

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. Richard Law Nesbitt, SC

Mr. John O'Donnell, SC

Mr. Conleth Bradley, BL

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

FOR DENIS O'BRIEN: Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FOR MICHAEL LOWRY: Mr. Rossa Fanning, BL

Kelly Noone & Co.,

Solicitors

FOR CHRISTIAN HOCEPIAD: Mr. Anthony Collins, BL

Instructed by: Anthony Whelan

EU Legal Service

FOR JARLATH BURKE: Paul Marren

Martin E. Marren & Co.

Solicitors

OFFICIAL REPORTER: Mary McKeon. SCOPIST: Anna Papa

I N D E X

Witness:	Examination:	Question No.:
Christian Hoceped	Mr. Coughlan	1 - 90
Mr. O'Donnell	91 - 100	
Mr. Fanning	101 - 115	
Mr. Marren	116 - 124	
Mr. Coughlan	125 - 128	
Joe Jennings	Ms. O'Brien	129 - 236
Mr. Fanning	237 - 245	
Mr. O'Donnell	246 - 275	

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 11TH JULY,
2003, AT 11AM:

OPENING STATEMENT BY MR. HEALY:

MR. HEALY: Sir, I think because the Tribunal is not necessarily moving on to something new, but moving on to something that perhaps was last mentioned some considerable time ago and is not a direct continuation of some of the evidence that's been heard in the last few days, it might be appropriate just to make one or two opening remarks in connection with the evidence to be given by Mr. Hoceped, and to some extent, the evidence that will also be given at a later point by Mr. Jarlath Burke.

Now, it will be recalled that in the Opening Statement Mr. Coughlan made reference to a letter from Commissioner van Miert to Mr. Michael Lowry as Minister. The letter was dated 14th July 1995. It contained, I think, what has been called the Commission's imprimatur, as it were, for the Department's proposals as to how the competition for the second GSM licence should be revamped in light of the Commission's objection to the auction element of the process.

I think Mr. Loughrey called it something slightly less, a nihil obstat.

The letter was the culmination of a dialogue between the Department and the Commission dating from around the end of April. Mr. Martin Brennan and Mr. Fintan Towe have given a significant amount of evidence concerning this aspect of the process. Mr. Brennan and Mr. Towe were asked about a copy of one page of Mr. van Miert's letter which appeared to have found its way, as the Tribunal then thought, to Esat Telecom in the person of its chief regulatory counsel, Mr. Jarlath Burke.

On a reasonable interpretation, at least one reasonable interpretation, the letter from the Commission contained confidential information. The Department's correspondence in connection with the matter was clearly stamped confidential and the

content of the correspondence, I think, made it clear that the Department regarded the dialogue as a confidential one. I think I am right in saying that both Mr. Brennan and Mr. Towey confirmed that they so regarded the correspondence, as did Mr. Loughrey.

When this matter came to light there was a course of correspondence between the Tribunal and the European Commission with a view to ascertaining whether the Commission could provide any information as to how this document came into the possession of Mr. Burke of Esat Telecom. In the course of that correspondence, the Commission indicated that it did not regard the letter as confidential. Mr. Burke has also indicated that he does not regard the portion of the letter that he received, the first page, as confidential. He has informed the Tribunal that he received the document from the Commission, and that it is most likely that it came from Mr. Christian Hocepiéd. He has asserted, however, that this did not involve any impropriety on the part of himself or Mr. Hocepiéd. Mr. Hocepiéd has stated that there appears to be no concrete evidence indicating that the document found on Esat Telecom's files was transmitted directly in the Competition Directorate of the Commission, the Directorate with which Mr. Burke was dealing and in which Mr. Hocepiéd has worked. He has informed the Tribunal he does not remember having sent a copy or asking his secretary to

send a copy of the Commission's letter to Mr. Burke or to Esat Telecom.

Now, the Tribunal's perspective in relation to this matter is multi-faceted. If, as the Department contend, the document was a confidential one, and if the Tribunal ultimately concludes that it could have given an advantage or at least an edge to one competitor over another, assuming that competitor was the only one who had it, the Tribunal will wish to ascertain how the document came into the possession of Esat Telecom and whether this entailed any intervention or any action on the part of Mr. Lowry.

Obviously, in conducting that inquiry, it will be important to endeavour to ascertain whether the document came from the Department or from the EU or possibly some other source.

If Mr. Lowry was not involved directly or indirectly in the transmission of the document to Mr. Burke, then obviously that is something upon which the Tribunal will wish to reach a conclusion and that will be a very important conclusion.

What's more, if, in the event the Tribunal concludes that Mr. Lowry had no involvement in the transmission of this document to Esat Telecom, and if the Tribunal further concluded that this document could have given an edge or an advantage to Esat Telecom in the process resulting ultimately in the success of its

application, this is something which ought to be clarified in fairness to Mr. Lowry, as it would be an edge or an advantage obtained without any intervention direct or indirect on his part.

Whether there was any impropriety or not in the transmission of the document to Mr. Burke is of no concern directly to the Tribunal, as long as it can not be shown to have involved Mr. Lowry.

It's important to state at this point, that the Tribunal is not reaching any conclusion as to whether it was improper or not, and as I have already said, it has been asserted on the part of Mr. Burke, and I think on behalf of Mr. O'Brien, that there was no impropriety.

I should also say, because Mr. Burke will not be giving evidence today or tomorrow and it may be sometime before he gives evidence, that as regulatory counsel for Esat Telecom, Mr. Burke appears to have had a course of dealings with the EU Commission. The Tribunal is not aware of the full extent of his dealings with the Commission and they appear to have involved, to some degree, Esat Digifone's affairs.

But it is again important to note that there could have been no impropriety whatsoever on the part of Esat Telecom or Esat Digifone or Mr. Burke in lobbying the EU Commission with regard to any aspect of the GSM process at any time, either prior to, during or even

after the process, and the fact that Mr. Burke may have had regular dealings with the Commission in regard to Esat Telecom or Esat Digifone's affairs, including any aspect of the capping of the process, or the changing of the weightings and so forth, would be wholly legitimate.

CHAIRMAN: Very good. We'll proceed to evidence.

MR. COUGHLAN: Mr. Christian Hocepied.

MR. COLLINS: Chairman, before Mr. Hocepied takes the oath, I'm applying for representation on behalf of the European Commission, both for the agent of the Commission, Mr. Anthony Whelan, and myself as counsel assisting Mr. Whelan.

CHAIRMAN: Very good.

MR. COLLINS: In the circumstances of Mr. Hocepied's involvement, and his cooperation to date with the Tribunal, I think it's proper that I accede to an order for limited representation on the usual basis.

MR. MARREN: Mr. Chairman, Paul Marren of Martin E. Marren & Co. I'm applying for limited representation on behalf of Mr. Jarlath Burke who is the legal and regulatory counsel for Esat Telecom in relation to the period for which this issue arose; I am applying for limited representation in that regard.

CHAIRMAN: Well, it is a matter that's potentially involved issues that are of importance to your client and that have been pursued by the Tribunal, so on the

usual basis, which essentially means that I am giving no undertakings or guarantees on matters of costs, that can, of course, only be resolved at the conclusion of the business and report, I'll similarly accede to limited representation to yourself for Mr. Burke.

CHRISTIAN HOCEPIED, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY MR. COUGHLAN:

CHAIRMAN: Thank you very much for your attendance and your cooperation thus far, Mr. Hocepied.

Q. MR. COUGHLAN: Thank you, Mr. Hocepied. I think you have prepared for the assistance of the Tribunal a number of memoranda of proposed evidence; is that correct?

And if you have those in the witness-box, it would be my intention, in the first instance, to lead you through those and then perhaps to return, ask a few questions to clarify certain matters, if that was all right.

A. That's okay.

Q. Now, I think your first memorandum, which is at Book 39, Divider 2A, and I think you have stated in that memorandum by way of background, the Tribunal seeks your recollection of any facts which may throw light on the circumstances surrounding, firstly, who and what prompted the intervention of the European Commission, the Commission in the configuration of the

competition for a second GSM operator in Ireland, and who and what prompted the ultimate resolution as agreed between Commissioner van Miert and Minister Lowry; and secondly, the Commission's position regarding the dispute between Esat Telecom and the Department of Transport, Energy and Communications regarding the definition of voice telephone and the provision of telephone services through routers technology.

I think you then continue, in 1994, you took over the Irish file from your former colleague, Gareth Locksley, currently working at The World Bank. Given that over seven years have elapsed since the facts in question, your memory of events is limited and is therefore largely based on the documents retrieved from DG Competition files, many of which have already been supplied to the Tribunal on the 26th October 2001, the 18th July, 2002, and the 16th September, 2002, in response to its requests.

At the time of the events in question, you were dealing with a large number of matters including infringement procedures against Italy, Belgium, Spain and Austria, regarding the continuation of their GSM monopolies. Monitoring the implementation of directive 90/388/EC by the Member States jointly with Louisa Gosling, currently working with C&W, providing DG Competition's input to the follow-up of the mobile

Green Paper, and the subsequent drafting of directive 96/02/EC on the mobile communications jointly with Marcel Haag.

Two other files concerning telecommunications in Ireland, the auto-dialers issue and in 1996, the request of the Irish Government for an additional transitional period to implement the full liberalisation of its telecommunications sector.

You have set out below your recollection of the events in question and attach in Annex A a comprehensive schedule of contacts and communications for the period under review. However, a number of points must be borne in mind.

Firstly, given that the procedures against Italy, Belgium, Ireland, Austria and Spain related to similar facts to those of the procedure on which the Tribunal seeks information, it is difficult for you to remember some seven years later, which arguments were exchanged regarding which procedures.

Second, given that you were subsequently involved in another Irish case which involved regular contact and meetings with the same officials, the request for an additional derogation period for full liberalisation, it is difficult to recall which contacts concerned the cases of interest to the Tribunal in which concerned the derogation and which concerned the derogation request.

Third, given the extent and frequency of contacts between yourself and Department officials, you cannot exclude the possibility that, in addition to the contacts detailed below, you may have briefly and informally discussed the matters under consideration with such officials on other occasions, for example, at a Council Working Group meeting, but you have no recollection of such discussions.

You will not comment on the substance of the position taken at the time by your Director General and Commissioner van Miert since this is outside the scope of the Tribunal's inquiry. Your statement also does not cover the involvement of other Commission services.

You then deal with the nature and extent of DG Competition's involvement.

The Commission's involvement regarding the licensing conditions of the Irish second Irish GSM licence must be seen in the context of the duty of close cooperation between the Member States and the EU institutions enshrined in Article 10, formerly Article 5 of the EU Treaty. There were no formal infringement proceedings as regards the tender conditions and the letter of formal notice concerned only the maintenance of Telecom Eireann's monopoly to provide a GSM mobile telephone licence.

As regards the tender conditions, the Commission's

role is, therefore, limited to assisting the Department in structuring the tender in such a way to avoid a situation which could justify new proceedings under EU Competition Law. Formal proceedings could, in principle, only have been initiated after the completion of the tender, because the Commission would have had to show that the measures could have had anti-competitive effects. DG Competition's review of the Irish tender conditions, therefore, necessarily concerned only the strictly Competition Law aspects of the tender procedure.

And then you reply to specific questions raised in our fax of the 28th August, 2002.

"1. You were asked for details of all dealings and consultations between the Commission and the Irish Government in advance of the launch of the second GSM competition by the Department in March, 1995."

And you respond: "On the 11th February 1993, a bilateral meeting was held between DG Competition and the Department on the implementation of directive 90/388 as regards non-reserved voice telephone services. This led to the Director General for competition, Claus Dieter Ehlermann, to supply, on the 25th February, 1993, a note to the Irish Permanent representative setting out DG Competition's preliminary position on the use of leased lines. A second bilateral meeting with the Department

represented by Mr. Ryan was held on the 28th June, 1993 at which the issues of the Irish GSM monopoly and the use of leased lines were discussed. On the 25th October 1993, DG Competition wrote to warn the Department that an infringement procedure would be commenced if it did not call for a tender for a second GSM mobile telephone licence. The Department replied on the 23rd November 1993 that it would draft the tender and issue a second GSM licence by mid-1994. However, given the lack of progress on the 17th February, 1994, Mr. Ehlermann wrote to Commissioner van Miert asking for approval on a draft letter of formal notice. On the 9th March 1994, the Department's Conan McKenna spoke to DG Competition's Gareth Locksley and faxed an extract from the record of the Dail on the 17th February in which the Minister at the time, Mr. Cowen, had announced that he would shortly be announcing a tender for a second GSM licence, and that he intended that the licence would be awarded by the end of 1994.

"On the 27th April, 1994, Commissioner van Miert wrote to Mr. Lowry regarding his concerns as to the tender.

On the 4th May 1994, the Commission sent the Irish Government a letter of formal notice warning that an extension of Telecom Eireann's monopoly to the mobile GSM market would breach Article 86 in conjunction with Article 82 of the EC Treaty.

"On the 1st July 1994, the Irish Permanent representative supplied on behalf of the Department, the draft tender conditions sent to the Commission and requested an additional delay for applying to the letter of formal notice. Commissioner van Miert replied on the 18th July 1994 and granted an additional delay, but warned that the licence fee should not be discriminatory.

CHAIRMAN: I suppose there is a possible slight error, Mr. Coughlan, on the penultimate paragraph. The letter does refer to Mr. Lowry, but Mr. Cowen would still have been in situ as Minister at that stage.

A. Chairman, may I here intervene one moment. In my additional memorandum to the Tribunal, I corrected, indeed, that this letter it's not only the name is a typo, but this letter is a letter of '95 and should not have been mentioned here. I must say, as you mentioned at the beginning, that this chronology happened when I was not dealing with the file, so I reconstructed on the basis of the file and because this letter of '95 was filed together with those of '93, I just mentioned it, but it makes indeed no sense, because we had not seen the tender conditions, because they are only they were only sent on the 1st July, '94, so this whole sentence has to be deleted, so the first sentence of the penultimate paragraph.

Q. MR. COUGHLAN: Well, it was on the 27th April, 1995 that Commissioner van Miert wrote to Mr. Michael Lowry as Minister, isn't that correct?

A. Yes.

Q. Now, you say that on the 17th January, 1995, Mr. Ehlermann sent Commissioner van Miert a note regarding the Irish delays which led to the Commissioner to write to the new Minister, Mr. Lowry, on the 24th January to request that the matter be given the necessary priority.

So the background is that DG Competition were in contact with the Irish Government about the introduction of competition from 1993. Delays were requested, they were acceded to in certain situations and the Commission continued to prompt the Irish Government in relation to their obligations. Would that be a fair summary of what was happening in that period?

A. I think so. Again, I mentioned I was not personally involved. It's on the basis of documents I found in the file.

Q. I think it's common case. I don't think there is any difficulty about that.

Now, I think you were asked for details of all dealings and consultations between the Commission and any other person including submissions made to the Commission in connection with the licensing of a

second mobile telephone operator in the Irish market prior to the launch of the competition in March of 1995. And you have informed the Tribunal that for the avoidance of doubt, all contacts with the Irish Government and its representatives in connection with the licensing of a second mobile phone operator in the Irish market prior to the launch of the competition in March 1995 are disclosed. That's the background.

You have informed the Tribunal that you do not recall any dealings or consultations between DG Competition and any other person in connection with the licensing of a second mobile phone operator in Ireland prior to the launch of the competition in March 1995. For the avoidance of doubt, there were no formal or informal complaints from any person or company regarding the GSM monopoly in Ireland.

You say that on the 13th January 1995, Esat's that's Esat Telecom's of course Mr. Doug Goldschmidt, who I think was, at that time, he had a senior executive role in Esat Telecom in any event wrote to DG information society regarding Esat's concern about the Department's position on leased lines and attaching a copy in copy, a letter of the 12th January sent to Mr. Newe at the Department. In early February 1993, DG Competition met with Esat's Mr. Goldschmidt to discuss leased lines services, but to the best of your recollection,

the licences of a second mobile phone operator was not discussed.

