that we split them, that Mr.

Brennan, for example, did some, I did some. I think, if recollection serves me correctly, there was a view initially that we would take all the questions together, and there was a view that we would take all of the questions independently, and then there was a final view that we would take them all together again.

Q. Right.

It has certainly been highlighted here that it was the presence of Andersens, the consultants, that they played a full role in the evaluation process, and that it was their involvement that was necessary to ensure that the process would be accepted as fair; isn't that right?

A. Yes. I think it was always clear that part of the reason for having consultants was that from the perspective of interested parties, there would be a view that this would be an objective process.

Q. Yes. Now, I don't think we need to deal with that portion dealing with the licence fee. I think there is a clear understanding about that, and I think that

that is put in here.

But I just want to ask you about and read the text:

"With regard to the licence fee, I should point out, first of all, that when the competition was first launched, it included an auction element as the fourth selection criterion in descending order of priority ranking below the tariff deal for consumers and other important criteria. It is public knowledge that the EU Commission raised legal argument against this aspect of the matter, and after taking the advice of the Attorney General's office, my Department entered discussion with the Commission which led to a modification of the rules of the competition. A cap of €15 million was put on the licence fee in the context that Eircell would pay 10 million also. This led to the approval in advance of the selection process by the Commission. It is speculative at this stage whether the Commission would have accepted a higher figure than €15 million, but it is clear that there would have been a commensurate increase in the demand from Eircell. There should be no doubt that in the long run any fee which will be paid by the consumer in higher prices. I am satisfied that we have achieved an appropriate balance over this issue."

Then on the financial, technical and ownership aspects: "None of the six applications submitted were rejected because of absence of technical and financial

ability to deliver the service. Examination of the aspects was an integral part of the evaluation.

Paragraph 3 of the bid document which related to full disclosure of ownership was adequately dealt with in the evaluation of applications. In fact, the majority of the applications contained indications of probable changes in the ownership of minority interests by way of floatation, institutional investment, etc., after licence award, and the level of which proposed changes was considered acceptable. The intentions of the winning applicant in this regard were fully disclosed."

Now, do you know who drafted that?

A. I can't say specifically, but I may have had a hand in it. I can't specifically say at this stage.

Q. Right. Now, I am not going to go into any great discussion with you about the position which pertained after there had been the announcement of a winner of the competition and as to how confidentiality might have applied thereafter. We have been through that with Mr. Brennan

A. Okay.

Q. in some detail. But can I take it that when this was drafted, the civil servants who were, or you as a civil servant involved in the drafting of this, were aware of what had been contained in the bid document and what had been stated at the presentations?

A. Yes.

Q. And can I take it that it was whilst you were it may have been drafted on the basis of confidentiality, for whatever reason, that it was not your intention to avoid disclosing what was in the bid document or what was stated at the presentation?

A. Yes.

Q. You had you personally saw no difficulty in doing that; would that be fair to say?

A. Sorry, saw no difficulty in...

Q. In stating what had been represented in the bid document and at the presentation.

A. Well, I am not sure what specifically you mean. I mean....

Q. As regards who who was represented to the Department as being the people behind the backers, in effect, who would get the licence if they won the competition?

A. Yeah, I think I understand. I mean, in the case of Digifone, which had won at this stage, I mean, there was no difficulty in saying that it was a 50:50 joint venture, and there was an intention to float or to place 20%.

Q. Is that your understanding of what was stated in the bid and what was stated at the presentation?

A. My

Q. That there was an intention to float 20%?

A. Sorry; I didn't mean "float".

Q. Okay. Fair enough.

Now, was there any discussion that you can remember about the drafting of this particular response?

A. I don't recall a discussion specifically on this.

Q. Would it have gone through, as you say, a number of iterations, the draft?

A. Well, the reply as a whole would have been examined through the different levels. It is impossible to say at this remove what happened with any particular part of it.

Q. Yes. But can I take it that whilst you have no recollection, there must have been discussion to enable this to be this response to be drafted?

