

A P P E A R A N C E S

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## I N D E X

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THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 14TH

OCTOBER, 2003, AT 11AM:

CHAIRMAN: Good morning ladies and gentlemen.

Whilst no Opening Statement, as such, is intended today, I think I should state for the benefit of those persons present, that what is intended for the duration of this week's hearings, is that a relatively limited number of witnesses will be taken, who will deal with aspects related to the licence hearings that already have been substantially covered in earlier evidence. This primarily relates to certain European Union related matters, and also, to certain matters relating to contributions made to and dealings had with the Fine Gael Party.

I have to state that through no fault of anyone, it is

likely that the hearings for the balance of this week will be somewhat truncated, primarily because there is a very high level European Union conference in anticipation of Ireland's Presidency next year being held on the premises which greatly complicates the holding of public sittings with the public access that, of course, we do have to afford. There is also a possible question of indisposition of a witness, which is being looked into and checked today as a matter of urgency.

When hearings are taken up then next week, what is envisaged is that, subject to any matters of arguments, applications or rulings that may still have to be dealt with or finalised, that the Tribunal will proceed to take evidence of what may loosely be called the "testimony" of those persons involved on the applicants' side for the licence, and certain advisers retained by those persons. The thrust of that evidence will very substantially adhere to the substantial Opening Statement given by Mr. Coughlan in the latter portion of last year, and where fresh matters of material import have been uncovered in the Tribunal's inquiries in the interim, statements will be made to clarify any such fresh matters.

Mr. Coughlan.

MR. COUGHLAN: Mr. Jarlath Burke, please.

MR. MCGONIGAL: Just before you take up that matter,

there are two matters I wonder if I could mention:

The first is a housekeeping matter, and it is that

Mr. Jim O'Callaghan is now part of Mr. O'Brien's legal team.

CHAIRMAN: Well, he has appeared already in an earlier guise in the Tribunal. He is very welcome. I'll note his application.

MR. McGONIGAL: The second matter, Mr. Chairman, is that you will recollect that on the 16th July, 2003, I indicated that I wanted to make an application in relation to the position of Michael Andersen and the witnesses from AMI who had apparently indicated an unwillingness to come to the Tribunal, and at that stage it was understood that the unwillingness related to the fact that they were seeking either their costs to be paid or an indemnity and/or an indemnity given to them by the Tribunal.

You will be aware, Mr. Chairman, that Mr. O'Brien is very anxious that not only Michael Andersen, but also the persons who were involved on behalf of AMI, should come to give evidence because without their evidence, it will be impossible for the Tribunal to reach proper conclusions in relation to the process which was carried out and conducted by Mr. Andersen, and also will have difficulty, if not an impossible difficulty, in arriving at conclusions in relation to other issues which are seem to be current before the Tribunal.

Now, Mr. our application, as we indicated in July, was that we would be seeking that you, Sir, would refer the matter back to the Oireachtas in relation to the question of costs and indemnity to be given to Michael Andersen and AMI, to ensure that they came to give evidence, and we are anxious to make that submission, as we indicated in July, as early as possible.

Now, I understand from your counsel that the situation, in relation to Michael Andersen I am not sure what the position is in relation to the other potential witnesses may have changed somewhat, and that there has been communication between written communication between the Tribunal and either Michael Andersen and AMI, or both, which I have not yet had an opportunity of seeing, and I am very anxious to see it, particularly if it is going to change the basis of the submission which we have prepared. So that really what I am keen, Mr. Chairman, to do is to that application as early as possible.

We have prepared a second submission, which you may wish us to give and circulate, but that is based on the facts as we understood them understand them to be as of July. If there has been some change, then that would have to be incorporated within it.

I am also concerned that this may be an area where the public interest should be involved, and it seems to me

to be one of those areas that Mr. Clarke, at a very early stage in this Tribunal, indicated might be an area where he would have to be consulted on something which might involve the constitutional rights of a party to the Tribunal, or alternatively, the public interest aspect of the Tribunal, particularly where they were conflicting.

So that in the circumstances, Mr. Chairman, I should indicate that I am in a position to make the application, but I understand that, if I understood what you were saying earlier, that you may have identified a date when it should be made more appropriately.

CHAIRMAN: Yes, Mr. McGonigal, that was the essential matter that I had been referring to, by implication, in dealing with embarking upon next week's sitting in relation to what you may call evidence related to the applicants, and I think probably the most sensible time-frame is to take it up at the earliest possible stage next week, and perhaps if I were provisionally to say that probably Tuesday morning would seem the appropriate time. And I agree with you, it is a matter in which Mr. Clarke, as counsel for the public interest, ought to have an opportunity to contribute, and on that basis,

Mr. McGonigal, I'll receive any further documentation that you may wish to add to that that has already been

submitted, and of course, give you an opportunity to flesh matters out further, as you may think fit. And I'll provisionally fix it, then, for the start of the sittings on Tuesday morning.

MR. McGONIGAL: Just two small further matters,

Mr. Chairman: First of all, I would be anxious to get the correspondence, if it exists, between the Tribunal and Andersen/AMI as early as possible, so that if there is a change, it can be incorporated.

The second matter that I think some consideration might be given to is, all of us have identified the question of Michael Andersen/AMI as an issue which needs to be discussed, argued and debated because of their essential feature within the Tribunal. It does occur to me that procedurally, it may well be more appropriate for the Tribunal to lead the position that they say exists to enable us to reply to it. I'd like some consideration to be given to that. I don't want I am not holding to it because I am quite happy to lead the application anyway. But in fairness to the Tribunal, I think it's something that they may want to give some consideration to.

CHAIRMAN: Well, I understand, Mr. McGonigal, you have had a number of words with Mr. Healy, who is primarily looking after this aspect in any event, and those, of course, can continue, with a view to enabling the application to proceed as expeditiously and

realistically as possible next week.

MR. McGONIGAL: May it please you, Chairman.

CHAIRMAN: Very good.

MR. COUGHLAN: Mr. Burke.

JARLATH BURKE, HAVING BEEN SWORN, WAS EXAMINED AS

FOLLOWS BY MR. COUGHLAN:

CHAIRMAN: Thank you, Mr. Burke, for your attendance

and your cooperation in the making of statements. And

I note that Mr. Marren, in respect of whom limited

representation has already been granted on the usual

terms, is present. Are you happy there, Mr. Marren?

Would you rather come up front?

MR. MARREN: I am fine here, Mr. Chairman.

Q. MR. COUGHLAN: Now, Mr. Burke, I think you furnished

the Tribunal with a statement or a Memorandum of

Proposed Evidence dated the 8th July, 2003, and also

an addendum to that particular document, isn't that

correct?

A. That's correct. I am sorry, Mr. Coughlan, is that

right.

Q. That is correct. And what I intend doing, Mr. Burke,

is, in the first instance, just leading you through

the statement in the first instance, then the

addendum, and perhaps coming back to clarify matters

then arising.

A. Very good.

Q. Do you have the documents with you in the witness-box?

A. Yes, I do.

Q. I think in the statement or memorandum which you first furnished to the Tribunal, you state that from October 1994, until June 2000, you were employed as legal and regulatory counsel and subsequently Director of Legal and Regulatory Affairs by Esat Telecom. Prior to that appointment, you completed a law degree of University College Dublin, as well as a Masters degree in European law. Since leaving Esat Telecom, you have qualified as a barrister and have received a Masters degree in comparative law from the University of Chicago Law School. Immediately following your position at Esat Telecom for a period of one year, you were Head of Legal Affairs and Deputy Commissioner at the Commission for Aviation Regulation in Dublin, is that correct?

A. Correct.

Q. I think you then informed the Tribunal that when you joined Esat Telecom in 1994, you were immediately made aware that it intended to bid for a second GSM licence in Ireland. Ultimately, you were required to give support to the bid on competition law and regulatory matters. In its Green Paper on mobile services, the European Commission had indicated to the Member States, including Ireland, that the continuing monopolies over the provision of mobile telephony services was a violation of Article 90 of the EC

Treaty, in conjunction with Article 86. The Commission had already indicated its concern in relation to excessive licence fees.

I think you then informed the Tribunal that once the details of the GSM competition were announced by the Government, you received a copy and reviewed them from a competition and telecommunications law perspective.

You recall that at that time, you had concerns in relation to several aspects of the proposed competition, specifically in relation to the interconnection charges, the rates that the new entrants would pay Telecom Eireann/Eircell for national and international calls, and the amount of spectrum that would be allocated, is that correct?

A. Correct.

Q. I think you then informed the Tribunal that prior to, and immediately following the announcement of the GSM competition, there was extensive media reporting in relation to possible scrutiny by the Commission of several similar competitions being held in other Member States. In or about March, 1995, an article published in a trade journal, Mobile Communications, published by the Financial Times concerning possible action by the European Commission in relation to the issue of licence fees and its application in respect of a second GSM licence in Ireland. The article mentioned that the Commission wanted to avoid the

imposition of discriminatory licence fees. It also reported a Commission official as saying that Ireland received a warning to that effect at the end of January of 1995. Is that correct?

A. That is correct.

Q. I think you then informed the Tribunal that sometime after the terms of the competition was announced, which you believe to have been in May, 1995, you made contact with the European Commission's Director General for Competition, DG IV, as it was then known as, so as to communicate Esat Telecom's views on matters referred to above. You said that there was nothing unusual or remarkable about a company like Esat Telecom doing so. In fact, by contrast with other bureaucracies, the European Commission operates an open-door policy so as to encourage individuals and companies to bring information to it in connection with whether or not EU rules have been complied with by the Member States. Under EU law, the Commission is responsible for upholding the Treaty rules, and in particular, the competition rules. Is that correct?

A. That is correct.

Q. I think you then informed the Tribunal that you cannot say with certainty to whom your initial contact was addressed, but it was probably to the division of DG IV with responsibility for the application of competition rules in telecommunications. At that

time, you understand that Mr. Herbert Ungerer was the Acting Head of Unit, and that he was directly concerned with these matters, and was assisted by other officials, including Mr. Marcel Haag and Mr. Christian Hoceped.

You recall sending a fax outlining certain issues, though you cannot say at this remove who the fax was addressed to, as you had not been provided with a copy by the Tribunal. You recall at least one follow-up phone call with Christian Hoceped to ascertain that DG IV had everything it needed so as to consider the issues raised. Other than being informed that DG IV was considering the matters raised,

Mr. Hoceped was noncommittal, is that correct?

A. That is correct.

Q. I think you have informed the Tribunal that prior to making contact with the Commission, you had become aware, through press reports, that the European Commission was looking into the issue of discriminatory licence fees for GSM in Italy.

Specifically, the Italian Government had proposed that the new operator would be obliged to pay a licence fee, while Telecom Italia Mobile would not face a similar obligation. The parallel with the Irish situation was immediately apparent, given that nowhere in the original documentation concerning the Irish GSM competition was there any indication that Telecom

Eireann/Eircell would be available would be liable to pay an equivalent fee. That was a fairly obvious breach of the competition rules, since it amounted to the State imposing dissimilar conditions on equivalent transactions, something which is expressly prohibited by Article 86 of the EC Treaty, and which in turn the Member States must not be by virtue of Article 90.

I think you informed the Tribunal that you were also of the view that if the Commission moved to challenge Ireland in accordance with the law and its policy, that was likely to result in an equivalent fee being imposed on the eventual GSM licence winner, as well as on Telecom Eireann/Eircell. At that time, it was also your view that this, in turn, would induce Telecom Eireann/Eircell to take steps to ensure that its financial exposure was limited. In other words, if the Commission proceeded with ensuring the application of non-discriminatory licence fees, Telecom Eireann/Eircell was likely to push the Government into a corner by claiming that an auction would result in a potential huge financial liability.

As such, the Government decision to cap the licence fee, it became clear as a result of the application of EU competition law and Telecom Eireann/Eircell's concern to limit its own financial exposure. This is something that you anticipated at the time, and in all likelihood shared with your colleagues in Esat

Telecom, as well as with Mr. Owen O'Connell of William Fry Solicitors. You should also add that a substantial amount of information appeared in the press indicating that a cap was the likely outcome of the Commission's intervention.

Now, if I just pause just for one brief moment to deal with this question of the cap and the view that you had about what was happening at the time.

Am I correct in understanding that there was, and you can take it that there is no doubt, there was debate and there was reference in that trade journal you referred to, to the Commission's concern about what was happening I think, in particular, in Italy and Spain at that time, isn't that correct?

A. That is correct.

Q. And you were of the view that if there was discrimination; in other words, if a successful applicant had to pay a high fee and Eircell or Telecom Eireann had to pay no fee, that that would be discriminatory, and that the Commission might take steps to ensure that an equivalent fee, or something similar, would be levied on the incumbent, isn't that correct?

A. That is correct.

Q. I think you were also of the view that Telecom Eireann/Eircell might use whatever political muscle or power they had to try and keep that down and

therefore, the question of a high fee was not something that was necessarily facing all the applicants who were entering the competition, in your view?

A. Correct.

Q. So it was a combination of the Commission and the political strength of Telecom Eireann/Eircell?

A. Yes, and Telecom Eireann/Eircell, their own concern to protect their own position.

Q. Of their own position, wouldn't want to pay a very high fee?

A. Yes.

Q. And I think it's fair to say, perhaps, that a view could be taken that once the cap was imposed, there was a redistribution of the weightings at that time, which you subsequently became aware of, isn't that correct?