You were then asked for details of all dealings and communications of whatsoever nature, between the Commission or any official of the Commission, including submissions made to the Commission, between the 8th March 1995, being the date on which the second GSM licence competition was launched by the Irish Government, and the 27th April, 1995, being the date of the letter from Commissioner van Miert to Mr. Michael Lowry, then Minister for Transport, Energy and Communications, with any of the following:

1. Any official of the Irish Government.

You say that you do not recall any such communications.

2. Any member of the Irish Government.

And you say that you do not recall any such communications.

3. Any person on behalf of any official or any member of the Irish Government.

And you state that you do not recall any such communication.

4. Any consortium or any member of any consortium having any interest in competing for the licence.

And you have informed the Tribunal that on the 20th March, 1995, Esat Telecom supplied DG Competition with 149-page submission on its use of auto-dialers as

"virtual leased lines" for the provision of value added telecommunications services in Ireland. DG Competition met with Esat Telecom during the week of the 3rd to the 7th April 1995 to discuss the use of auto-dialers. To the best of your recollection, the issue of the GSM licence tender procedure was not raised.

On the 10th April, Esat's Jarlath Burke wrote to you to thank you for the meeting and to follow-up on the auto-dialers issue. On the 21st April, 1995, your director, Humbert Drabbe, wrote to Mr. Burke asking his provisional view on the interpretation of directive 90/388 in relation to the use of auto-dialers. You do not recall discussing the GSM tender with Mr. Burke until the start of June, 1995.

5. You were then asked about any person on behalf of any consortium or any member of any consortium.

And you have informed the Tribunal that you had various meetings with Mr. Tom Tuyten, legal counsel to Unisource at the time. You do not recall him ever raising the issue of the Irish tender. You believe that you only discovered that Unisource had been part of a consortium interested in the licence when you first saw Persona's formal complaint in 1996. Is that correct?

I think you were then asked for details of all matters, factors or considerations which prompted the

Commission to raise issues regarding the following aspects of the design of the second GSM licence competition.

1. The inclusion of an open-ended licence fee as one of the evaluation criteria.
2. The lack of transparency in the competition design, specifically in connection with the non-disclosure of the weightings to be applied to the evaluation criteria.

And you have informed the Tribunal that you believe that Commissioner van Miert may have been prompted to raise these concerns with the Department because similar concerns had been raised in ex officio cases brought against Italy and Belgium. To the best of your recollection, no rival consortia or their legal advisers had raised concerns regarding the tender conditions with DG Competition until the 2nd June, 1995?

You were then asked for details of all dealings, consultations or communications of whatsoever nature, including submissions made to the Commission between the Commission or any official of the Commission during the period from the 27th April, 1995 to the 2nd June, 1995 with any of the following:

Then you were asked in the first instance, any official of the Irish Government?

And you have informed the Tribunal, you do not recall

any such communications.

Secondly, any member of the Irish Government. And you have informed the Tribunal that to the best of your recollection, there was no such communications other than Commissioner van Miert's letter of the 27th April, 1995 to Mr. Lowry regarding licence fee balancing payments.

Thirdly, any person on behalf of, any official or any member of the Irish Government?

And you have informed the Tribunal you do not recall any such communication.

Fourthly, any consortium or any member of any consortium having any interest in competing for the licence. And you have informed the Tribunal that on the 2nd June, 1995, Esat Telecom's Mr. Jarlath Burke faxed you a two-page memorandum concerning inter alia, the legal basis for granting a second GSM licence.

Around the 2nd June 1995, you spoke to Mr. Burke in relation with his concerns.

Fifthly, any person on behalf of any consortium or any member of any consortium.

And you stated that Mark Pery Knox-Gore of Beauchamps Solicitors sent you a one-page fax on the 2nd June 1995 requesting information on the position of the Commission services on the imposition of counter-balancing licence fees on incumbents. Mr. Pery Knox-Gore called you shortly after having sent

you his fax to discuss. You do not remember for whom he was acting at the time.

You were then asked for precise details on the meeting of the 2nd June 1995 in Brussels with officials from the Department of Transport, Energy and Communications and including, and you stated, there is nothing on the DG Competition's file regarding a meeting with the Department on the 2nd June 1995. You recall attending a meeting with certain officials of the Department, including Mr. Brennan, and the Danish consultants appointed for writing the tender documents, Andersen Management International, to discuss the approach.

This meeting may have taken place on the 2nd June.

However, given that you did not retain any note of the meeting, you cannot give any further details of who attended or what was discussed.

I think you were then asked for details of all dealings, consultations or communications between the Commission or any official of the Commission, including submissions made to the Commission during the period from the 2nd June 1995 to the 15th June 1995, and again the list contains the people we have previously referred to, and you have no recollection of any communications with any of these people, isn't that correct?

I think you were then asked for precise details of the teleconference between officials of the Commission and

departmental officials on the 15th June 1995.

And you have informed the Tribunal, the question refers to a teleconference and below to a conference, however, you do not recall the telephone call being prearranged. In any case no notes of the call were kept and no report was made. As far as you can recall, the subject to be discussed had not been specified when the call came in.

You have also informed the Tribunal, you cannot recall the identity of all those who were present on the telephone call, but you do remember, at least, Mr.

Brennan and Mr. Ungerer were present. You recall that Mr. Brennan had introduced one or more colleagues who were with him on the call. You assume that Mr. Fintan Towey was present given that he subsequently sent you a fax on the 4th July 1995.

You were asked for the purpose of the conference. And you have informed the Tribunal that as far as you can recall, Mr. Brennan shared your concern that the tender could be challenged for breach of community law, and he wished to discuss possible measures which could be proposed to avoid the concerns raised in Commissioner van Miert's letter on the 27th April 1995.

I think you were then asked for the matters under discussion in the course of the conference. And you have informed the Tribunal, as explained, in Mr.

Mensching's letter to the Tribunal on the 15th July 2002, the discussion centred around possible approaches to ensure that the Irish tender procedure would not be anti-competitive. In this context, the position taken by the Commission service in the Italian and Belgian case was discussed. In the Belgian case, the authorities had agreed to reduce the weighting of the auction element and to ensure that Belgacom mobile would pay the same fee as the entrant. You discussed the difficulties of applying a similar solution in Ireland. The Irish situation was more complex because Eircell was not yet legally distinct from Telecom Eireann. As far as you remember, both sides shared the view that in such circumstances, imposed on the vertically integrated fixed mobile operator, the same fee as that paid by the new mobile entrant would not necessarily ensure a level playing field. The Department, through Mr. Brennan, you believe, proposed capping the fee to redress this. The issue of direct interconnection was also discussed. You do not recall any discussion regarding the publication of the criteria weighting. You were then asked about the outcome of the conference and you have informed the Tribunal, as far as you can remember, you had a rather positive impression of the matters discussed which were in line with those in the Belgian case where both Commissioner

van Miert and the legal services Commission had accepted the closure of the case.

You were then asked for the Commission's understanding as to the steps which would then be taken by the departmental officials. And you have informed the Tribunal that given that it was not possible to fax the Department copies of correspondence of the Commission with the Belgian Government, you agreed, as far as you remember, to send a draft letter, based on the letter sent to the Belgian authorities but amended to take into account the Irish situation. Indeed, if the Department would, could agree with the elements mentioned in such letter, it would be likely that taking into account the Belgian precedent, both Commissioner van Miert and the legal service of the Commission would approve the letter without difficulties. It was agreed that the Irish authorities would, on that basis, draft the formal written proposal to Commissioner van Miert reflecting the measures discussed during the call.

You were then asked for details of all dealings, communications or consultations including submissions made to the Commission during the period from the 15th June to the 22nd June 1995 being the date the formal letter was received by the Commission from Mr. Michael Lowry, between the Commission or any official of the Commission with any of the following:

And you say that the informal exchanges of faxes and possible telephone calls in the period is not documented in the file on the basis of the fax of Martin Brennan to yourself dated 20th June 1995 sent to DG Competition by the Tribunal, you recall having faxed to the Department an outline of the letter of the Commission drafted on the basis of the letter sent to the Belgian authorities and received the mentioned fax. You do not recall further contacts in this period.

We'll come to deal with those in more detail because we actually have those documents now.

You were then asked for details of all dealings between you and Mr. Ungerer and the Commissioner and any other official of the Commission regarding the proposals made by the Irish Government for the resolution of the issues raised in the Commissioner's letter of the 27th April 1995.

And you have informed the Tribunal that in late June, you drafted a note in the name of the Director General of the competition, Alexander Schaub, discussing the proposals set out in Mr. Lowry's letter on the 27th June and recommended that the file be closed. This note would have been discussed with Mr. Ungerer, Mr. Swab, prior to it being sent by the latter to Commissioner van Miert. In early July 1995, the reply to be given by Mr. Lowry was discussed with

Commissioner van Miert in the presence of the legal service which had to give an opinion on the proposals made in the note, on a Thursday afternoon meeting on the basis of the aforementioned note.

You were then asked for details of all matters, factors or considerations which prompted or informed the Commission's decision to accept the proposals of the Irish Government in relation to the licence fee criteria specified in paragraph 19 of the RFP document and in relation to the non-disclosure of the weightings to be applied to the evaluation criteria.

And you have informed the Tribunal, the proposals put forward by the Irish Government were examined according to the standard Commission procedure, to assess whether they would remove any potential future Competition Law concerns arising out of the tender procedure. During the above-mentioned meeting on the 29th June, Commissioner van Miert decided after having asked the legal services of the Commission its possible comments to accept that the Department's proposals relating to the licence fee criteria specified in Mr. Lowry's letter of the 27th June, were indeed sufficient to remove potential Competition Law concerns.

As far as you recall, the issue of the weighting of the criteria was not discussed further. You believe that this is because the Commission had accepted the

non-disclosure of the criteria weighting in the Belgian case. You believe the reason for this was that since directive 96/02 had not yet been adopted, the Commission could only rely on the Treaty provisions, Articles 86 and 49, absent further specification of the obligations which resulted therefrom, the Commission could only require the tender selection criteria to comply with the general principles of non-discrimination and transparency. Because the tender conditions were not so inadequately detailed that they prevented undertakings from any Member State from participating on a level playing field in the tender procedure, it was not thought sufficiently likely that the mere non-publication of the weightings of the tender criteria could be successfully challenged.

You believe that in the Irish case, the legal service agreed on the closure of the case but said that this should only occur after Eircell had paid the compensating fee, and the Department had formally confirmed receipt of the fee to the Commission. In practice, this occurred after Telecom Eireann had divested Eircell in 1996.

Just very briefly, just to recap on what transpired. The background of the whole situation was the requirement of the Irish Government to introduce competition in the telecoms sector, and DG

Competition's interest was to ensure that they complied with their obligations in this regard, isn't that right?

A. Yes.

Q. In the course of that, the Irish Government submitted to the DG competition, and to, in fact, what I think was then, DG XIII, its tender proposals, and on receipt of those, those tender proposals were examined by DG Competition and it was decided to write to the Irish Government specifying two issues: firstly, that the auction element could give rise to anti-competitiveness or, in effect, breach of EC law; and secondly, the question arose as to transparency.

That's those were the two concerns of the Commission, of your

A. Yes. If I can somewhat reformulate it, there was a formal infringement procedure opened by the Commission regarding the maintenance of the monopoly of Telecom Eireann for the provision of GSM mobile telephone in Ireland, so that was the only formal procedure on which we could argue with the Irish Government. But on the basis, indeed, of our duty to cooperate, and the duty of the Member States to cooperate with the Commission in order to attain the objectives of the Treaty, I mean, we made comments, but which were not part of a formal procedure, but linked to procedures, well, a procedure that we had pending, because in

January of that year, '95, we sent a letter of formal notice, a warning letter to Italy, telling the Italian Government that we opened the procedure regarding the tender conditions, and just to give the context, the Italians had already granted their second licence in '94 on the basis of the procedure which was quite similar to the procedure intended in Ireland, where also there was no clear transparency of the weighting, and the reason why there was no transparency was indeed because the Ministry of Finance, didn't want that it would be clear that the auction fee, let us say, element, was only, I don't know, 20% or something like that, because then the consortia would put, I mean, their money on roll-out, quality, tariffs and so on and not on the auction fee.

And the second element was the level, I mean, which was attained, which was about one-third of the investment required to basic coverage, to reach a basic coverage, which the second operator had to reach, and we considered that this handicap was such to favour the maintenance of the dominant position of the incumbent, and what I didn't recall, but going through the binders of the Tribunal, I see indeed that we provided also to Mr. Brennan, a copy of this letter of this warning letter to the Italians and probably it was not a copy in Italian, but our internal copy in English, to allow him to understand I mean

Q. Your thinking?

A. Our thinking, and let's say, the thinking of the Commission because it was a formal procedure regarding Italy, and the reason why indeed Commissioner van Miert agreed to send this letter to the Irish Government was that, I mean if we didn't, I mean if any of the Irish Government didn't in time amend the procedure, this could lead to the Commission opening also a new infringement procedure. We should have to close the procedure regarding the maintenance of the monopoly as soon as this second operator would have been granted its licence, but immediately, we could have had to open a second procedure, which indeed would have been, let's say, probably disrupting the whole process in Ireland. We had in Italy I mean, that was my main file in '95, the whole problem that the Italians were somewhat blackmailing maybe it's a strong word in the context of the Commission by saying, well, don't pursue this infringement procedure because the only thing you will do is to push us to revoke the licence we granted to the second operator. And if you read the Commission decision, which was adopted in October '95 and also sent to the Tribunal, I mean, our main argument was that the winning consortium had the best points on all the criteria. So not only on this financial criteria but on the other ones. And our arguments that even if they

neutralised this auction fee element, that that should have no bearing, no effect on, I mean, the selection of the second operator. But we were not certain that the same result would be achieved in Ireland, so if in Ireland there was a selection based on, I mean, this auction fee element, and afterwards we would intervene, this would have led, indeed, to precisely the contrary of our policy. I mean, which is set out in the evidence provided by my head at the time, Mr. Ungerer, which was policy to have as soon as possible, competition in the Member States, and maybe to give an element which, I mean, was, at the time I mean, we had not yet evidence of it, but afterwards, showed to be the case, it's when the second entrant entered into the market too long after the second one I mean, they could never recover, let us say, the disadvantage, the time disadvantage they had on the incumbent, and we saw that, I mean we still see that in Ireland where Eircell/Vodafone has still a much larger market share than O2 which succeeded ESAT which came into the market earlier on. And the same phenomenon can be noticed France, in Spain, in Belgium, in all these countries where the second licence was given one year or two years after the first licence. And that was our concerns, that to extend, to prolong the process, so that at the end, our aim of the competition was to avoid, let us say,

extensions of creation of dominant positions and then that by our action we would reinforce a dominant position, and that's the reason why let's say it's not really informally, but outside of a formal infringement procedure, we wanted in time to raise the attention of the Irish Government on this possible problem in order to find a solution.

Q. You wanted, or Commissioner van Miert, carrying out his duties, wanted to introduce competition quickly, so as to ensure that the incumbent didn't stay in a dominant position for longer than could possibly be avoided, because of the situation which you have described all over Europe. And in that regard, he exercised his judgement as to what he should do in intervening in the Irish market and therefore took the steps he did, particularly in relation to appraising the Irish Government of the position in Italy. .

Now, in doing that, he had two concerns in relation to the structure of the Irish tender competition. One was the question of a licence fee, an entry fee for the new entrant. And for whatever reasons, DG Competition had, the view was always taken that a high licence fee, in effect, discriminated against the new entrant, unless the same fee was necessarily going to be imposed on the incumbent. That was the one issue. And the other issue was the question of transparency, isn't that right?

A. I think that the two issues are somewhat linked in the sense that we reacted mostly on the lack of transparency, because the effect it had on the amount of the fee which would be offered by the new entrant. At the same time, there is a broader problem with transparency, which is linked to the freedom of establishment in the sense that when the conditions are not very transparent, it is not an incentive, indeed, for freighters from other Member States to invest because it requires some kind of investment to prepare a bid, so look for partners, to look for banks, to finance the staff, to prepare an offer, because I mean, they can have the suspicion that behind the, let us say, unclear criteria, that the relevant Government would like to favour the consortium with a strong national presence, and when we look again through what happened at the time with the granting of a second GSM licences, we see that in the Union, that accepting in Greece, which was a specific situation, and also in Belgium and Luxembourg, in all the other Member States, there was a very strong, I mean, national company part of the consortium. So even in the Netherlands, I mean, Vodafone had to buy up shares of the national presence the same in Portugal in order to start getting the control of the second operator which initially was, I mean, granted to a consortium with a company,

let us say, with maybe some links to the Government.