A. Well, I am not clear on why you say there must have been discussion.

Q. Well, this was in response to parliamentary questions; isn't that right?

A. Yes.

Q. It is very important to keep the Minister right?

A. Yes.

Q. The Minister, by this time, would have been aware, and in fact we know that from an early stage the Minister was aware of who were the backers of the various projects or applicants, applications? Well, we know because you drafted a statement where the Minister it is way back in August of 19

A. This is the press release?

Q. The press release, yes.

A. Yes.

Q. He had, I think, indicated the backers or he had stated that the backers behind this particular consortium, that is the A5, the Esat Digifone consortium, were Telenor, Esat, Esat Telecom, or whatever their

A. Communicorp.

Q. whatever their name was at the time, and four institutional investors; isn't that right?

A. Yes.

Q. And had anything happened in the meantime, or do you remember any discussion in the meantime which altered that particular view, insofar as you were concerned?

A. No.

Q. Do you remember any discussion about I know what you have said about the letter of the 29th, but after that was sent back, do you remember any discussion about anything that was contained in that letter of the 29th or the involvement of anyone else in this before this statement was drafted?

A. No, no.

Q. Now, if you continue on, then, there is the tariff aspects and that portion of the statement. And then the meetings with the consortia; we have dealt with that.

A. Yes.

Q. As you say, the Minister sat down without using that portion of the text; isn't that right?

A. As we read through here, I am not sure exactly at what point he stopped.

Q. Yes?

A. But....

Q. But he didn't give this he didn't give this particular response, anyway, in the House.

A. Yes, okay.

Q. I think you remember it, do you? You remember seeing it on the monitor and him sitting down?

A. I remember, I mean, consciously being aware that he had stopped and that he hadn't given the full reply as prepared, yes. All I am saying is, just now as we look through this, I am not sure where the point was, but I agree

Q. You know specifically this reply wasn't

A. This one wasn't, exactly, yes.

Q. Well, did it cause any surprise to you?

A. At the time I think I took the view that the Minister was chancing his arm, if I can put it that way, that he could sit down at that point that he had.

Q. The reply is a grand reply, isn't it? There is nothing, there is no problem in the reply, if what it says is correct, of course, you know sort of of course he would have met with people, it is listing

the circumstances, there is nothing much

A. Yes, I understand what you are saying.

Q. Now, I suppose civil servants looking at their Ministers on the monitor and seeing them doing something might, I suppose, smile at what they were doing in the House sometimes, if they thought that they were performing well or doing something of that nature, they might make comments that you wouldn't necessarily record as being official comments; wouldn't that be so?

A. Civil servants might?

Q. Civil servants might, or anyone might?

A. Civil servants occasionally might make comments that aren't recorded, that's correct, yes.

Q. Did any thought like that cross your mind at this time?

A. No, not particularly. I mean, in the sense that I mean, by way of background, I think I should say that it was quite evident when Mr. Lowry become Minister that he was not particularly enthusiastic about public speaking events, and in his early days as Minister he put a lot of work into rehearsal and preparation for speaking events in the Dail, and he availed of some professional advice in that context. Now, the fact that he would choose, in the middle of quite a long reply, to sit down and not deliver the rest of it, I think I would have seen, in that context, the

Minister

Q. Chancing his arm?

A. chancing his arm that he might get away with that.

Q. But the information contained in the response is information which you believe would have been obtained from his office, because you would have to be sure; you would have to be reasonably accurate. You would have to be very accurate, perhaps, in responding to this, insofar as the Office of the Minister would remember meetings that you had

A. I don't believe a civil servant would propose this response to the Minister without having checked the available official information, and indeed with the Minister himself.

Q. With the Minister himself?

A. And with the Minister himself, yes.

Q. You would check through his office, and you believe they would check with the Minister himself?

A. Yes, it is the kind of question that should be checked with the Minister.

Q. When the Minister or, sorry, when the information was received from the Minister's Office which gave rise to the preparation of this reply, and when the Minister and/or when the Minister didn't use it in the House, did you remember the telephone conversation that the Minister had with you back in September of 1995 where he said that he was coming under pressure

from maybe he hadn't used the word "consortium",
but that he had come under pressure from an applicant?