A. That is correct. We became aware at the same time as the other bidders that there would be a change to the terms of the competition.

Q. And in fact, what was subtracted from the weighting applicable to the fee which was proposed was, in fact, added to the weighting appropriate to tariffs, we now know, isn't that correct?

A. We now know, but we did not know at the time.

Q. Absolutely, but we now know that, and in fact, just taking that point up at this stage, in fact, the

weighting which applied to tariffs amounted to 18% or 18 points of the overall 100%, we now know. Is that correct?

A. If you say so. I don't know the precise figure, but I accept what you say.

Q. And, in fact, perhaps in terms of that inured more to the benefit of those who were strongest on tariffs, which in the case of this competition in relation to the first three people was Irish Mobicall, in the first instance sorry, Eurofone in the first instance, and Persona, second.

CHAIRMAN: Well, I think you prefaced it as the top three.

Q. MR. COUGHLAN: Sorry, of all competitors, in fact. Unisource scored best on tariffs and Persona second Eurofone, I beg your pardon?

A. I must say I am not intimately acquainted with who scored best on particular criteria. So it's perhaps best if I don't speculate.

Q. Very good. Now, I think you then go on to inform the Tribunal that the Government's decision to cap the licence fee you say, as such the Government's decision to cap the licence fee, it came about as a result of the application of EU competition law and Telecom Eireann's concern to limit its own financial exposure. That is something that you anticipated at the time, and that you would have discussed with your

colleagues, and with Mr. Owen O'Connell, who was legal adviser or solicitor to the company, isn't that right?

A. Correct.

Q. Now, you say that the fact that the competition was being suspended was not communicated to you by the Commission. You became aware at the same time as everybody else that an announcement had been made by the Department of Transport, Energy and Communications to the effect that the competition was being suspended. During that period, you had no discussions or contact, directly or indirectly, with the Minister, or any of the officials of the Department, in relation to the suspension, the issue of the licence fee and/or the weightings to be attached thereto, or indeed any other matter connected with European Commission legal competence in these matters. In fact, you recall a certain amount of frustration within Esat Telecom at the time the suspense was announced, given the risk that the competition could have been delayed indefinitely. Your recollection is that when the competition was suspended, Esat Digifone's bid was at a highly advanced stage, and Esat were eager to press ahead with lodging it. In addition, substantial staffing and other costs were being incurred, is that correct?

A. Correct.

Q. I think you have informed the Tribunal that you

confirm that you had no knowledge, direct or indirect, of the negotiations that took place between the Irish Government and the European Commission concerning the competition up to the completion of those negotiations on or about the 14th July, 1995. Is that correct?

A. Correct.

Q. Furthermore, you had no knowledge, direct or indirect, of any proposals made by the Irish Government to resolve the intervention of the European Commission, and in particular, the proposal whereby the licence fee would be capped at  $\text{€}15$  million, with Telecom Eireann paying an approximately equivalent fee of  $\text{€}10$  million, is that correct?

However, as you say you explained above, prior to the announcement of the revised terms of the competition, it was anticipated that if the Commission applied the non-discriminatory principle, that it would lead to an effective cap on the licence fee to be paid by the second operator, by virtue of Telecom Eireann/Eircell's likely concern to limit its liability.

You then inform the Tribunal that in relation to the extract from the final version of a letter sent by the Commission to the Minister, dated 14th July, 1995, you believe that it is important to correct a number of serious and continuing errors that appear to have been made in relation to that document.

References have been made to Esat Telecom receiving a copy of the draft of a confidential letter. All three points of description are in error.

First of all, you did not receive a letter. You received the first page of a letter sent by the European Commission to the Irish Government.

Second, you did not receive a copy of the draft letter, or for that matter, any extract from a draft letter. What Esat Telecom received was the first page of the final version of the letter.

Third, you wish to dispute the repeated characterisation of this letter as confidential. At no time did the Commission indicate that the extract of the letter sent to you was confidential. The letter as sent to the Minister is not marked "Confidential", and as such, it is, at first instance, a matter for the European Commission to decide who receives that letter or extracts therefrom, and indeed, on what terms. Is that correct?

A. Correct.

Q. You then inform the Tribunal, more importantly; an analysis of the content of the letter reveals that to the extent that any part of the letter could be regarded as confidential, it was a portion of the letter following the first page, a portion that you or Esat Telecom did not receive. The first page describes the Commission's understanding as to the

terms on which the competition would proceed, and also makes some general statements in relation to ensuring a level playing field between competitors once an eventual winner emerged. The remaining portion of the letter, which you only saw for the first time after the Tribunal read it in public as part of its Opening Statement in this module, sets out the legal analysis as to why, assuming that the Irish Government proceeded on the terms suggested, the Commission planned not to take any further action under the Treaty. It is not surprising that the Commission, in sending an extract to you, decided not to convey this portion of the letter, since the basis on which the Commission decided to exercise its prosecutorial discretion under the Treaty is probably something the Commission does not want to enter into the public domain. In addition, you note that the Commission's indication at the end of the letter to the effect that the restriction on international interconnection was disproportionate.

In relation to the fact that the extract from the said letter mentioned that the weighting to be attached to the licence fee would not exceed 15%, you say, and believe, that no particular significance would be attached to this. Esat Telecom was not intended to be, and could not have been advantaged in the slightest by having this information. The extract

from the letter does not disclose the actual weighting to be attributed to the licence fee, and in any event, all of the bidders in the competition were aware that the Department, since it had announced this fact, had decided to cap the licence fee. In other words, any rational bidder would ensure that it bid precisely up to the cap and not 1/21 more or less. Apparently evidence given to the Tribunal reveals that all of the bidders proceeded in this way, and as such, no advantage accrued to the Esat Digifone bid. Furthermore, knowledge that the weightings to be attributed to the licence fee would not exceed 15% did not and could not assist Esat Digifone in any way in deciding what effort should be expended on meeting the other criteria. To your knowledge, no information concerning the actual weightings was known to Esat Telecom in making its bid. As such, claims that Esat Telecom was somehow advantaged in the competition by possession of this letter was completely are completely without foundation.

You then informed the Tribunal: "As to the communication of the said letter to Esat Telecom, to the best of my recollection, I only received an extract of the said letter. I cannot expressly recall how it was received. I believe that I received it between the 14th and the 24th July, 1995, and that quite possibly I requested a copy of it from Christian

Hocepied. It must be remembered that I brought issues in relation to the competition to the attention of DG IV, and it would be normal practice for me to inform an interested party of the outcome of its application of the competition rules which was represented by the extent of the letter sent to me.

"I say and believe that there is nothing objectionable or wrong about this, and what is more, that it was something that could have been done by any of the other bidders. Furthermore, as explained, none of the information contained in the extract was confidential, nor did it confer, nor was it intended to confer an advantage on any bidder."

Is that correct?

A. Correct.

Q. You then inform the Tribunal: "While 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, and most likely came from Mr. Christian Hocepied. In identifying Mr. Hocepied in this matter, I wish to point out that I do so with great hesitancy because of 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 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 did not, could not and was not intended to do so.

In relation to your transmission of the document to Mr. Mike Kedar of the 24th July, 1995, as you have previously explained to the Tribunal, Mr. Kedar was a director of the Board of Esat Telecom at the time, and was especially knowledgeable in the area of regulatory affairs. By sending him the letter, you simply wished to keep him informed of matters. In relation to the transmission of the extract from the said letter to other persons, you expect that it was copied to senior Esat Telecom executives and members of the bid team.

Now, I think you then

A. Mr. Coughlan, could I trouble you for a copy of the addendum, because I actually do not have it with me?

I apologise.

(Document handed to witness.)

Q. I think you then furnished the Tribunal with an addendum which follows, in effect, an answer to a questionnaire which was furnished, isn't that correct?

It contains much of the information which you have already furnished in your statement, but I think it

might be helpful if we just went through it and

covered all matters.

I think the first question you were asked, and which appears in the addendum, is details of your knowledge, direct or indirect, as of April to July 1995, of the matters which were the subject matter of the intervention by the European Commission in the second GSM licensing process, including the source or sources of your knowledge. And you inform the Tribunal that prior to and immediately following the announcement of the GSM competition, there was extensive media reporting in relation to possible scrutiny by the Commission of several similar competitions being held in other Member States. In or about March, 1995, an article was published in a trade journal, Mobile Communications, published by the Financial Times, concerning possible action by the European Commission in relation to the issue of licence fees and its application in respect of a second GSM licence in Ireland. The article mentioned that the Commission wanted to avoid the imposition of discriminatory licence fees. It also reported a Commission official as saying that Ireland received a warning to that effect at the end of January, 1995.

Prior to making contact with the Commission in May, 1995, you had become aware, through press reports, that the European Commission was looking into the

issue of discriminatory licence fees for a GSM licence in Italy; specifically, the Italian Government had proposed that the new operator would be obliged to pay a licence fee while Telecom Italia Mobile would not face a similar obligation. The parallels with the Irish situation were immediately apparent, given that nowhere in the original documentation concerning the Irish GSM competition was there any indication that Telecom Eireann/Eircell would be liable to pay an equivalent fee. Based on your knowledge of EU law, you anticipated that the Commission might intervene so as to uphold the principle of non-discrimination.

I think the second question you were asked then was for details of your dealings with the European Commission, or any officer of the Commission, regarding the second GSM process at any time prior to the launch of the process on the 2nd March, 1995, or at any time during the course of the process from the 2nd March, 1995, to the 16th May, 1996, including the subject matter of such dealings and the identity of the official or officials involved.

And you replied, sometime after the terms of the competition was announced, which you understand to have been on the 22nd May, 1995, you made contact with the European Commission's Director General sorry, the Commission's Director General for Competition, DG IV, so as to communicate Esat Telecom's view on the

matters referred to above. You say that there was nothing unusual or remarkable about a company like Esat Telecom doing so. In fact, by contrast with our bureaucracies, the European Commission operates an open-door policy so as to encourage individuals and companies to bring information to it in connection with whether or not EU rules are being complied with by the Member States. Under EU law, the Commission is responsible for upholding the Treaty rules, and in particular, the competition rules. You cannot say with certainty to whom your initial contact was addressed, but it was probably to the division of DG IV with responsibility for the application of competition rules in telecommunications. At that time you understand that Mr. Herbert Ungerer was the Acting Head of the Unit, and that he was directly concerned with these matters and was assisted by other officials, including Mr. Marcel Haag and Mr. Christian Hocepiéd.

You recall sending a fax outlining certain issues, though you cannot say at this remove who the fax was addressed to, as you have not been provided with a copy by the Tribunal. You recall at least one follow-up phone call with Christian Hocepiéd to ascertain that DG IV had everything it needed so as to consider the issues raised. Other than being informed that DG IV was considering the matter raised,

Mr. Hocepić was noncommittal.

To the best of your recollection, you had no dealings, direct or indirect, with any official of the Commission regarding the second GSM licence prior to the launch of the process on the 2nd March, 1995.

You were then asked for details of your knowledge, direct or indirect, of the negotiations between the Irish Government and the European Commission, either during or subsequent to the completion of those negotiations on the 14th July, 1995, including the sources of such knowledge.

And you informed the Tribunal that you had no knowledge, direct or indirect, of the negotiations between the Irish Government and the European Commission during those negotiations. Subsequent to the completion of those negotiations, you became aware of the amendment to the terms of the GSM competition, when it was disclosed by the Department to the bidders.

I think you were then asked for details of your knowledge, direct or indirect, of the proposals made by the Irish Government to resolve the intervention of the European Commission, and in particular, the proposal that the licence fee be capped at  $\text{€}15$  million and that Eircom pay an equivalent fee of  $\text{€}10$  million, together with the source or sources of your knowledge.

And you have informed the Tribunal that you had no

knowledge, direct or indirect, of the proposals made by the Irish Government to resolve the intervention of the European Commission, and in particular, the proposal that the licence fee be capped at  $\text{€}15$  million. However, you were aware of the media speculation that the involvement of the EU Commission meant that there could be a change in the proposed fee arrangement.

You were then asked for the identity of all persons to whom you disclosed or discussed your knowledge of any of the matters referred to above, including the approximate dates and subject matters of such dealings and discussions.

And you say that in relation to your knowledge of the matters referred to above, you cannot specifically recall with whom you discussed the matters known to you, but you expect that you discussed them with Mr. Denis O'Brien, Mr. Enda Hardiman, Mr. Mike Kedar and with Mr. Owen O'Connell of William Fry Solicitors.

You further expect that you did so on an ongoing basis from March, 1995, up until the Department's announcement of the amended competition. Those discussions would have taken place as part of your general responsibility regarding regulatory matters and the Esat Digifone bid.

I think you were then asked the date on which and the identity of the person from whom you received a

document comprising a draft of a letter from Commissioner van Miert to Mr. Michael Lowry, which was ultimately dated the 14th July, 1995.

You informed the Tribunal that you never received a document comprising a draft of the letter from the Commission ultimately dated 14th July, 1995. You did receive the first page of the final version of a letter from the Commission which was ultimately dated the 14th July, 1995. You cannot say for certain on what date you received the document, but that you expect that it was between the days of the 14th it was within days of the 14th July, 1995.