I don't try to insinuate, certainly not when I am speaking in the role that there was some kind of maladministration, but when we spoke, and it's something I remember at the time, with potential investors, I mean, that was always what they told us, we are not interested in that country because we don't have, let's say, a strong national partner which would allow us be certain that we don't invest in preparation and that the tender, with the risk that then the criteria would be used to keep us out of the market.

Q. Well, in the Irish case, by the time Commissioner van Miert received the letter from Mr. Lowry which arose as a result of discussion between yourself and Irish officials from the Department, and replied to it, whilst you couldn't have closure on the Irish case until Eircell was established and paid its compensating amount, I think it was 10 million was the suggested and perhaps accepted, whilst not agreed, amount, and that occurred in 1996 at the time of the licensing, I think, of the second GSM, around the same time as the licensing of the second GSM operator. Nevertheless, you had an understanding of the Irish position and you were happy with it, would be a fair way of describing it, when Commissioner van Miert wrote his letter on the 14th July?

A. If I can say, let's say both for Commissioner van Miert, for my Director General, the case was closed, and I mean, we also prepared a press release. Another time I remember Mr. Ungerer said, well, let's not just make a press release for Ireland, because maybe the Financial Times would not take it up and then we wanted to cover also other Member States, and the press release, I don't know when it was issued, but it was so added to one of the documents provided to the Tribunal in the preparation for an interview that van Miert gave for an Irish journalist in September '95, and therein died, we give the situation with the different procedures and we clearly mention that the procedure in Ireland is closed.

So when, in my statement, I say that the procedure is not closed, is because I refer to the, let's say, the formal internal rules of the Commission

Q. Talking about the legal position: It wasn't close it was not closed legally until 1996, isn't that right?

A. Yes. It was still in the register of the Secretariat General of the Commission.

Q. What you had was that you had accepted the position, would be a fair way of putting it, isn't that correct? You had a working position in relation to Ireland?

A. At the same time, let us say, I mean

Q. When was it closed? It was closed in 1996, wasn't it?

A. I agree with this, let us say, statement, that you are making in the sense that purely from an internal administrative point of view, the procedure was still open. But it was only open for, let us say, a technical issue because we needed to have, let us say, a copy, proof and evidence of this payment by Telecom Eireann.

Q. No, by Eircell?

A. Eircell, yes.

Q. Which didn't exist at that time, isn't that right? It wasn't a separate company at that time?

A. That's true, that's true.

Q. Let's just be clear about this, Mr. Hoceped. The position as regards Ireland was closed as understood legally in 1996, isn't that right?

A. I mean, here

Q. Did you inform the Tribunal of that in your statement, and isn't that the true legal position it was closed in 1996?

A. It was administratively closed in '96. When you say legally, I don't know, I mean here, it's the kind of legal interpretation of, let's say, the internal rules of the Commission, because

Q. Perhaps we shouldn't debate it with you.

A. Yes, okay.

CHAIRMAN: I think it's reasonably clear there was a basis for resolution with the implementation of the

terms

MR. COUGHLAN: The term though, Mr. Hoceped is quite clear when he used the expression closed. Closed has a very significant meaning. It's neither here nor there at the moment, but I won't debate the issue with you.

Q. Now, I am now going to move on to the position. What had happened was, as you informed the Tribunal, is that the Commissioner van Miert and your Director General, at a meeting of the 29th June, were happy with the fee element in the Irish tender competition, isn't that right? The proposals as regards the fee element, a capping of it at whatever it was, i.e. 15 million, I think, and a payment of i.e. 10 million by Eircell when they were became a separate company from Telecom Eireann, and that ensured a balance. There was an argument, I think, that the i.e. 5 million difference represented perhaps the administrative cost of running the competition.

And it was in relation to that, that you were satisfied?

A. We sent to the Tribunal both the note that my Director General submitted to the Commissioner and also an attachment to that note was the draft letter which was subsequently faxed by me on the evening of the 29th after the meeting to Mr. Towey, so I think I could only have faxed it because we discussed it with the

Commissioner and the Commissioner said: "Provide me the, let's say, the signature and I will sign it as soon as I get the signature." And that's why I also probably said to Mr. Towey, well, it will be signed tomorrow, or something like that, because the Commissioner in the meeting was very clear that he accepted the different conditions, so it was not only the price gap, but the list of conditions which were in the letter and have probably been discussed with him in the presence of a representative of the legal service.

Q. Now, we know there was some delay and we'll come to that. And perhaps we'll move to your second memorandum then, which is at Divider B just behind, and I think you were asked then about the system whereby letters were processed in the Office of the Regulator Commissioner van Miert in 1995 and you have informed the Tribunal that the Tribunal seeks a recollection regarding the system whereby letters were processed in the Office of the Regulator Commissioner van Miert in 1995. In this regard, you need to mention that the system whereby letters were processed changed frequently over the years you worked in DG Competition. You are, therefore, not certain about the procedure followed in 1995 and must limit yourself to what you remember and/or reconstruct on the basis of the correspondence in the file.

On that basis, would you say that the normal procedure was that DG IV that was DG Competition prepared physically the signature with the letter to be signed by the Commissioner? (The signature is a hard covered file used for circulating documents for approval and/or signature through the relevant Commission hierarchy). The signature was then seen and initialled by the hierarchy in DG IV, (head of unit, director, assistant of the Director General, Director General or Deputy Director General) and then brought to the Office of the Regulator Commissioner. In the Office of the Commissioner the signature was reviewed and approved by the advisor responsible for the relevant area of competence of the Commissioner as well as the head of Cabinet of the Commissioner before being submitted to him.

If changes were asked by the Commissioner or his office the relevant secretary sometimes asked for the electronic version of the letter concerned and made the desired changes. This must have happened with a letter to Mr. Lowry dated 14th July 1995 since it contains the initials FT which are those of a secretary of Commissioner van Miert's office at the time. After signature by the Commissioner, the letter was registered and date-stamped in the Office of the Regulator Commissioner and sent to the addressee. An unsigned copy was date-stamped at the same time and

sent to DG Competition for the file of the relevant case handler. It also appears that in this case, DG Competition also received a copy of the letter prepared in the Commissioner's office bearing the initials "F/ft" without a date-stamp as an undated copy of the letter was sent from DG Competition fax at 15:57 on the 14th July 1995, see below that's a copy that was sent, I think, to Mr. Fintan Towey and Martin Brennan in the Department. And we'll come to those in due course.

Now, I think you were then asked for your dealings with Mr. Burke and how a copy of a fax to Messrs. Brennan and Towey could have been available to him. And you say you're not able to add more evidence than already provided to the Tribunal on this point. One has, in this regard, to take into account the time elapsed since then and the fact that the Irish file was not your main file and that at a later stage, you had more dealings with Mr. Burke regarding other issues. You would refer, first to all first of all, to the fax of Commissioner van Miert's letter of the 14th July 1995 sent from the fax machine in DG Competition unit C1 at 15:57 on the same day, apparently, to Mr. Brennan and Mr. Towey. This is an undated and apparently unsigned copy of the Commissioner's letter. The fact this bears the initials F/ft indicates that it is the final version

of a letter prepared by Commissioner van Miert's office. You do not remember or having asked the Secretary to send a copy of the letter by fax to either Mr. Brennan or Mr. Towey., however you cannot exclude that you might have done so in order to confirm to them that a definitive position had been adopted along the lines that it had been discussed since last June. The copy of the Commissioner van Miert's letter of the 14th July 1995 found in the files of Esat Telecom, copied by the Tribunal to the European Commission on the 2nd December 2002, also bears the initial F/ft and it is also unsigned and undated.

Now, you clarify that in a further memorandum which you were furnished to the Tribunal this morning, all that was in the files was the first page, so you were uncertain as to whether it was unsigned. It's clear it was undated. So therefore, not registered, isn't that right?

A. Yes.

Q. You also understand that it's not apparent from the face of that document whence it originated, that is, it does not bear a fax banner indicating a fax machine from which it was transmitted. You are given to understand that there is evidence that it reached Esat Telecom sometime before the 27th July, 199 the 24th July, 1995.

Thus, there appears to be no concrete evidence indicating that the document found in Esat Telecom's file was transmitted directly from DG Competition to Mr. Burke or to Esat Telecom. Furthermore, you do not remember having sent or asked a secretary to send a copy of the Commissioner's letter to Mr. Burke or to Esat Telecom. Indeed, there is no indication in the file of DG Competition that such a fax was sent. You would also recall that the statement in the fax from Mr. Mensching to the Tribunal on the 13th December 2002 that the file does not indicate that any such fax was sent to any bidder or their representatives.

However, you should add that having regard to the state of your recollections, you would not attempt to testify categorically that such a fax was not transmitted directly from DG Competition to Mr. Burke or to Esat Telecom in the event that concrete evidence of such an origin were subsequently to come to light before the Tribunal. If the Tribunal were ultimately to establish that the copy of the Commissioner's letter found in the file of Esat Telecom had been transmitted directly from DG Competition, you can currently only speculate as to what the reason might have been. If Mr. Burke and possibly other operators or their representatives might have asked yourself or colleagues at the time whether the Commission had ended its opposition to the original tender conditions

and if so, under what conditions.

In this regard, your recollection is, as already stated in the above mentioned fax from Mr. Mensching to the Tribunal, that it was understood that as soon as the Department received the Commissioner's letter, the Irish Government would invite the participants in the tender to resubmit their bids in accordance with the terms stated in that latter.

We have dealt with that already.

Now, I think you then this morning, there are just a few technical matters to take up really. I think you furnished a short supplementary memorandum this morning, and you state that, firstly, that it's just a few corrections in relation to that memorandum we have just dealt with.

Firstly, at page 3 paragraph 2 of your statement, states that the fax of Commissioner van Miert's letter of the 14th July 1995 was sent from the fax machine of DG Competition unit C1 at 15:17 on the date, apparently, to Mr. Brennan and Mr. Towey. Having had sight of the cover page of the fax transmitted by the Tribunal to the European Commission under cover of letter dated 2nd July 2003, you are now satisfied that you sent the fax to Mr. Brennan and Mr. Towey. So you are satisfied it came from you?

A. Yes.

Q. Then, page 3, paragraph 3, goes on to describe this

document as "an apparently unsigned copy of the Commissioner's letter. Having had sight at the second page of the faxed letter transmitted by the Tribunal to the European Commission under cover of letter dated 2nd July 1993, you now understand that the copy was signed.

That is the document which went to Mr. Towey and Mr. Brennan.

And then you clarify the position as regards at page 3, paragraph 36, your statement describes a copy of Commissioner van Miert's letter of the 14th July 1995 found in the files of Esat Telecom as being unsigned and undated. When you wrote this, you had seen the first page of the letter only. You had not seen a copy of the second page of the letter in that context.

Having read the statement of intended evidence to be given by Mr. Burke, Mr. Jarlath Burke, dated 8th July, 2003, and received yesterday, it appears that the second page of that letter may never have been in the possession and is not in his possession and is not in the Tribunal's possession. There was, therefore, no basis as to any statement whether that copy of the letter was signed.

Now, if we just we can run through them fairly quickly because we can identify the document quite easily, I think, by reason of the just run through the documents now.

I think on the 20th June of 1993 you faxed a draft letter to Mr. Brennan, isn't that correct? That was for discussion purposes?

A. Yes.

Q. I don't think we need concern ourselves with that.

All it has on it, European Commission, and it has Brussels on it sorry, if we go to the actual document which was faxed.

A. Can I ask something. It was not only for discussions, but clearly in order to get an agreement of the Irish Department of having this letter being, let's say, signed by Commissioner van Miert in order to close the case.

Q. I use the term "discussion" in that context. What you were sending them was saying, this is a draft which you proposed would go through the procedures in Brussels, and I suppose inquiring into their views about it?

A. To see whether this would end I mean, if they could agree, let's say, with the different conditions which are set there, and if that would end, I mean, legal uncertainty which was created by the letter of Commissioner van Miert of 27th April.

Q. There is no question being raised as to the appropriateness of such conduct. This is perfectly normal dealings between the Commission and a Member State.

Now, we know that it can't be the first page of that particular draft which was found in Mr. Burke's file.

We needn't go through it. I think it's clear to everybody and we have been over and over it again.

Now, on the 26th June of 19 29th June, I beg your pardon, 1995, you then faxed to Mr. Towey, I think, the draft which it was hoped that Commissioner van Miert would sign that day, isn't that correct?

A. That's right.

Q. And again, we can see that it has the word "Brussels" initially we had thought we had written the word draft on it, but it doesn't appear it happened in the Tribunal here, it happened either in the Department perhaps in the Department the Irish Department, that is, but in any event, we know that that can not be the first page that was Mr. Burke's file, because, again, it doesn't contain the F/ft legend. So we can set that aside.

We then have the next document, which is the document which was faxed at 15:57 by you, you now accept, to Mr. Brennan and Mr. Towey, which is the final form of the letter, isn't that correct, which Commissioner van Miert issued, but what it is is: it is a document which contained some alterations which were made in the Commissioner's office because it contains the letters F/ft on it, and it is signed, but it was not registered and was not the official letter because it

didn't bear the date-stamp, isn't that correct?

A. Well, it depends, again, what you mean the official letter, because being signed, it's somewhat an official letter, but before being sent it was indeed registered at the register of the Cabinet and indeed this did not happen, and probably, I mean, I got a copy of this letter because of different phone calls I must have got from Messrs. Brennan and Towey, and I probably would have asked the secretary of Commissioner van Miert, before bringing the file even to the fax, to send me immediately a copy

Q. I am not criticising what was done here at all. I am just trying to follow the procedure in relation to the correspondence. Of course, it was Commissioner van Miert's letter. You were perfectly entitled to send a copy to Mr. Brennan and Mr. Towey, there was no dispute about any of that. You were dealing with the Member State. You were dealing with Mr. Towey and Mr. Brennan primarily in dealing with the Member State on this whole issue, isn't that correct?

A. That's right.

Q. There is no concern about that. We then go over to the next document which is a fax, and it is the letter which again is signed by Commissioner van Miert but it now has the date-stamp on it and this was sent to the Irish Permanent representative and it came back to Dublin in a diplomatic bag, so we know about that, and

then we have the hard copy which arrived formally at the Department some days later.

And I don't think that there can be any doubt but that the page, the first page which was in the documents of Mr. Jarlath Burke, is the first page of the letter in the form as faxed by you to Mr. Brennan and Mr. Towey, is that right? I think there is no doubt about that.

You have seen a copy of the document which was found in Mr. Burke's papers.

Now, I think you are also aware, and if we just look at it, the document which was found in Mr. Burke's papers, we can put it on the screen, that it contains no fax banner head, isn't that right?

A. (Nods head.)

Q. And was either copied to exclude it or in the copying, something happened, although that's something that we just have to try and consider.

You have no recollection of giving of sending it to Mr. Jarlath Burke or of your secretary sending it, or directing your secretary to send it, is that correct?

A. That's indeed correct and that's also what I stated in my written statement.

Q. Yes, you have no recollection of it. In the normal course, if you were sending something yourself by fax, or if your secretary was sending something by fax, it would contain the banner head of the machine, isn't that correct, in DG Competition, from which the fax

was sent as we can see in all of the other documents?

A. That's correct, yes.

Q. Now, the correspondence which was received from the Irish Minister was stated to be confidential and specific reference in the body of the correspondence was making to the confidential nature of the weightings when an indication was being given to Commissioner van Miert of the type of weighting which might apply to the licence fee, isn't that right?