A. No, I didn't make that connection.

Q. You didn't make that connection?

A. Yeah.

Q. Now, I think supplementaries were prepared as well,
and if we just go over to the fourth page of the
possible supplementaries

A. Sorry, just reflecting, may I just reflect for a
moment, please, on the point you just raised.

In the question of that conversation, I mean, I
couldn't rule out that the Minister, when he made that
phone call to me, was in contact with other
politicians, for example. I couldn't rule out that
possibility.

Q. If we go to the fourth page now of the
supplementaries. Now, this wasn't asked, of course,
but it was prepared. If you go to this is the
fourth page; I am sorry.

Yes, the last page in the tab. You are right. The
last page in the tab, yes. This is the one that I
wanted to

A. What is the question?

Q. The question is, "Can the Minister give great detail
of the methodology used by the consultants?"

MR. O'DONNELL: The third-last page?

A. The second page of the supplementary.

Q. MR. COUGHLAN: Do you know who drafted this? It would probably be a bit of a mouthful to arise as a supplementary, I suppose, but wouldn't you think?

A. Yes.

Q. "It is clear from their report that the Project Team and consultants examined the applications methodically in all of their aspects. Different aspects were scrutinised by groups with the relevant expertise. For example, technical matters were examined by technical experts and financial matters were examined by accountancy experts. The applications were checked for internal coherence and consistency. Sensitivities were tested. Finally, the results from all the expert evaluations were amalgamated in a manner which fully respected the selection criteria and the weightings given to them. This led to a clear-cut result. Nevertheless, the leading applications were subjected to further checking which validated the result."

Do you know who drafted that?

A. Not specifically, but again, I may have had a hand in it.

Q. Again, this is silent as to the quantitative evaluation, isn't it, this particular response? I know it wasn't given in the House.

A. It is.

Q. It is silent?

A. Yes, it is silent on the quantitative model, yes.

Q. And that was a detail of the methodology used; isn't that right?

A. It was, yes.

I mean, just on that, I mean, you know my view anyway; my view is that it wasn't worthy of mention. If I was drafting sorry, if I was drafting something here on the instruction that I should refer to the quantitative model, then it would be that we used a quantitative analysis but found it was redundant in terms of trying to reach a fair comparison of applications.

Q. Well, the only point I make here, and I preface it by saying, this was not used in the House; there is no question of it being on record of the House. I say that all the time.

A. Okay, yes.

Q. And also, in fairness to you, I would say that I don't know, maybe some TD might have asked the question to give greater detail of the methodology, maybe in precisely those terms; but in the way this draft was prepared, it is just silent as to the quantitative, isn't that right, although the quantitative was part of the methodology?

A. Yes, I would agree with that.

Q. Yes. Now, there was just one other draft supplementary. I don't suppose anything turns on it. It may have been it is the one, "Were all financial

and ownership aspects properly dealt with - was that the case with Esat?"

Do you see that supplementary? Just looking at it again, and I am just wondering, you see the response is, "There are separate specific questions on this later. I must respect the lottery system for questions."

A. Yeah.

Q. There was nothing prepared about the financial, nothing prepared in terms of a response in respect of the financial matters for Esat; isn't that right? In other words, the matters which had been identified as being necessary as a condition to be tied into a licence?

A. Arising from the report. I mean, it is not mentioned there, no.

Q. Now, if you go to the fourth page of the actual report in the House behind Tab 156. And this is why I am just wondering whether there must have been there must have been some discussion about matters, about the question of ownership of the proposed licensee, and that that discussion, from the response here, looks as if it may have involved the Minister as well. Because if you go to the bottom of the page, you see "Mr. Molloy", you see the second half: "Were the names of the investors disclosed"?

A. Is this the fourth page of the official report?

Q. This is the fourth page sorry, I beg your pardon, it is the fifth page; I beg your pardon. The fifth page of the official report.