You were then asked the precise circumstances in which you received such documentation, including the manner in which it was conveyed and all requests made by you to the person who was the source of the document and details of all dealings between you and such person either prior to or subsequent to the receipt of the document.

And you have informed the Tribunal that you cannot say with certainty who sent you the said document. But you have concluded that it was almost certainly from within the ranks of Mr. Herbert Ungerer's unit, and most likely was faxed to you by Mr. Christian Hoceped. You have no recollection of discussing this document, or indeed either requesting it from Mr. Hoceped or any other Commission official.

However, you cannot rule out that you asked to be informed as to the outcome of the Commission's intervention and was therefore sent a copy of an extract from the Commissioner's letter of the 14th July, 1995. You have no recollection of subsequently discussing the document with Mr. Hocepić or any other official of the Commission.

You were then asked the purpose for which the document was faxed by you to Mr. Mike Kedar on the 24th July, 1995.

And you have informed the Tribunal that Mr. Mike Kedar was a director of Esat Telecom in 1995. He was especially knowledgeable in the area of regulatory affairs. The purpose of sending him the page from the Commission letter would have been to keep him informed of matters.

I think you were then asked the identity of all persons to whom you provided a copy of the document, or to whom you disclosed its contents, or any part of its contents, and the purpose for which the document was so provided or its contents disclosed.

And you have informed the Tribunal, that you cannot recall to whom you copied the document to. Since the document was not in any way significant, no specific dealings would have been required, other than in the general context of the competition.

I think you were then asked for details of all

dealings which you had with any person in connection with the document or its contents. And you have informed the Tribunal that you do recall you do not recall to whom you copied the document. However, it is clear that you faxed a copy to Mr. Mike Kedar, a director of Esat Telecom, as explained above.

Now, Mr. Burke, can I take it that

CHAIRMAN: Mr. Coughlan, not to interfere, but might we just, perhaps, open the fax of June, since it was part of the documents, it might be useful, before you sought to ask supplemental questions.

Q. MR. COUGHLAN: Yes. Now, if we look at the document in question, and I think you have been furnished with a copy of it, isn't that correct?

A. That's correct.

Q. Now, do you have a copy?

A. Yes, I do.

Q. Now, before the Tribunal contacted you, did you have any recollection at all of anything concerning this document?

A. No, I didn't.

Q. Now, just to explain to you: Files kept by you, which were essentially Esat Telecom files, were handed over to British Telecom, which then became O2, and when these files were made available to the Tribunal by Messrs. McCann Fitzgerald Solicitors, acting for, as it was then, British Telecom, this document, in this

form, appeared on the files?

A. Correct.

Q. Now, you were primarily involved in the fixed line business, isn't that right

A. That is correct.

Q. of Esat Telecom? And you had dealings with the Department on behalf of Esat Telecom, isn't that correct?

A. Principally in relation to regulatory affairs of the fixed business.

Q. And principally of Mr. Sean McMahon I think, perhaps, who was the de facto Regulator, isn't that correct?

A. That's correct.

Q. And I think you also had some dealings with the European Commission, with DG IV, and with Mr. Christian Hoceped in Mr. Ungerer's department in DG IV, regarding the fixed line business?

A. That is correct.

Q. Specifically in relation to disputes and interpretations of what amounted to voice telephony?

A. Correct.

Q. Various techniques or systems that were being used, and dispute arose in relation to them?

A. Correct.

Q. That was the main area of concern and that you were involved with the Department and with the Commission, isn't that correct?

A. That's correct, at that time.

Q. And I think Mr. Hoceped, in fact, has given evidence to the Tribunal that he received a lengthy document, I think from Esat Telecom, perhaps from you, on this issue, and that he had perhaps one meeting with you about that, that particular issue?

A. That's correct, in relation to auto dialers referred to in leased lines.

CHAIRMAN: That was the 2nd of June letter, was it?

A. I'm not certain of the date of that letter.

CHAIRMAN: Well, was the relatively lengthy fax that you sent to Mr. Hoceped dealing with the legal basis, international calls, then going on to matters of Eircell, termination, planning?

A. Chairman, that was slightly different. Perhaps

Q. MR. COUGHLAN: I think that was a second communication?

A. That was a second communication.

Q. I think in the first instance you had a fairly lengthy communication with Mr. Hoceped, and I think Mr. Hoceped has given evidence that the document might have run to 130-odd pages or something?

A. Correct, and that related to auto dialling.

Q. That related to fixed lines and auto dialers?

A. Correct.

Q. You had a meeting with Mr. Hoceped, and from Mr. Hoceped's evidence, he has no recollection of

ever discussing GSM with you at that time at all?

A. That's correct. And I have no recollection of discussing GSM at that time.

Q. And it was unlikely that you would have discussed GSM with him at that time?

A. I think so. Because the complaint on auto dialers was very long, very complicated, and that was the purpose of the meeting with him.

Q. So that was would I be correct in thinking, that was the first time you would have had contact with Mr. Hocepied?

A. Correct.

Q. With auto dialers?

A. Correct.

Q. And you had one meeting with him?

A. That's correct.

Q. I think from the evidence of Mr. Hocepied, there was a subsequent telephone conversation between the two of you, and it was more of a courtesy-type call and you thanked him for receiving the deligation and whatever submissions you made?

A. Correct.

Q. And you remember that?

A. Yes, I do.

Q. Now, I think you then, on behalf of Esat Telecom, but in the context of it being part of a proposed consortium to bid for the mobile phone licence, sent a

fax to Mr. Hocepić on the 2nd June of 1995, isn't

that correct, where you raised certain issues?

A. That's correct.

Q. I'll just put it up on the screen. You sent a fax

cover sheet you sent it by way of fax, this

particular communication, and you sent a fax cover

sheet, and it was addressed to Mr. Christian Hocepić,

and it's from you, and you say: "See attached. Kind

regards, Jarlath M. Burke." Isn't that correct?

A. Correct.

Q. Then there is a memorandum. It's an Esat memorandum

and again it's from you and it's regarding the draft

GSM licence. I think by this time, the RFP or the

tender document had issued, isn't that correct, and

you had an opportunity to look at it?

A. That is correct.

Q. And it did contain a form of a draft licence as well,

or there was

A. Yes, that is right.

Q. Now, you then that particular memorandum is you

are not making a formal complaint to Mr. Hocepić, or

to the Commission, at this time, are you? What you

were doing is, you are sending your views that it's

something that the Commission might consider, I

suppose would be the way to put it?

A. That is correct. I think it amounts to providing

information to the Commission.

Q. Providing information. And the first thing you address is the legal basis. You have looked at these documents, and you see that you discuss that the legal basis under which the licence is granted is stated to be Section 1.11(1) of the 1983 Act. And you say this is arguably incorrect, and you go on to specify your reasons why you state this to be incorrect.

You then in fact, you were probably right. I think the licence was subsequently issued under a different section?

A. I think it's rather an obscure point, but I don't think any of the business people cared about it really.

Q. You then go on to deal with the question of international calls. And you say that "the obligation to terminate all international calls using Telecom Eireann is problematic, Esat seeing two competing interpretations of the legal situation.

"1. The mobile communications as PSGM and therefore the Member States are justified in forcing the second GSM operator to meet its obligations on universal service. Hence the obligation to terminate international calls using Telecom Eireann.

"2. The alternative view is that mobile telephony is not voice telephony (a conclusion which you reached in your Green Paper.) Therefore the concept of the

universal service obligation is unintelligible.

"Article 90 of the EC Treaty would only kick in at the point where the switch from fixed line to mobile telephony becomes clear (as in Sweden) and the USO would be financed by appropriate interconnection charges between all operators.

"Further, the concession in Condition 66 of the licence, that all interconnection rates will reflect USO means that forcing the second GSM operator to terminate international calls on Telecom Eireann looks very dubious from a legal perspective.

"Esat is anxious to discover whether or not the GSM operator will be liable to directly interconnect with other GSM operators.

"On the issue of interconnection, the Department is not clear that incremental rather than fully allocated costs will be used."

So you are raising two issues in relation to this matter here in relation to international calls, isn't that correct?

A. And that's a very significant issue, commercially, at the time.

Q. You then raise an issue about Eircell and when it becomes a separate company from Telecom Eireann, isn't that right?

A. Correct.

Q. You then raise an issue about termination.

"It is unclear whether upon termination of the licence ownership of the licence returns automatically to the State." Fair enough.

Then you raise an issue about planning law, isn't that right?

A. Correct.

Q. And those were the issues that you were providing information on

A. Correct.

Q. to the Commission, isn't that right?

A. That's right.

Q. You did not raise any issue or provide any information to the Commission about the question of licence fees?

A. No, other than in the context of equal treatment, vis-a-vis Eircell in the fax.

Q. Now, do you remember any contact with Mr. Hocepied after you sent this? You may have had a telephone conversation with him?

A. That's correct.

Q. Asking him if he had received everything?

A. That is correct.

Q. And do you remember that?

A. I do. And I now understand, from what Mr. Hocepied has stated, that in fact, there was the fax had not got to his desk, which resulted in me resending the fax to him.

Q. But you don't remember that?

A. I don't recall resending the fax to him.

Q. But you do remember sending him the fax, and you do remember a telephone conversation of some sort

A. Yes.

Q. in any event?

A. Yes, that is correct.

Q. Again, of a general information nature as to whether he had received all the information, and as you now know, as a result of what he told you, you had to send it again?

A. Correct.

Q. But you don't recollect that. You have no recollection, am I correct, of requesting any document from Mr. Hoceped?

A. That is correct. I have, however, stated that I cannot rule out that I asked to be informed about the outcome of the Commission's inquiry into the GSM competition.

Q. Yes, I understand that. But what I am interested in at the moment is your recollection of events. You have no recollection?

A. That is correct, I have no recollection.

Q. You have no recollection of receiving the document, which was on your papers, on your files?

A. That is correct. Not being a significant document in any way, I have no recollection of having received it.

Q. Again, what I am interested in, is your recollection.

You have to recollection of receiving it?

A. Correct.

Q. You have no recollection when you received it?

A. That is correct. However, I have indicated in my statement that the approximate time-frame within which I expect that I received it.

Q. Well, it had to be within that time-frame?

A. That is correct.

Q. But you have no recollection?

A. That is correct.

Q. The document is dated sorry, this document is not dated, but the document left the Commission on the 14th of July?

A. That is correct.

Q. And you faxed it to Mr. Kedar on the, whatever the date is, the 24th, I think, of July, is that correct?

A. Correct.

Q. But you have no recollection of when you received it?

A. That is correct.

Q. Apart from the fax cover sheet to Mr. Kedar, do you have any recollection of sending it to Mr. Kedar?

A. No, I don't. As you can see, it's a scribbled fax.

Q. As is your one to Mr. Hocepied?

A. I did a lot of scribbling.

Q. And you have no recollection of discussing it with anyone in Esat?

A. I have no specific recollection of discussing it with

anybody in Esat.

Q. Or you have no recollection of discussing it with Mr. Owen O'Connell?

A. I have no recollection of specifically discussing it with Mr. Owen O'Connell.

Q. What's the distinction between "specifically"? Are you making a point?

A. Yes, it's very deliberate because I don't want to mislead in any way.

Q. Could you just

A. I had continuing ongoing discussions with other members of the bid team in relation to regulatory issues, and indeed, with Mr. O'Connell. So I cannot recall a specific discussion with any of those people in relation to this letter.

Q. Can you recall any form of a general discussion?

A. I do not recall. All I can say is, that I would expect that I would have had discussions with people on an ongoing basis as to the terms of the competition, whether the Commission was looking into the matter, and what might be the possible outcome.

Q. I can understand that. That was general discussion about that, even arising out of, as you say, commentary which appeared in trade magazines, matters of that nature?

A. That is correct.

Q. But you have no recollection of discussing this

document with anybody in Esat, or with Mr. Owen

O'Connell, is that correct?

A. No, that is correct.

Q. Can I take it, as far as your recollection is concerned, you don't remember getting this document, you don't remember from whom you got the document, you don't remember who you discussed the document with, and you don't remember who you might have shown or given the document to, is that correct?

A. That is correct.

Q. May I then ask you to consider this: you have informed the Tribunal in evidence this morning that you have concluded; can I take it that that is a judgement made by you?

A. That would be correct.

Q. That it was almost certainly received or obtained from within the ranks of Mr. Herbert Ungerer's unit, and most likely was faxed to you by Mr. Christian Hocepied. How do you make that or draw that conclusion when you have no recollection of events at all?

A. First of all, I did not say that I had no recollection of events at all. In relation

Q. Of this document?

A. Yes, but you said in relation to events at all.

Q. No, about this document?

A. I have no recollection in the terms that I confirmed

to you a few minutes ago. However, I believe that in circumstances where I brought information to the attention of the Commission touching upon some of the points which were eventually part of the outcome of a process between the Irish Government and the Commission, that it would not be unusual for the Commission to inform me, as an interested party, of the outcome of this process. And I say that as somebody with a lot of experience dealing with the Commission, and the fact that the Commission, as a courtesy, likes to keep people informed in these situations. That is the basis for my indication as to the likely source of the document.

Q. Right. So, therefore, you are basing it on a courtesy which you would have received from the Commission in response to information which you had brought to the attention of it?

A. That is correct.

Q. Did you receive one page or two pages, do you know?

A. Based on the information before me, it appears that I only received one page.

Q. Why do you say that?

A. Because I don't have a specific recollection, as I have told you, of receiving the fax. However, it's undisputed that a fax was in my possession, it was on my files, and that that was one page. Therefore, that's all that I can say.