A. Well, here I am not certain that I completely follow you. What is clear is that, according to my reading it now, so I have no idea about what I was thinking at the time, but reading it now, what is clear is that the document sent both by Mr. Brennan on the 20th, but then later on also the letter of Mr. Lowry to Commissioner van Miert confidential, which is something which is quite normal, as long as we are discussing with Member States before a settlement, that this kind of, I mean, correspondence is not shown to any third party, because indeed, it's a negotiating position, and when we look to the letter of Minister Lowry, for instance, regarding the weighting criteria, I mean, he mentions I am looking for the wording he mentions somewhere even that he would be available to change the order, so it's clearly a negotiating position. It's certainly not providing to the Commission the weighting criteria, and as far as I

could make out of the file and I mean remember, but here my memory maybe can be limited, I mean the Irish authorities always refused to give us any indication about this weighting, and the most precise figure we ever got was in the fax of Mr. Brennan, where he said that it would be 10 or less, so in our mind, 10 or 9, something like that. So after a while I saw it was 11, it was even not an accurate figure, but that's the most precise figure which was given.

If we go back to the fax that well I drafted and sent for discussion, as you said, to Mr. Brennan, there the idea was that we would not enter into the precise, let us say, weighting, but give an indication, because both for the Commissioner and both afterwards when the Commissioner has to defend his position and we go to go when we go for closing the file, the formal closing has to happen through the college of the Commission, I mean we cannot say, a limited weighting; we have to give some indication, some range. So what I had proposed in this fax was to provide a range, when we say 20 or less, because the licence fee element was the fault of 8 criteria. When we say 20 or less excuse me, it was less than 20, so it means, it's either I mean, it's any figure between 109 and probably 5, because there still must be points given to the four last criteria. So we gave that kind of range. So it's not divulging, not

providing any information about the weighting.

Q. I understand your point.

A. And after a while these figures were changed when, indeed I don't remember exactly, but I reconstruct on the basis of different faxes, this less than 20 was changed to less than 15, because I had this fax of Mr. Brennan where he said it would be 10 or less. So then I was using a range which was more limited which went from 14 up to 5, but this kind of open range is not like providing a figure, and that's what we are doing, as we say, in DG Competition, when we are publishing the decision we are taking, and I mean it can't be fair to merge our decisions. We are also not providing figures regarding market shares while it is sensitive, but then we give a range of between so much percent and so much percent.

So this I mean, it's clearly to stress that this letter of Mr. Lowry, I mean, when I read it, I cannot see how, I mean, I could have or anybody in the union, could have considered this less than 15 as a kind of sensitive confidential information. And to reinforce that, the fax which was sent on the 20th June to Mr. Brennan, I mean, there was no mention confidential. So it was clear from this fax that the letter of Van Miert was not intended to be a confidential letter and Mr. Brennan, in his reply, didn't say, "well, we want this letter to be confidential". At the contrary, we

couldn't use that's what I understood from discussions at the time, that this letter would be, I mean, circulated in Ireland. I mean, apparently, it was not the case. I mean, that's something which I found later in looking through the files; apparently there was a letter of the Minister, or Martin Brennan, I mean, to the six consortia without putting in annex, let us say, the letter of Van Miert, but the understanding which I thought we had was that this letter would be used to end all legal uncertainty and so be circulated with the parties.

Q. Now, let's look at the letter which the Minister sent to the Commission. A formal communication between a Member State and a Commissioner. What status does that have within the Commission? I am just trying to understand, because I want to come back and tease out some of your own views in a moment and understand if that was the view of the European Commission, and particularly, of DG Competition in relation to confidential correspondence. But the letter from the Member State, from the Minister, is headed "Confidential"; isn't that correct?

A. Yes, that's correct, and this letter was never sent to any other parties. I mean, clearly it was kept in our file, probably according to our internal rules, in a closed cupboard and so on, so I completely understand. I agree with your position.

Q. Now, I now want to take you to the second page of that letter, if we could. And to the second-last paragraph on that page, which commences: "On the basis that prospective licensees will be best able to value, in commercial terms, what a reasonable price to pay for these advantages" he then sets out then he goes on not a negotiating position "A clear but confidential decision has also been taken that this element would get less than 15% of the overall marks in the quantitative assessment by our consultants."

Now, you knew that this Member State was not going to publish its weightings, didn't you? Isn't that right?

A. Yes, certainly.

Q. You knew that you were being informed by the Minister, or sorry, the Commissioner was being informed by the Minister, that a decision had been taken a confidential decision in the context of the confidentiality surrounding weightings in the Irish tender competition, had been taken; that it would be weighted at less than 15%, isn't that right?

A. That's certainly right. And even I knew that it would be 10 or less because of this accompanying fax of Mr. Brennan.

Q. Would you just listen to me, Mr. Hoceped, and look at the correspondence.

A. All right.

Q. The Commissioner is being here informed by the Irish

Minister that a confidential decision had been taken and that he was disclosing to him a confidential decision, isn't that right?

A. Well, regarding that decision, I have some doubts that the decision had been taken because if you take the next page, I mean, the second paragraph on the next page, then it stated: "Furthermore, having regard to your concerns about the priority given to the licence fee in the selection process, I am prepared to consider an appropriate repositions of the fee requirement in the selection criteria at paragraph 19." So he would even be able I mean, open to reconsider the ranking according to this, which means that if the decision here was something final, then it could have been just between, let us say, 14 and 5, but taking into account the paragraph in the second page, it could even be 1 or something like that, if we would have pursued that element. So, I mean, the interpretation I have, maybe the interpretation is not right, but reading the document not only that sentence, but the rest of the document is that it is a negotiating position and not, let us say, a final position.

Q. Mr. Hoceped, this Tribunal pays due respect to the European Commission. I am trying to understand how the European Commission views a statement by a Minister from a Member State about a confidential

decision of which they are being informed in a licensing tender process where the Commission, and particularly DG Competition, was aware that they were not going to disclose those weightings. That's all I am trying to understand. What, if any, weight did DG Competition give to what it was being informed by the Member State?

A. I completely understand your reaction. The only thing I wanted here to say is that we can hardly consider a statement like less than 15% as providing a weighting to the Commission. So that's the only thing I wanted to say. Maybe I was quite long, but that's...

Q. Let me tell you now what the view of the Member State is about this. The Secretary general of the Department who was running this particular competition, had no doubt that this was highly confidential. Mr. Martin Brennan, who was the Chairman of the Project Group, had no doubt that it was highly confidential. And Mr. Fintan Towey, who was effectively, the secretariat for the group running this competition, had no doubt that this was highly confidential.

A. Well, I mean, did they say that now here in the Tribunal?

Q. They stated that in sworn evidence before this Tribunal, sworn evidence.

A. The only thing I can say is on the basis of the

documents, that Mr. Brennan on the 20th June, '95, in his fax, didn't state that.

Q. Now, this is the reason I am asking you this is because it may be of assistance to the Tribunal in trying to understand where this document came from.

Mr. Jarlath Burke and Mr. Burke will be coming to give evidence, furnished the Tribunal with a statement of intended evidence. He still has to come and give evidence and be tested on it. And Mr. Denis O'Brien went on Irish television on the 4th December, 1995, and both Mr. O'Brien stated on television I don't think there is need to play the footage but I can tell you what he said about this that the letter the page of the letter which Mr. Burke received, or had in his possession, sorry, he received from the European Commission, and you have seen Mr. Burke's statement where he has also stated that he received this document from the European Commission and that it was possibly from you he received it, possibly. Well, he says possibly, and then at another stage he says almost certainly. I'll read out the paragraph.

"While it is difficult for me to" paragraph 16 I think "While it is difficult for me to say with certainty who it was within the Commission that sent me the extract from the letter to the Minister, I conclude that it was almost certainly within the ranks of Mr. Herbert Ungerer's unit, and most likely came

from Mr. Christian Hoceped. In identifying Mr. Hoceped in this matter I wish to point out that I do so with great hesitancy because the unfounded but continuing suggestion that by doing so, there was some impropriety. The standard to which the Commission operates cannot be judged or impugned by reference to a culture this is Mr. Burke making a submission but I'll read it "To a culture of secrecy that is more characteristic of Ireland than elsewhere or indeed ignorance or mischief in relation to whether or not the portion of the letter as disclosed to Esat Telecom was confidential, in the sense of conferring a peculiar commercial advantage to any one bidder. Quite simply it does not, could not and was not intended to do so."

Now, Mr. Burke will come and give evidence and be questioned about that, but he is effectively identifying you as somebody who sent it to him. Did you?

A. I mean, in my statement, I mention that I could not categorically exclude that. The only thing is I don't remember that and there is no element in the file which would indeed help my memory to remember having sent it. And if, when I am looking to the press release we drafted in September, then I see at the time I was working on the Austrian file and something which has to be mentioned here is that, I mean, this

letter of Van Miert was quite important for me in the context of the Austrian file because I mean, if I wanted to convince the Austrians to reduce, let's say, the weighting, then the best thing I could have was to show them this letter sent to the Irish. So I really, I mean, again, I don't remember exactly what I thought at the moment, but I really cannot accept this idea that the letter, the intended letter to be sent by Commissioner van Miert to the Irish, would have to be considered confidential because Mr. Brennan never objected, I mean, and certainly not in his fax of the 20th, and certainly if I have drafted it that way, because I wanted to have a document which I could use to help involving the Austrian case. So that was my purpose, why I have written it as first dot, reduced the weight to less than 20% and then I was happy to be able to write less than 15% because that's even more compelling to tell the Austrians, "well, look what we did with the Irish, and can't you follow the same approach".

Q. That's not the question I asked you at all, Mr. Hoceped. Could you concentrate on the question I asked you. I asked you a question, did you send it to Mr. Burke?

A. My reply is the reply in the statement, I don't remember that. And there is no element neither in my file nor in the documents which have been sent to me

by the Tribunal which I mean, make me just remembering I mean, the context, the contact with Mr. Burke. I mean, I cannot exclude it and certainly if Mr. Burke is saying it, but I cannot say I sent it when I don't remember it.

Q. Right, if you were sending it to Mr. Burke, if your own view was that there was no confidentiality, the Tribunal will take into account the views expressed by the Irish Government and the Commission in relation to the confidentiality, of course, but if, in your view, confidentiality didn't apply, and you felt that you were entitled to give it to Mr. Burke or to anybody else who may have been inquiring about it, can I take it that you would have had no difficulty in sending him the whole letter and that it would contain a fax banner?

A. Let us say, if it would happen today

Q. No, at the time. At the time if you felt there was no difficulty, would you have just sent it in the normal way?

A. I cannot again speak about at the time, it's seven years ago. I would just say if it happened again today, I mean, reading that letter, and reading the fax of Mr. Brennan on the 20th June, reacting on that letter, I would see no objection to sending it to, let's say, a party who had an interest and asked for having the exact circumstances of and grounds of the

decision of the Commissioner.

Q. I am asking you how would you have sent it?

A. Excuse me. Well, certainly by fax, the same way as the faxes that I mean, you have seen, I would have asked the Secretary just to type the standard fax and have written it please, and

Q. Maybe a cover sheet?

A. Certainly a cover sheet, certainly. I mean I

Q. That would be on the file in DG Competition, if you did that?

A. Well, that would probably not be on a file which is closed and sent to the archives, because it's procedures with the Member States. We only keep normally the elements which we have to send to the Tribunal in case in the first instance, in the case of appeal and these type of documents are some particular correspondence, which we'll say formal correspondence.

Q. What?

A. This kind of correspondence, which is not formal correspondence, like, briefings for the Commissioner, like background briefs, I mean, for meetings of journalists, this kind of exchange of information which we do, is I mean, as you have seen, the different faxes sent to the Department were not filed in the file of the Commission. So you know, I agree, and that's why it's written in my statement

that I cannot exclude it, because on the basis of the file, the fact that there is no banner excuse me, no cover page in the file, doesn't mean that it has not been sent; and then when the file was filed, that we have not thrown it away.

Q. Leave aside a cover sheet, you'd expect it to contain the fax banner head, wouldn't you?

A. Certainly, and the same fax banner of the unit C1.

Q. That you sent to Martin Brennan and Fintan Towey?

A. Yes, that's correct.

Q. And the whole letter?

A. Well, it depends what I was asked for. If

Q. If you were asked.

A. If I was asked for the precise grounds on which van

Miert decided to accept, I mean, the deal with the

Irish authorities, then I would have sent the whole

letter. I mean, if I was asked for more specific

questions, and the reply to the more specific

questions were only on the first page, then I would

have sent only the first page. The second page is

mostly on the issue, as far as I understand, on the

international interconnection, and so if, let us say,

I was not asked about that, then maybe I would have

sent only one page, but I would have had a tendency to

send the whole, just to avoid the other person would

call me again and say well

Q. How many more pages are in it?

A. yes, and then would take up so much more time, I mean...

Q. That's what in ease of you, Mr. Hoceped, I am trying to tease this out; that you feel you would have had a tendency to send the whole letter to avoid further inquiry?

A. Mmm.

CHAIRMAN: Is it your evidence, Mr. Hoceped, that if you do, as here, receive a letter from a Government Minister of a Member State on a matter that is headed as being confidential and that contains one particular matter alluded to as confidential, that if on looking at the position you feel that it's particularly not helpful or confidential, that you feel at liberty to disclose it to third parties without reverting to Mr. Brennan or his Minister?

A. Well, I mean, as you say Chairman, the normal practice is that we revert to the officials concerned, I mean, to get their requirement. Here, in this case, it's a specific situation, because we had this discussion. I mean, we had sent in advance I mean, this letter, without a heading I mean, the reply without a heading confidential. We had received the comments of Mr. Brennan and he didn't mention that obviously this letter had to be kept confidential. So I mean, it would duplicate somewhat the procedure, but so I mean, there must be a case of doubt. I mean, here in

this case and I think maybe we should enter into the substance about I mean, we can discuss is it confidential or not, but I mean, if one has followed, I, mean this weighting issue, I mean, and there are eight criteria and you do some kind of you ask a mathematician to make an assessment about what the weighting criteria should be, already stating less than 20% or 15% is what, I mean, a normal mathematician would say for the fourth criteria because otherwise you don't have any sensitivity in the dispersion of the criteria. So in practice, it's merely something like in the public domain. Secondly, I mean, there is another issue which is quite important in the Irish case: It's this commitment of having a cap, which made, I mean, the weighting of these criteria

Q. Neutralised?

A. made it completely neutralised. And I found it in a statement, I think, by an official of the Ministry of Finance, it said, I mean, its weighting was becoming irrelevant. So then, I mean, indeed, for formal procedure, we can always send faxes, ask the Department and so to confirm, but I mean, knowing that these persons were also quite busy, and I mean it's probably something that maybe I would not have even thought about doing. But again, I don't remember having sent it. And everything I do, I say here are

pure assumptions on the basis of what I would do today in July 2003.

Q. What you are doing is speculating. You have no recollection of sending it to Mr. Burke or of giving it to Mr. Burke, because if it came to Mr. Burke in the form, and that is the only form that we have ever been told about, that it existed on Mr. Burke's file, was in the form with the fax banner head excluded or obliterated, it doesn't look as if it would have come from you in that form, would you agree?

A. I completely agree.

MR. MARREN: I don't believe that assumption is open to Mr. Coughlan to draw. I think at the moment, he has a statement in which he has heard extracts from my client and also he has hard evidence which is based on a recollection of Mr. Hoceped. Now, surely that must they must represent the only circumstances from which Mr. Coughlan can draw an assumption. He made reference earlier on to the possibility of somebody photocopying so as to obliterate. Now perhaps maybe Mr. Coughlan should demystify the entire thing and look at the content of the letter in the context of the evidence that Mr. Hoceped has given in relation to its position with regard to the application of competition rules. And the concerns that were raised, and issues that were raised with DG IV in relation to this competition to which Mr.

Hocepied has already alluded, but for some reason has not been actually gone into by Mr. Coughlan, and perhaps maybe this sort of question or this concern that he might have would actually evaporate.

I think he is he is seeking to draw a conclusion, which I don't think will create a false impression as to what this document represents and what the significance of it being found on Mr. Burke's file represents.