And you see there, towards the bottom half:

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

Of course the term "investors" is perhaps not an appropriate term, but it is being used here in its more common meaning.

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

Now, that response doesn't appear in any draft prepared, so it looks as if Mr. Lowry is on the hoof here, if you know what I mean.

A. Yeah.

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

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

"Mr. Lowry: A number of the investors stated that minority shareholdings would be available through various mechanisms, such as by way of flotation or institutional investment."

Well, we know that flotation was altered postdate the award of the licence in all cases or institutional investment.

"The winning applicant clearly stated that Esat would

have a 40% ownership, Telenor a 40% ownership, and the other 20% would be available to institutional investors."

That is all correct, insofar as it is in conformity with the bid; do you understand?

A. Yes.

Q. And then he goes on, "or other interest groups."

Now, perhaps there wasn't a discussion that any civil servant was involved in and this was something that was known to the Minister, or maybe it is just a throw-away comment by the Minister?

A. You mean that particular comment?

Q. "Or other interest groups. That was clearly stated publicly as well as privately."

A. Okay, you said earlier Mr. Lowry said, "The names of investors were not disclosed in respect of a number of applications, but that did not contravene the criteria set down."

Q. Yes?

A. I think that stacks, or that stands up in relation to some of the material proposed, where it was indicated that a number of the applicant consortia foresaw evolution of ownership.

Q. There is no doubt I think everyone, without exception, I think they all saw an evolution of ownership for many different reasons.

A. Yes, yes.

Q. That was after the company was up and running, and it was always in the future; some because they thought it would be a good idea to have customer or public involvement with things, some for other reasons. That is clear; there is no difficulty with that. That isn't the what I am asking about here really is

A. And on the question of there being a discussion with the Minister, I mean, I would expect there was discussion with the Minister about the response.

Q. Absolutely.

A. Sorry, about the response generally, but I mean

Q. All right.

A. I am not sure specifically about this, okay?

Q. Okay. I can understand that. And from our reading of the applications and listening to the presentations, that seems clear enough and is fine, about the evolution of ownership in the future; no difficulty about that. But what he then goes on to say again, and this is something that he would have known from the time that the applications came in, because it is in the press statement, "That Esat stated" sorry, "That the winning applicant stated that Esat would have a 40% ownership, Telenor a 40% ownership, and the other 20% would be available to institutional investors." Again, he may have if there was any discussion, they may be respecting the confidentiality aspect of matters in relation to those investors, even

at this stage.

A. Mm-hmm.

Q. No difficulty with any of that; it is all in conformity with what happened so far.

Then do you see, "or other interest groups"?

A. Yes, I see that.

Q. Now, if that came from a civil service source, there must have been some discussion with the Minister to enable them to do that, and I am just wondering, did it come from a civil service source? And if so, how could it have come from a civil service source?

A. I don't see how it could have.

Q. Yes.

I don't think that there is anything else that I wish to ask you about at this stage, although if you just go to the second-last page, you can see there that Mr. Brennan everybody still seems to be talking about the 20% part of the Esat Digifone consortium; isn't that right? Still everyone is talking about 20% at that stage?

A. On the second-last page?

Q. Mr. Brennan, yes; do you see that? Yes, do you see the reference to the 20%, who owns the 20%, everyone is talking about 20% at this stage; isn't that right?

A. Yes, yes.

CHAIRMAN: You mean as opposed to 25%?

MR. COUGHLAN: Yes, yes.

I think I might leave it there for today.

CHAIRMAN: Well, in view of the other commitments, I dare say you won't object too much, Mr. Towey. I know it has been an arduous and difficult toll for you. I know you have the difficulty of getting back to your family and job and commuting with Brussels. I can't say how much it will go into next week, but I can guarantee to you that you will be finished before the end of the week.

We will resume as usual at 11 o'clock on Tuesday.

THE HEARING THEN ADJOURNED UNTIL TUESDAY, MAY 20TH,
AT 11:00 A.M.