Q. You raised an issue, a legal issue, isn't that correct?

A. Correct.

Q. Or you brought you provided the Commission with information about the legal basis on which it was proposed to issue a licence, isn't that correct?

A. Correct.

Q. You also gave information to the Commission about international

A. International interconnection.

Q. international calls?

A. Correct.

Q. Isn't that correct? I take it you have, by now, seen the second page of the document, the first page of which was on your files?

A. That is correct.

Q. The information dealing with the legal basis and with international calls, I take it you would agree is contained on the second page of the letter?

A. That is correct.

Q. And we know from the evidence of Mr. Hocepied, and I didn't get into any debate with Mr. Hocepied about the confidentiality of this document, the Tribunal can form its own view about that having heard everybody's evidence. I am not going to get into the same I am not going to get into a debate with you either about it, Mr. Burke. But Mr. Hocepied has expressed his

view that if he was responding to an interested party who had furnished information, or if he had been asked for a response, he would have furnished the whole document, particularly

A. Let me say that that is not my reading of the transcript of Mr. Hoceped's evidence.

Q. Tell me so

A. At various stages he may have made those indications, but he also added that he would send the portion, as it were, that the person was looking for, had asked for or had an interest in. So I think that it's a little bit difficult, perhaps, reading the transcript, but I think it's not quite that clear.

Q. Right. Well, let's take the point that you have just made there. You had made a submission or provided information about the legal basis and about international calls, isn't that correct?

A. Correct.

Q. In fact, I would suggest to you that on your fax, these were two major issues that you were bringing to the attention for the information of the Commission?

A. I think certainly the international interconnection was a major issue.

Q. And the legal basis. It takes up a fair portion

A. As I said earlier, a slightly obscure point. The main issue was international interconnection.

Q. The response to both of these issues is on the second

page?

A. That is correct.

Q. Can I take it that if you were seeking information from Mr. Hocepied, based on your understanding of the transcript now, that that information in relation to these two issues was on the second page of the document, isn't that correct?

A. It is clear it is on the second page.

Q. Might I suggest to you, that in those circumstances, if you had requested information or a response to your fax, that Mr. Hocepied would have furnished the second page which was responding to two significant issues raised by you?

A. Not at all. Because if you look at the terms in which the issue of international interconnection is dealt with on the second page, you will see that the Commission describes the Irish Government's proposal in relation to that restriction as being disproportionate. They go on to say, however, that they will not take action unless they receive a complaint. Therefore, I would suggest to you, that any Commission official might be concerned and would take steps to ensure that an interested bidder like me, with a track record of making complaints to the Commission, should not be sent the second page of a letter which invites a legal submission to the Commission in relation to that issue.

Q. Your solicitor, Mr. Marren, put certain matters to Mr. Hoceped on your behalf when he attended here to give evidence, isn't that correct?

A. That is correct.

Q. And you have read the transcript of that portion of Mr. Hoceped's evidence?

A. That is correct.

Q. Mr. Marren specifically put it to Mr. Hoceped that the information being sought in the fax, the response thereto, was on the first page, isn't that correct, particularly in relation to he says: "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 it would be fair to say that these concerns and the Commission's position in it would be reflected in the first page of the letter we have been considering, particularly the final version of that letter?"

"Answer: They are, I think, regarding the interconnections, but I have to check again to be certain. The interconnection issue is, in my view, on the second page.

"Question: I think the interconnection is dealt with, I think, at Bullet Point 4, I think, on the front page, the first page.

"Answer: That that's for that's for national

interconnection disputes, but when you see the last paragraph, 'Finally, I take note that the Irish Government will, for the time being, not allow direct cross border connections,' so this issue was really dealt with on the second page."

So that's the evidence of Mr. Hocepić, who entered no caveat about any references or views that the Commission may have expressed regarding reserving its prosecutorial powers, as you described it in your own statement?

A. Yes, but I understand that Mr. Hocepić was not asked whether or not that particular portion of the letter dealing with international interconnection, whether you would view that as problematic if that was shared with a bidder.

Q. Mr. Hocepić has expressed the view in sworn evidence in this Tribunal that he didn't consider anything in this letter problematic?

A. Mr. Hocepić will have to speak for himself.

Q. He did; he has given sworn evidence.

A. That is fine. I am simply suggesting to you that it could well be the case that a person, acting perhaps, you know, being busy, might decide 'I am going to send an extract from this letter, I will not send the entirety of the second page because that raises an issue which could become problematic and may create difficulties vis-a-vis the Irish Government if it came

into the possession and knowledge of a bidder.'

Q. Well, let me just tell you the evidence which has been given here by Mr. Hoceped on behalf of the Commission.

A. I accept what you have told me. I am just making a suggestion to you.

Q. That is the evidence. What I am trying to ascertain is why you conclude, having no recollection of matters, and bearing in mind

A. I do not have no recollection of matters.

Q. Of this document?

A. Yes, but I think it's fair to be precise as to what one is saying.

Q. Let's be precise so. You have no recollection of this document at all, isn't that right, Mr. Burke?

A. I have no recollection of either asking or receiving the document. However, I do recall sending a fax to the Commission. I recall a brief conversation with Mr. Hoceped, and I have suggested to you that as a courtesy to me, it is likely that I was sent, by Mr. Hoceped, an extract from the said letter.

Q. Mr. Hoceped said that he has no recollection of sending it to you, and that if he was sending it to you, he would have sent the whole document, and that if he had received a request, he saw no difficulty in furnishing the document?

A. Right. Well, I have already, I suggest, contradicted

you in relation to him having confirmed that he would send the entirety of the letter. That is not clear from his evidence, and I have read the transcript very carefully. All I can say to you is that I received one page, and that is all that I received.

Q. From whom?

A. I have explained that I believe that in all likelihood it came from Mr. Hoceped, as a courtesy to me, being the person who had sent him a memo in relation to issues connected with the process. That is not unusual in these circumstances.

Q. How do you believe you would have received it?

A. How do I believe I I can only tell you how I would expect.

Q. How do you believe you would have received it?

A. I believe that I would have received it by fax.

Q. You were not in Brussels, so you would not have received it personally. Would that be correct to say?

A. I was not in Brussels, that is correct.

Q. Did you receive it by letter?

A. I cannot say that I received it by letter.

Q. But you say you believe that it's most likely you received it by fax?

A. Yes, and that's all that I can say.

Q. Would you look at the document?

A. Yes.

Q. You can see it's effectively topped and tailed?

A. Yes.

Q. I suggest to you that if you had received it by fax, it would not have been in that form?

A. That may or may not be correct.

Q. And I am suggesting to you that the reason for the topping and tailing of this particular document, the most likely explanation was to obscure where it came from?

A. I think that's a serious allegation to make. I certainly it's not my business to obscure documents that I would receive from the Commission. I have no reason to. That's not the way I do business.

Q. Could you have received it from anybody in this country?

A. I do not believe that I received it from anybody in this country.

Q. Could you have?

A. I cannot exclude that as a possibility. However, I do not believe that I would have. We were in an extremely tight process, which was being run by the Department. There was a protocol for the way in which we would receive information. I think there was no possibility of receiving this form of communication from the Department, the Department not having a track history or practice of sharing correspondence that it receives from the Commission.

Q. Why do you think that you couldn't have received it in

this country?

A. Well, I say it because it is in the context of a process which was a very serious one. It was run very strictly

Q. Confidentially?

A. by the people running it, certainly they ran the process confidentially. But more importantly, it would not be the practice of Irish Government departments to share correspondence, no matter what its nature, innocuous or otherwise, or however you want to categorise it, with third parties; that is not the practice in this country.

Q. I want to recap now over this side of the water. You say that for two reasons you believe that you couldn't have received it in this country. Firstly, that this formed documentation or within a process which was being conducted confidentially by the people conducting the process

A. I should say

Q. Could we just, you can explain in a minute. Could we just clarify what you have just said now. The first is that it was a document within a confidential process which was being run by the Department here, and secondly, that it is not in the mindset or the culture of Irish officials to give documents to people?

A. Correct.

Q. They are the two issues?

A. Correct. And on the first point, I just want to say that in using the term "confidential", which I agree with in terms of the process, I do not want that to be taken as me agreeing to the categorisation of that extract as confidential. I think that's an important distinction that I would like to make.

Q. You see, the process was confidential, wasn't it?

A. I accept, and I just want to enter that caveat. I agree with you, it was a confidential process.

Q. Yes, and from the point of view of the people conducting that particular process, confidentiality was something that they were conscious of, and as far as we know, attempting to achieve, isn't that correct?

A. That is correct.

Q. But your view was that this was an insignificant document, it made no difference to thinking?

A. It made no difference to anybody. All of the bidders were aware that the fee would be capped. Every bidder bid up to the maximum amount. The letter didn't disclose what the weightings were. It didn't give any advantage, and it couldn't have given any advantage.

Q. I know your view about that, and I am not going to debate that issue with you, Mr. Burke. That's a matter for the Tribunal.

A. Okay, very good.

Q. But the document you received is a document which has

the top missing from it?

A. Correct.

Q. And it has typed in "Brussels" and "F/ft". Do you see that?

A. Yes.

Q. Now, we have been over these documents a number of times, and I think you are probably familiar from reading the transcripts?

A. Correct.

Q. To Mr. Hoceped, or somebody on the Brussels' side, that would have been significant, that it had "Brussels, F/ft."

A. Correct.

Q. They knew this document could be identified at a particular time because it's not registered, it doesn't have the date-stamp on it?

A. Correct, but I would say that for practitioners in EU law the capital "F" is well-known to signify "FIN" or final version.

Q. And that is not the evidence that has been given about this document. That is given as being the reference of Mr. van Miert's

A. No, that's "ft" that's "Ft", the small "ft."

That's what I understand from the transcripts.

Q. No civil servant who gave evidence here, or nobody from the Irish side, was familiar with that particular aspect of the matter.

A. That's fine. They may not be practitioners in EU law.

They may not do it for a living, like I do.

Q. And with the top removed from the document, thereby making it difficult to ascertain its provenance. I am suggesting to you that anyone in Brussels would not have done that because the provenance would be obvious with the "F/ft" on it, but that for somebody over here, it would not have been obvious?

A. Is your question to me whether or not it was obvious to me that that was a final form of the letter?

Q. No.

A. No?

Q. What I am suggesting to you is this: that one could more likely conclude that you got this document from somebody here in Ireland, rather than somebody in the Commission?

A. I think not, especially when evidence has been tendered that this is, apparently, the same page as the page that was sent to Messrs. Towey and Brennan by Mr. Hoceped. I think that might invite the opposite conclusion to the one that you have just suggested.

Q. Well, you have drawn the conclusion that you must that you got it from Brussels because you were in communication. You have no recollection you were in communication with them, you sent them information by way of fax, and that this was a courtesy or a response to that information, although

the real response to the information which you sent them is contained on the second page of the letter which, according to yourself, you have no recollection of receiving, and certainly wasn't on your file of papers?

A. I wouldn't agree with your reference to it as the "real response". The extract that I received answered or dealt with a number of the issues that I had raised in my fax. There are, however, two issues that are dealt with on the second page, which I also raised in my fax, but which I suggest to you were not conveyed to us because, as a bidder, in the event that we won the licence, we would immediately make a complaint to the Commission that the Irish Government was acting unlawfully by preventing direct international interconnection. That's why I suggest, and I accept what you have told me by Mr. Hoceped, that there may have been reason not to send me the second page of the letter.

Q. What we are trying to do here is to try and ascertain why you conclude you got it from one source and not the other, because you have no memory

A. I don't think that I have no memory.

Q. of the document, Mr. Burke?

A. Okay, but I think that

Q. Am I correct in saying that you have no memory of the document?

A. I have no recollection of receiving the document. You have asked me to comment on your suggestion that it is more likely that I received, perhaps, the document from within Ireland. What I'm saying to you is, I don't understand, and therefore, I don't accept how it is that you suggest that that is a likely explanation.

Q. Well, let's look at the document. On the face of it, the document appears to be one which was prepared for the purpose of obscuring its provenance, its particular provenance?

A. What I am saying to you is, it is fair to say that the provenance, if by that you mean the fax header, is missing, that is clear. I don't think it's fair to say that it was prepared for the purposes of obscuring its provenance.

Q. On the face of it?

A. No, I don't think there is any that you could draw that inference. What I am saying to you

Q. Could you give me an explanation so as to how a document like this

A. Yes, I will.

Q. which you say more than likely received by way of fax is in that form on your file? Could you explain that to me?

A. I think it wouldn't be at all unusual, and you must have some experience of this yourself dealing with huge amounts of correspondence, that over time, a copy

may be made quickly or carelessly, and that as a result the copy can end up back on the file, rather than the original. What I am saying to you is, that it can happen that over time a fax banner head or the source of a document becomes obscured.

Q. We have received all of Esat's documents from BT. We have received your documents. This document appears only once and only in that form in all the documents the Tribunal has received. Now, if it was faxed to you, can I suggest to you that the original would be kept on your file and that if photocopies were made, they would have been distributed to other people, but that the original should be on your file?