CHAIRMAN: Well, what the Tribunal is pursuing is an inquiry into a potentially important aspect with no preconceived ideas on it, and it's necessary to examine, from a point of view of the interests of all persons, the various possibilities that may arise in relation to it. And I feel that the line of questioning is perfectly legitimate. You'll have an opportunity to have Mr. Burke's evidence heard and you'll have an opportunity to ask any questions in due course.

I think it's five to one

MR. COUGHLAN: Perhaps I could just inform Mr. Hocepied I'll be coming back shortly after lunch the reason I say that the only information the Tribunal has as to the form in which this was found, these papers are all in the possession of British Telecom, which became O2 which acquired the interest of Esat Telecom. That's where the document

was found in papers furnished to the Tribunal by them.

When it was first received from the Tribunal, the Tribunal believed that it was just a photocopy it had received and perhaps it was photocopied poorly. When we went back to solicitors for O2, as they are now, the Tribunal has been informed, this is the form in which it exists on Mr. Burke's file. And that is the only document and the only form in which it exists on Mr. Burke's file. So this is why I am raising questions.

And perhaps I should just explain I wasn't, I hope, in any way, jumping the gun in relation so if you had given it to Mr. Burke or sent it to Mr. Burke, you say it would not have been in that form.

A. Yes, but again I have seen a photocopy where you'll see clearly there could have been a banner because, for instance, the I don't know if you can show it, I mean the EU flag is partly cut, so it's not clear I mean, as you see, maybe there was a banner above it which is, or cut or I don't know exactly how it's possible that it's in that format. I would like to see, I mean, the physical copy.

Q. That is the format on which it was on Mr. Burke's files. The reason I am inquiring of you is because that first page also appears on the files of the Department of the Department, because you faxed to Mr. Brennan and Mr. Towey that particular page and the

second page on the 14th July of 1995. And there was a fax banner head on the document you sent. That's why I am carrying out the inquiry. The Tribunal is trying to ascertain where did it come from. Did it come from the Commission's office or did it come from the Department?

A. And I completely understand

Q. Do you understand the point?

A. And I am sorry that I cannot solution the discussion

Q. Mr. Burke says that it almost certainly came from you.

You say that you have no recollection of giving it to Mr. Burke, isn't that right?

A. That's indeed my recollection.

Q. I am asking if you had given it to Mr. Burke and as you have argued that it wasn't confidential and that was your view, you would have seen no difficulty in giving him the whole letter, and you would have sent it in a formal way by means of fax or

A. Yes.

Q. That's your evidence, is that right?

A. That's indeed my evidence.

CHAIRMAN: Five past two. And I think we might correct just, I think, the reference to Mr. O'Brien's interview on Radio Telefis Eireann, I think it must have been an error, I think it was the 4th December 1995, which plainly was pre Tribunal

MR. COUGHLAN: Sorry, I beg your pardon, 4th December 2002, I beg your pardon.

CHAIRMAN: Very good. Five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF CHRISTIAN HOCEPIED BY

MR. COUGHLAN:

MR. COUGHLAN: We won't be much longer, Mr. Hocepied.

I just wanted to ask you I think you have informed us in your memorandum and in your evidence that the file copy of this particular letter, this is

Commissioner van Miert's letter, which would be held on DG Competition files, would be a copy with the date-stamp on it and no signature, isn't that correct?

A. Well, that's the usual, let's say, way of filing it, but at the same time, I think in this file, we found a copy with a date-stamp and signature. I cannot say exactly, but we transmitted the copies to the Tribunal, so...

Q. What you found on the file was one with date-stamp and signature and one with date-stamp and no signature, which would be the file copy that would be retained?

A. Right.

Q. I think they say would be the ones that you furnished to the Tribunal in the first instance, isn't that correct?

A. Yes.

Q. Now, in the normal conduct of business, if you were furnishing a document, a letter to somebody, can I take it that it would be usual that the document which would be furnished would be a copy of the file copy, if you understand me?

A. Well, here it will depend really to whom we furnish it. Let's say, if I mean, as I mentioned, one of the aims of having that document in our file was to be to use it for the other procedures we had and certainly with the Austrian, which was my next urgent file, it was clear with the Austrians, I would really use the one certainly with the date-stamp because otherwise they would not be very impressed to get a copy without any date-stamp. I mean, anybody could have produced it on its PC. At the same time, let's say a lawyer is calling, and let's say I have other things to do, I don't know any more at the time, but it can happen now, that I just take the first copy that I find in my file and I give it to the secretary and I say, fax this to Mr. or Mrs. X or Y, so I cannot say that if it's one copy or the other copy, that it should come from the Commission or not from the Commission, I don't think it's possible to make any conclusion.

Q. What I am asking you is this: The document which you faxed to Martin Brennan and Fintan Towey on the 14th July, was that retained on the files at DG Competition

in the form that you faxed it to Fintan Towey and

Martin Brennan?

A. I presume in the short term it was retained in the file, so...

Q. What would happen to it then?

A. What do you mean? Once it was excluded well, taken out I mean, when we archive the file, so as

happened in '96 and we take out all the documents

which are not really relevant any more, which are this

kind of correspondence without stamps and we just

keep, I mean, the formal ones

Q. Explain to me, what do you keep?

A. We keep in the document I mean, official correspondence from the Commissioner, from the Director General, from the Director and everything we

get formally from the Member States. Not exchanges

of, let's say, faxes between the services of the DG

Competition and the services of, let's say, the

relevant Department. Minutes and written minutes are

also not kept. Only, really, let's say, formal steps,

which we can have to use in, I mean, as I mentioned,

when there is an appeal, when we want to have an

example or something like that, let's say, referring

to precedence for younger colleagues who would join

the Union, I mean, when they want to see, I mean,

different steps of the file.

Q. What would be kept for archive purposes would be the

file copy which would be the date-stamped one?

A. Yes.

Q. Unsigned?

A. Yes.

Q. And in this instance, you had a copy of the date-stamped signed one also, is that correct?

A. If we transmitted them to you, it's because we found it in the file, yes.

Q. I am just checking as to whether you did transmit to us the date-stamped signed one; I am just unsure of that. I know you certainly transmitted the date-stamped unsigned one as the file copy.

Now, I think the one thing that you can state categorically is that you faxed the signed document without a date-stamp on it to Martin Brennan and Fintan Towey on the 14th July of 1995 at 15:57 Brussels time, isn't that correct?

A. Yes. I mean

Q. You can state that categorically?

A. Yes, certainly.

Q. And that has a fax banner head on it, is that correct, and therefore, we can identify the machine and everything?

A. Mmm.

Q. And the information on the fax banner head the fax banner head comes up on the document of the person receiving it, isn't that correct?

A. Yes, in principle. I am not an expert in all the different categories of faxes, so it can be that some faxes don't read that banner, but in principle

Q. We know the banner head came up on the machine in Dublin, isn't that right?

A. Yes, in principle, yes.

Q. It doesn't appear on the document which you had faxed, the banner head doesn't?

A. You mean the original?

Q. Yes.

A. Yes, indeed, the original is adjusted by the fax, but not altered.

Q. Now, as you have said, if you were sending the document to Mr. Burke at his request, you would have seen no reason why you wouldn't have sent the whole document, isn't that right, the whole letter?

A. I agree with you, except if Mr. Burke had the specific question, I mean but again, it's all supposition.

Just thinking what would happen today, if a lawyer is questioning me on a point and I have a document of ten pages and I will not send nine pages which are not relevant for that point.

Q. And considering the views you have expressed and your state of mind, you would have had no reason to obscure the source of the document to Mr. Burke; you would have faxed it to him?

A. I don't see any reason, but again, I mean, it's quite

difficult later on to just make assumptions. I mean, one can always imagine, for instance, that something had been written I mean, I don't know when I got the telephone call from, let's say, somebody else and sometimes I write it on the paper which is in front of me, but I don't think it would be just on the top of it, it would be written on the bottom of it or something like that. But there can always be explanation, I don't want here my statement to be used to make a kind of categorical conclusion, because I think

Q. Let me just be clear about this, Mr. Hoceped. This Tribunal is about making categorical conclusions at the end of the day. That's why people are giving evidence here. So your evidence is very important. I am just trying to ascertain where this came from.

A. I know, I agree. Then I replied to you normally in principle, I don't see any reason why I should have cut it. I mean, one chance on I mean, if ever it came from me, because I cannot exclude it, but I don't remember, I just say that it sometimes happens that on some files I write something like, you know, telephone number which I have to recall or so before some date and then indeed, I would try to obliterate it and not to send it.

Q. Yes, I can understand that. Some information which you wouldn't wish to convey. That's perfectly

understandable. Of course.

A. Then in principle, I don't see why

Q. In principle you would have sent this, if you were requested, over the normal fax system, which would contain your banner head?

A. That's clear. I would have asked the Secretary. I wouldn't have done it myself.

Q. You would have had, on the state of the the state of mind which you say would have affected you, you would have no reason to obscure or cover the source from which it came?

A. No.

Q. Now

CHAIRMAN: And I suppose, if you had one of those situations where you were, for perfectly professional reasons, trying to obscure some confidential piece of information, you could use blanking tape or something like this?

A. Yes, that's clear, and usually it's not a banner which is obscured but let's say some paragraph.

Q. MR. COUGHLAN: It would be something down along which you'd either block out or cover in some way, of course; or if you had written some handwritten note on it that wasn't pertinent to the person, you wouldn't send that in the document. Yes, I understand that.

It wouldn't be the banner head. It couldn't be the banner head anyway because that comes from the man

that's sending it?

A. Yes.

Q. Now, you have no memory of being asked or of sending

anything to Mr. Burke. You can state categorically

that you sent a document to the Department, which has

the banner head on it, isn't that right? This

particular document we are talking about, the one

that's undated with the F/ft on it. Now, if you look

at the document in the form that it was found in

Mr. Burke's file, and we have been informed by

solicitors for O2, that that is the only form on which

it appears on the file, it appears that the fax banner

head may have been cut off or obscured in some way,

because looking at the other documents, the one you

sent to Mr. Brennan and Mr. Towey, you can see that

the fax banner head is some distance above the crest

of the European Commission, and it may be hard to

think that just that would have occurred in the course

of some form of photocopying. It looks as if it may

have been removed, doesn't it?

A. Well I cannot reply. I mean, I have no idea how

this European Commission at the top has been taken

out. It can be from photocopy it's a question I

cannot give a reply. I mean, it's but it's clear

that it's obscured.

Q. And perhaps that's a matter we'll take up with

Mr. Burke. You can't say.

A. (Nods head.)

Q. Now, looking at reasons why, possible reasons why one may obscure it from the point of view of Brussels, if I can just deal with it from the Brussels point of view.

A. Mmm.

Q. A reason for obscuring it would be on the basis that this was a leaked document; that would be one basis for obscuring it?

A. Well, again, I speak so many years afterwards, but I mean, I don't see why, I mean, if it was a leaked document, I mean well, it depends, what you mean the person who received it would have obscured it?

Q. Yes, you see, what I am trying to understand here is understand and there were two places where this document existed: One was in Brussels and one was in the Department. The Tribunal is trying to ascertain where it came from. As you say, you would have had no reason for not sending it in the normal way, bearing in mind whether you're right or wrong, what your view was there was no reason why you shouldn't send it, therefore, from your point of view, you would have had no reason to obscure the source of it?

A. No, I would certainly have no reason, but the source would not be on my copy, as you said, my copy I mean, it's only on the fax you have this number. So the only reason, as I say, which somebody in the

Commission could have, well to cut off the top, is if something handwritten or a secretary had spilled coffee or something like that on it, and I mean, didn't want that to pass through the fax. So the stamp, the banner is only on the receiving end.

Q. Thank you, Mr. Hoceped.

CHAIRMAN: There may be a couple of other questions from other legal representatives, and I'll leave your own legal adviser until the end, which is or normal procedure. So Mr. Fitzsimons? Mr. Kelly? Then, I think Mr. O'Donnell?

MR. FANNING: I beg your pardon, Sir

CHAIRMAN: I was going to take the order of it seemed more logical, as you're relatively distanced from this, that I'll leave people who are more directly connected with the possible matter until the end. So that's why I was promoting you

MR. FANNING: That's fine, I have no difficulty.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'DONNELL:

Q. MR. O'DONNELL: Just one or two questions, Mr. Hoceped.

I think your evidence is clear that you did not regard this information as particularly confidential or sensitive, that you'd have no problem in giving it to Mr. Burke, is that correct?

A. Yes.

Q. I think you are also aware that both Mr. Brennan and Mr. Towey are absolutely adamant that they didn't give

it to Mr. Burke?

A. (Nods head.)

Q. And I think you're also aware that Mr. Burke has a clear view that he did get it from you, isn't that right?

A. I read his statement, and it's written in his statement, yes.

Q. And what you say is you can't exclude that as being the situation, and you also say that you don't have a record of sending it to him, but you also say that you kept no file of informal exchanges. And, in fact, I think while you say you don't remember sending it to him, you also didn't initially send the faxed copy to Mr. Brennan and Mr. Towey initially, but subsequently your memory improved, and the document was able to be identified.

I think it's also clear that there is one other document within the booklet of documents that came from the Commission that doesn't have a fax banner headline on the top of it. The first document in the booklet of documents in your settlement re statement. It's one headed "Fax" and it is it doesn't appear to bear the numbers of the fax machine on the top of it. It's the first document?

A. It was sent on what date?

Q. It's the first document in your list of

A. 29th June no?

Q. 20th June.

A. Yes, I mean, that would depend certainly on the receiving machine. It's not the sender

Q. Of course. It just doesn't appear on it.

A. I agree.

Q. So you agree with the propositions I put to you in relation to those matters. You are nodding, are you, for the purpose of the transcript, yes?

A. Well, it depends I agree that there is no banner on this fax. So

Q. And do you agree with the previous propositions I put to you in relation to the evidence of Mr. Towey and Mr. Brennan?

A. I agree, indeed, that in the statement of Mr. Burke, he is saying that it would come from me.

Q. You can't exclude that?

A. That's what I have written in my statement, that I cannot exclude it, yes.

CHAIRMAN: Mr. Fanning?

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING:

Q. MR. FANNING: Mr. Hoceped, I appear for Minister Lowry who was the relevant Minister in the government department at the time, and I think you were here at the beginning this morning when Mr. Healy gave a brief explanation as to why evidence was being heard on this issue at all, and I think you'll have heard that he explained that the circumstances by which Mr. Burke

came into possession of the letter are really relevant from the Tribunal's perspective only if there is evidence that Mr. Lowry was in some way involved in the letter's onward transmission. So I think you are aware of that general context, isn't that so?

A. (Nods head.)

Q. Now, can I ask you then, Mr. Hoceped, in those circumstances, isn't it the case from your initial statement that you provided to the Tribunal, that there was, in fact, a background of a fairly substantial amount of contemporaneous communication between Mr. Burke and Esat and DG Competition in the months leading up to the sending of this letter, isn't that so?

Isn't it the case that on the 20th March, Esat supply DG Comp with a 149-page submission to do with auto-dialers and that was followed by a meeting during the week of the 3rd to the 7th April, 1995, between Esat and DG Comp.

Isn't it also the case that on the 10th April, Mr. Burke wrote to you personally, to thank you for that meeting and to follow-up on the auto dialer issue. And wasn't it also the case then that a further letter was written to Mr. Burke on the 21st April, all in connection with the auto-dialer issue.

Isn't that all correct?

A. I mean, I think you are reading that out of my

statement, and I can only confirm my statement.

Q. Exactly. And I think it's also the case from your statement, and I don't think it's controversial here either, that on the 22nd May and subsequently on the 2nd June, Mr. Burke faxed you a memorandum concerning the legal basis for granting the second GSM licence in this jurisdiction, and do you think you subsequently spoke to him orally, presumably, on the telephone around that time?

A. Yes, again that's in my statement, yes.

Q. So isn't the point, Mr. Hocepić, that, in fact, you had had a relatively clear channel of communication established between yourself and Mr. Burke at the relevant time when Mr. Burke came into possession of the letter, isn't that correct?

A. Here I cannot fully share this conclusion, because clear channel for me really implies to have had more contact with the person and with a legal representative that I have met once in my life and I had maybe two or three times maximum on the phone. So...

Q. Certainly, but you nonetheless had business dealings with him in the very recent past, isn't that so?

A. I knew he was representing Esat fixed business, so that's clear.

Q. Now, Mr. Hocepić, you have given very clear evidence, and I don't want to go back on that in any way, but

your evidence very much seems to be to the effect that you regard this document, this letter and the information contained in it as being, perhaps, in some way less confidential and less important than the Irish officials who have preceded you in giving evidence, and that has already been put to you by Mr. Coughlan this morning and that's the position, isn't it?

A. I completely confirm that and here maybe I can even add that I am very astonished that Mr. Brennan told that it was, that he considered it as being confidential in the sense that we passed him the warning letter we sent in January to the Italians, so if I was him, I would have been completely aware that one of the aims of having this letter sent by Commissioner van Miert to Minister Lowry was to be able to use it in our procedures that we had with other Member States concerned, what effectively happened with Austrians. So I really don't understand, and if this is the case, why he didn't react in his note of 20th June telling me, well, please, this information is confidential, don't mention it to any third parties, because it's certain that in Vienna, in the archives of the Ministry, you will find a copy of that letter. Well, I accept if they cleared it, let us say, but

Q. Just like Mr. Coughlan, Mr. Hoceped, I want to park

that issue as to whether or not the substance was confidential. The question I am really asking you for the moment is that, if it was the position of the Irish representatives, Mr. Loughrey, Mr. Brennan and Mr. Towey, that the matter was confidential as compared to your own position that the document was not as confidential, doesn't that seem to make it, on one view of matters at least, more likely that the document emanated from the Commission than from the Irish side?

A. I think here you ask me a judgmental, you know, something which is relating to facts.

CHAIRMAN: I think, Mr. Fanning, it is more a question for me really. I take your point and I'll certainly reflect on it.

MR. FANNING: I am afraid the witness has been asked to speculate all day as to the possibility he can't give direct evidence on. I think it's a fair question to ask at this stage of the process.

CHAIRMAN: Well, we'll pass on.

Q. MR. FANNING: Can I ask you then, Mr. Hoceped, specifically, assuming that it wasn't sent deliberately by you or on your behalf, and you have given clear evidence that you can't recall whether or not it was, but is it possible, as an alternative possibility, with regard to the potential of the document emanating from the Commission's side, that it

was leaked by the Commission as opposed to deliberately sent; can you rule that possibility out?

A. Well, here, speaking as a Commission representative, I think the Commission doesn't leak documents. So it's and I don't see exactly what you mean with leaked. I mean, if somebody is asking

Q. Was there in some way can you rule out in some way an improper or surreptitious disclosure of the document to best of your recollection by or on behalf by somebody in the Commission as distinct to the Irish Department are you in a position to categorically rule out that possibility?

A. I think it's a quite difficult question seven years after the fact. In principle, I think it's quite difficult, but I mean we can never exclude I mean, these documents are not treated, you know, like real business secrets, but again it's just speculation. I hardly see somebody in our office getting into the file but it can not excluded also.

Q. Can I take your answer you'd like to think not but you cannot firmly exclude the possibility?

A. I have to look here to my colleagues to know if I mean my reply to this question means the same thing as what I understand. Let us say I would exclude it, let's say, for nearly, let's say one thousand, or 9900 I mean, comma, point and nines, chances about on 10,000. So I don't see it but again, it can the be excluded

because of the security measures of the Commission are not such to prevent, I mean, this kind of thing.

Q. I'll pass from that. I think your position is relatively clear. Can I just turn for a moment, if I may, to the substance of the letter. I think it's fair to say that the letter gave some very limited indication of the weightings used in the quantitative assessment that was set up for the Irish process, isn't that so, and what I'd really like to ask you, Mr. Hoceped, is that given that the Tribunal has now, at this stage, heard evidence, and I don't know whether you're familiar with this or not, that the quantitative assessment was ultimately dropped in favour of a qualitative assessment, how useful in that context, and if you can't answer the question, so be it, would the information in the letter have been to the Esat consortium?

A. Let's say, I think that's for the Esat consortium to reply. My only assessment which I already mentioned this morning, is that given that there were eight criteria and a ranking, that by knowing that this licence fee element would get less than 15 or less than 20, didn't give any indication on the weighting of the other criteria. So that the value would be completely, I mean, very limited, and if you add the element of the capping, I mean, then this value for Esat was, and for the other participants would be

completely nil because the natural tendency of any bidder would be to bid the maximum, and I found in the file they did it because whatever I mean, the amount, or the weighting on this licence fee, I mean, they knew what the maximum was so they would bid the maximum. So I mean, I would do so, I mean, you would do so, everybody who makes a bid would do so, except if this capping had been put at the level which was too high. But given that it was a reasonable level, as Mr. Brennan also in the telephone conversation of 15 June, stated to the Commission, I think that the normal tendency of somebody who has to fill in a bid so that's why I mentioned this morning that I didn't see anything confidential with the statement. And I also added that we never received from Mr. Brennan or anybody else, the exact weighting, because that indeed would have been a confidential data, but the only element we got was in this fax of 20th June, the statement that it would be 10 or less, something like that, 10 or 9, and that's something which we never mentioned. Otherwise, we never had any information on the weightings which was kept completely secret and that was always been one of or problems was the lack of transparency in the process.

Q. I want to advance one more specific proposition and if you're not able to specifically answer it, perhaps just say so. But I am suggesting to you that, in

fact, in light of the dropping of the quantitative assessment, receipt of this document by Esat might even have been counterproductive or injurious to their planning for the GSM process, and it might have been a red herring from their perspective. Can you comment specifically on that suggestion? If not, perhaps leave it go.

A. Well, you know, I can't comment because it's an issue which I didn't look at at the time.

Q. Very well. Can I just ask you finally if, and I don't expect you to be able to answer this question either, but for the purposes of completeness, if the document in the possession of Mr. Burke did not emanate from the Commission, but emanated from the Irish government department, are you in a position to assist the Tribunal in any way with regard to the identity of the person or persons who may have forwarded the document to Mr. Burke?

A. As I say, I don't really understand how which kind of assistance I could provide.

Q. And you're certainly not offering any evidence that my client would ever have had anything to do with it?

A. I really don't know what the I mean, I don't understand exactly the question. I mean you mean if it was not coming from the Commission, it was coming from the Department. I mean what I mean, somebody in Brussels it would help to know who in

the Department

Q. Probably not at all, but the difficulty the Tribunal faces is that apparently nobody is in a position to give that evidence. Thank you, Chairperson.

CHAIRMAN: Mr. Marren.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MARREN:

Q. MR. MARREN: There are just one or two points, more by way of clarification. Mr. Hoceped, in circumstances where a party brings issues to the attention of, let's say, DG Competition, would it be usual where an assessment of a competition has been concluded, to inform that interested party of the outcome of the application of competition rules?

A. Well, I think this happens in the case of a formal complaint. In this case, I mean, the only elements we got from Mr. Burke and from Beauchamps was some kind of background memorandum and I don't think I mean, we would just send to everybody who has contacted us in the course of a procedure, just a feedback about what the Commission did, if they didn't ask for it.

Q. Am I correct in saying that Mr. Burke had raised certain concerns in respect of aspects of the GSM competition, tender, particularly in relation to interconnection charges and spectrum allocation, etc., and that would it be fair to say that those concerns and the Commission's position on it would be reflected in the first page of that letter that we have been

considering, particularly, the final version of that

letter?

A. Here I think regarding the interconnection, but I have

to check again to be certain, the interconnection

issue in my view is on the second page, so...

Q. I think the interconnection is dealt with, I think, at

bullet point 4, I think, on the front page the

first page.

A. That's for that's for national interconnection

dispute. But then you have the last paragraph,

"Finally, I take note that the Irish Government will

for the time being not allow direct cross-board

interconnection." So this issue is really dealt with

on the second page.

Q. That's dealt with on the second page?

A. Yes.

Q. And would it also be fair to say that the paragraph 2,

and then bullet point number 1 and 2, would reflect

the competition policy of the European Commission as

expressed in its Green Paper; that merely is a

statement of its policy and its attempts to actually

neutralise the effect or the auction aspect of a

licence fee in relation to second GSM licence

applications throughout Europe?

A. That's completely true, that's the way to neutralise

it, and that's also the reason why I mentioned that we

wanted to have that letter, you know, in order to be

able to show it also to other Member States who have a specific example or how, due to the good cooperation we had with the Irish Department, we could get a solution which suited everybody and avoided the situation of infringement.

Q. So in essence, that information will effectively benefit the European Commission by making its policy known and its approach known in the general market place?

A. I think here, if you are asking me if sending this first page to Mr. Burke would benefit the whole of the union, I think that would be maybe overestimating, I mean, the process. I mean, the aim normally was to have a press release afterwards setting out, I mean, this different conditions. Press release which was issued, I mean that's something to be checked somewhere in August or beginning of September.

Q. The point being that the introduction of a limited weighting to an auction element, effectively, neutralizes the auction element or the licence fee under the auction?

A. That's completely true.

Q. In line with competition policy?

A. That's completely true, yes.

Q. And therefore, the knowledge of that would not confer any advantage on any party?

A. No, certainly I don't see what advantage one would

have from that information, which was an information,
I mean, any of my colleagues could have given in
conferences also that we were in favour of limiting
the weighting of licence fee elements in this kind of
auction procedure.

Mr. Marren: Thank you, Mr. Hocepied.

MR. COLLINS: No questions, Chairman.

THE WITNESS WAS EXAMINED FURTHER BY MR. COUGHLAN:

Q. MR. COUGHLAN: I just have two matters that I want to
ask you about, Mr. Hocepied.

Firstly, Mr. Burke had been in contact with the
Commission in relation to auto-dialers and
interconnections, isn't that correct? The information
in relation to that is on the second page of the
letter, isn't that right?

A. I agree with, it's this international interconnection,
yes.

Q. Now, just in relation to a question which
Mr. O'Donnell asked you on behalf of the Department
here. He has said that Mr. Burke has stated in his
memorandum he hasn't given his evidence yet and he
has to give, I say, evidence and be questioned on
it and what effect that evidence will have on the
Sole Member of the Tribunal will have to be taken into
account. But what he has stated is: "Whilst it is
difficult for me to say with certainty who it was
within the Commission who sent me the extract from the

letter to the Minister, I conclude that it was almost certainly from within the ranks of Mr. Herbert Ungerer's unit." So Mr. Burke is going through kind of a judgmental process in relation to his memory of how things happened. "It was almost certainly from within the ranks of Mr. Herbert Ungerer's unit and most likely came from Mr. Christian Hoceped." He is not stating there, as I understand it, categorically either, just as you couldn't state categorically that you did something, he doesn't appear to be stating categorically that it came from you. Do you understand?

A. I understand. And also by reading it, that's what I told this morning, I mean, it did in some way ring a bell or so by reading his statement. If you had given a specific day and some of the context or so, then

Q. In the context of Mr. O'Donnell asking you the question that you couldn't exclude it, that you sent it to him, you have no memory of sending it to him, do you?

A. No.

Q. If you had sent it to him I am just trying to go through all the steps you would have had no reason to send it, in the normal way, the full letter containing the full fax banner head if it was received at the

A. It's in the same format as the ones sent to the

Minister.

CHAIRMAN: Thank you very much for your attendance and assistance, Mr. Hoceped. Thank you.

THE WITNESS THEN WITHDREW.

MS. O'BRIEN: Mr. Joe Jennings, please.

JOE JENNINGS, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY MS. O'BRIEN:

Q. MS. O'BRIEN: Thank you, Mr. Jennings. Mr. Jennings, I think you were the press officer at the Department at the time of the announcement of the result of the evaluation process for the grant of the second GSM licence. That was in October of 1995, isn't that right?

A. That's correct.

Q. And I think you have assisted the Tribunal by providing a memorandum of intended evidence?

A. Correct.

Q. And do you have a copy of that with you in the witness-box, Mr. Jennings?

A. I have.

Q. It's in Tribunal Book 35 at Divider 7 for the assistance of everybody else. What I propose doing, Mr. Jennings, is just taking you through that and there may be one or two matters that I might just then clarify with you, is that all right?

A. Okay.

Q. You have stated in the first paragraph of your

memorandum that you were press officer at the Department of Transport, Energy and Communications during the period in 1995/1996 when the competition leading to the award of a second GSM licence by Minister Lowry to Esat Digifone was processed.

You state that during that period you dealt with many press, print and electronic queries seeking information, comments, interviews and updates on the competition's state of progress, is that right?

A. Correct.

Q. You informed the Tribunal that from the date when the competition was announced to the disclosure of the award winner by Minister Lowry, and subsequently, you were in regular contact as required with the appropriate Department officers and the Minister regarding press queries as the scrutiny of applications progressed, is that right?

A. Correct.

Q. You have informed the Tribunal that for all practical purposes, the people with whom you had regular consultations were Minister Michael Lowry; Secretary General John Loughrey; Assistant Secretary, Sean Fitzgerald; principal officer, Martin Brennan who was Head of Development and Fintan Towey Assistant Principal.

A. Correct.

Q. Paragraph 5 you state that you recall the article that

appeared in the Examiner newspaper on Tuesday, October 24th, 1995, but was drawn to your attention by the Tribunal. You state that the article is a fair and accurate report by journalist Brian O'Mahony of your telephoned response to him on that occasion. The quote from this article drawn to your attention by the Tribunal reads as follows: "Last night a spokesman for Michael Lowry confirmed that a final decision would be made by the end of November. He would not comment on the short list."

You have informed the Tribunal that this quote from Mr. O' Mahoney's article referred to the final decision on the competition being made before the end of November. You have stated that you were already aware of this end-of-November time-frame which had always been signalled at an earlier news release?

A. Correct.

Q. You have informed the Tribunal the earlier news release which signalled this end-of-November time-frame was circumstance circulated through you to the media on the 4th August, 1995. You informed the Tribunal that this earlier release stated inter alia that Minister Lowry announced receipt of "Second mobile phone application today, August 4th, 1995 when the list of applications closed at the noon deadline."

The applicants were named as Cellstar, Esat Digifone, Eurofone, Irish Cellular Telephones, Irish Mobicall

Limited and Persona. The news release concluded:

"The Department of Transport, Energy and Communications assisted by international consultants Andersen Management International of Copenhagen, will be scrutinising the applications with the intention of submitting a recommendation to the Minister by the end of November."

You state that this news release, having been cleared for publication by the section dealing with the competition, was prepared and readied by you in your office for transmission to the media about 30 minutes after you received it. Your responses to subsequent media queries remained in line with the November time-frame. That stance remained unchanged until the end of the competition concluded and the Minister was enabled to announce the winner earlier than expected.

Is that correct?

A. Correct.

Q. You state that up until the 25th October, 1995, you did not know the name of the winner of the GSM licence competition. You had made a point of saying to the Evaluation Team (Mr. Brennan and Mr. Towey) that you did not wish to be informed at any point as to who the winner was so that there could be no fingers of suspicion pointed at you in the event of a leak, is that correct?

A. Correct.

Q. You state that you were satisfied at all times that the Evaluation Team conducted their affairs confidentially and that their offices were like, as you indicate in quotes "Fort Knox"; is that correct?

A. That's right.

Q. You state that you recall meeting Mr. Lowry shortly after the conclusion of what you believe was the Cabinet Subcommittee meeting on the 25th I think that should be October, isn't that right?

A. Yes.

Q. 25th October, 1995.

A. Yes.

Q. You state that you were in the habit of meeting Mr. Lowry after Cabinet meetings. At that meeting of the 25th October 1995, Mr. Lowry informed you that he had a winner of the competition. You advised Mr. Lowry that he and the Department should go public with this as soon as possible so as to avoid a leak. Mr. Lowry agreed. He also agreed that, following consultation with the Department officers, arrangements be made to hold a news conference as soon as possible to announce the winner of the competition. Is that correct?

A. That is correct.

Q. You state that as far as you were concerned, you were the person who initiated the idea of going public with the announcement of the winner so as to avoid a leak.