A. What I have said is, you would expect that the original that I received should be on my file, I agree with you. What I'm suggesting to you is that over time, and, for example, I will just give you an example: The way in which the Tribunal furnished my files, my old files to me, was not at all in the manner in which I keep those files. So I wouldn't even be certain that somebody hadn't that I wasn't getting a copy of what I already had, that somebody had recollated it, reorganised it. So just in that instance, documents get moved around. What I'm suggesting to you is that perhaps, over time, through being moved about or being copied, the origin of the fax was obscured.

Q. Why do you resist the suggestion that it couldn't have come from somebody here?

A. It's not a question of resisting the suggestion. What I am saying to you is, that in a process that was being run, a confidential process, as we have agreed, there is quite simply no possibility that the Irish Government would share, or any of its officials, would share correspondence of any nature with a bidder, or indeed with anybody else in relation to these matters. So, I guess my answer to your question is, it's a sense of the way things are done.

Q. Right. So can I take it that when you got this document, you were keenly aware that it was a document which no Irish official or Government member would have shared with you?

A. Yeah, but I don't attach any particular significance to that.

Q. I see. I see. So as far as you were concerned, you were aware that there was a confidential process; that it was impossible for anyone involved in that process on the official side to share any information with you because of their view of the thing being conducted confidentially? You were aware of this, and you attached no significance to it. Is that your evidence?

A. That's correct.

Q. At this particular time, and I want to be fair to you,

Mr. Burke, at this particular time I think you were, what is called, the legal and regulatory counsel of Esat Telecom, is that right?

A. That's correct.

Q. What's that?

A. It's the person who has overall responsibility for legal affairs within the company, and also regulatory affairs because of the sector-specific regulation.

Q. And at that time

A. Counsel, I should say, is an Americanism.

Q. At that time what you had was a primary law degree, is that correct, from University College Dublin, and a Masters in European law, is that correct?

A. Correct.

Q. You had no professional legal training, is that correct, at that time?

A. Limited, if you call working with solicitors occasionally.

Q. In what capacity? Were you apprenticed? Were you a researcher? What were you?

A. Research and other work.

Q. Research. You were not trained as a solicitor, you were not trained as a barrister, is that correct?

A. Correct, but I had a Masters degree in European law, with distinction.

Q. You had academic qualifications, is that correct?

A. That is correct.

Q. Whilst you had no you have no recollection of specific discussions about this letter with anybody.

Do you think that it is likely that you would have discussed it with other with executives or members of the Board of Esat Telecom and/or their legal advisers?

A. Yes. I think, as I indicated earlier, it's likely, in the context of the process and my duties, that I would have done that, and I now know that I faxed it, but I don't have any recollection of it, to Mr. Kedar, who was on the Board of Directors of Esat at the time.

Q. Why did you send it to Mr. Kedar?

A. Mr. Kedar was Canadian and was very expert in regulatory affairs. Sometimes Board members are interested in regulation, sometimes they fall asleep at the mere mention of it. Mr. Kedar was one of these people who understood it very well, so for the sake of completeness, I would have sent it to him. I should also say as well, that I had extensive dealings with him in relation to the fixed business, and you recall that there is a letter attached

Q. I do?

A. In in relation

Q. For Mr. McMahan?

A. For My Friend, Mr. McMahan.

Q. And a business card of a lawyer in London, isn't that correct?

A. That is correct.

Q. Had that got anything to do with this?

A. Yeah, the lawyer in question is a Canadian lawyer who Mr. Kedar knew, and he just simply asked me this was unrelated he simply asked me for the contact details of this letter.

Q. It's unrelated?

A. It's unrelated, yes.

Q. As was the issue that you were in dispute with Mr. McMahon about; that was about fixed line

A. That's correct.

Q. matters, isn't that correct? Did Mr. Kedar have a role in the GSM company?

A. My recollection is that he didn't have a specific role. He was simply one of the directors of Esat Telecom

Q. Of Esat Telecom?

A. who was kept apprised of the bid.

Q. Well, can I take it that even if you didn't regard it as sorry, you did understand the view of the Irish authorities that this might be viewed confidentially. You paid no particular heed to that

A. Remember, I had no view as to what the Irish authorities thought at the time.

Q. You just told us there a few moments ago that you would have viewed it as that?

A. What I am saying to you is, I had no view at that time

as to how the Irish authorities saw you know, how they regarded the nature of that chain of correspondence. I knew that they regarded themselves as being in a confidential process, and I knew that they would not share information which they believed to be confidential, with bidders, and I also knew that, from practice, the tendency would not be to share any correspondence from the Commission.

That's

Q. That's what I was asking about.

A. Correct, okay.

Q. You said that you didn't consider it a significant document?

A. That is correct.

Q. Why, then, send it to Mr. Kedar in Canada?

A. Simply for completeness. I think it's always good to show your superiors that you are being diligent.

Q. Did you send Mr. Kedar everything that appeared on your files?

A. My recollection would be that I would send him drafts, certainly, of letters; for example, such as the draft letter to Mr. McMahon, you know, for comments or suggestions, because of his expertise.

Q. Did you send him a copy of the memorandum you sent to Mr. Hoceped?

A. I cannot recall.

Q. Could it be the situation that there was a realisation

within Esat that you had possession of a sensitive document, at least?

A. You are introducing a new term.

Q. I am.

A. And what I would say to you is that this document was not significant, and given that it was not significant, I would suggest to you that it wasn't sensitive.

Q. I understand your view that you say it's not significant. I also understand what you say about your understanding of what the Irish officials' view might be of the matter.

A. Correct.

Q. In that context, might I suggest to you that there could have been a view within Esat that this was at least sensitive?

A. I'm trying to be helpful here

Q. Can I put it in some form of context?

A. Yes.

Q. Can I take it that being aware of the Irish officials' position, that it is unlikely that you, or to your knowledge, anyone on the Esat side, would have informed the Irish officials that you had possession of

A. That's correct. I think it would be fair to say that we wouldn't advertise the fact that we had the letter.

I also believe that the officials wouldn't be

surprised subsequently because of their knowledge of the Commission, that the Commission would form its own view as to who it shared letters or extracts from letters with. But I think I would agree with you that, we would not advertise that to the officials.

Q. And could I ask you why, in your view, in your view, that might be so?

A. Because that might place a strain on the relationship between the officials in the Commission and the officials in the Department, and that's not it's certainly not in your interest as a bidder to be, as it were, causing problems. We were in a delicate position, that is why, as you correctly say, we did not make a complaint to the Commission. We brought information to the Commission because you don't want to be seen to be upsetting the apple cart. So I put it to you this way: to advertise the fact that we had received this letter, or the extract from the letter, to the Department, to tell the Department might, in our view, put strain on the relationship between the parties, and that would not be we would view it that that would not be in our overall interest.

Q. Do you remember any discussion about that?

A. No.

Q. So do we now have a situation where, in relation to the document which was on your files, that and we see the form that it was in that if you received it

from the Commission, you believe you received it by

fax?

A. Correct.

Q. And that the explanation for the documentation being

in that form could be that it was photocopied a number

of times and the top became obscured?

A. Correct.

Q. You have no recollection of giving the document to

anyone else other than you have no recollection of

giving it to Mr. Kedar, but we have proof positive

that you did, in the sense that they sent a fax?

A. Correct.

Q. And can I take it that I am just trying to tease

this out now if you had photocopied it, if, well

let's operate on the basis that you did photocopy it

first of all. How many people do you think you might

or could possibly have given it to?

A. Just to be clear, we are

Q. I am not saying that you did.

A. We are speculating at this point, so you have invited

me to speculate?

Q. Yes.

A. Okay. I would suggest that if you look at to whom I

copied the original memo that I sent to the

Commission...

Q. Mr. Mesh

A. Yeah, Mr. Mesh, Mr. Kelly, Mr. Hardiman, and possibly

Mr. O'Brien.

Q. So, could you just tell me, who is Mr. Mesh?

A. He was the Chief Operating Officer of Esat Telecom at the time.

Q. All right. Mr. Kelly?

A. He was working on the bid.

Q. Right. And Mr. Hardiman?

A. He was the head of the bid team.

Q. Right. And possibly I know we are speculating at this stage possibly Mr. O'Brien, possibly?

A. Yes.

Q. Now, so, therefore, that would have involved the making of four copies, isn't that right?

A. That would be correct.

Q. And perhaps one more, a fifth, the one that went to Mr. Kedar, isn't that right?

A. Correct.

Q. And would that be the extent of it, do you believe?

A. Yeah, I would expect that.

Q. And could I take it that if you were going to circulate it to that group, a fairly small group of people

A. Correct.

Q. that the probability is that they'd have been copied at the same time?

A. That would be likely, yes.

Q. And that all of this would have been done within a

fairly short period of time after I am going to use a more neutral term the document came into your possession?

A. Correct.

Q. The document, or sorry, the fax which you sent to Mr. Kedar is in exactly the same format as the document which was on your file. I think you can take that as being correct; in other words, the top was gone off it?

A. Right, okay.

Q. Doesn't it appear to be more likely that what you received was the document in this form rather than, bearing in mind the limited amount of photocopying, the time-frame involved, than a document which had been faxed to you from Brussels and on which the top became obliterated because of extensive photocopying?

A. I am afraid I don't agree with that, in the sense that I think that it's equally conceivable that having received it by fax it was copied it may have been copied to everybody simultaneously or it may have been, you know, two, and then the other two

Q. I understand that. I am not let's

A. So what I'm saying, that in those circumstances it could have become obscured.

Q. But the original would have been on your file?

A. Well, what I'm saying to you is that you would expect that the original would be on my file, but that over

time, an original may get substituted, files are moved; that's all that I am saying.

Q. Isn't it more usual when one is, I suppose, the technical term is filleting of files, cleaning out a file, is that originals tend to be kept and copies, if there are any copies on the file, tend to be the ones that are if one is trying to reduce the amount of paper that one is storing

A. Well, what I would say to you is I worked on my own at that time, I didn't have the benefit of secretarial assistance. So things may not have been as deliberate as the exercise that you describe, where typically you would tend to keep the original. However, I would say to you that people's tendency to keep the original relates to something that is sent to them and is perhaps signed. So I might keep a letter addressed to me and signed and keep the original. We only have a fax, and the difference between one fax and a copy of that fax is not that significant, if you see my point?

Q. I take your point, yeah. But doesn't it, at the very least, seem unusual that if you received a fax from Brussels, that that document, in that form, isn't with your papers?

A. I don't necessarily see it as unusual.

Q. Why, if you didn't consider the document significant, and I am back to using your term, and I understand the explanation you have offered for Mr. Kedar; he was a

man that had interest in regulatory matters and a long experienced career in telecoms I think as well, hadn't he?

A. Correct.

Q. I perfectly understand you consulting him or referring to him or seeking advice, obviously, because of his experience. Why would you why might you, I didn't say you did, why might you have copied it to Mr. Kelly and Mr. Hardiman? I exclude Mr. Mesh at this stage, because of his senior executive position.

A. Because I was providing support to the bid team, and people have different roles. My job was to support on regulatory issues. There wasn't a huge amount of activity on regulatory issues so, as I say, it's always good to be seen to be diligent, and I would have copied it to those members of the bid team. I expect that I would, as we have agreed.

Q. You expect that you would?

A. Yes.

Q. And why to Mr. O'Brien, if you did?

A. Because Mr. O'Brien was obviously in overall charge of the bid, and I would have seen him in the same terms as those other people; in other words, somebody to be kept informed.

Q. To that level of detail as you would describe it, having informed us that most Board members, their eyes tend to glaze over when regulatory matters

A. That's right. Mr. O'Brien tends to have an astute comprehension of regulatory matters.

Q. Mr. O'Brien tended to have an astute comprehension of regulatory matters?

A. Yes. But it wasn't copied to the other directors of the Board, or at least we have no evidence to show that it was copied to other directors.

Q. Just offhand, who were they, at that time, if you can remember? If you can't, it doesn't matter.

A. I can tell you one of them would have been Mr. Pdraig O'hUiginn and Mr. Brendan O'Kelly.

CHAIRMAN: It's just five to one, Mr. Coughlan.

MR. COUGHLAN: I'll be a little bit longer, Sir.

CHAIRMAN: It's preferable that other people may have questions as well. So we'll take up the latter part of your testimony, Mr. Burke, if that's suitable to you, at ten past two.

Just before we rise, I think you have identified that whilst you don't have precise recall, the higher probability in trying to surmise as to what occurred, you consider is that you received it from Brussels rather than from Dublin?

A. Correct, Mr. Chairman.

CHAIRMAN: And you have also, I think, agreed with Mr. Coughlan on foot of that, that you would perhaps have regarded possession of the document at the time in question as being potentially a little sensitive

with the people conducting the competition in Dublin?

A. Correct.

CHAIRMAN: Do I take it from that then, that you can

positively rule out, from your own recollection, any

dealings with the limited number of top public

officials who might have had access to this, by which

I mean, obviously, Mr. Brennan, Mr. Towey,

Mr. Loughrey, and theoretically Mr. Brosnan, as the

person who brought the document in the diplomatic bag?

A. Yes, Chairman. I have no recollection of any dealings

with any of those people in relation to this matter.

And I say that given the way things were done at the

time, I would not expect to have had.