Your view, there was no risk of a leak until such time as the result was brought to the attention of Cabinet.

It was your view also, in any Cabinet, that there were real risks of leaks but in particular, in a rainbow or coalition-type Cabinet. Is that right?

A. Correct.

Q. Then finally, you say that you went to Mr. Loughrey, Mr. Fitzgerald, Mr. Brennan and Mr. Towey so as to bring them all within the loop of that decision?

A. Yes.

Q. Now, Mr. Jennings, you have indicated that you were press officer of the Department at the time, and can I take it that you were press officer to the Department as opposed to the Minister?

A. Yes.

Q. And had you been appointed prior to Mr. Lowry taking up office as Minister in December '94?

A. Correct, yes.

Q. And did you continue on after Mr. Lowry's resignation in November 1996?

A. Yes.

Q. So in effect, you were, if you like, in the same, or a similar role as a civil servant within the Department?

A. More or less.

Q. Now, you say that you recall the article of the 24th October, and I am just going to refer you briefly to it. It's in the Tribunal books, and that's Book 58 at

Divider B1. It's very, very difficult to read. It's a very poor copy, Mr. Jennings, but what I am just going to refer you to, rather than reading it all out, in the second column, I don't know if you can see it on the monitor there, I'll read it first because I don't think I'll be able to read it from the monitor myself, and then I can hand you up a hard copy so you can verify it.

It's an article which appeared in the Cork Examiner on the 24th October, 1995, and the by-line is to Mr. Brian O'Mahony.

In the second column, second paragraph, it says:

"Last night a spokesman for Michael Lowry confirmed that a final decision would be made by the end of November. He would not comment on the short list."

Do you see that?

A. Yes.

Q. And that's the part we actually quoted, I think, or you quoted in your memorandum of intended evidence?

A. Yes.

Q. Now, I think you say in your memorandum that you would have replied to Mr. O'Mahony's query on the basis of the press release of the 4th August, is that right?

A. Yes. There is no change in the position since the 4th August.

Q. There was no change, as far as you were concerned?

A. As far as I was concerned.

Q. On that occasion, or indeed on any other occasion, would you have made any specific inquiry of any of the people that you have referred to there with whom you had contact, or would you just have relied on the earlier press release?

A. No. We had a system of where I kept a log of queries, and regularly during the coffee break or the tea break, I would meet some of the Martin or Fintan Towey or John Fitzgerald and usually, just to keep up to date, I'd say "Is there any change since the last statement we put out?" It was just a cursory thing.

And they would say "No change."

Q. I suppose when you were asking them if there was any change since the last press release, you would have known, and they would have known that what you were referring to is in the timetable?

A. They would. But in the case of Mr. O'Mahony's query, I would normally check back with him on the phone, I put a statement out on the 4th August and to save a lot of going into detail, I'd say, are we still in the same position? Has the position changed? And they say, no. So I repeated the comment.

Q. It's likely, therefore, that on the 23rd October when you spoke to Mr. O'Mahony, you would have checked with Mr. Brennan or Mr. Towey as to whether there was any change in the position as per the press release of the 4th August?

A. I would have checked with one or other of them. I

can't recall, but I should also add that

I sometimes a reporter might come through with a

query, it might have been the 21 or the 22nd, but the

latest it would have been would have been the 23rd, so

I can't be sure when Mr. O'Mahony wrote the story

because I hadn't access to when his query came in.

But it would be presuming that he had done it the day

before, but it has been known I had replied to queries

before several days earlier, even sometimes for

somebody writing for a Sunday paper, and the query

would be four or five days old by the time it would

appear.

Q. I see. You're happy enough that irrespective of when

the query was made, whether it was the 23rd, 22nd,

21st or 20th, perhaps even earlier, that you would

have simply just taken a precaution of checking with

either Martin Brennan or Fintan Towey that the

position as was continued to be as per the press

release of the 4th August?

A. Correct.

Q. Now, can I just refer you to the press release. We'll

hand you up a copy of it. It's in Book 57 at Divider

3. I'll hand you up my copy because it's very clear

and I should be able to read it to you from the

monitor.

(Document handed to witness.)

And it's a release it's a press release issued on behalf of the Department, and it's dated the 4th August, 1995. And it's headed: "Lowry announces receipt of second mobile phone applications.

"Mr. Michael Lowry, TD, Minister for Transport, Energy and Communications, today announced that the bidding process for the competition for a licence to provide a mobile telephone (GSM) in Ireland closed at noon today.

"The Minister is pleased to note a high level of interest in developing the Irish mobile market. Six tenders were submitted before the noon deadline for receipt of applications. Details of the applicants are as follows:"

You then set out the details of the composition of the six consortia that had applied for the licence.

Then the second-last paragraph over the page it continues: "The Minister stated his intention to promote the development of the Irish mobile market by the introduction of competition and the selection of a candidate who will provide a quality mobile service at reasonable cost. The Minister re-emphasised the priority of securing the best possible deal for the Irish telephone consumer.

"The Department of Transport, Energy and Communications, assisted by international consultants, Andersen Management International of Copenhagen, will

be scrutinising the applications with the intention of submitting a recommendation to the Minister by the end of November."

A. Correct.

Q. That was the press release?

A. That's it exactly.

Q. Paragraph 7 of your memorandum, Mr. Jennings, you said that up until the 25th you did not know the name of the winner of the GSM licence competition and you stated that you had made a point of saying to the Evaluation Team, Mr. Brennan and Mr. Towey, that you did not wish to be informed at any point as to who the winner was so that there could be no fingers of suspicion pointed at you in the event of a leak. Do you recall when you had that discussion with, or conversation with, Mr. Brennan and Mr. Towey?

A. I think from the time the competition was first announced, I was present in the room which was to be the Fort Knox, if you like, for keeping all the documentation and information, and I was aware that there was a degree of confidentiality at that time, which I thought was extraordinary, in my experience down through the years. So much so that I decided myself that, there is no need for me to know, and if I don't know and somebody somewhere leaks it, it is they couldn't necessarily point the finger at me. Not that I would have any fears on that line, but

at least I'd be one suspect less.

Q. You say that you were surprised at the level of security that was being introduced. What prompted you to be surprised about it?

A. To be surprised about which?

Q. About the level of confidentiality and the level of security that was going to operate?

A. There was an air of security about the operation. And to some extent, I, for one, any time I was visiting the floor in which Martin Brennan and Fintan Towey operated on, I'd normally phone them before I went up so that they knew I was coming. But you would never go into that Department without somebody's door being open and you would be observed irrespective of who you were. So it wasn't that I had the presumption that they were standing like centuries at the place, but I got the message and I understood it to be that they were quite serious about keeping a tight lid on it, and I respected that and my concern was to preserve the integrity of the Department in that respect.

Q. So that you didn't want to be given any information of any sort?

A. Well, my attitude was if there is information to give and it's the people in the principals on the team are in favour of releasing it, I would be the first to release it because I believe in transparency and letting people know. But there is a time when you

have to exercise prudence and a degree of responsibility in case there would be any inadvertent leakage of intelligence or information that might be useful to somebody out there that would have an interest in gleaning some more knowledge.

Q. I see. There was nothing in the circumstances of your discussion which led you to suspect that somebody might give you information, was there, about who the winner was or the likely winner?

A. No. My experience I have been on secondment to the Government from 1982 and dates onwards, and my experience has been to, just to mind your own business and let other people mind theirs.

Q. Now, paragraph 9 you stated that you recall meeting Mr. Lowry shortly after the conclusion of the Cabinet Subcommittee meeting on the 25th November, and that you were in the habit of meeting him after Cabinet meetings. At the meeting of the 25th October Mr. Lowry informed you that he had a winner of the competition and you advised him the Department should go public with it as soon as possible.

So am I correct in thinking, therefore, that your usual pattern and the usual arrangement was that you met with Mr. Lowry after Cabinet meetings?

A. Yes.

Q. And would that be arranged from meeting to meeting or would that arrangement be in place and established on

a continual basis?

A. Well, he normally returned to his Department after meetings in the Cabinet. It was only across the road in Government Buildings, and when he returned, I usually had early access to him, so that if there had been anything at the Cabinet by way of relating to the Department of which I worked, he would discuss it and I would make whatever arrangements to brief somebody or to prepare an announcement or to have an announcement prepared. And I would normally meet him, as I did on this occasion, and he said, "We have a winner." And I said to him immediately, I said, "Now, I don't need to know the winner at this stage, but I advise you to call a news conference and make the announcement as soon as possible." And he agreed. And we discussed around it. And I did mention that there was a danger or a risk of a leak, and my advice to him, is like an old gaelic football advice, if you are in possession of the ball, don't let anybody dispossess you, because if you do you lose the run of the game, and I said I would need to check with the Secretary General and Martin Brennan and those, if it's all right to go ahead tomorrow. And if they agreed, I came back to him and said, "yes, we have agreement." And we called the news conference, for, I think it was two o'clock the next day.

Q. Are you certain about that in terms of your timing,

Mr. Jennings? Because certainly on the basis of the evidence that we have, the meeting that the Minister had with the Party leaders was on the 25th, and the actual news conference was later in the evening on the 25th, perhaps five o'clock in the afternoon?

A. No. My recollection is that we had it the following morning.

Q. I think you, perhaps, could be wrong in that recollection.

A. Perhaps. It may be that I might be confused in my memory with when the actual cheque was handed over, that was at two o'clock in the afternoon.

Q. I think you might possibly be slightly confused on that, because certainly on the basis of the evidence which we have, and the documents available to us, the actual press conference to announce the winner of the competition was later in the afternoon on the 25th, and that was the same day as the meeting which Mr. Lowry had with the Party leaders.

A. I have difficulty in reconciling what happened. My impression was that when he told me, we would agree to announce it but before we would agree to announce it, I had to clear it with Martin and the Secretary General.

Q. Do you recall how you went about clearing it with Martin Brennan and the Secretary general?

A. What I did was, I did the rounds and said that the

Minister had come back to say that we have a winner.

And that would it be okay to announce it the following day? Now, going on my memory, and the reason being that I didn't want any delays in case it might have been leaked.

Q. When you say you did the rounds, would you have how would you have gone about doing the rounds?

A. I went to the Secretary General's office, I went to Martin's office, I went to John Fitzgerald and Fintan Towey, mainly to check with them that they would have that they were clear to run with the announcement.

Q. So you would have physically gone from office to office?

A. Yes. I can't recall in which order I actually met them, but I do recall doing the rounds.

Q. And I take it there would have been they wouldn't have been surprised at you coming in and saying that the Minister had told you there was a winner?

A. Pardon?

Q. Would they have been surprised, do you recall did they know there was a winner when you went to discuss it with them?

A. Well, I imagine they would have known as quickly as I would have known.

Q. Can I just ask you about that day when you had the meeting with the Minister after he met with the Party

leaders. I think we know from the evidence that that wasn't, if you like, a scheduled Cabinet meeting; it was a meeting that the Party leaders were having between themselves?

A. Subcommittee

Q. And Mr. Lowry went to attend it. Do you recall whether he contacted you after the meeting or before the meeting to ask you to come and talk to him, because as I said, it wasn't a scheduled meeting of the Cabinet.

A. I can't recall on whose initiative it was. I just know that I would normally meet him and I presume that I had gone in to talk to him after the meeting, but I don't know whether he sent for me or I sent for him, but normally I wouldn't barge in on him. I would check through his private secretary if he was free to drop in to see him.

Q. Can you recall how you would have known there was a meeting which Mr. Lowry attended with the Party leaders on that occasion?

A. Well, he told me of the meeting. He told me of the result.

Q. Right.

A. That came to me as first news. I didn't know of it until he told me.

Q. That came to you directly from Michael Lowry?

A. Directly from him, yes.

Q. Did he telephone you with that news or did he ask you to come and see him in his office?

A. No. It was an oral exchange between the two of us, when I went in to see him.

Q. When you went in to see him?

A. Yes.

Q. What I am trying to get at is this: Did he contact you for you to come and see him?

A. I can't honestly recall which it was.

Q. But if it wasn't a scheduled meeting of the Cabinet, it's unlikely that you would have known about the meeting, isn't that right?

A. Well, he would have there were lots of meetings that he attended not necessarily the Cabinet meetings, but lots of meetings. Then after these meetings, I would go to discuss it with him.

Q. But if these weren't scheduled meetings, what I am trying to get at is: You couldn't have known that the meeting took place and you couldn't have known that it was appropriate for you to go and discuss it with him.

A. I didn't know the decision had been made until he told me himself.

Q. And that was in his office?

A. That was it. I didn't necessarily need to be know or to be told if it was coming up.

Q. You say it was your advice to him that he should announce it publicly straight away?

A. As soon as possible.

Q. Because you were concerned that there might be leaks?

A. I was. There is that risk it has happened before and it may happen again. So up to that moment, we had been very free of any undue information getting into the public domain, so I wanted to keep it that way.

Q. Had any information got into the public domain at that stage, do you recall?

A. Pardon?

Q. Had any information gone into the public domain at that stage other than on foot of releases by the Department or responses by you to press inquiries?

A. Nothing else that I was aware of. There was speculation from time to time in newspapers, usually you'd get a query from a newspaper man or newspaper men or women and you dealt with it and if there was no change or there was no substance in it, invariably they didn't make any comment on it.

Q. I see. I think you say in your memorandum that there was no risk of a leak until such time as a result was brought to the attention of the Cabinet. That's what you have stated in your memorandum.

A. Yes. There had been no leak, because nobody had nobody had used the eventual winner's name, that I recall, as potential or possible or probable winners up to then.

Q. But, as you saw it, the risk arose once the matter

went to Cabinet?

A. I thought the risk arose once the decision had been made.

Q. And had gone to Cabinet?

A. Well, it went to a subcommittee a sub-Cabinet.

Q. I suppose then had gone into the political arena?

A. It had gone into the political arena.

Q. And it was because it was in the political arena that your concern was prompted?

A. Well, my concern was that I was reasonably assured that the Department itself and the personnel in the Department kept a tight lid on affairs. When it goes outside that, it is difficult to control it.

Q. Exactly. And that's what you have said in your memorandum.

Can I ask you one other matter which isn't covered in your memorandum, perhaps you can be of assistance to the Tribunal. Did you have a role at all, Mr. Jennings, in the press cutting service in the Department?

A. At the time there was a press cutting service supplied to the Department. I think it was done by the national Rehab or some of these people who went through all the newspapers and sent in the cuttings on a regular basis. Other than that, we just scanned the papers ourselves.

Q. You scanned the papers yourselves?

A. Mmm.

Q. But you, as press officer, had no direct role in the press cutting service, had you?

A. No.

Q. Can I just refer you to just a few articles, Mr. Jennings, to see whether they came to your attention at all, because notwithstanding the press cutting service that was available, it appears that none of the civil servants who were members of the Project Group, nor Mr. Loughrey, who was the Secretary General, nor Mr. Fitzgerald who was the Assistant Secretary, seemed to have become aware of these articles, and I don't know if we have a spare Book 58 that we can hand up to you. Tab 5 B5, it's right at the back of the book. I don't know if you're looking at the article headed, "Desmond Company to Handle Esat Sale." Do you have that before you, Mr. Jennings?

A. That's the one by Tom McEaney.

Q. That's it. That appeared in the Irish Times on the 18th November, and it states that:

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

"The Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International

Investment and Underwriting Limited, had been appointed as advisors for the sale of the stake.

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

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

"Esat Digifone is estimated to be valued at $\frac{1}{2}$ 100 million.

"Last month Mr. Desmond paid $\frac{1}{2}$ 14.5 million for London City Airport. Given that the airport was originally on the market for $\frac{1}{2}$ 30 million, Mr. Desmond is seen to have driven a hard bargain in the deal.

"Mr. Desmond

CHAIRMAN: The rest of it is just biographical.

MS. O'BRIEN: Yes.

Q. Do you recall seeing that article at all, Mr. Jennings?

A. I would have seen it.

Q. You would have seen it?

A. Yes.

Q. It would have come to your attention?

A. I would have read it in the papers. I scan through the papers each day.

Q. And when you scan through the papers and you saw

something like that, you would realise would be of direct interest to the Department, would you bring it to anybody else's attention?

A. I can't recall what I did in relation to this one. I do recall having seen it. And I should imagine that others may have seen it as well if they were in the Department on the day.

Q. Well, I think this was a Saturday. So it probably would have been the following Monday, perhaps, when you'd have been scanning the paper.

A. They probably would have.

Q. Well, Mr. O'Donnell says you didn't say you saw it in the Department. You just said you saw it. So it's possible that you could have you said, I probably would have seen it on the Monday, is that right?

A. Correct.

Q. And in the ordinary course, if you saw something like that, you'd discuss it with people in the Department, would you?

A. Not necessarily. I wouldn't, unless they had some reason to discuss it with me.

Q. Wouldn't this have been of particular significance in terms of what was happening within the Department at that time, Mr. Jennings? You said this was the first time which there had been a process of this confidentiality and of this importance in the Department, and of this a significant piece of

intelligence and information in relation to the winning consortium.

A. This appeared after the announcement?

Q. Yes.

A. Well, once the announcement was made, my worry about the story breaking prematurely was finished and anything that happened after that was something they'd have to deal with inside.

Q. You wouldn't rule out the fact that you'd have discussed it with the various people you refer to in your memo, would you?

A. No, I don't necessarily remember having discussed it with anybody or I might have been instructed to make some comment about it or there might have been a decision to make a comment on it, but there is nothing that I was aware of.

Q. Right. But you couldn't rule it out?

A. Well, I could neither rule it in nor out.

Q. There was another article. I am not going to read it out to you, but it's in the next Divider, Divider 6 headed, "Desmond Firm Advising Digifone on Share Placing" this was by Shane Coleman, and it was in the Irish Independent. Would you have also seen that? Isn't it likely you would have as well. It's actually even a more prominently and lengthier piece than the Irish Times piece?

A. Yes.

Q. And I suppose the same would apply to that article, would it?

A. Yes, we had no direct I had no direct connection with it in the thing, so therefore it didn't come into my others in the Department would have seen it if it was of

Q. Do you remember seeing this one? Do you remember seeing this article?

A. I remember reading a lot of what Mr. Desmond was doing at the time in relation to Esat. But I remember reading them as such.

Q. You remember reading it?

A. Yes.

Q. What Mr. Desmond was doing in relation to Esat?

A. Pardon?

Q. You remember reading what Mr. Desmond was doing in relation to Esat?

A. Yes, I did.

Q. And would you have discussed that with anybody, generally, within the Department?

A. No, I didn't. Not really.

Q. Why wouldn't you have, Mr. Jennings? Wouldn't it be very natural to discuss it? Wasn't Mr. Desmond a person of high profile?

A. He may have been, but it didn't concern me at the time, because once the competition was over and the winner had been declared, that was another story as

far as I was concerned.

Q. But the process wasn't over at this stage?

A. I know it wasn't

Q. Because the actual winner wasn't licensed until the following May, so it was very much a matter that the Department was considering; it was very live for the Department?

A. Yes. There was a certain degree of speculation in subsequent times as a result of which officers of the Department had to hold a news conference to try and explain what they, what their position was.

Q. That's right. That's right.

A. Yeah. But on this particular comment, it would have been would have come to the attention of the people concerned with the the team shall I say.

Q. And certainly wouldn't have escaped the press cutting service, would it?

A. Oh, it wouldn't, no.

Q. Can I refer you then, to the final article that I want to bring to your attention. It's at Divider 7, and this appeared in the Irish Times on the 28th February of 1996. And it's a by-line to Mr. John McManus: "Esat seeks $\frac{1}{2}$ 30 million in debt to fund mobile phone network launch".

Can I just refer you to the second-last paragraph.

There is a lot of information. It's a very dense article and there is a lot of information in it. But

can I refer you just to the second-last paragraph:

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

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

Now, is it likely that the spokesperson that's been referred to in that article was you, Mr. Jennings?

A. Yes.

Q. It is. So it appears that Mr. McManus must have made contact with you either on the 27th February, the day before this article was published, or on a day proximate to that to ask for your comments?

A. Well, as I recall, and I can't be too particular, but as I recall, when the announcement of the winner was made, there was to be a period during which time Esat Digifone would have to undergo certain checks and perform certain operations to the satisfaction of the departmental officials before they finally got the licence and that this was part of it.

Q. There was a licensing process.

A. It was part of the licence procedure, yeah.

Q. Can I just ask you here, it says, "The Department of Transport, Energy and Communications said yesterday that the negotiations were at an advanced stage."

Presumably when Mr. McManus raised that query with

you, you would have gone to Mr. Brennan or to Mr. Towey and asked them what the state of play was, or perhaps to Mr. Loughrey?

A. I am not too sure which of them I checked with, but I would have checked with one of the possibly Mr. Loughrey, Mr. Fitzgerald or Martin Brennan.

Q. Right, one of the three?

A. Possibly.

Q. Now

A. I cannot recall which.

Q. Presumably when Mr. McManus contacted you, he was indicating to you that he was going to write a piece about Esat and he was raising these queries with you?

A. Correct.

Q. So presumably then, when you went to either Mr. Loughrey or Mr. Fitzgerald or Mr. Brennan to ask them what the position was, you would have explained to them in the ordinary course that Mr. McManus had made an inquiry with you?

A. Yes, I took the query and we decided, or they decided on what the proper answer, proper response to give and I conveyed that response to Mr. McManus.

Q. And you'd okay that response with either Mr. Loughrey, Mr. Fitzgerald or Mr. Brennan?

A. It would have been with one of the team. Certainly not on my own volition, it would have been checked with one of the team.

Q. So you would have known that Mr. McManus was going to publish a piece on this?

A. Yes.

Q. And I suppose you would have alerted yourself and you'd have been on the look out to pick it up in the newspapers?

A. I normally did because I wanted to check the veracity or otherwise of my response. I kept a note of the responses and if they tallied, that's it, yeah.

Q. You'd have read this article very carefully?

A. Well, I just read through it word for word.

Q. Word for word. Having initially checked and clarified with Mr. Loughrey or Mr. Fitzgerald or Mr. Brennan as to what your response would be?

A. I didn't see the article before it was written.

Q. No, of course not.

A. But I supplied the response to it. And checked that the response I gave was in accordance with the instructions given by either of the three people I went to.

Q. Thank you very much, Mr. Jennings.

MR. FANNING: Very briefly, Sir, unless Mr. O'Donnell

CHAIRMAN: I'll leave Mr. O'Donnell till the end. I

will revert to the normal order.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING:

Q. MR. FANNING: If I could just very briefly ask Mr.

Jennings a couple of points for the purpose of

clarification. Firstly, Mr. Jennings, whatever about the accuracy of your recollection of the precise timing of the announcement, you are quite clear that your reaction was that the wisest course was to announce the result as promptly as possible?

A. Yes.

Q. And are you aware in giving that evidence, that that view appears to coincide, for instance, with the view of the then Secretary General, Mr. Loughrey, who has already given similar evidence, that his view was that it was wise to announce the result as quickly as possible?

A. Yes, I have read that.

Q. Did you have a discussion with Mr. Loughrey about it on the 25th October?

A. Well, I had yes, because I had to go around to check with them all that it was okay to run with the news conference the following day, that's to the best of my recollection.

Q. Did anyone that you spoke to on the 25th October dissent from that perspective?

A. No, none of them.

Q. So is it fair to say then, that Mr. Lowry, the Minister at the time, could not be considered to have been the Party initiating the decision to go public so quickly with the result?

A. I'd say it simply arose out of a simple

across-the-table discussion with him. I told him the danger of not making an announcement meant that it might drift out of his control and that the benefit of making the announcement should be his.

Q. If I can put it this way: Was making the announcement immediately Mr. Lowry's idea or was it advice he took of his officials, including yourself?

A. Well, it may have been. I wasn't necessarily aware that officials or Andersens had made the same thing, but I am glad that we're on the same ship.

Q. It was certainly your advice and it was certainly Mr. Loughrey's advice to the Minister?

A. Oh, it would always be my advice. I never believe in holding a thing on for five minutes, not nowadays.

Q. That's based on, I suppose, your common sense and your instinct and your experience as a departmental press secretary?

A. It was.

Q. Finally, then if I can ask you, to use the language that the Tribunal has been using: insofar as there was any acceleration of the announcement of the result, that acceleration wasn't instigated by Mr. Lowry but was a course of action advised to him by members of the Department and people like yourself. Isn't that your understanding of the position?

A. It could have been, because the deadline, or the date by which the announcement was expected to be made, was

scheduled for November, and I remember in August when that decision was made, I recommended to the team that to build in a safety valve, so that if, for example, we said that the news release said that we'd be ready to go at the end of September, every newspaper office and every radio station keep a diary, and it would have been written in, the 30th September would have been written in, check with the Department about the phone, the mobile phone licence and if they did, and we hadn't received or hadn't reached a conclusion, then it leads to a ruaille buaile because this would be all kinds of questions arising afterwards and stress caused to people, why weren't they ready on the date? Was there something up? And speculation would feed on speculation. So it's much better to build a safety valve and if you put in the end of November and you can go the middle of October, the better, no stress and no problems.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'DONNELL:

Q. MR. O'DONNELL: You were press officer in various guises for a number of years, Mr. Jennings, is that right?

A. Yes, I was from 1982 until 1997 at different times.

Q. And in your view, and I think you were also in the newspaper business on the other side of the house, so to speak, before

A. I was trained as a newspaper man in Sligo and I worked

in the Irish Press in Dublin.

Q. So you would have been aware of the interest and media speculation that was likely to be generated by the licensing, the process?

A. I was part of the machine of seeking after that information, preferably ahead of others, if I could.

Q. And you were also aware that there was likely to be speculation, and in fact some of the speculation could be ill-informed or misguided and it was appropriate that insofar as you could, it would be appropriate to try and dampen down any speculation or not give rise to additional speculation?

A. Not give rise to undue speculation.

Q. I think, for example, the article that's been referred to tips two people as being short-listed who, in fact, weren't, who weren't the top two in the end?

A. That's right. I know that on the day of the announcement, some of the reporters present had to exchange bets with each other because they had bet as to who the outcome was going to be and some lost and some won.

Q. I see. Certainly the day before the announcement, the newspaper, insofar as it's tipping anybody, is tipping two of the wrong people, two of the wrong contestants?

A. Sorry, would you repeat that?

Q. Certainly. The day before the announcement is made, one newspaper is tipping two of the wrong contestants,

two of the unsuccessful contestants?

A. Yes.

Q. You also said, and I think it's of significance, that the level of security surrounding the process within the Department was unprecedented?

A. I never remember seeing anything like it in any other departments I had worked in down the years.

Q. Had you worked in many departments?

A. Well, I had worked in the same Department I had worked in education and I had worked in transport under three different Ministers, and I had worked under a Taoiseach in the Government Information Services, and from time to time you have certain degrees of security around certain matters, but I happen to notice this one in particular, because I got the feeling that they wanted to keep a very tight lid on it.

Q. And the personnel involved within the Project Team, within the Department, they were all highly trustworthy people, so far as you were concerned?

A. They were. I had no worries about any one of them.

Q. Individually or collectively?

A. Individually or collectively. They were an excellent team to work with and they were good they were very helpful to me and I tried to be as helpful as I could to them.

Q. They were conscientious and hard-working and discreet?

A. They were, and they were quite open in keeping me up to date if there were any developments, or if sometimes I got queries from some newspaper men who would probably have got it from sources relating to some of the competitors, and I usually got a simple steer from them which precluded any undue speculation appearing.

Q. The and these were people who Mr. Brennan, Mr. Towey, you would see, I think if you wanted to check things you would see them at the coffee break or the tea I think

A. Invariably at the coffee or tea break, because it was they were sitting more or less together, it was easy to walk in and sit down and just speak quietly for a second or two.

Q. Or Mr. Fitzgerald, I think, was the other person?

A. Or Mr. Fitzgerald.

Q. To be fair, Mr. Jennings, you have no specific record or recollection of having, of each and every meeting or contact you had with them at the coffee break, but that was the system that was operated?

A. That was the system and it was practically every day.

Q. I think the newspaper article seems to say that "last night", rather than "yesterday"; "last night" the spokesman gave the information to the newspaper, and that would mean, therefore, that it was Monday night?

A. If the paper appeared on Tuesday

Q. Which it did.

A. Last night was Monday.

Q. And I think you have said sometimes articles are written a day or two before they think they are actually going to be printed and that could have happened here, but that would have been, if it had been written two days before

A. It could have happened, for example, Pat O'Mahony's article, I know

Q. Brian O'Mahony?

A. I know that sometimes I had queries from him and the story mightn't appear for a day or two because he had other information to collect in the meantime, but I respected his confidence and I wouldn't break it to anybody else.

Q. Well, so far as the query is concerned, insofar as you connected with Mr. Brennan or Mr. Towey or Mr. Fitzgerald, if it was Monday, Mr. Brennan and Mr. Towey was certainly involved in the Project Team meeting considering the final report, do you remember that?

A. No, because the final I didn't know about the actual decision until it was made. And I actually didn't know about who the winner was until I turned the press release upside down on the table at the news release, because I didn't want to know.

Q. So far as the personnel were concerned, Mr. Brennan

and Mr. Towey would have been in that meeting, it seems to have been for a lot of the day and some of the evening as well?

A. They could have been at several meetings but I wouldn't know because I had other matters to deal with, other queries relating to other matters.

Q. So you can't say who you checked with, whether it was Mr. Brennan or Mr. Towey or Mr. Fitzgerald, but it's one of those three?

A. Are you speaking with them

Q. In relation to the Mahoney article.

A. Oh, I would have it could have been any of them, I can't be too sure, but there was no change in the timetable.

Q. And as you have indicated earlier, you saw nothing inappropriate with announcing the result earlier than the indicated intended deadline?

A. No, no. All the better.

Q. Also, just finally, in relation to the series of articles that have been opened up to you by the team for the Tribunal, I think you said you wouldn't discuss those articles with people unless they brought them to you in the first place?

A. Yes.

Q. And you have no record or memory of discussing these articles with anyone?

A. No, except that query from Mr. McManus, I would have

checked it with somebody.

Q. Before making an announcement?

A. That's because in the period when the winner was announced, there was to be a period of when I forget the exact term, but it is while these negotiations were leading to the award of the licence, and until they were concluded, but the winner of the competition was clear. That's where the big story was and that's where the big story broke. After that, it was just a matter of mopping up.

Q. And so, if you were asked for a it seems to be that your evidence is if you were asked for a comment on behalf of the Department by the press, you would go and check and in relation to this particular one, you probably checked with Mr. Loughrey or Mr. Fitzgerald or Mr. Brennan or some other member of the team, you can't be sure of?

A. Yes.

Q. And in respect of other articles that appeared about the Department, you would see them, but you wouldn't necessarily bring them to the attention of anybody else?

A. No, not necessarily.

Q. Thanks very much.

CHAIRMAN: Regarding those latter articles, Mr. Jennings, it was the situation that you recall reading the pre Christmas Irish Times article

suggesting that Mr. Desmond may be involved and also the Independent one?

A. Yes, Chairman. I would have been aware that the other officers in the Department and in the team would have seen those.

CHAIRMAN: And similarly, when the February article came out from Mr. McManus, you recall fielding his queries for the Irish Times?

A. I do, on reading it now, I certainly do, yes.

CHAIRMAN: You went and discussed your response with one of the three senior civil servants.

A. I had received a number of queries from Mr. McManus going back over a number of years on that and other topics and so it was just an ordinary, take his query, bring it, process it and go back with the response to him.

CHAIRMAN: You carefully read Mr. McManus's article to see that it jelled with your response.

A. It did, yes, yeah.

CHAIRMAN: So on your evidence, it would seem almost extremely improbable that those articles could have flowed entirely over the heads of your civil service colleagues in the Department.

A. Some one or other of them would have seen it or it would be brought to their attention.

CHAIRMAN: Thank you very much for your attendance, Mr. Jennings. That's today's evidence and we'll

resume Tuesday.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 15TH JULY,
2003 AT 11AM.