CHAIRMAN: Yes. Very good. We'll take up the balance

at ten past two. Thank you very much.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF JARLATH BURKE BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. Burke, if I could just return

to something we were dealing with before lunch, and I

appreciate it's in the realm of speculation, in that

you believe that you would have copied the document to

Mr. Mesh, Mr. Kelly, Mr. Hardiman, and Mr. O'Brien,

and/or Mr. O'Brien?

A. Yes, I believe that to be likely.

Q. And Mr. Hardiman was in charge of the bid operation,

would that be a fair way of putting it, or he was

leading

A. He certainly was initially.

Q. And Mr. Kelly had a role to play in that as well?

A. Yes.

Q. Mr. Mesh was the Chief Executive of Telecom, is that right?

A. He was the Chief Operating Officer of Telecom, and he was a person who I reported to for the fixed business.

Q. Did he have a direct involvement? I appreciate that he might have an interest in the bid, but did he have a direct involvement in putting together the bid?

A. Not really.

Q. And I think were Mr. Kelly, Mr. Hardiman in a different building to you?

A. That's correct. Eventually they were.

Q. Right. Well, in, say, July, it was coming

A. Yeah, by that time

Q. By that time they probably would have been because the bid had been worked on before the postponement of the process as well?

A. Correct.

Q. And where was that building, can you remember, in terms of distance from you?

A. I think it was Fenian Street, which would probably have been a 10 or 15 minute walk from where Esat Telecom was on Mount Street at the time.

Q. And Mr. Mesh would have been the same building as you?

A. That's correct.

Q. If you sent it to Mr. Kelly and Mr. Hardiman, would

you have faxed it to them, do you believe?

A. I cannot recall. If

Q. Did you have much communication with them in general

terms?

A. I had communication with them in the context of the

bid and regulatory issues.

Q. How was communication? I take it they'd ring you

about things, for example?

A. Yes, that's right.

Q. And would you have faxed information, or faxed notes

to each other or...

A. Yes, that could happen, or I could just walk the ten

minutes to them. That happened occasionally as well.

Q. That happened occasionally?

A. Yes.

Q. You have no recollection anyway in this context, or

even if you gave it to them?

A. That's correct.

Q. So even on an analysis as to how the banner head, not

just the fax banner head, but portion of the EU logo

at the top of the document became obscured, you can't

assist the Tribunal as to how many times it might have

been photocopied in that short period of time, bearing

in mind the limited number of people who you might

have given it to?

A. That's correct, except that previously we went through those people and who it was most likely, correct.

Q. Yes. If you were faxing a document which you had received, wouldn't it and I appreciate that you were working effectively on your own without full secretarial service that you would have been doing this sort of job yourself, perhaps?

A. Correct.

Q. And one might think that it would be in ease of somebody working on their own, that if they were faxing a document they'd just scribble out a note, say as you did to Mr. Kedar, and fax that, and fax the document itself, without making a photocopy for the purpose of faxing it, if you understand me, just to save time?

A. That's if I faxed it, but I cannot be categorical as to whether it would have been faxed or copied.

Q. Now, I understand the evidence you have given and the reason why you say you conclude that it is more likely that you got it from Europe, I understand that evidence and the reasons why you say that. Because you have no recollection of the document

A. Correct.

Q. can I take it that you cannot exclude the fact that you got it from somebody inside Esat?

A. I cannot definitively exclude that possibility.

However, what I would say to you is that I was a person exclusively tasked with regulatory affairs.

Q. I understand that entirely, Mr. Burke, but you cannot

A. And therefore, in all likelihood, it came to me and did not come to me via another person.

Q. You see, in the I'm just looking now at matters in the absence of finding this document anywhere else in the files. Could it be the situation that you were given this document by somebody inside Esat and told to fax a copy of it, or fax it to Mr. Kedar because he wasn't in Dublin?

A. Well, I have no recollection of that.

Q. Right. But you can't exclude that?

A. I cannot exclude it as a possibility.

Q. And whilst you have no recollection yourself of being in contact with any officialdom, if I might put it that way, in the Irish sense?

A. Correct.

Q. You don't know what other people in Esat, what contacts other people in Esat may or may not have had?

A. That's true.

Q. Now, I wonder would you mind just looking at that page again, the first page of the letter from Mr. van Miert to Mr. Lowry?

A. Could you just give me one moment to find it, please?

Q. I will.

A. That's okay. Thank you. I have got it.

Q. We can skip the first two paragraphs for the moment.

A. Okay.

Q. And we'll go to the bullet points.

A. Okay.

Q. And the first point is: "That the Irish Government will give only a limited weighting to the auction element in the call for tender (less than 15%)."

That information had not been, nor was it ever made public, isn't that right?

A. I believe that to be correct.

Q. Any potential weighting.

"The same licence conditions (including the payment of an amount equivalent to the auction fee minus a difference justified by administrative costs related to the GSM competition design and selection process) will apply to Eircell even before it becomes a separate subsidiary of Bord Telecom Eireann."

That information was made public, because that was the capping and the equivalent fee for Eircell, isn't that right?

A. That is correct.

Q. And it is also something leave aside the amounts or anything like that, it is also something that you had figured out would probably, or there was a good chance that something like that would happen?

A. That's fair, yes.

Q. But that became public.

"The second operator may set up its own infrastructure without any restriction, or make use of alternative infrastructure rather than the fixed network of Bord Telecom Eireann."

I think that information was available to all bidders arising out of the information round or questions and answers session which had been carried out in May of 1995, that is before the postponement of the competition, is that right?

A. I'll have to accept what you're saying.

Q. You can take it that it's in the draft licence, Clause 8?

A. Just except to say that as I understood it at the time, the second operator was being permitted to operate what's called a backbone, a microwave network.

Q. Yes.

A. However, I think that, how would I put it? That's very specific. This says, "May set up its own infrastructure without any restriction." That's broader than simply setting up an SDH, what's called an SDH backbone network. So just to be clear, I do not necessarily accept that that is simply confirmation of what was already known, because it was very precise what was understood.

Q. Right. Well, taking your point, there was an indication given in the draft licence or the

conditions which would have allowed applicants to appreciate that they were going to have some entitlement; this took it further and this was made public, isn't that right or sorry, when I use the term "Made Public", I mean to all bidders?

A. That's right, yeah. That's fair.

Q. And when I use the term "Public", again I am using it in the context, because I appreciate that these this questions and answers session and the draft licence only applied to people who had paid whatever the fee was, 10,000, whatever, 5,000 to get it.

A. Okay.

Q. The next one: "An efficient procedure would be provided to deal with interconnection disputes to prevent the new entrant being at a disadvantage vis-a-vis Bord Telecom Eireann, which provides both a fixed voice telephony and GSM, and account will be taken of the declining underlying marginal cost of the use of PSTN."

Again, this matter is a matter which had been dealt with in the draft licence at Clause 31 I think, isn't that right?

A. Can I just ask you: Was the issue of the marginal cost dealt with in the licence because I do not recall?

Q. Right I'll check that and I'll come back to that

particular one.

A. That's okay. I believe it wasn't.

Q. Right. But that was the only issue, marginal costs, isn't that right?

A. It's a small word, but believe me, it's very important because there is a difference between fully allocated costs, which appeared to be the basis on which the interconnection charges had been worked out in the indicative document issued by Telecom Eireann, versus marginal costs, which to keep it simple, would mean that the costs would be smaller.

Q. But in any event, again, this again was a matter which went into the public domain vis-a-vis all bidders?

A. Certainly the procedure, and you'll come back to me about the point about marginal costs

Q. Even this point being made in this particular document is something which was brought to the attention of all bidders, in fact?

A. Again, I don't want to be troublesome

Q. Not prior to this, but when the competition got going again?

A. I am not sure whether or not the Department brought it to the attention of bidders that the methodology for setting interconnection would be based on the underlying marginal cost.

Q. Right.

A. I think it's

Q. I think, and I am only I'll come back to it again, right.

A. That's okay.

Q. Then the next point: "The new operator will have a right to the same treatment as Eircell by Bord Telecom Eireann in all respects, including co-location, subject only to technical constraints."

Again, Clause 42 seems to be cover that particular point?

A. I think that's correct.

Q. Isn't that right?

A. Yes.

Q. The next bullet point: "The second operator will have a right to a DCS 1800 licence when this technology is licensed in the Irish market."

Again, that seems to be Clause 47 of the licence, of the draft licence.

Then: "The second operator will have a right to become a reseller or service provider on Eircell's analogue service to prevent this service being used in an anti-competitive way."

Again, there seems to be reference to equal treatment in Clause 63 of the draft licence?

A. I think so, yes.

Q. There doesn't, and I could be wrong about this, there doesn't appear to be a reference to the question of the declining underlying marginal cost of the use of

PSTN in the draft licence.

A. Yeah, that's

Q. But was that information which was made available to

the other to I take it from your side only,

because that's the side, the Esat side; was that

information made available in the course of the

bidding process subsequently, to the best of your

knowledge? If you can't help us, because I don't want

to...

A. It's a little bit complicated. I can maybe throw some

light on it, if it helps?

Q. Yeah.

A. The way this was to work was that Telecom Eireann had

given indicative prices for interconnection. That

appeared to have been based on historic costs, what it

had cost them in the past. Those rates then formed

the basis for negotiation between the new operator and

Telecom Eireann, and may well have been adopted as the

actual initial rates. So in that sense, if you like,

the issue of the basis on which they were calculated

was probably not explicit; it's just the numbers were

agreed. But, you know, from a telecommunications

perspective, to make reference to marginal cost, it's

a term of art, and would have a particular

significance, and I am uncertain whether or not the

Department subsequently clarified that. In other

words, going forward, the rates would be based on

marginal cost.

Q. Right. Like you, I'm unsure about that, but I do recall it may be of significance as to whether this may have conferred any advantage on anybody bidding, if other bidders were not aware of it. But from my recollection of evidence of Mr. Martin Brennan, I think he informed the Tribunal that the matters contained in the bullet points, other than in the first bullet point, of course, were matters which were made known to all bidders, either in the draft of the licence or in information which was subsequently given to bidders. Do you understand me?

A. I'd say that's a fair statement in general terms.

Q. I think that was his evidence in general terms, and I wasn't as focused on that particular nuance at the time, I don't think anybody was, including Mr. Brennan. But I am operating on the basis that all information, other than that contained in Bullet Point 1, was information which was either available or about to be made available to people participating in the bid. Do you understand?

A. Yes.

Q. And in broad terms, would you agree with that?

A. Yes, I think that's fair, what you have said.

Q. Now, what was never made available to anybody was the weighting or the type of weighting which might apply to the auction element, isn't that right, or to any of

the criteria?

A. Yes, except that we knew, obviously, that the criteria were in descending order

Q. I understand that.

A. of importance. But we didn't know the specific weighting.

Q. But of course and everybody was in the same position in that regard?

A. Correct.

Q. Because it clearly stated the matter would be adjudicated upon on these criteria, which were in descending order of importance, I think, and that was even the Government decision?

A. Yes.

Q. Now, bearing in mind that all of the information contained in these bullet points was available, or about to be made available, and in case, and even on the question of Eircell having to pay an equivalent fee could be reasonably guessed at by people involved in the bid process, what would the purpose be in sending this document to Mr. Hardiman and Mr. Kelly, if you did send it to them?

A. Well, what I would say to you is that, given that my involvement in the overall process was fairly limited, on any occasion where frankly I was relevant to the bid, it would have been my practice to bring that information to the attention of people.

Q. I understand that.

A. That's

Q. I understand that, but isn't the key

A. Well, can I

Q. I beg your pardon.

A. The other thing that I would say to you is that obviously I would have considered myself qualified to look at this and take a view on it in terms of what it meant, but that's probably a task that you're better to share with colleagues.

Q. Well, all of and I take your point, that you had studied the tender documents when they were received, and to such an extent that you sent a fax to the Commission about them, so you studied them closely. When you saw this document, I take it you would have been either reasonably au fait with the tender documents or looked at them again and been able to tick off 'Yeah, that's that, that's that'?

A. Correct.

Q. That sort of thing?

A. Yes.

Q. Isn't the significant piece of information on this document that there is reference to a weighting?

A. I think that that question can only be answered by reference to other information that was in the public domain at that time, specifically all of the bidders were informed that the fee, in effect, would be capped

at 15 million, and as I have indicated in my statement, any rational bidder, and they were all rational, would bid up to the 15 million, and would thereby bag, if you like, whatever percentage was attributable to the fee component of the evaluation procedure. However, the fact that, by virtue of this letter, we knew that that was 15%

Q. Or less?

A. Or less, didn't in any way advantage us because we knew already that the criteria were in descending order of importance, and we knew that everybody knew that it was prudent to bid up to 15 million. So there was no way in which this, for example, guided us or steered us in the direction, we'll say, of emphasising site roll-out or tariffs, or indeed any one of the other criteria over any of the other. So, in that sense I say to you that it wasn't sensitive. I take your point that

Q. It was the only piece of information that no other applicant was privy to, isn't that right?

A. That is correct, that is correct, but I also say that

Q. It is also something, I suggest to you, that if one had that piece of information, and I mightn't be able to analyse it, you mightn't even be able to analyse it yourself; you, like me, are a lawyer, you might look at the other matters there and sort of you, on looking

at it from a regulatory point of view, said that

complies with whatever aspect

A. I think you are confining my job a little bit. My job

is, at the end of the day, to be commercial.

Q. Wasn't there a firm of consultants involved in this

bid called PA?

A. That's correct. And they were involved in writing the

bid document.

Q. Yeah.

A. But I was the person who dealt substantially with

regulatory affairs.

Q. And they had, in fairness to them, an expertise both

in adjudicating on competitions in other parts of the

world, or Europe anyway, and had experience in

assisting the preparation of bids, isn't that right?

A. I believe that to be correct.

Q. That was their expertise?

A. That was their job, yes.

Q. What use somebody like them might have made of a small

piece of information or a small piece of information

might be more significant to experts in the field than

it might be to

A. You have yet to explain to me, or suggest to me how

that could be significant.

Q. Well, you see, Mr. Burke, it is a piece of information

which the consortium, sorry, which the Esat

Consortium, I want to be careful about this because I

am unsure as to who in the Esat Consortium was privy to this information, but it is a piece of information that no other applicant was privy to. The competition was designed to be on a level playing field, isn't that right?

A. Yes, but, Mr. Coughlan, with due respect, I have just gone through for you clearly why it was that that did not give us any advantage. You have speculated as to whether or not in the hands of an expert this might confer an advantage. I say it wouldn't. If you want to put to me a scenario whereby that could have conferred an advantage, I am happy to give you a view on that, but I say that it didn't confer and wasn't capable of conferring any advantage on us.

Q. I understand your point. But you do agree that it was a piece of information, a confidential piece of information?

A. I accept the point. I do not wish to labour the point further by way of answers because I have explained our view of the letter.

Q. Sorry, would you just listen to the question now. It was a confidential

MR. MARREN: Mr. Hoceped has given evidence. It's quite clear that the letter itself, from the Commission's point of view, was not confidential. So I think it's unfair for Mr. Coughlan to categorise the document as confidential in that context. And I don't

think even Mr. Brennan referred to this letter as a confidential letter. He referred to a confidential process, and he also speculated himself as to whether or not the letter itself was confidential in the eyes of the Commission. So I think

CHAIRMAN: Well, there was reference, I think, to Mr. Lowry's letter having been headed as "confidential", but I recall that evidence from Mr. Hoceped.

Q. MR. COUGHLAN: I don't think anybody, including you, Mr. Burke, would suggest that the question of the weightings from the point of view of the people conducting this process was confidential?

A. That is probably was probably their view, but they will have to answer that question.

Q. Well, they have said it.

A. That's fine, but that does not answer the question as to whether or not it conferred an advantage on anybody.

Q. But it was a piece of information

A. You have said that repeatedly, Mr. Coughlan.

Q. isn't that correct?

A. Yes, Mr. Coughlan.

Q. Which no other bidder had?

A. I think I have acknowledged that three times for you.

Q. And it has been said in evidence here by witnesses from the Department, that it wouldn't take somebody of

the highest level of intelligence to work out, bearing in mind where that particular criteria was placed in descending order, to be able to make a good educated guess as to what might apply to other criteria?

A. I am not familiar with what evidence those people have given on that point. But what I would say to you is, it still is a mystery to me how you can say that somebody would be in a position to ordain the values that had been allocated to the other weightings, except to say that we always knew that they were in descending order of importance. You could run a mathematical function, perhaps, to come up with one possible view, right, but that would be based on a linear relationship which may not actually follow through in the actual weightings that were applied in practice.

Q. Did you ever hear anybody inside Esat say to you, or did anybody say to you, 'We shouldn't have that information'?

A. I have no recollection of anybody saying that to me.

Q. Did you see mathematical models constructed in relation to this bid process on the various criteria and the weightings?

A. No, I didn't.

Q. Now, if I might finally return to what you recollect. You recollect sending a submission to Mr. Hocepied in relation to the fixed line business, a long

submission, perhaps running to about 130-odd pages,

isn't that correct?

A. That's correct, Mr. Coughlan.

Q. You recollect having a conversation sorry, you recollect having a meeting with Mr. Hoceped regarding that?

A. About that submission, yes.

Q. You remember having a subsequent telephone conversation with Mr. Hoceped, which was probably of a courtesy nature, where you thanked him for receiving the delegation and the courtesy shown. You remember that?

A. Yes.

Q. You remember sending a fax to Mr. Hoceped, the one we have just looked at, dated the 2nd June of 1995?

A. Yes.

Q. Dealing with GSM issues?

A. Yes.

Q. And thereafter, you have no recollection of any contact with Mr. Hoceped in respect of that?

A. There was the

Q. In respect of the GSM

A. There was the call to check had he received

Q. Sorry, I beg your pardon. You remember the call and he, you believe from the evidence of Mr. Hoceped, but you recollect a call to Mr. Hoceped?

A. Yes.

Q. And you have no recollection of receiving the document?

A. Correct.

Q. You have no recollection from whom you received the document?

A. Correct.

Q. And apart from the fax, sending it to Mr. Kedar, you have no recollection as to who else you may have shown or given the document to or copied it?

A. That's correct.

Q. I must suggest to you, Mr. Burke, that it is incredible that you would not recollect receiving this document from Mr. Hocepić if you had so received it?

A. I don't agree with that. A person like me is receiving hundreds or thousands of documents over time. As I have told you, this extract was not significant in my view, and therefore, the fact that I cannot remember receiving it, I think is to hold a human too high a standard of memory than is fair and reasonable in all the circumstances.

Q. Very good. Can you tell me how many times have you received a document from anyone in the European Commission which was being sent by a Commissioner to a Minister in a Member State?

A. I cannot recall. However, I have frequently received indications of the outcome of a process being run by

the Commission, whether it be looking into a matter, which is what happened here; I brought the information to its attention, or where I formally filed a complaint on behalf of Esat Telecom, in which case I would be the addressee of the communication.

Q. Yes, I can understand that.

A. I think though, frankly, in the way that you talk about communication from Commissioner to Ministers is, perhaps, to elevate the significance simply because of the identities, perhaps to attach too much significance to that, rather than looking at the actual content. And I think, I have said in my statement, that the Commission operates differently, frankly, in relation to these matters.

Q. Well, can I ask you this again: Can you ever remember receiving from the Commission a document from a Commissioner to a Minister in a Member State?

A. No. But I do not believe that I had any reason to.

MR. COUGHLAN: Thank you.

MR. FANNING: I don't know whether Mr. Collins wants to go ahead of me.

CHAIRMAN: Well, the practice that I have tended to adopt, Mr. Fanning, is to have counsel for the actual or the legal practitioner for the actual person giving evidence given the last say, subject to the Tribunal counsel's right of rejoinder. So

MR. FANNING: I was referring to Mr. Collins, who is

appearing for Mr. Hoceped, rather than Mr. Marren.

But I have no difficulty.

MR. COLLINS: Yes, I have some questions to put to the witness, Chairman.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. COLLINS:

Q. MR. COLLINS: Mr. Burke, you have just informed the Tribunal that you have no recollection of receiving any document

A. That is correct.

Q. from the Commission. In those circumstances, I wonder how it is possible for you to be so clear as to the actual document in question? You state categorically in your evidence that you received an extract or one page of this letter. How can you be so clear if you are not certain as to whether you actually received the document at all?

A. I think the fact that the document was located on my files raises a strong presumption that I received it.

Q. But it only goes that far. You can't recollect what you actually received?

A. That is correct. I cannot recall the precise circumstances I cannot recall specifically receiving it. However, I have not been categoric.

What I have indicated is, that in all likelihood it was sent by the Commission to me as a courtesy, given that I had brought information that was relevant to the attention of the Commission, and specifically to

Mr. Hoceped.

Q. Well, coming to that, I should simply say; paragraph 12 of your statement would appear to indicate a degree of definite thinking on this matter, but coming to that, you said earlier this morning that in your quite fairly that in the facsimile that you sent to the Commission, which ultimately seems to have been received on the 2nd June, 1995, Mr. Coughlan asked you some questions about that this morning; the Esat memorandum, that the items raised in that memorandum are addressed by the Commission in the second page of the letter which you which wasn't found on your files?

A. That's correct.

Q. Very well. Now, you also say that you suppose that the Commission sent this document to you, because you can't recollect; that you received the document by way of courtesy in order to inform you of the outcome of the process in which you had given some information?

A. That's correct.

Q. Would you not agree that it's somewhat strange that the information that you supplied the Commission with, and therefore the matters the Commission intended to address, weren't responded to in the extract that appears in your file?

A. I think that there is, perhaps, a question to be answered as to why that might be so. And I have

offered an explanation, because of what I think is the clear sensitivity of the position taken by the Commission, I believe, in the very last paragraph of the letter in relation to international interconnection. Quite simply, that is something which I would expect the Commission would like to be in the hands of any of the bidders.

Q. But, Mr. Burke, you'll accept that's pure speculation on your part?

A. I believe that it certainly is speculation, but you must look at this in the context of who was who was receiving the letter, and the fact that we had previously, Esat Telecom had previously filed formal submissions with the European Commission requesting the commencement of proceedings under Article 169, and that if Esat was to receive the second page with the reference to the fact that the international interconnect restriction was disproportionate, that could lead to problems down the road. It almost certainly would lead to problems down the road.

Q. Well, I'll come at that a number of ways. First of all, the picture you paint of the Commission, and I don't believe that's contradicted by Mr. Hocepiet's evidence; that the Commission is, let us put it this way, a more open bureaucracy than that which we would be normally accustomed to dealing with in this State?

A. I think that's correct, that's fair.

Q. And therefore, if someone was to supply information to the Commission and the Commission were to take certain steps in relation to it, is there any particular reason why the Commission would wish to suppress communicating that information to that interested party?

A. Yes, I believe the Commission would have an institutional interest, perhaps, in not seeing this, if we could call it, delicate compromise unwind, because obviously this was an important issue for the Irish Government. The revenues from international were claimed to be necessary in order to finance Telecom Eireann's universal service obligation. As it stood, we could have made a complaint in relation to that issue. But I ask yourself to consider yourself, if you were in my shoes, if you had seen a letter signed by a Commissioner which actually said that that restriction was disproportionate, then you would feel very confident about going to Brussels and making a complaint. What is more, if the Commission refused to act on that complaint, or ruled against you, the Commission has a little bit of explaining to you because a Commissioner, on the advice of his officials, has in writing told a Member State that it's disproportionate. The Commission, in that situation, is in a little bit of a bind, I would suggest to you, and that is not something which, to be

fair to the Commission, it's not a situation I think it wishes to be in, and that is something that occurred within the overall context of what I would describe as a delicate, what now looks to be like a delicate compromise between Brussels and Dublin as to how this would be run.

Q. Well, Mr. Burke, let's look at the second page of this letter and see what the Commission actually said to the Irish Government. If we look at the second page, the first paragraph deals

A. I don't have a copy of the second page.

CHAIRMAN: We have it on the monitor, if that's sufficiently clear for you, Mr. Burke?

A. Okay. (Document handed to witness.)

Q. MR. COLLINS: The first paragraph simply deals with the question of the legal basis issue.

A. This is just the one page.

Q. The second page is on the screen.

A. I'd like to see it. It's easier for me.

CHAIRMAN: Surely.

(Document handed to witness.)

Q. MR. COLLINS: Now, you were, of course, aware of the context in which this letter was written, that the issue, in reality, was dealing with the possibility of Bord Telecom Eireann engaging in an anti-competitive manner, and this was the primary reason for the capricious involvement in the matter in the first

place.

If you look at the first paragraph there, there is no indication as to any view being taken of the Commission other than an understanding as to the legal basis question. There is no particular reason why that shouldn't have been disclosed if, which is uncertain, the contents of the first page were disclosed. There is nothing there to indicate

A. Sorry, this is a different version to the I'll look at the screen. But that's a draft of the letter. I am sorry.

Q. I actually can hand a copy in.

(Document handed to witness.)

A. Okay.

Q. The first paragraph, you will see the legal basis question, and nothing very much turns on that.

A. Yes.

Q. One then turns to the second paragraph: "In view of these circumstances, and assuming these measures are effectively implemented, the Commission deems that the granting procedure followed by the Irish Government does not favour the extension of the current dominant position of its public telecommunications organisation, Bord Telecom, to the new GSM market, which will constitute an infringement to the Treaty competition rules."

That's a categorical finding, that in the Commission's

view that the procedure to be followed by the Irish Government would not constitute an infringement of the Treaty competition rules. Again, it's difficult to see what difficulties would

A. I am not contesting that.

Q. Very well. The third sentence states that: "For this reason, it considers that it has no grounds for action under Article 90."

And again the same.

Now, the next paragraph states: "This assessment could, nevertheless, be reconsidered if the factual legal submission cited above is changed and the competitive situation of the second GSM operator was adversely affected vis-a-vis Bord Telecom Eireann."

Would you not agree that that is, in effect, the Commission saying it reserves the right to take whatever action it considers appropriate if circumstances change?

A. I agree that that's certainly an interpretation.

However, I think it's also significant, because it, as it were, signals that the matter is not definitively closed.

Q. But what matter is being definitively closed? The Commission your statement earlier

A. They are saying that the issue they're dealing with the issue of the licence fee. However, they are saying that they may there could be a reason if the

competitive situation is adversely affected. And I would say to you that the Department, I am sure, would not have communicated that on those terms to any of the perspective bidders because what it's doing is it's saying, 'Well, yes, we are happy with this arrangement, but there is going to be ongoing surveillance of this matter.' I am sure the Department wanted to present things as certain, clarified and then renew the process.

Q. Mr. Burke, you stated earlier this morning that you are a practitioner in the field of European law?

A. That's correct.

Q. Yes. You are well aware, therefore, that the Commission could not give an undertaking that it would not uphold European law if future circumstances changed?

A. That's not what they did here. I think we need to be precise, right. There is a difference between the Commission's function and the Commission, in writing, saying that they will keep a situation under review. That means that the Commission is a little bit more committed to the situation than if they have said nothing. There is a distinction. And I think it's important. I am not saying that they have given an undertaking, of course they can't give an undertaking not to enforce the Treaty rules.

Q. Mr. Burke, have you ever worked in the Commission?

A. No, I have not.

Q. So what's the basis for your last statement, that the Commission in the manner in which you read this implication into what is written in writing and what you know well to be the legal position, vis-a-vis the Commission?

A. What I'm saying to you is this is a mixed issue, if you like, of law and politics. If the Commission in writing commits itself to keeping something open, that tends to constrain the Commission a little bit more than if it had said nothing. It's a question of emphasis. And what I say to you is, that they have reserved their position in express terms, and obviously that was not something that was known to the bidders at that time.

Q. Well, I am simply saying that the Commission was quite entitled to reserve its position, and indeed had no alternative but to do so?

A. The issue of its entitlement is not in dispute. I wouldn't agree with you that the Commission had no alternative but to do so in writing because based on your own analysis, based on what you have just said to me, you know, the Commission isn't going to fetter itself. All I am saying to you is, that the Commission has put down a marker, it's in writing, it's in a document that was sent to a Government Minister in Ireland. It is, at the very least,

politically significant.

Q. Again, you have to accept that's a matter of speculation, on your part?

A. In the same way as the contrary would be on yours.

Q. You then we then turn to the last paragraph, the question of cross-broader interconnection. And various matters are set out in the paragraph. And the Commission finds in the penultimate sentence that, "The prohibition of direct cross-border interconnection would seem to contravene Article 90 in conjunction with Article 59. Given that this condition is only ancillary to the licencing process, I do not want at this stage to delay the granting of the second GSM licence for this reason only, but reserve the right to come back to this issue, in particular if we receive a formal complaint."

Now, does that not say in plain English that if the Commission were to receive a formal complaint, it might well have to revisit the matter?

A. That's right, but it wasn't going to do anything about it at that time, and that was important in the context of this delicate compromise that had been reached.

Q. You are saying, therefore, that this express statement on the Commission's part, that if it receives a formal complaint, it will it may well act upon it, it doesn't say it will, obviously it can't it may well act upon it, is a matter which it would have wanted

to, not to pass on to Esat?

A. Correct. I believe that the Commission would not like Esat to be possessed of the analysis which tells us that in the Commission's view there is a breach of Article 90 through Article 59.

Q. So why would it then say that "If we receive a formal complaint"?

A. And in particular, they would realise that if we did have that information, they would almost be guaranteed to receive a complaint.

Q. And if a formal complaint was received, the Commission would decide what it wished to do with that formal complaint?

A. That's right. But that could be quite a delicate issue politically for the Commission.

Q. That wouldn't necessarily prevent the grant of the second GSM licence from going ahead?

A. No, it wouldn't, but it could lead to the elimination of an important part of the overall compromise in relation to the GSM process, which included a monopoly over international for Telecom Eireann.

Q. Mr. Burke, you were aware of the situation of the irrespective of whether or not you received the second page at the time. The fallout of the circumstances were that the Irish Government continued at that time not to allow direct cross-border interconnection?

A. That's right. And in fact, we invited the Department to reconsider their position in relation to that issue.

Q. But you decided not to make any complaint to the Commission?

A. No, but I'd ask you, though, what view we would have taken if they had that page of that letter at that time as to whether or not we might make a complaint and whether or not the Commission would be in a difficult position if it were to receive that complaint.

Q. Unlike you, Mr. Burke, I do not speculate as to what my clients think.

To turn, then, to the next question. You mentioned earlier on in replies this afternoon that you frequently received the outcome of processes from the Commission. Obviously if you were a complainant, a letter would be addressed to you, but you said frequently received the outcome or processes where you submitted information to the Commission?

A. That's right.

Q. Can you recall any other occasion on which you submitted information to the Commission and received what would appear to have been a partial and if not inadequate information concerning the outcome of the process?

A. Well, sorry, I'd ask you to explain, what do you mean

by "inadequate"?

Q. Well, you can't recall what you received, so clearly you are in some difficulties as to what precisely you did receive, but you surmised from the state of your file that you received the first page of this letter?

A. That's correct.

Q. You also stated quite fairly in evidence, that the matters which were of principal concern to your client, as set out in your memorandum of June, 1995, were addressed in the second page of this letter?

A. Correct.

Q. Now, you might never have received any document from the Commission at all, that's one possible explanation?

A. That's a possibility that I cannot exclude, as I have explained earlier.

Q. I accept that very fairly, Mr. Burke.

A. Okay.

Q. But on the other hand, had you received documentation from the Commission, and that can't be ruled out either, does it not strike you as being somewhat odd that the documentation you received did not address the issues that you had submitted information to the Commission?

A. Not at all, for the reason that we have just gone through at considerable length, which is that it disclosed the fact that the Commission believed that

the restriction on international was a breach of the two Treaty provisions, and it also said that the matter, in effect, would be left alone. However, it would obviously have to be revisited if there was a complaint.

Q. But, Mr. Burke, I have asked you that on any other occasion coming back to the question I have just put; on any other occasion you have submitted information to the Commission and you have received the outcome of a process from them. Obviously there may have been occasions in which you received no response at all?

A. Yeah, obviously, for example, the derogation process. Esat would have submitted information to the Commission, and would have been appraised of the outcome of that process.

Q. If the Commission appraises you of the outcome of the process, would you not expect that it would appraise you, particularly if it was to send you a copy of this correspondence, and again we don't know whether it did or not; do you not think it is odd that it simply sends a response that does not address the issues that you raised, the specific issues that you raised in your memorandum?

A. It addresses some of the issues that I raised, and does not address one of the other issues for what I believe to be a fairly obvious reason, but I don't

want to keep going over that ground, unless you insist.

CHAIRMAN: Well, if I can just put it momentarily from the standpoint I am seeing it at the moment, Mr. Burke.

Would it be fair to say that if matters arrived at your desk by fax from Mr. Hoceped on a basis of there being no covering note such as you'd sent with the two faxes that we have seen, of a basis that only one of the two pages was furnished to you and on a basis in which the top in the fax banner had been concealed, or had been omitted; may I take it, and I have noted the individual pieces of evidence you have given on those various factors, but may we take it, it would be a clear improbability that Mr. Hoceped would simply have put in a truncated form of one page deleting the second page, and I have noted what you have said about that, but with no cover note indicating, perhaps, 'Here in response to your query is the relevant portion of a letter that has just been finalised by my Commissioner'?

A. I have no recollection of any cover sheet, and I can't help you in the sense of would he have done that or should he have done that.

CHAIRMAN: Well, it seems a bit improbable, does it not?

A. That he would have sent it without explaining why

CHAIRMAN: No cover note, just one page and that page not complete?

A. I don't know what his reasons would have been for sending one page. I can only speculate.

CHAIRMAN: Right. Thank you.

Q. MR. COLLINS: I have finally just one question, Mr. Burke. This morning you stated that you had carefully read the transcript of evidence, and that it was not stated by Mr. Hoceped that he would have had no difficulty in giving you the entire letter, and I just want to put it to you that Mr. Hoceped made it very clear in his evidence before the Tribunal, in unequivocal terms, that since he didn't consider the letter to be confidential, he would have had no difficulty sending you the whole letter, if he was sending you the letter at all?

A. I think there is an indication to that effect from him in his evidence. I think there is also an indication from him that he may have sent what he was asked for, or he may have sent part of the entire document. That's all that I can say.

Q. Well, Mr. Burke, in relation to that, in fact Mr. Hoceped is very clear in his evidence. He actually states that at page 70 of the evidence given Question 77 he states that if someone asks him, makes a specific request of him for perhaps a specific point or a specific page or so of a document,

he would, perhaps, only send that. But you have no recollection of having any discussions with Mr. Hocepić along the lines of making a request of him for any document, isn't that so?

A. That's correct.

Q. And Mr. Hocepić has no recollection either of any conversation with you about that.

A. Except one conversation.

Q. But certainly not as regards transmitting a page of a letter?

A. That's correct.

MR. COLLINS: I have no further questions.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING:

MR. FANNING: Thank you, Chairperson.

Q. Mr. Burke, I appear for Mr. Lowry, the former Minister in the Government department in this matter.

The first thing I want to say to you is, I have listened to all of your evidence, which I think is very clear, I don't wish to traverse unnecessarily over any of it again, much less do I want to challenge any of it. However, what I do want to do for a few moments is to just simply focus for a moment on the relationship between the evidence that you have given to the Tribunal and the Terms of Reference, insofar as they implicate my client.

By way of introduction, with the Chairperson's permission, I might refer to the mini Opening

Statement, for a few moments, made by Mr. Healy just prior to the evidence tendered to the Tribunal by Mr. Hoceped. That was Day 233, or Friday the 11th of July, where Mr. Healy made, on behalf of the Tribunal, just a few introductory remarks as to the purpose for the investigation that you are helpfully providing evidence to the Tribunal in respect of today.

Mr. Healy, at page 3 of that transcript, right at the outset of that day, said that, "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."

At page 4, Mr. Healy went on to say the following, in the penultimate paragraph: "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."

Now, this, in reality, being only the second day of evidence on this particular issue, the issue being the origins of the letter of the 14th July, insofar as they appear in your folder; Mr. Healy's opening notwithstanding, it would appear to be the case that thus far today you have not been asked a single question about Mr. Lowry or whether you had any contact with him. I think we all know that that is the case.

Can I say, firstly, then we know from your evidence, Mr. Burke, that a channel of communication had been established, quite legitimately, between yourself and Mr. Hoceped on behalf of the European Commission by July, 1995, isn't that so?

A. That's correct.

Q. As opposed to that, Mr. Burke, was there any channel of communication in existence between yourself and Minister Lowry in July, 1995?

A. No, there was not.

Q. Had you been in the habit of meeting Mr. Lowry personally?

A. No, I was not.

Q. Had you ever met him on official business personally, in July, 1995, on behalf of Esat?

A. I did not.

Q. Had you telephoned him?

A. No, I did not.

Q. Did you ever speak to him on the telephone in the context of your work with Esat personally?

A. No, I didn't.

Q. Did you ever receive faxes or correspondence from him personally in respect of your work with Esat?

A. No, I did not.

Q. Now, we know that you have no direct recollection, because you have said so very clearly, as to how you received this document. But, can I ask you this: In

the context of the evidence you have just given the Tribunal, do you think you'd recall a dramatic intervention by the relevant Minister in charge of the relevant Government department if he dropped in a letter to you or rang you up and said he was posting you a letter, do you think you'd recollect that perhaps?

A. Well, as I have already explained, I think I put it in terms of, if the Department had done that, that would be extraordinary. It would be out of the blue, it would be unexpected. For the Minister to do that, would be equally extraordinary, out of the blue and unexpected.

Q. And following from that answer; do you think it's the kind of thing that you would recollect?

A. I think so, for somebody who had no contact with the Minister in relation to this process.

Q. Because, you see, Mr. Healy, on behalf of the Tribunal, has very fairly stated that none of this implicates my client, unless he can be shown to have an involvement in it. So am I right in saying, then, that as far as your evidence goes, you are excluding Mr. Lowry having any involvement?

A. What I'm saying is that I have absolutely no recollection of any involvement by Mr. Lowry on those terms, and I am also saying that if that had occurred, it would have been extraordinary and I would have

recalled it.

Q. If I can just ask you finally, Mr. Burke; Mr. Coughlan asked you at one stage this morning why you were anxious to resist, and that was his word, a theory that he was urging upon you that the document on your files must have Irish provenance. Can I take it from your evidence to the Tribunal today, that you were neither resisting a particular theory nor urging a particular theory, but in fact are simply trying to offer the Tribunal, what is from your perspective, the most likely explanation?

A. That's fair.

MR. FANNING: Thank you, Mr. Burke.

THE WITNESS WAS EXAMINED FURTHER BY MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Two questions. I think I did ask you whether you had any contact with anyone in officialdom in Ireland, isn't that correct, in relation to this document, and your response was that you had no recollection?

A. That's correct.

Q. Mr. Lowry is included in the context of officialdom.

I then asked you

A. If that's what you meant by it, I accept that.

Q. I then asked you whether you had received the document from anybody in Esat. And you have no recollection of that?

A. That's correct.

Q. And you have no recollection of any contact anybody in

Esat may have had with Mr. Lowry or the officials in

respect of this competition, isn't that right?

A. That's correct.

MR. COUGHLAN: Thank you.

CHAIRMAN: Thanks for your assistance, Mr. Burke.

THE WITNESS THEN WITHDREW

MR. COUGHLAN: Mr. Burke, unfortunately, is the only

available witness today, Sir. And we

CHAIRMAN: I have referred to certain circumstances of

truncation on two grounds for some of the further

sittings of the week, but there are some free

witnesses that will be attending at the usual time

tomorrow.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,

WEDNESDAY, THE 15TH OF OCTOBER, 2003, AT 11AM.